DETAILED ANALYSIS

OF

THE CIVIL RIGHTS ACT OF 1964

Prepared by:

WASHINGTON HUMAN RIGHTS PROJECT

PREFACE

This analysis was prepared rather quickly so as to be of maximum value to those Civil Rights Attorneys actively engaged in litigation and advising Civil Rights leaders immediately upon passage of the Act. It should go without saying that this analysis is primarily designed for the Civil Rights attorney and the Civil Rights leader in the movement.

There may be some errors, both legal and technical; the style and arrangement of material may not be perhaps as it should. However, it is sincerely hoped that this analysis will be of some value to those who might use it.

Any suggestions and directions in regard to a revised edition will be gratefully received.

The analysis was primarily written by six law students working under my general direction - John Denneen, Carolyn Heft, Miles Jaffe, Jeff Lamson, Chris Schwabacher, and Robert Turtz.

July 4, 1964

William Higgs
619 G. St. S.E.
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TITLE I - VOTING

Title I of the Act is a strengthening amendment to the federal statutes on the right to vote which was the principal subject of the Civil Rights Acts of 1957 and 1960 (U2 U.S.C. 1971). The 1964 legislation adds to existing law but does not change it. The new provisions are aimed at eliminating the discriminatory administration of existing law which has long been the means of perpetuating racial discrimination.

Section 101 (a)

This section adds two new paragraphs to Section 1971 (a) of Title 42 of the U.S. Code. The first, paragraph 1971 (a) (2), limits the powers of voting officials, and any other persons acting under color of law, to process voting applications.

Under subparagraph (A), voter registration applications must be evaluated, in "any Federal election", according to uniform standards, practices and procedures. The wording is very specific. The standards applied must be identical to those applied to other individuals, in the same or a similar political subdivision, "who have been found by State officials to be qualified to vote." This represents another statutory approval (see also 42 U.S.C. 1971 (e)) of the type of mandatory relief which has recently been used effectively in several cases, including the Panola County case (United States v. Duke, 5th cir., May 22, 1964). In this instance, the court ordered the county to keep temporarily in effect the same less stringent voter requirements which were used to qualify the already registered white voters during a period when the Negroes were being prevented, pursuant to a pattern or practice of discrimination, from qualifying. Such relief is necessitated by the imposition by the State of new and stricter requirements which, even if theoretically applicable to all citizens, primarily affect the disadvantaged minority who, because of past discrimination, have been unable to register. The new requirements, while constitutional on their face, tend only to perpetuate racial discrimination in the voting rights field. Judge Tuttle, speaking about this program for the Fifth circuit in the Panola County Case, stated:

> It may be said that when illegal discrimination or other practices have worked inequality on a class of citizens and the court puts an end to such a practice but a new and more onerous standard is adopted before the disadvantaged class may enjoy their rights, already fully enjoyed by the rest of the citizens, this amounts to "freezing" the privileged status for those who acquired it during the period of discrimination, and "freezing out" the group discriminated against. (at pp. 20-21 of his opinion.)

Because of the favorable effect this "freezing principle" could have upon the effective enforcement of the voting rights provisions, relief similar to that granted in the Panola County Case should be requested in all cases where a pattern or practice of discrimination exists.

Subparagraph (B) prohibits voting officials from denying any individual the right to vote, in "any Federal election" solely because of an error or omission which is immaterial in determining voting qualifications. This provision is limited to "an error or omission on any record or paper." It may be argued, then, that the prohibition does not apply to an immaterial error or omission in the registration process which is unrecorded by the Registrar and for which the applicant is denied access to the polls. In order to thwart any possible attempts to avoid in such a manner the impact of this provision, it is advisable to request that any court order, issued to enforce the voting rights provisions, direct the voting official to record each and every aspect of the qualification process.

Subparagraph (3) requires that any literacy test, which is a voting qualification in "any Federal election," be administered to all applicants and that it be conducted wholly in writing. These tests are to be retained and preserved along with all other required records and papers relating to the State voting requirements. Pursuant to 42 U.S.C. 1974, the tests are to be preserved and retained for twenty-two months from the date of the election to which they relate. Where there is permanent voter registration, these records and papers must, therefore, be permanently retained and preserved because they relate to all elections. It is further required that a certified copy of the literacy test and ot the applicant's answers to it must be available to him, upon request, within twenty-five days, so long as such request is made before the expiration of the period for which the records are to be kept. It would be advisable to request such a certified copy of all tests and to attach it to any complaint filed to enforce the rights protected by this title. This may serve to discourage registrars from administering and grading the tests of Negro applicants in an arbitrary and capricious manner. There are also other benefits which stem from the retention requirement. Whenever there is an issue about an applicant's literacy, the fact that the tests are available means that the issue can readily be solved de nove either upon judicial or administrative review. Moreover, both the Attorney General and the court can review the tests when necessary to ensure that they are being conducted in a fair and impartial manner.

All of subparagraph (C) is qualified by a proviso which gives the Attorney General an unlimited discretion to enter into agreements, with state or local authorities, that compliance with the applicable state or local law would be deemed compliance with the requirements relating to the preparation, conduct and maintenance of literacy tests. This clause is designed to provide relief for those states "where there is no problem whatsoever about discrimination by manipulating literacy tests." (Congressional Record, June 4, 1964, p. 12283.) It is thought that it would be an unnecessary burden to require auch states to retain and preserve such written records. Another purpose of the proviso is the solution of the special problems which blind persons, or those with other physical handicaps, have with written tests. It is important, however, to be alert to any attempt by the Attorney General to abuse this discretion and frustrate the legislative attempt of this subparagraph. Any such abuse should be promptly blocked by judicial action.

The second additional paragraph of subparagraph (C) contains two definitions. Under (3) (A), the term vote, whenever used anywhere in Section 1971, is to carry the same meaning as it previously did in subsection (e). In that subsection (e) of Section 1971 vote is defined as "all action necessary to make a vote effective including, but not limited to, registration or other action required by State law as a prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election."

Although this definition has not been specifically construed in any case, it is couched in such general terms that it probably will have a very wide and all-inclusive scope. In fact, it may be argued that any stratagem, however devious it may be, so long as it bars an individual from effective participation in the electoral process, can now be reached by any provision of the entire voting rights section. Thus,for example, in some states and localities the nomination of a candidate at a political party's convention (as distinct from a primary) often leads to his eventual election, it can be argued that exclusion from that party's conventions, for reasons of racial discrimination, is now illegal and may be prevented pursuant to the provisions of Section 1971 of Title 42 of the U.S. Code.

In (3) (B) of subparagraph (C) the definition of literacy test is set out so there will be no doubt about the scope of subparagraph (C). Since it includes any test of an applicant's ability to read, write, understand or interpret any matter, it will be very difficult for a voting official to administer any test that would escape the requiremtns of subsectionph (C). Even a test of objective knowledge, unless it is orally administered, would seem to be encompassed by the definition. Oral tests may be enjoined as outlined in the discussion on subparagraph (B).

THE EFFECT OF TITLE I ON PRIVATE SUITS

A primary goal of Title I of the Act is to supplement the Attorney General's authority to institute, for or in the name of the United States, a civil action or other proper proceeding for preventive relief. However, its effect reaches beyond such proceedings to private lawsuits. Its substantive provisions secure voting rights and privileges to all individuals and may be inforced by any injured party in an action at law, suit in equity, or other proper proceeding for redress (42 U.S.C. 1983). Such private lawsuits are extremely useful. In fact, it is anticipated that complete and unhindered participation in the electoral process, as guaranteed by the Constitution and laws of the United States, will be more quickly realized if there is a joint federal and private enforcement effort.

It should be noted that subsection (e) of Section 1971 of Title 42 provides for voting referees only in actions brought by the Attorney General. However, by imaginative fashioning of orders and by exercise of the appointment powers in equity (masters, itc), nearly the same result could be achieved in an action brought by a citizens.

Section 101 (b)

This section amends Section 1971 (c) of Title 42 which empowers the Attorney General to bring an action to enforce voting rights. It adds a statutory rule of evidence which is applicable whenever literacy is a relevant fact in any such proceeding. The rule creates a rebuttable presumption that any person, who had completed the sixth grade an any public school or, any accredited private school, in which instruction is carried on predominantly in the English language, "possesses sufficient literacy, comprehension and intelligence to vote in any Federal election," so long as that person has not been adjudged an incompetent. The reference to "any

public school" means that Negro public schools which have not been accredited by the state are included. Anyone who would rebut this presumption of literacy must do so by a preponderance of the credible evidence. It would then become a question to be determined by the trier of fact. It would then become a question issue may be seized upon by recalcitrant officials as a means of dragging our proceedings. Therefore an attorney should always be prepared to conclusively establish an applicant's literacy so they can dispose of the issue as expeditiously as possible.

Although this rule of evidence applies only to those actions brought by the Attorney General to enforce any right or privilege secured by subsections (a) or (b) of Section 1971, it may possible be employed with great effectiveness in other ways. The court should be encouraged to draw upon the presumption as a basis for an argument by analogy. It should be argued that this is a legislative judgment of a desireable rule of evidence and, therefore, it should be used as a guideline in any case where literacy of any person is an issue. It may also be useful for registration applicants to present the local officials with certified proof of their educational background. This could possibly serve to make such officials hesitant in disqualifying applicants on the basis of literacy since they will undoubtedly be aware of the effect of such a certificate in a legal proceeding.

Section 101 (C)

Section 101 (C) is the new section of 1071 (f). It makes it plain that the words "Federal election," when used in subsections (a) or (c) of Section 1971, apply equally to general, spedial, and primary elections. Moreover, the provisions apply not only to those elections which are exclusively federal, but also to those which are federal in part (i.e., to any state or local election which is held in conjunction with a federal election.)

Although the provisions of title I are consistently restricted to federal elections as defined in this paragraph of the section, it is believed that they may also be collaterally applicable to elections held solely for the purpose of selecting state or local officials. 42 U.S.C. 1971 (a) (1) applies to all elections and to all persons acting under color of law (U.S. v. McElveen, 177 F. Supp. 355, 358; D.C. La. 1959); it provides that all citizens "qualified by law to vote at any election by the people" in any territorial subdivision, shall be allowed to vote at all such elections. Therefore, it would seem to follow that once such a citizen has been qualified under State law to vote in any Federal election, he may not be denied the right to vote in any other election. Moreover, subsection (e) of the existing law (42 U.S.C. 1971) provides another means of filtering the provisions of title I through to state or local elections. Any voting referees appointed by the courts pursuant to subsection (e) of Section 1971 have the power to make findings applicable to any election and the court may then order the registration for all elections of the persons encompassed by these findings.

THE SCOPE OF THE THREE JUDGE COURT PROVISION

The first paragraph of Subsection 101 (d) (42 U.S.C. 1971 (h)) is perhaps the

most significant addition to the federal voting rights provisions. It authorizes the Attorney General, or any defendent in a suit brought by the Attorney General, to request that certain cases be tried and determined before a court of three judges. Heretofore, this procedure had been used primarily in cases challenging the constitutionality of state or federal statutes and enjoining the enforcement of such statutes, or of administrative orders issued pursuant to such statutes (28 U.S.C. 2281, 2282, 2284). Past performance has shown that the three judge court device is tremendously effective and that there is a great advantage to be gained by using it. Its use in voting rights cases should effectively insure speedy and just litigation of these controversies.

However, because the wording of the subsection is somewhat confusing, in several areas, its scope may be somewhat limited.

First of all, the use of the courts is limited to any proceeding instituted under this section. It is possible that this has reference only to section 101 of the Civil Rights Act of 1964. This would narrow the scope of this subsection considerably. However, since section 101 contains no express authority to institute suits, it is more probable that it refers to any suit instituted uuder 42 U.S.C. 1971.

Secondly, the authority of Subsection 101 (d) is limited to cases in which the Attorney General requests a finding of a pattern or practice of discrimination pursuant to subsection (e) of U.S.C. 1971. This is confusing because the Attorney General, technically, does not request such a finding pursuant to subsection (e). On its terms, that subsection does not limit or expand the Attorney General's discretion to ask the court to make such a finding - presumably, he could request such a finding in any action brought to end voter discrimination and, to be consistant, also request the three judge court in any such action. However, this is a broad interpretation of the statutory language and it is more probable that the courts will limit the use of three judge courts to actions instituted under subsection (c) of 1971 because of a deprivation of any right or privilege secured by subsection (a) of 1971. This would mean that a court of three judges would not be available, under Title I, in any action instituted under subsection (c) solely to enforce subsection (b) of 1971, (Intimidation, threats, coercion). This is especially probable in view of the single-judge designation provision of this subsection which specifically refers to "any proceedings brought under subsection (c) of this section to enforce subsection (b) of this section."

However, even a narrow construction of subsection 101 (d) may not have any practical effect on the availability of the three-judge court. Subsection 101 specifically provides that such a court is to be convened to hear and determine the entire case. This means that the three judge court will decide not only the outcome of the case but also the pattern or practice question and every other question involved in the case. Therefore, it will not be necessary for the court to find that "any person who has been deprived on account of race or color of any right or privilege secured by subsection (a) of this section" (42 U. S. C. 1971 (e)) before it convenes the three judge court. With this in mind, whenever the Attorney General wishes to have a three-judge court hear and determine an action instituted to enforce subsection (b) of 1971, he should also allege that the injured party has been deprived of a right or privilege secured by subsection (a) of 1971.

In view of all this, any person complaining to the Justice Department under subsection (b) of 1971 should also complain under subsection (a) of 1971. The Attorney General should be encouraged to use this three-judge court power as frequently as possible. Also, if the issue of the scope of the Attorney General's discretion under this paragraph of subsection 101 (d) is ever raised, it would be helpful for interested parties to file amicus curiae briefs in support of his

discretion to request a three-judge court in any proceeding instituted under 42 U. S. C. 1971.

THE DESIGNATION AND EXPEDITION OF PROCEEDINGS IN WHICH A THREE JUDGE COURT HAS BEEN REQUESTED

When such a proceeding is begun in a Federal District Court, the clerk of that court is required to immediately refer the request to the chief judge of the circuit or, in his absence, the presiding circuit judge, It is then his duty to immediately designate a panel of three judges composed of:

1) a district judge of the court in which the proceeding was instituted;
2) a circuit judge of that circuit (or assigned to that circuit); and
3) any other judge of that circuit (or assigned thereto).

It is hoped that these panels will be so well balanced and will reflect such a broad range of views that they will quickly be able to effect the judicial elimination of patterns or practices of voter discrimination. The Act requires a proceeding before such a court to be assigned for a hearing at the earliest practicable date and expedited in every way possible. Moreover, an appeal from the final judgment of such a court will lie directly to the Supreme Court. In cases where even such expeditious handling of the proceeding will not prevent specified irreperable damage from happening, the district judge, to whom the application is made, may grant a temporary restraining order to prevent that damage. (28 U. S. C. 2284(3)).

THE INDIVIDUAL CLAIM TO THE BENEFIT OF A THREE-JUDGE COURT CONVENED PURSUANT TO SUBSECTION 101 (d)

It would be tremendously advantageous for individuals, upon whose complaint the Attorney General has instituted a civil action and requested a three-judge court, to be made parties to that action. As parties to an action before an impartial three-judge court they would have a better chance to secure redress (including money damages). This might prove to be an effective deterent to offending registrars.

Section 101 (d) does not on its face authorize the injured party to participate in the three-judge court proceeding, and, therefore, authority must be found outside of its provisions. There are two possibilities:

a) Any person desiring to intervene with the court's permission must serve a motion for intervention upon all parties (stating the grounds on which he relies) together with a pleading containing a claim for relief. It is clear that the court could, in its discretion, permit the party to intervene if his intervention would not unduly delay or prejudice the adjudiciation of the rights of the parties.

Rule 24 (b) of the Federal Rules of Civil Procedure states:

> Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene: or (2) when the applicant's claim or defense and the main action have a question of law or fact in common.

(b) Even though there is an excellent chance that a three-judge court would grant a motion under Rule 24 (b), it would be better if the movant could avoid the risk of judicial discretion and bring himself within the terms of Rule 24 (a), providing for intervention of right:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene: or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action: or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

Rule 24 (a) (2) seems most appropriate. The use of the words "is or may be" demonstrates that a mere possibility that these conditions will result is sufficient to permit intervention.

Two of the key words and phrases of Rule 24 are:

a) representation is or may be inadequate: This is a factual question and doubt is often resolved in favor of allowing the applicant to intervene if he asserts that he may not be adequately represented. Grounds for such an assertion may be easily found: eg., the possible failure of his representative to take an appeal if he loses, or, that fact that the would-be intervenor is not on friendly terms with the attorney who represents his interests. The individual has a unique interest in his voting rights which may not be adequately represented by the Attorney General.

b) is or may be bound: There is considerable disagreement in the courts over the interpretation of this phrase. Some courts have taken the realistic approach and claimed that it means only that the applicant may be put to a practical disadvantage if he is not allowed to intervene (eg., because of the effect of stare decisis). But the Supreme Court, in Sam Fox Publishing Co. v. U.S., 366 U.S. 683 (1961), said that a party is or may be bound only when he would be legally bound by the judgment. The result of this construction is to create a dilemma which completely emasculates the effect of Rule 24 (a) (2). If the representation of an absent party is inadequate, he will not be bound by the judgment in the proceeding, and, if he is adequately represented, he does not satisfy the other requirement of the rule. In either event, he cannot intervene. Because of this dilemma some circuit courts have tended to construe narrowly the Fox case in order that this part of the rule not be rendered worthless. Thus the

Second Circuit has strictly limited Fox to the very special circumstances of a government anti-trust action (International Mortgage & Investment Corporation v. Von Clemm, 301 F. 2d 857 (2nd cir. 1962)).

In any event, a valid argument for intervention by a private person in a suit instituted by the Attorney General to enforce the voting rights provisions may be made. Any motion for intervention should, of course, point out the possible harmful effects of not being allowed to intervene. The movant should stress that he may be denied complete relief unless he is allowed to combine his claim for relief with the Attorney General's.

DESIGNATION IN SINGLE - JUDGE COURTS

The second paragraph of subsection 101(d) concerns the designation of a district judge (or, if unavailable, a circuit judge) in all proceedings authorized by this subsection in which neither the Attorney General nor any defendent requests a three-judge court and in any proceeding brought under subsection (c) of Section 1971 of Title 42 to enforce subsection (b) of section 1971. Such a judge must be designated immediately -- his designation taking precedence over the designation of judges for cases of other types already on the docket. Such preferential designation is unavailable in private actions and this is one more reason why it is desirable to allow an individual plaintiff to intervene in a proceeding instituted by the Attorney General.

THE EXPEDITING PROVISIONS

The third and final paragraph of subsection 101 (d) contains an expediting provision very similar to the one for the three-judge courts which was alluded to above. It has reference to the duty of the judge designated pursuant to this section. The meaning of this wording is not entirely plain and may be the subject of judicial interpretation.

If it is narrowly interpreted, the expediting provision might apply only to those cases in which the judge is appointed pursuant to the designating provisions of this subsection (designated pursuant to this section). These provisions are limited to suits instituted by the Attorney General and, therefore, such a restricted interpretation would be highly undesirable.

The broader and more desirable interpretation would apply the provision to any judge designated to hear and determine any case arising under section 1971 of Title 42. This would mean that any case, whether brought by the Attorney General or by a private individual must be assigned for hearing at the earliest practicable date and in every way expedited.

THE CONTEMPT POWERS OF THE COURTS UNDER TITLE I.

Every court, in which a suit is instituted pursuant to 42 U.S.C. 1971, may use its civil contempt powers to compel obedience to its orders.

The same courts may also punish disobedience through its criminal contempt powers without a jury trial. Since Title I was specifically excluded from the jury trial provisions of section 1101 of Title XI, the criminal contempt powers of the court are governed by existing law.

Under the Civil Rights Act of 1957 criminal contempt is punishable by a fine of up to $1000 and/or imprisonment of up to six months in jail. The judge may, in his discretion, try the defendant with or without a jury. But if the court, acting without a jury, adjudges a fine of more than $300 or imprisonment in excess of 45 days, the defendant may request a new trial before a jury. Arguably, these provisions would still apply to trials for criminal contempt arising under Title I.

However, it must be noted that Title I is an amendment to "Section 2004 of the Revised Statutes as amended by section 131 of the Civil Rights Act of 1960." Since section 151 (42 U.S.C. 1995) of the Civil Rights Act of 1957, which contains the provisions concerning criminal contempts, it is specifically limited to criminal contempt proceedings arising under that Act, it may be argued that Section 151 of the Civil Rights Act of 1957 will not apply to Title I of the Civil Rights Act of 1964. If this is the case, the only limitation on the power of the court to punish criminal contempts, arising under the provisions of Title I, without a jury, is the dictum of the Supreme Court in the recent case of U.S. v. Barnett. There it was said that there must be a jury trial in criminal contempt cases where the punishment is more than that provided for "petty offenses".

However this point might be interpreted, it is clear that a judge may punish to some extent criminal contempts, arising under the provisions of Title I, summarily without a jury.

CONSTITUTIONAL BASIS OF TITLE I

The legislation may be attacked constitutionally because of the fact that the establishment of voter qualifications, even for federal elections, is typically a matter subject to the regulatory powers of the State. Although there is little danger that such an attack will succeed, lawyers should be prepared to argue the point. An excellent discussion in the Congressional Record, March 30, 1964, at p. 6310, covers the pertinent points.

It is interesting to note that if the defendant in a voting rights action seeks to enjoin enforcement of the provision on the basis of its alleged unconstitutionality, the plaintiff may move to have the issue decided by a three-judge court (28 U.S.C. 2282, 2284) even though such a court would otherwise be unavailable.

TITLE II - INJUNCTIVE RELIEF AGAINST DISCRIMINATION IN PLACES OF PUBLIC ACCOMODATION

ESTABLISHMENTS COVERED BY TITLE II

Section 201 (b) and 201 (c) - BASIC COVERAGE

For an establishment to be covered by title II, it must be one of the establishments contemplated by subparagraphs (1) through (4) of Section 201 (b). In addition, either its operations must affect commerce or discrimination by it must be supported by state action.

Subparagraph (1): The Attorney General, at a Congressional hearing, (see Congressional Record, March 10, 1964, p. 4656), stated that lodgings open to transients are covered by the Commerce Clause of the Constitution. There is thus a presumption that lodging open to transients serve interstate travelers. The establishment need not be open solely to transients; it is enough if the establishment has some transient customers. One probably need not argue that the number of transients is "substantial". However, if there are no transients in the establishment when the abuse complained of occurs, it may be necessary to show that transients are "customary" guests.

Subparagraph (2): The Senate manager of this title of the bill stated (Congressional Record, April 9, 1964, p. 7179), that taverns and nightclubs are not intended to be within the scope of this subparagraph. However, nightclubs which provide entertainment can be included under subparagraph (3). Perhaps, taverns or bars which have an operating television for customers can also be included under (3). In any case, the language of subparagraph (2) does not exclude taverns or nightclubs. Since there is no rationale for excluding these establishments - virtually all hard liquor is shipped interstate - the legislative history whould be challenged. Of course, no facility under (2) is covered, unless it meets the requirements of Section 201 (c) (2).

Subparagraph (3): The legislative history, (Congressional Record, April 9, 1964, p. 7179), on this subsection indicates that only "spectator" events are intended. But the language of the statute does not exclude such places of entertainment as bowling alleys, billiard halls, golf courses, swimming pools, and dance studios. If one of these "active" or "customer participation" places of entertainment is physically located within an amusement park which has a sports arena, circus, or other "spectator" entertainment, then it is covered by the title. This conclusion is reached under subparagraph (4): the amusement park is covered because there is a "spectator" event within its premises (subparagraph (4) (A) (ii)), and the "customer participation" entertainment is covered because it is physically within the amusement park (subparagraph (4) (A) (i)).

Note that under Section 201 (c) the particular entertainment which has segregated audiences need not be one which"moves in commerce" to be covered. It is

sufficient that the exhibiting establishment "customarily" presents entertainment which moves in commerece. The entertainment in question need not charge admission to affect commerce. For the purposes of Section 201 (b) (3), commerce may mean simply interstate travel. A free concert series, for instance, is covered, if it is performed in more than one state. If "customer participation" entertainment is covered by Section 201 (b) (3), then bowling alley, etc., which customarily serves out-of-state customers is covered by Section 201 (c) (3). This coverage would result if the customers themselves can be properly regarded as sources of entertainment and if they travel interstate.

Subparagraph (4): Legislative history indicates that (4)(A)(ii) is not designed to include an office building which, for example, has a restaurant on the street level; neither offices in the building nor an adjacent shop facing the street is covered. This non-coverage is expressed by the language of Section 201 (b) (4) (B) which provides the additional requirement that the establishment within which is a covered establishment must hold itself out as serving patrons of the covered establishment. However, a department store which has a restaurant physically within its premises would be covered since the department store would hold itself out as serving patrons of the restaurant. Furthermore, since the department store is covered, an independent shop within it would be covered because such a shop would fall under subparagraph (4) (A)(i).

Section 201 (d) STATE ACTION

This subsection (d) is both more broad and more narrow than Section 202 of title II. It is more broad because its definition of government action goes beyond statutes and regulations to enforcement activities of state officials or simply actions of the state.. It is nareover because it refers to only establishments listed under Section 201 (b).

Apropos the definitions of state action in Sec. 201 (d) and Sec. 202, the Supreme Court in a recent decision - Bell v. Maryland, June 22, 1964, - split three ways on the question whether the 13th Amendment forbids discrimination in public aocomodations. More specifically, the issue was whether the state court's enforcement of trespass laws which were used to effect segregated public accomodations is state action within the scope of the 14th Amendment. Three judges did not pass on the issue. Three said that it is such state action, and three claimed that it is not and that the Supreme Court had never in the past held so. Mr. Justice Black, speaking for the last three denied that the 14th Amendment applied generally to all public accomodations, but made it as clear as is proper in such circumstances that nevertheless title II of this bill is constitutionally sound. The legislature can declare certain activities of private persons or of the states illegal, even though those activities are not unconstitutional.

Section 201 (e) - PRIVATE CLUBS

Comments in the Congressional Record indicate the intent not to allow this subsection to be a loophole for public accomodations seeking to avoid desegregation. The words "bona fide" before "private club" were deleted from this section by a Senate floor amendment. This change will have little effect since the question in the courts will be not whether the club calls itself private but whether it in fact serves the public. For example, the managér of title II in the Senate said, (Congressional Record, April 9, 1964, p. 2178) that a motel could not create a "club" for its recreational facilities by charging a small membership fee to white guests. Even if this "club" were found to be private by the courts, it would be covered by Section 201 (b) (4); since its facilities are available to the patrons of an establishment covered by Section 201 (b) (1).

Section 202 - STATE ACTION IN SUPPORT OF DISCRIMINATION

This section applies to any establishment or place, and is thus not limited to public accomodations as defined in Section 201. In this respect it is much broader than Section 201, but the type of state action requisite for coverage by Section 202 must be much more direct than is required for coverage by Section 201. To fall within Section 201 (e) it is sufficient that the discrimination be "carried on under color of any custom or usage required or enforced by officials of the State or political subdivision;" to fall within Section 202 the discrimination must be purported to be required by law, statute, ordinance, regulation, rule, or order of the state or political subdivision.

Section 204 (a) - INTERVENTION BY THE ATTORNEY GENERAL

This subsection provides that the court "may, in its discretion," permit the Attorney General to intervene in an action brought by an aggrieved person. By refusing to allow such intervention, a district court judge could frustrate effective desegregation in instances where it is impracticable for the aggrieved person to sustain a suit. For example, an interstate traveller refused lodging at a motel will be able to bring an action but will be unable to sustain it effectively unless intervention is allowed. In such an instance, the Attorney General should be urged by interested persons and groups to intervene.

These difficulties in Section 204 (a) may be avoided by recourse to Section 206. Under that section the Attorney General may sue directly if certain requisites are met. Pressure should be put on the Attorney General to exercise this power given him under Section 206.

It should be noted that Section 204 (a) ostensibly provides only civil injunctive relief. If the defendant is tried for criminal contempt, he has a right to trial by jury as provided in title XI of this bill.

Section 204 (b) - ATTORNEY'S FEES

This section provides that the prevailing party in an action may be awarded reasonable attorney's fees. Frequently making such awards would serve as a deterrent to delay.

Section 204 (c) - THE RES JUDICATA EFFECT OF STATE DETERMINATIONS

Southern states seeking to delay and thwart desegregation will undoubtedly pass laws prohibiting segregation and authorizing a state commission to enforce the laws. This will delay action 30 days under the terms of this subsection. A key issue in this regard is the problem of res judicata as applied to the findings of such a state court or administrative body. A decisive argument can be made for the view that there is no res judicata. The important clause is "the court may stay proceedings --- pending the termination of state --- proceedings." The word "may" indicates that the District Court need wait only 30 days - even though the state court has not come to a final determination. There can be no dispute that the language of this subsection says that there is no res judicata - except at the discretion of the district court - if the state court has not come to a decision within 30 days of notice of discrimination. The same import is found in Section 207 (a) which states that the district courts "shall" (i.e., "must," rather than "may") exercise jurisdiction without regard to whether the aggrieved party shall have exhausted state remedies. Congress realized that forcing the federal courts to await the outcome of state actions would be consistent with a policy of res judicata but would subject litigants to intolerable expense and delay. Similarly, the authors of this act were aware that the findings of fact in Southern state courts in civil rights cases are often contrary to the evidence and designed to quash suits. If a res judicata effect on the federal courts were allowed to apply to these findings, the Southern states could nullify much of the effectiveness of the 1964 Civil Rights Act. Complainants could have to appeal through the state courts, rather than use the direct and expedited procedures of the act, procedures created specifically to avoid this costly process. It is, therefore, in accord with the spirit and language of this subsection to say that a district court must allow federal proceedings after 30 days, even if a state court has found against the aggrieved party.

Another question concerning this subsection is the power of the district court to grant a temporary injunction while the state agency or court is determining the issue. The policy arguments for this power are obvious; if there are demonstrations over a segregated establishment and/or threats of social unrest and violence, speedy judicial action is necessary.

Section 204 (d) - REFERRAL TO THE COMMUNITY RELATIONS SERVICE

An unfriendly district court can use this subsection to delay a case up to four months. The language gives the court broad discretionary power to refer the suit to the Community Relations Service. Such discretionary power is rarely appealable. However, the fact that the court may refer the matter only as long as it believes there is a reasonable possibility of obtaining voluntary compliance may serve as a check on gross abuses of discretion. The best technique is to get the Community Relations Sefvice to write a letter to the court declaring that it is unable to secure voluntary complaince and that the court should proceed with injunctive process. This requires civil rights attorneys and organizations to exert pressure on the Administration to insure a liberal and cooperative Community Relations Service. Note that under this subsection the state need have only a law prohibiting the discriminatory practice in question; whereas in subsection (c) the state law had to prohibit discrimination and establish a local authority to implement its provisions. However, the full requirements should also be read into 204 (d) by implication.

Section 205 - COMMUNITY RELATIONS SERVICE

According to Section 204 (d) the Service cannot act if the state has passed a law prohibiting the discrimination in question. But Section 1102 of title X allows the Service to offer its services on its own motion or on that of an interested party, if, in its judgment, peaceful relations among citizens of the community are threatened. This is important, because disputes are quite likely to develop over public accomodations. Disputes in the past led to the present legislation. The Service, therefore, will have ample opportunity to act under Section 1102. In fact, there is no reason why it can not act concurrently with the state agency under Section 20. (c) - thus acting as a "watchdog" over bad faith proceedings (or lack of proceedings) by the state body.

Section 206 (a) - SUITS BY THE ATTORNEY GENERAL

Under this subsection the Attorney General is given power to commence actions directly, and it will be the function of civil rights groups to encourage him to use this power. He may act whenever he has reasonable cause to believe that there is a pattern or practice of resistance to the full enjoyment of the right to public accomodations. A practice can be two discriminatory acts by a single individual. It is also required that the pattern or practice be intended to deny the exercise of these rights, but the requisite intent need be only the intent to discriminate and not the intent to break the law.

The Attorney General may request any relief which "he deems necessary," but this is limited by the requirement that it be preventive relief. This may allow, for instance, an order to close a public accomodation unless the owner posts a bond which will be forfeited, if he does not comply with a desegregation ruling. Section 207 (b), however, states that "the remedies provided in this title shall be the exclusive means of enforcing the rights hereby created." But, as has been pointed out, the wording of Section 206 (a) is open-ended - not exclusive.

Actions by the Attorney General are to the advantage of both parties. The complainant who wishes to eliminate discriminatory practices is better served by an action by the Attorney General, because such an action can end a whole pattern of discriminatory practices - not just the practices of the particular establishment which is the subject of the complaint. On the other hand, the defendant establishment should prefer an action by the Attorney General against a pattern of non-compliance in its area because, if a single establishment is forced to desegregate by a private suit, it will be put at a disadvantage with its competitors.

Section 206 (b) - THE THREE JUDGE COURT

This subsection is highly important, because it provides a means to avoid a prejudiced district court judge. The Attorney General has the discretionary power to ask for a three-judge court chosen by the chief judge of the circuit. If the Attorney General fails to request such a court, the chief judge of the district choses the judge who will try the case. Note that the three judge court is made up of at least one circuit judge and "a district judge of the court in which the proceeding was instituted." Thus the chief of the circuit selects the district judge, hopefully assuring that the fairer ones in the district will sit on the court. The limitation on the Attorney General's right to request a three judge court is that he must certify that the case is of general public importance. This requirement should not be hard to meet. Civil rights often involve "general public importance" since demonstrations creating a possibility of public disorder and the necessity for speedy and effective resolution of the alleged abuse are normally present.

Section 207 (a) - JURISDICTION OF DISTRICT COURTS

The directive in this subsection that the district courts "shall exercise" jurisdiction, rather than that they merely have the right to jurisdiction is rather unusual in federal statuatory law and indicates the strong congressional policy to provide impartial tribunals for civil rights complainants. The purpose of the section is to avoid state judicial or administrative tribunals under the exhaustion of administrative remedies or comity doctrines.

Section 207 (b) - REMEDIES ARE EXCLUSIVE

The "exclusive" language of this subsection weakens Title 2. Specifically, a private individual cannot sue under other Civil Rights Acts (e.g., damages under 42 USC 1983) for infractions of this title.

TITLE III - DESEGREGATION OF PUBLIC FACILITIES.

SUITS BY THE ATTORNEY GENERAL

Section 301 (a): The phrase "any public facility ... operated ... on behalf of any State" indicates that facilities that are merely licensed or regulated by the state are not included under this title - they must be licensed or regulated "on behalf of" the state. Legislative history indicates that such facilities as state and local hospitals, pools, golf courses, beaches, parks, clinics, auditoriums, stadiums, libraries, court rooms, armories, civil defense shelters, jails, and community centers are covered, but "intangibles" like a government program or activity is not. The Attorney General in a Senate hearing declared that even a Chamber of Commerce or a United Givers Fund which is supported by government funds is not within the scope of this subsection. This legislative history should be challenged. There is no rationale for making a distinction between a program-activity and a facility managed on behalf of the State. Certainly, a United Fund supported in part by the state and designed to help the needy and less fortunate should not discriminate in the allocations of its funds on the basis of race.

Note the language "the Attorney General is authorized to institute for or in the name of the United States a civil action." "For or in the name of" appears to indicate that the Attorney General may institute proceedings either "for" the government, or only "in the name of the United States," but for the individual complainant. The Attorney General would then fall within the authorizing language of Section 303 and would be able to sue for civil damages in behalf of the complainant. The language that the Attorney General may sue "for such relief as may be appropriate" reinforces this interpretation of the "for or in the name of" phrase.

Like Section 207 (a), Section 301 (a) states that the district court "shall have and shall exercise jurisdiction" -- a clear directice that the federal court may not defer to a possibly hostile state court or agency. The language is itself a disciplinary device to check district judges who wish to thwart desegregation.

Section 301 (b):

Under Section 301 (a) the Attorney General may institute a suit against a segregated public facility when he decides that the individual complainant is unable to do so effectively. The present subsection gives the Attorney General broad discretion in deciding that the complainant is unable to bring suit. It is up to civil rights groups to force him to utilize this wide discretion. Note the phrase "other organizations" which refers to the anti-barrity statutes in a number of Southern jurisdictions which make it dangerous and impractical for the NAACP to give legal assistance to civil rights complainants. Such a state statute should be pointed out to the Attorney General when requesting that he institute proceedings. Section 301 (b) embodies the intent of Congress as expressed in legislative history to right the balance between the individual citizen and the manifold power of state governments by allowing the United States attorney General to represent the citizen.

TITLE IV - DESEGREGATION OF PUBLIC EDUCATION

Section 401 - DESEGREGATION, PUBLIC SCHOOLS, PUBLIC COLLEGES DEFINED

The definition of "desegregation" in Section 401 (b) regretably does not include "the assignment of students to public schools in order to remove racial imbalance." On its face the definition seems to incorporate the "neighborhood school system" into the Title. Thus in communities with racially segregated housing, the problems of de facto school segregation will not be specifically solved by this Act. However, in the South, where it is the present practice to have two school systems juxtaposed upon each other, the definition allows for the integration of the systems under the Act. Schools in the neighborhood of both whites and Negroes will have to accept all students regardless of race.

Despite the "busing" exclusion, the definition is broad enough to allow for several inroads into the racial imbalance problem in the public schools. Nothing is said about the transfer of students from school to school to prevent the development of racial imbalance. In certain areas where communities are relatively heterogeneous, more Negroes than whites or vice versa, may move into the neighborhood thereby threatening the present racial balance in the schools. Presumably transportation of students to maintain a racial balance can be considered desegregation within the meaning of the Title.

In the South, where the above situation does not exist, the problem of imbalance may be approached through the construction of new schools. New school sites should be carefully selected and, where possible, should be located within easy reach of both Negro and white communities. Where school building, maintainance, and aid is substantially financed through federal funds, means of coercing state officials to select proper building sites exist under Title VI. As empowered by Section 602 of Title VI of this Act, the Commissioner of Education should promulgate a rule requiring a state or district school board to consider the racial question along with other factors in considering building sites. The weight given to the racial question should be very substantial, and if the Commissioner felt that such a rule was being ignored, he could proceed under Section 602 to cut off federal building funds. If the school is built through the use of state and local funds in spite of the cut off of federal money, then presumably the Commissioner could withhold federal aid to that school after it is built.

A private citizen, also, who alleges that the choice of a school building site discriminates against his children may proceed against the Commission. He could bring suit under Section 601 to (1) enjoin the disbursing of federal money for building the school, and (2) to enjoin giving subsequent federal aid to that school if built with state and local funds, but his success in the second case may be questionable because of the difficulty he may have in showing how aid to the already built school personally harms him. Also under section 601 the private

citizen may be able to bring suit directly to enjoin the state from building the school on the proposed site on the grounds that the site is discriminatory, and the program of building is receiving "federal financial assistance," be it ever so little. If at this point the state declines to accept any federal assistance under the program, the complaint can and should be made to read that plaintiff is now "being denied the benefits of " the particular program.

A complaint also should be directed to the Attorney General under section 407 alleging that the choice of the school site is, in effect, a denial of equal protection of the laws, since it is a means of purposely maintaining segregation. This may bring the U.S. into the picture against the state if the other requirements of section 407 are met. Thus, by (1) the Commission proceeding under Section 602, (2) a private action under Section 601, and (3) a complaint directed to the Attorney General under Section 407, the state may be effectively stopped from erecting schools in the middle of white neighborhoods far from Negro communities.

Under Section 401 (c) public schools and colleges must be either "operated by a State, subdivision of a state, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source" in order to come within this Title. The underlined portion above will be used to delineate the public from genuinely private schools or colleges when actual controversies arise.

The use of the word "predominantly" in this section presents a ready ambiguity. On one hand it can mean greater than fifty per cent of the operating funds or property are governmental. On the other, it may have a broader and still perfectly valid meaning. If the governmental funds or property form the largest single pperating resource of the school or college, the school or college may well come within this Title. This latter interpretation is by far the one to be preferred. Under it the actual percentage of governmental funds or property may be quite small, yet the college or school is covered.

In order to succeed in convincing the courts of the validity of this view, cases must be selected carefully. A case involving a school which is operationally financed up to about forty per cent through government sources, the remainder through numerous and considerably smaller grants, would be a good starter since governmental predominance can be easily shown. Once the courts have accepted the position that "predominately" can mean less than fifty per cent, they will have a hard time drawing any line except that of the single greatest source of funds or property.

The distinction between funds and property may be significant. Because of this distinction a school may be getting very little monetary aid, yet qualify as "public" because its real and personal property may be predominately derived from a governmental source.

The interpretation by the courts of the words: "from," "through the use of," and " derived from a governmental source" with reference to funds or

property, is also of great potential importance in defining the scope of coverage of this Title. The exact meanings of the three terms are unclear, but probable meanings are:

"from" - direct grants of money for school construction, etc.; personal property or equiptment and real property either given or sold by the government (state or federal) to the school or college.

"through the use of" - money lent by government to the school or college at zero or some rate of interest; equipment or real property on loan or leased to the school or college for some or no consideration.

"derived from a governmental source" - money saved through tax exemptions (i.e. money which the school or college would not have but for tax exemptions of different sorts), interest dividends, or other income form direct investments in government securities or from reinvestment of government loans, governmental funds which have come to the school or college indirectly; surplus governmental personal property or equipment which has indirectly worked itself into the possession of the school or college.

Just how indirect the route from government to school or college can be is not indicated. It seems therefore, and this should be stressed by the attorney, that this phrase invites a liberal construction.

Under Section 401 (d), where a state has an official or unofficial policy of segregation within the schools of that state, it can be cogently argued that the state itself is the school board within the meaning of this section. For segregation is that state's policy of "assignment of students to or within such (school) system."

Section 402 - SURVEY AND REPORT OF EDUCATIONAL OPPORTUNITIES

The Commissioner's survey and report is the only place where a study of racial imbalance and de facto segregation is specifically provided for. The survey, to be of value, must be of a highly detailed and thorough nature. Every school district and institute of higher learning in the country should be studied with regard to each variable mentioned: race, color, religion, national origin, and the equality or lack of equality of educational opportunities. If properly carried out, such a study will provide information invaluable to Congress in future dealings with the problems of de facto segregation. Since this Act under any reading does not forbid action by state or local authorities to combat de facto segregation, public and private groups would find such a study extremely useful in campaigning against de facto segregation.

Unfortunately Section 402 calls for only the single survey and report to the President and Congress. Certainly periodic reports would be of extreme value as an indication of the effect of this Title on racial imbalance in the schools and as an indication of the increasing or decreasing need for further

sweeping legislation. Educators should therefore urge House and Senate leaders to supplement Section 402 with further legislation providing for additional reports to the President and Congress.

The importance of adequate appropriations by Congress for implementing Section 402 must not be ignored. The quality of the report that comes out will depend on the quality and number of the staff personel, and these, in turn, depend on finances appropriated by Congress. Time should therefore be spent explaining the far reaching importance of the report to the various Congressmen on the Committees directly involved.

Section 403 - TECHNICAL ASSISTANCE

The Commissioner of Education is also authorized to render technical assistance, upon application of a governmental unit responsible for running a school or schools, to such applicant in coping with desegregation problems.

Such assistance can only be forthcoming at the application of the appropriate school authorities, and according to Senator Humphrey, it will be available, if requested, when desegregation is accomplished under court order rather than voluntarily (p. 6321 Congressional Record, Senate, March 30, 1964).

One problem which may arise is that a particular town or city may decide to desegregate its schools whereas the state officials remain adamantly opposed. The town or city may be more than hesitant to request technical assistance under this section for fear of reprisals in the form of cut off of state funds for school operations and perhaps for other operations. Sections 601, 407, and 902 of this Act may provide answers to this serious problem. A private citizen, either Negro or white, in the particular town will certainly be deprived of the benifits of the federal program of assistance to desegregation under Section 403. That Section 601 speaks of "Federal financial assistance" rather than technical assistance does not seem critical. The town or city without this federal technical assistance would have to get it elsewhere, which undoubtedly would involve hiring experts and spending large sums of money. So in a very real sense, federal technical assistance saves the town or city large expenditures and is therefore tantamount to the "Federal financial assistance" of Section 601. If this is so, and it is eminently reasonable that the Courts so find, then the private citizen should be able to sue to enjoin the state from interfering with such federal program. Such a suit would probably be successful because the aim of Section 601 is to end discrimination in and provide for the benefits of federally assisted programs rather than to terminate such pr9grams.

The Attorney General may also be able to proceed under Section 407 against the state as a "school board" for "such relief as may be apprpate." Such relief would obviously include an injunction against the state to prevent it from cutting off funds to the town or city, attempting to close a school, or otherwise interfering with the federal program.

Such action by the Attorney General is proper since it can be shown that cutting off or threatening to cut off state funds to a city trying to desegregate its schools deprives the citizens of equal protection of the laws. Segre-

gation clearly comes under the ban of the 14th Amendment's Equal Protection Clause, and attempts to prolong segregation are denials of equal protection. Of course, the other requirements of Section 407 must be met in order for the Attorney General to proceed.

However, if the private citizen has brought the suit under Section 601, alleging specifically the denial of equal protection of the laws, the Attorney General may, in his discretion, intervene under Section 902 if he "certifies that the case is of general public importance." The relief the United States is here entitled to is the "appropriate relief" under Section 407. The advantage of the intervention proceeding under Section 902 over a direct suit under Section 407 is that the Attorney General by intervening is not concerned with the plaintiff's ability to "initiate and maintain appropriate legal proceedings." The Attorney Generl can intervene regardless.

Section 404 - TRAINING INSTITUTES

The language of the section does not authorize training institutes to go into the problems of racial imbalance. However, as a practical matter those problems will arise and will almost certainly become part of the regular course of study.

One of the big problems involved with the Training Institutes may be getting many Southern teachers, etc., to attend if they fear that their jobs may be lost or become precarious as a result. However, Section 601 provides them with the means of injuntive and other relief against the states if the state should try, throug harrassment or coercion, to deny them the benifits of the Federal Training Institutes.

These Institutes should of course be set up in the North, but will be needed primarily in the South. Because of the unrest which is anticipated attendant to desegregation in the South, a first step might be to establish the Institutes in colleges located in the Border States. If locations at universities in the deep South are thought necessary immediately, they should be chosen with great care to avoid violence of the type that occurred at the University of Mississippi. Political pressure should be exerted upon the President to supply Federal agents to patrol the grounds of the institutions of higher learning selected as sites for the Institutes.

Section 405 - GRANTS

This section should be considered in conjunction with Section 403, Technical Assistance. Problems likely to arise under this subsection are similar to those under section 403, and treatment of them should also be similar. This section makes a slightly stronger case for private action under Section 601 since the financial aid involved here is direct rather than indirect in that the federal government gives the local authorities money rather than merely saving them from spending it.

Section 406 - PAYMENTS

Allowing payment pursuant to grants or contracts under this Title to be made in advance or as reimburement may have the effect of giving the Commissioner a limited amount of coercive power. By regulating the time of payments, the Commissioner may be able to get a greater degree of compliance with the terms of the grant or contract than would otherwise be possible. To the extent that this is true, the Commissioner should be encouraged to develop and use this authority.

Section 407 - SUITS BY THE ATTORNEY GENERAL

(a) Before the Attorney General can proceed under this section he must receive a complaint in writing - but it need not be under oath. Two types of complaints are specified, one pertaining to public schools, the other to public colleges.

The allegation of "deprivation of the equal protection of the laws" in complaint number one, regarding public schools, is very broad. The mere fact that Negroes and whites have been assigned to the same school does not satisfy the "equal protection" requirement. The clause anticipates desegregated class rooms and seating within the rooms, lunch rooms, locker rooms, gymnasiums, playgrounds, school theatrical productions, athletic teams, clubs, and graduation award standards and graduation exercises themselves. Deprivation of equal protection in any of these and other facilities and programs will be valid bases of complaint under this subsection.

Complaint number one: Under this complaint the deprivation must be by the "school board." Where the state has as its official or unofficial policy segregation in education, the state can qualify as the school board under Section 401 (d) and can thus be the defendant in the Attorney General's suit. Deprivations by individual schools within a system or by teachers or staff within a single school relate to the board on principles of the law of agency.

Complaint number two: This complaint pertaining to public colleges, gives a narrow range of protection to the college student. Only if he alleges that he has been denied admission or has not been permitted to continue in attendance at a public college because of race, religion, color, or national origin can the Attorney General even consider entering the case against this section.

Unequal facilities, opportunities, etc., within the public college will probably not form the basis of action under this section unless it can be shown that these inequalities effectively forced the student to leave the school. If this can be shown in an action by the Attorney General under this section, the relief which is appropriate is an injunction against the college authority prohibiting the inequalities which coerced the student into resigning. In this way certain discriminations in public colleges, not approachable directly through the language of this sectin may be indirectly approachable through the coercive nature of the inequalities themselves.

The Attorney General, before commencing the action, must certify that

"the signer or signers of such complaint are unable, in his judgement, to initiate and maintain appropriate legal proceedings for relief, and that the institution of an action will materially further the orderly achievement of desegregation in public education." The Actorney General's judgement is final as to these qualifications, and he has a broad discretion as to which cases he will institute.

Civil Rights leaders familiar with methods and consequences of discrimination in public education should therefore approach the Attorney General to explain the need for a very restricted view of the limitations upon his power to sue. It would be pointed out that the inability of the private individual to initiate and to maintain legal proceedings is not critical because of the possibility of avoiding this limitation in many cases where schools are receiving federal aid. A private suit brought under Section 601 alleging denial of equal protection in which the Attorney General intervenes under Section 902 allows for the same relief as if the Attorney General instituted the action under Section 407. By proceeding under Sections 601 and 902 the limitation that the person not be able to initiate and maintain legal proceedings is avoided. While this method will not work all of the time, it may work frequently enough to convince the Attorney General that this limitation upon the rights to sue is not critical and should be construed narrowly.

The certification under Section 407 that the suit will materially aid desegregation should be read in light of the more generally worded certification of public importance in Section 902. Since the latter can frequently be used instead of the former (as shown above), the Attorney General's treating the Section 407 certification as similar to one of public importance will be justified.

Once the suit is brought in the U.S. District Court, the U.S. is entitled to "such relief as may be appropriate." This is broad enough to include damage relief as well as injunctive relief and may be important where injuries have been suffered as a result of segregation and other denials of equal protection of the laws. That the Attorney General and the U.S. can bring proceedings against a school noard should have deterrent effects upon a board's policies of non-compliance.

Consistently with Section 401 (b), Section 407 (c) provides that "nothing herein shall impower" any U.S. Court of official to order the transportation of pupils or students from one school to another to achieve racial balance. The word, "herein," above was explained by Senator Humphrey to refer to the entire Act rather than to this Title or section (Congressional Record, June 4, 1964, p. 112289), but dispite this, if any of the language of the Act can be construed to permit or empower the courts to issue such order, there is at least a fair chance that "herein" will be limited in scope to this Title by the courts.

This language of the Section 407 (c) does not preclude a U.S. court or official to seek to achieve a racial balance in schools by means other than transporting students. Therfore, seeking racial balance through school building program, (see supra, discussion of section 401 (b)), is not affected by the present language.

Likewise the transportation of students for any reason other than to "achieve a racial balance" is not covered by the language of this subsection. Transportation to maintain a certain balance (see supra, discussion of Section 401 (b))is probably not affected by the language of Section 407 (a)).

Section 407 (c) states that the term "parent" means anyone standing "in loco parentis," and it may be that "in loco parentis" in a non-technical sense includes teachers. If this is so, a teacher with first hand information of what is occurring in his school could sign the complaint under Section 407 (a). In addition, it may be possible for many parents to authorize a single person other than a teacher to act in the capacity of "parent" in dealing with the educational problems, including those of segregation. The devices could be especially useful if parents are apathetic, uninterested, or afraid to sign the complaint.

Section 409 - EFFECTS OF ATTORNEY GENERAL'S SUIT - RES JUDICATA, COLLATERAL ESTOPPED

Section 409 provides that Title IV in no way abridges the rights of the aggrieved party to bring a private suit to obtain relief against discrimination in public education. It can be argued on the basis of thes section that, if a party files a complaint under Section 407, and the Attorney General loses the subsequent suit, the party may then bring a private suit. Since nothing in this Title shall adversely affect the aggrieved party's right to sue, the effects of res judicata and collateral estoppel presumably will not bar his suit. Furthermore, if this second suit is brought by the aggrieved party on the basis of denial of equal protection of the laws, the Attroney General may be able to intervene under Section 902 and thereby get a second chance to end the discrimination.

TITLE V - THE CIVIL RIGHTS COMMISSION

Title V is a series of amendments to the Civil Rights Act of 1957. Below are indicated the changes which are effected by these amendments.

CHANGES IN SECTION 102 OF THE CIVIL RIGHTS ACT OF 1957 (42 U.S.C. 1975a)

RULES OF PROCEDURE FOR COMMISSION HEARINGS

1) Section 102 (a) (42 U.S.C. 1975a(a)): A new sentence is added, requiring the Commission to publish in the Federal Register notice of the time, place and subject of hearings.

2) Section 102 (b) (42 U.S.C. 1975a(c)): Copies of the Commission's rules are now made more than available to witnesses; the rules must be served with the subpena.

3) Section 102 (c) (42 U.S.C. 1975a(c)): It is made explicit that a witness desiring counsel may have it as a matter of right. There is created a duty of the Commission not to delay hearings and to be courteous to witnesses.

4) Section 102 (d) (42 U.S.C. 1975a(d)): The power of the Commission to punish unprofessional ethics on the part of counsel by censure and exclusion is eliminated, but it retains the power to punish breaches of order and decorum by such censure and exclusion.

5) Section 102 (e) (42 U.S.C. 1975a(e)): The procedure to be followed when the Commission determines that evidence or testimony may tend to defame, degrade, or incriminate is made explicit. The person tended to be defamed, degraded, or incriminated is given the right to appear in executive session. If the Commission decides to use the possibly defamatory material, it must give such person an opportunity to be heard in public session.

6) Sections 102 (f) and (g) (42 U.S.C. 1975a(f) and (g)) remain unchanged.

7) Section 102 (h) (42 U.S.C. 1975a(h)): This section of the 1957 Act provided that the Commission shall be the "sole judge" of the pertinency of evidence and testimony. As amended by the 1964 Act, this section now provides that the Commission "shall determine" such pertinency. This change presumably is designed to make clear that a decision by the Commission to allow or not to allow pertinent sworn statements is reviewable as a possible abuse of discretion.

8) Section 102 (i) (42 U.S.C. 1975a(i)): Under the 1957 Act, transcripts of public hearings were made available at cost only to witnesses; they are now made available at cost to the public. The 1964 Act makes it matter of right for a person who submits data or evidence to procure a copy of the data or evidence submitted by him and for a witness in executive session to examine his own testimony. Unless there is

good cause for not allowing it, such a witness may examine a transcript of the entire executive session. Under the 1957 Act these privileges of examining materials from executive sessions could be exercised only upon the authorization of the Commission.

9) Section 102 (j) (42 U.S.C. 1975a(j)): The only changes are the amounts given to witnesses for travel, time, and subsistence.

10) Section 102 (k) (42 U.S.C. 1975a(k)): The scope of effective service of process is expanded to include hearings held in the state in which a person is domiciled or has appointed an agent for receipt of service of process. It is further provided that one may be compelled to attend hearings within fifty miles of the place where he is found or resides or is domiciled or transacts business or has appointed an agent for receipt of service of process. Since in many states agents for receipt of service of process are appointed by operation of law, the question may arise whether the phrase "has appointed" refers to one's being in the state of having an agent appointed or to one's personally appointing an agent.

11) Section 102 (l): This section is entirely new. It requires the Commission to publish in the Federal Register descriptions of its organization and locations, statements of its decision-making process, and the rules which it adopts.

CHANGES IN SECTION 103 OF THE CIVIL RIGHTS ACT OF 1957 (42 U.S.C. 1975b)

COMPENSATION OF MEMBERS OF THE COMMISSION

1) Section 103 (a) (42 U.S.C. 1975b(a)): The changes in this section are mostly increases in the amounts of compensation for members of the Commission. Other changes are: payment for travel expenses may be made in advance instead of by way of reimbursement, and the system of compensation is explicitly geared to Section 5 of the Administrative Expenses Act of 1946 (5 U.S.C. 73b-2).

2) Section 103 (b) (42 U.S.C. 1975b(b)): The only substantial changes gear compensation for travel expenses of other governmental employees on Commission work to the Travel Expenses Act of 1949 (42 U.S.C. 835-42) and allow for payment of such travel expenses in advance instead of by way of reimbursement.

CHANGES IN SECTION 104 (a) OF THE CIVIL RIGHTS ACT OF 1957 (42 U.S.C. 1975c(a))

DUTIES OF THE COMMISSION

Subparagraph (1) of subsection (a) remains unchanged: the Commission still has the duty to investigate allegations of deprivation of the right to vote. The phrase "because of race, color, religion, or national origin or in the administration of justice" is added to the subparagraphs (2) and (3) to make explicit that the duties of the Commission under those subparagraphs is limited to these specific types of denials of equal protection of the laws under the

Constitution.

Subparagraphs (4), (5), and (6) are new. Subparagraph (4) requires the Commission to serve as a national clearinghouse for information in respect to denials of equal protection of the laws because of race, color, religion, or national origin. Subparagraph (5) differs from subparagraph (1) in that it includes unlawfully according a person the right to vote, is limited to federal elections, and allows the Commission to investigate denials and accordations for reasons other than race, color, religion, or national origin. This provision was designed with the Chicago vote fraud situation in mind, but it can prove useful in investigating, among other things, the more than unitary vote held by some Southern white citizens. Subparagraph (6) has the purpose of preventing further Commission inquiries into the internal affairs of fraternal, religious, and private organizations.

CHANGES IN SECTION 104 (b) OF THE CIVIL RIGHTS ACT OF 1957 (42 U.S.C. 1975c(b))

LIFE OF THE COMMISSION AND REPORTS

The life of the Commission is extended until March 31, 1968. (The final report is due January 31, 1968, and it ceases to exist 60 days thereafter; see Section 104 (c) of the Civil Rights Act of 1957 (42 U.S.C. 1975c(c)). The institutional insecurity and lack of opportunity for long range planning made it highly desirable, however, that the Commission be made permanent.

Congress gave itself power to order an interim report from the Commission. Under the 1957 Act this iniative was reserved only for the Commission and for the President.

CHANGES IN SECTION 105 (f) AND (g) OF THE CIVIL RIGHTS ACT OF 1957 (42 U.S.C. 1975d(f))

THE DECISION TO HOLD HEARINGS

The only change in subsection (f) is the addition of the requirement that the holding of hearings be approved by a majority of the Commission or of the subcommittee which is contemplating holding a hearing.

In subsection (g), the possible venues for court actions against a person who is contumacious or refuses to obey a subpena are expanded to include district courts within the jurisdiction of which the person is domiciled or has appointed an agent for receipt of service or process. Since in many states agents for receipt of service of process are appointed by operation of law, the question may arise whether the phrase "has appointed" refers to one's being in the state of having an agent appointed or to one's personally appointing an agent. The other change in Section 105 (g) is that the court may order the production only of "pertinent, relevant and nonprivileged" evidence.

A NEW SUBSECTION 105 (i) ADDED TO THE CIVIL RIGHTS ACT OF 1957

ADDITIONAL RULES MADE BY THE COMMISSION

This new subsection authorizes the Commission to make rules and regulations necessary to carry out the purposes of the "Act." As this addition is in the form of an amendment, the term "Act" refers to the Civil Rights Act of 1957 as amended by the Civil Rights Acts of 1960 and of 1964, and does not mean the Civil Rights Act of 1964.

COMMISSION HEARINGS IN MISSISSIPPI

THE NEED

It is essential to the effective realization of the Civil Rights Act of 1964 that there be hearings held by the Commission in Mississippi. The value to this end of information which could be collected by such a hearing and of the notoriety which could be given such a hearing would indeed be great. The Civil Rights movement knows too little about Mississippi and Mississippi knows to little about the Civil Rights movement.

THE PREVIOUS TRIES

The Commission has, at least five times, planned to hold hearings in Mississippi. In the latest instance, the situation occassioned by the entry of James Meredith into the University of Mississippi in 1963 led first to the postponement of a hearing and finally to its cancellation. The pressure for the cancellation came from the Justice Department. (See the Congressional Record, April 6, 1964, pp. 6763-4, for correspondence on this matter between Robert Kennedy and John Hannah, then Chairman of the Commission).

THE BASIS OF DECISION

The decision to hold hearings is entirely the Commission's. Section 105 (f) of the Civil Rights Act of 1957, as amended by the Civil Rights Act of 1964, provides that the Commission, or a subcommittee thereof, may "for the purpose of carrying out the provisions of this Act, hold such hearings and act at such times and places as the Commission or such authorized subcommittee may deem advisable."

The Commission's inaction in 1963, and prior thereto, may be understandable, but it is doubtful that it was advisable. Situations such as that which was created by the resistance to the entry of James Meredith into the University threaten to become even more numerous. Such incidents should not be an excuse for inaction but rather a reason for action. The presence of an educative, non-military, and non-judicial force in Mississippi would lessen misunderstanding on the parts of both whites and Negroes. The Commission would demonstrate graphically through hearings the nature of Mississippi society and the rights which there are to be achieved and to be given, concepts not effectively grasped by the majority of Mississippians.

In the Civil Rights Acts of 1957 and 1964 the functions of the Commission are termed "duties." Only by holding hearings in Mississippi can the Commission fully perform this statutory imperative.

NOTORIETY OF HEARINGS

The only limitation on public hearings is Section 102 (e) of the Civil Rights Act of 1957 as amended by the Civil Rights Act of 1964. The Commission must hold executive sessions of it determines that the evidence or testimony to be received may tend to defame, degrade, or incriminate any person. Evenso, such evidence or testimony may be made public by the Commission after the holding of the executive session if the person who may be defamed, degraded, or incriminated is given an opportunity to submit statements at a second public session.

Section 105 (e) of the Civil Rights Act of 1957 (42 U.S.C. 1975d(e)), which is not changed by the 1964 Act, provides that " all Federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties." This should be an imperative to the Justice Department and other agencies to use their existing powers to ensure the effectiveness of Mississippi hearings.

SUBPENA OF WITNESSES

There is no limitation in any of the Civil Rights Acts on who is subject to the subpena of the Commission. This subpena power should be pushed to the limit to include as many state government officials and employees as possible.

USE OF NEGROES TO SERVE SUBPENAS

Section 105 (f) of the Civil Rights Act of 1957 (42 U.S.C. 1975d(f)) as amended by the 1964 Act provides that subpenas "may be served by any person designated by *** (the) Chairman." In exercising this designating power, the Commissioner should not discriminate and should appoint Negroes to serve subpenas. Negroes so chosen will gain access to places not covered by the Civil Rights Acts and will gain for themselves and others the feeling and respect which accompany equality.

Anyone who obstructs or resists or opposes a person duly authorized in serving process of a United States Commissioner is subject to criminal penalty under Section 1501 of Title 18 of the United States Code.

REFUSAL TO OBEY SUBPENAS

Section 105 (g) of the Civil Rights Act of 1957 (42 U.S.C. 1975d(g)) as amended by the 1964 Act gives the Attorney General power to apply to the district courts to issue orders compelling the attendance of unwilling witnesses, provided the personal jurisdiction of the court to which he applies is proper. Section 105 (e) of the same Act, which is not changed by the Civil Rights Act of 1964, provides that all federal agencies shall cooperate fully with the Commission. Thus it presumably is a duty of the Justice Department to make such application to the courts to issue an order for the attendance of recalcitrant witnesses.

Section 105 (g) also provides that "failure to obey such order of the court may be punished by said court as a contempt thereof." Since this provision refers only to punishment, it seems to contemplate sanction only for criminal contempt, which is unfortunate because title V of the 1964 Act is subject to the jury trial requirement of title XI for criminal contempt proceedings. However, even though the remedy in such a case is statutory, it can be forcibly argued that the clause was not intended by Congress to limit the traditional power of the courts to secure obedience to orders through exercise of civil contempt powers without a jury.

RIGHT TO COUNSEL AT HEARINGS

It is provided in Section 102 (c) of the Civil Rights Act of 1957 (42 U.S.C. 1975a(c)) as amended by the 1964 Act that "any person compelled to appear in person before the Commission shall be accorded the right to be accompanied and advised by counsel." Presumably this language contemplates the appointment of counsel for indigents, and such construction should be urged to secure effective hearings.

TITLE VI - NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

Section 601 - Introduction

The thesis running through the following discussion of section 601 is that it provides an independent right of action for private persons and federal agencies. Its independent authority may be used in court to attempt to get an immediate favorable interpretation of powers and rights under title VI, bypassing the procedures of sections 602 and 603 which may take a year or more to pursue effectively. The fact that section 601 involves constitutional principle as well as a statement of public policy is basic to this approach.

Section 601 - ANALYSIS OF WORDS AND PHRASES:

Constitutional Principle Reaffirmed

Section 601 is more than a statement of the principle to govern across-the-board non-discrimination in federally assisted programs and activities. In using the words "no person shall" it gives such person a statutory , as well as a constitutional right, to sue to prevent discrimination against him in any program or activity receiving federal financial assistance. Such person or persons shall have standing to sue in federal court; they cannot be rejected as mere taxpayers arguing against the manner of general expenditure of federal funds. (See Frothingham v. Mellon, 262 U.S. 447, 43 S.Ct. 597 (1923).) This statute, section 601, gives persons standing to raise a constitutional issue with respect to the use of federal assistance. It also clarifies judicial confusion concerning the power and the duty of the court to enjoin the discriminatory use of federal assistance. "Shall" makes this prohibition on discrimination mandatory.

It is clear that the person referred to is the participant in and beneficiary of any program or activity receiving federal financial assistance; he is not the "recipient" of the aid, e.g., the hospital or school or building contractor who receives federal assistance directly or through a state or local agency and who may not discriminate; he is the "person" who can enjoy the benefits of the expanded hospital facilities, federally supported school lunches or of available employment in federally supported construction programs.

As mentioned, the use of the word "person" supports the theory that section 601 gives private persons a right of action. In addition, it can be argued that such a right of action is absolutely essential to the effective implementation of the remedial ends of title VI -- which is designed not to terminate federal assistance, but to insure its non-discriminatory use. Assuming that immediate agency action under section 602 may be restrictively viewed, section 601 alone must be interpreted to provide an independent means of enforcing the title. Also, since section 601 reaffirms constitutional rights, using section 602 as the only means of enforcement would be derogatory of the enforcement of such constitutional rights.

Moreover, if private institutions are the ultimate distributing "recipients" of federal aid, receiving it through the state, then an agency which contracts or arranges with the state only may be powerless to attack discrimination by such private institutions. Those persons subject to discrimination, actually injured and wronged at the grass-roots level of distribution of federal assistance, may have to use the power of the courts if title VI is to serve the purposes that Congress intended.

Although the words "notwithstanding any inconsistent provision of existing law" were deleted from the House Bill, legislative history, intent and reasonable interpretation strongly indicate that they are to be read into section 601. Thus the Hill-Burton Act (assistance to construct and expand hospital and medical facilities), the second Morill Act (assistance to land grant colleges), and Public Law 815 (assistance for federal school construction in impacted areas) which explicitly or implicitly permit separate-but-equal programs are modified or changed to the extent that any "licensing" of discrimination is now clearly prohibited by Congress.

Key Phrases in Section 601

The strength of section 601 lies in the three clauses stating that "(n)o person...shall, on the ground of race, color, or national origin, (1) be excluded from participation in, (2) be denied the benefits of, or (3) be subjected to discrimination under any program or activity receiving Federal financial assistance. This specificity may have far-reaching effects on the kind of injunctive measures a complainant can request and a court can employ.

(1) be excluded from participation in:

Federal funds must be distributed by the state so that all persons regardless of race, color or national origin can equally participate, e.g., state employjent services totally supported by federal monies must not only cease to discriminate in the selection of Negro or white for available jobs, but they must make all types of jobs available to qualified Negro and white alike. They can not continue only to offer the Negro unskilled labor openings. Thus because of title VI, section 601, discrimination with respect to job applications, as well as on-job discrimination under title VII, can be prevented by the courts.

(2) be denied the benefits of:

The best interpretation of "be denied the benefits of" may mean that a state or subdivision thereof may be prevented from refusing to use federal funds or from discontinuing a federally assisted program as alternatives to discriminating. Negro citizens may appropriately claim that as beneficiaries of a federally assisted school or hospital construction program, essential to health, safey and welfare, construction may not cease for the purpose of denying them the benefits of the program. Moreover, this phrase may give the court or the federal agency the power, without hesitation, to order the channeling of federal assistance to or through itself or another agency, including a private one -- one that promises not to discriminate. Counsel would be wise to suggest alternative political agencies or even private agencies on the statewide or local level for the administration of federal assistance.

An example of rechanneling federal assistance was a recent case -- Leflore County, Mississippi's cutoff of federal surplus food because of voter registration activities to thirty thousan beneficiaries, four-fifths of whom were Negro; the Department of Agriculture forced the county to resume distribution through the threat of either doing it itself or allowing COFO, a private civil rights agency, to do the distribution -- an obviously distasteful alternative to the local authorities.

(3) be subjected to discrimination

"Subjected to discrimination" has a more basic impact than the preceding phrases. It indicates that participants and beneficiaries cannot receive their share of federally assisted programs through "separate-but-equal" facilities, e.g., not only must there be equality of participation in state employment services but the waiting rooms in the offices must be integrated. This phrase confirms the interpretation that section 601 is, among other things, a statutory amplification of the Equal Protection Clause of the Fourteenth Amendment. Thus section 601 imposes a statutory duty which can be used to underscore the constitutional duty of a state or a private institution with which the state is sufficiently involved not to discriminate in the use of government assistance.

But the effect of section 601 is broader than the self-operative effect of the Fourteenth Amendment.

Section 601 and Constitutional Interpretation: Who may not discriminate

Section 601 prohibits discrimination in any program or activity receiving federal financial assistance. It does not refer to who administers such programs. Thus any program -- administered by any recipient -- can be read into section 601. The impact of this interpretation is that section 601's principle coupled with the Fourteenth and Fifth Amendments to the Constitution and interpretative case law, if necessary can be used to bar discrimination by all governmental and private agencies administering federal funds.

The Fourteenth Amendment states that "/n/ o State /may/ deny to any person within its jurisdiction the equal protection of the laws." Thus it is clear that any discrimination in the use of federal assistance in any amount by the state can be enjoined under this part of the Constitution, once a right of action is recognized under section 601 There would also seem to be no question that the use of federal funds by local agencies designated by state or federal governments for the administration of federally assisted programs also are within the "no state" prohibition of the Fourteenth Amendment, regardless of the amount of federal funds used by them. Thus, whether there is token or considerable use of federal funds by governmental agencies, there is little or no difficulty in finding constitutional support and authority behind the principle and right of action 601 with respect to such entities.

Similarly, since the "equal protection" clause of the Fourteenth Amendment has been read into the Due Process Clause of the Fifth Amendment, no Federal agency can discriminate in its allocation of federal funds to individuals or to the states or subdivisions thereof. Besides the specific exception of contracts of insurance and guaranty from title VI, which includes federal deposit insurance, federal savings and loan insurance, federal crop insurance, and certain FHA and VA housing loans, the purely federal projects, such as river and harbor improvement programs, direct federal furnishing of services (such as medical care at federally owned hospitals), and funds given directly to ultimate recipients (such as social security payments, veteran's compensation and pensions, and civil service and railroad retirement benefits) do not come within the prohibition of section 601 -- according to the legislative history. (Record, March 30, p. 6324). The rationale is that (1) the federal agencies do not discriminate, being so prohibited by statutes and by the Fifth Amendment, and (2) title VI does not authorize the witholding of any of these direct payments on the ground that the beneficiary engages in race discrimination in business or other activities. However, in spite of the

legislative history, if an agency should discriminate with respect to the distribution of funds or services to such "recipients," the specific language of section 601 would seem to give the injured parties a right of action.

Though section 601 is broader on its surface than the self-operative Fourteenth Amendment, nevertheless the broad interpretation of section 601 that would prevent private institutions using federal assistance from discriminating has sound constitutional support.[1] Moreover, the wording of section 601 implies that if any federal funds are involved in the activities of the private recipient, it can be barred from discriminating. The telling implication is that section 601 imposes a statutory duty to only use federal funds non-discriminatorily, or not to use them at all.

There is some question as to whether a "state action" argument would have to be used at all to support the application of the constitutional and section 601 to private institutions. Such an argument was successfully employed in Simkins v Moses H. Cone Memorial Hospital, 323 F.2d 959 (C.A. 4th, 1963). In the Simkins case the court decided in part that the private hospitals could not discriminate because they participated in a comprehensive state plan involving the appropriation of millions of dollars of public monies; the court also cautioned that each such activity or program would have to be considered in terms of its particular circumstances, that not every "subvention by federal or state government automatically involves the beneficiary in "state action." In section 601, the amount of assistance, the kind of arrangement and so forth is not defined. It should be argued that "any" assistance used by any agency provides the requisite state involvement or "state participation through any arrangement, management, funds, or property." Cooper v Aaron, supra, at p.4.

In other words, the courts no longer have to use the caution suggested in Simkins. Under section 601 every subvention by federal or state government should automatically involve the recipient in federal action or in "state action." Thus the diversion, particularly in the South, of federal funds to private institutions or agencies as against public ones, may not be used to evade the impact of the prohibitions on discrimination in section 601.

Section 601 and Constitutional Interpretation: Applications

If the foregoing interpretation is used and "any program or activity" receiving federal financial assistance means what it says -- litigants and courts should not hesitate to attack and enjoin discrimination wherever they know federal funds, in whatever amount, are being used, e.g., in highway construction, for school lunch programs, expansion of the facilities of private non-profit hospitals, and so forth. Moreover, the use of federal property may be considered a form of assistance, and any activity involving construction on or the use of federal land may come under title VI. State or private institutions that "receive" the benefits of federal tax exemption may also be considered as using federal funds.

In enacting this section Congress sought to allay its difficulties in trying to tack non-discrimination clauses to particular legislation providing federal aid for particular programs. In section 601 it has placed a powerful statutory right

[1] See Cooper v Aaron, 350 U.S. 1, 4 (1958): The prohibitions of the Fourteenth Amendment may extend to actions of private persons and organizations if the government participates in those actions. See also Burton v Wilmington Parking Authority, 365 U.S. 715 (1961). Of course, the constitutional power to carry on a federal program takes with it broad discretion in the total administration of that program.

and weapon in the hands of civil rights advocates. Given Congressional intent, the words any program or activity and the word assistance should and can be broadly interpreted: assistance need not be the direct distribution of "pocket" money. Activity comprises the development of a plan or arrangement for allocation of funds; thus section 601 is not delimited to specific, already started program. A state may be enjoined from acting in terms of a plan that would be implemented discriminatorily. This will have impact in the North as well as the South, eg., in school construction and urban renewal programs. For example, the "excluded from participation in" coupled with "any...activity" may prevent the planning and building of middle class developments that will exclude a large percentage of the Negro population.

SENATE CONFIRMS INDEPENDENT AUTHORITY IN SECTION 601: THE EXCEPTIONS

Section 601 is to be interpreted independently of the procedures for federal agency and departmental action articulated in 602 and 603. This interpretation is confirmed by the precautionary Senate amendment, section 605, which exempts financial assistance extended by way of a contract of insurance or guaranty from the authority given in title VI. Although section 605 is restrictive, ie., section 601 cannot be interpreted to prevent discrimination in activities involving contracts of insurance or guarnaty, it is also explanatory, ie., the Senate thought that section 602's authorization to each federal department or agency to issue regulations to effectuate section 601 other than in regard to programs extending financial assistance by way of a contract of insurance or guaranty would not exempt such contracts of insurance or guaranty from the independent authority -- substantive right and standing to sue -- conferred in section 601. Thus, by implication, the addition of section 605 to title VI reaffirms the interpretation that section 601 confers independent authority.

In authorizing action to prohibit discrimination in any program or activity, section 601 can have an important effect on employers and employment agencies despite the exemption in section 604 -- since 604 keeps them under the prohibition on discrimination of title VI when a primary objective of the financial assistance is to provide employment. Note that employment only has to be "a" primary objective; note also that the legislative history states that most, if not all federally assisted construction projects, (such as the accelerated public works programs), and many federally financed state employment agencies have as a primary objective the stimulation of employment.

INDEPENDENT ACTION UNDER SECTION 601: AGENCY ACTION TO BYPASS 602 AND PRIVATE ACTION

Although sections 602 and 603 of title VI specify the alternative procedures that federal agencies may follow to secure compliance with section 602 non-discrimination requirements, section 601 creates an enforceable equitable right in private persons to go to the courts for relief in accord with the non-discrimination policy and principle of title VI. The fact that section 601 exists independently, and the fact that his statement of principle or "policy on constitutional law" was not incorporated in section compels this interpretation. Also, the rather drawn-out procedure of section 602 is designed to secure "compliance with any requirement adopted pursuant to this section." Thus any

existing regulations or orders barring discrimination can be used in court along with section 601 by the agency to enjoin discrimination in the use of federal funds distributed (under existing orders) after the effective date of the Act.

Agency Action to Bypass section 602

A suit, with the agency as complainant against the discriminating state and/or local agency, can be filed in federal district court asking for an injunction ordering the state or local agency discriminating, or private segregated institutions receiving federal financial assistance (directly or indirectly) to cease discriminating, and in the alternative to restrain from distributing or utilizing federal funds with respect to a particular program or activity until a nondiscriminatory plan is approved or until employees, patients, students, professionals -- beneficiaries and participants -- are assured equal treatment. A date for cutoff of funds or even for repayment, in the event of noncompliance, can be proposed by the court.

To induce the agency to begin such an action, the private persons actually discriminated against -- and immediate efforts should be made to participate in federally assisted programs and activities operating in their states -- should file citizens' complaints with the appropriate agency (e.g., the Department of Health, Education and Welfare or the Secretary of Agriculture) explaining in detail the circumstances of the discrimination and providing a brief legal statement of the agency's rights and powers to so act under section 601.

In addition, if the agency has not articulated requirements prior to the Civil Rights Act of 1964, it may now do so under section 601 -- outside of the procedures of 602 and 603 which are not designated as exclusive. Existing executive orders pertaining to racial discrimination in housing are also useful. The legislative history states that section 601 provides statutory support to such orders and requires the extension of such a policy to agencies which presently take the position that they are legally unable to adopt such requirements. Thus although certain VA and FHA contracts are excluded from the authorization of title VI, viz., 602 and 605, section 605 does state that "nothing in this title shall add to or detract from any existing authority."

The court may question its authority to act against the agency or to help the agency to act outside of section 602. The argument should be made that section 602 was not established as an exclusive remedy; when Congress intended the procedures and remedies spelled out in the Act of 1964 to be exclusive it made it so explicitly, e.g., in titles II and VII. Furthermore, section 602 was intended to give the agencys' power to cutoff aid immediately through unilateral orders, if necessary, ie., not to wait until the time for contract renewal or renegotiation arose. To so suspend assistance in "mid-term" involves a harder burden of proof than refusal to continue assistance when the time for reconsideration arises. The unilateral orders for cutoff established under section 602 would apply to all pending agreements as well as future agreemnts -- but it will take considerable time before they are enforceable. However, the courts, outside of section 602, should have the authority to make the agencies enter into and enforce contracts under existing statutes empowering the agencies to terminate assistance. The agencies failure to use such power in the past may have been due to ambivalent feelings concerning the relationship of federally assisted

programs to public policy and constitutional principle against discrimination. New section 601 clears up such confusion and creates the right to act.

In addition, the President's review of agency regulations before they are adopted will be unreviewable by the courts. This provision of section 602 helps support the interpretation that section 601 may be used independently by the agency and the courts as a means to terminate assistance, if necessary. (See the discussion of "Presidential Approval" under section 602 below.)

In a suit by an agency a defendant state or political subdivision thereof may be ordered to repay unexpended funds Under section 601 a court may also order the state to repay to the federal government funds improperly used ie contrary to contract agreement, section 601 and/or the Constitution.

Private Action

The independent right of action that section 601 gives private persons has already been analyzed above. Under section 601, persons -- participants and beneficiaries -- may sue discriminating recipients in the federal district court in the district in which they reside or where the cause of action arose. Such persons may also make the federal agency a defendant in the federal district court in the state. (see 28 USC 1361; 28 USC 1391 (e)). But the federal agency, as sole defendant, should and can be sued in Washington, D.C. to enjoin it from acting in terms of agreements made prior to the Act of 1964 that do not explicitly and actually bar discrimination.

The problem that complainants may have to face is that on its face section 601 appears to provide a right without a specific remedy. However, this problem may be effectively met by arguing that the statutory duty of section 601 reflects, not only underying and long existing public policy with respect to the actions of federal agencies, but also a pressing constitutional duty under the Fifth and Fourteenth Amendments. As mentioned above, using section 602 only would be derogatory of the enforcement of constitutional rights.

Any agency agreement, agency-state-local subdivision agreement or state-local institution agreement to provide and distribute federal funds that does not expressly prohibit discrimination may be said to unconstitutionally sanction it. The complainants suing under section 601 and the Constitution have a right to injunctive remedies and possibly damages against a federal agency and/or state, local and private recipients. Concerning damages, if persons have been denied the benefits of assistance, they may be entitled to receive monies from the state to remedy the unconstitutional and statutory wrongs that discrimination in federally assisted programs has caused them to suffer.

In a suit by a private person against the federal agency, if the agency makes or has made an agreement -- to be carried out after the effective date of the Act of 1964 -- under the statute empowering it to render financial assistance, and claims that it was unable to demand an either-or proposition, ie., bar discrimination or funds will be refused, the court may be able to

rule that the agency has abused its discretion or has acted ultra vires. The relationship between the federal agency and the state or recipient can be said to require measurement by the standards of the Constitution. But to avoid the constitutional question the court may find that the statutes empowering the agencies to give financial aid imply that non-discrimination in activities shall be a prerequisite, for otherwise, the contrary use of such statutes by the administrative agency might be unconstitutional. (Cf. Simkins v Moses H. Cone Memorial Hospital, supra; : court declared explicit separate-but-equal clause in Hill-Burton Act was unconstitutional.)

"Denied the benefits of" and Rechanneling of Funds

If the federal agency is sued in the District of Columbia, it can be enjoined from paying funds or ordered to carefully supervise the use of the funds or to rechannel the funds if possible through a local agency willing not to discriminate. Indeed if "denied the benefits of" can be interpreted to mean that any termination of assistance will deprive persons of a right to the benefits of the assistance then continuation of the funds in some effective non-discriminatory manner may be ordered.

Analogy to Third Party Beneficiary Theory

A brief point should be made that a third-party-beneficiary type theory may even be used as an alternative to the right of action legislated in section 601. Such a theory could be based upon detrimental reliance by the individual beneficiary upon expectation of prompt and effective federal-state agreements to provide the federally assisted benefits in question. The happy consequence of the acceptance of such an argument would be that the agency could be ordered to find some way, e.g., a willing-to-comply private entity, to continue to supply the benefits of assistance at the local level.

Remedies in a Private Suit against a Private Institution

The constitutional support for a private suit and the right of action under section 601 has been discussed above. (see pps. 1-4.) Some of the remedies requested can be (1) specific performance of contractual obligations not to discriminate, (2) damages, (3) discharging the institution of its responsibilities and substituting another agency which will agree not to discriminate.

Civil Action for Deprivation of Rights under 42 USC 1983:

Section 1983 of the United States Code, title 42, states that "every person who under color of any... regulation, custom, or usage of any State... subjects... any citizen... to the deprivation of any rights... secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." If there is any doubt that section 601 of title VI provides a right without a remedy, section 1983 of the United States Code, title 42 seems to assure a remedy -- including damages. Section 601 makes it clear that the right to participation in and the benefits of any federally assisted program or activity shall not be denied. Thus any person depriving someone of this right to federal assistance is liable to the party injured under section 1983 of title 42 of the United States Code.

Caution! The Problems of Primary Jurisdiction and Exhaustion of Remedies

In bringing the agency into court, the existence of administrative procedures in 602 and 603 will almost certainly raise primary jurisdiction and exhaustion of remedies issues. Since immediately effective judicial action is most likely to result, if at all, from a suit in the district court of the District of Columbia against the agency alone -- (although simultaneous suits can be instituted in the federal district courts in the states against the federal agency[2] and state and local agencies) -- arguments against suing the agency before it acts or has time to act in terms of the procedures provided in section 602 will have to be countered. It can be argued that section 601 creates an independent right of action to sue to remedy the violation of constitutional rights and/or that the suit is not limited to the mandatory rules, regulations or orders issued under the authority of section 602, and most significantly, that in other titles, when Congress wanted designated procedures to be exclusive it said so, e.g. titles II and VII.

Thus the courts can initially act, irrespective of primary jurisdiction arguments, to interpret section 601, and the rights, duties and authority legislated therein. The issues raised do not require administrative expertise or specialized administrative experience, e.g., whether or not states under agreements with federal agencies may allocate funds discriminatorily. The courts may direct the agency but leave it up to the agency under judicial supervision to develop with the states of localities plans for the non-discriminatory use of federal assistance. This may overlap somewhat the Congressional directive in section 602, but the courts already have (as shown by Simkins v Moses H. Cone Memorial Hospital, supra) at least a minimum concurrent jurisdiction in this constitutional area. Similarly, an irreparable injury argument can be used to counter an exhaustion of remedies defense.

SECTION 602: FEDERAL AGENCY ISSUES ORDERS AND SECURES COMPLIANCE

Agency Must Act

The strong point of section 602 is that agencies are "authorized and directed" to issue rules, regulations or orders of general applicability in order to effectuatethe provisions of section 601, i.e., promulgate statements definitively providing for non-discrimination in any program or activity receiving Federal financial assistance. The fact that such regulations can not be issued under section 602 with respect to contracts of insurance or guaranty, e.g., VA home mortgage insurance, does not mean that existing agency powers and executive policy cannot be used with respect to such programs. An agency must issue orders containing requirements of non-discrimination; it has no discretion at this point. Any unreasonable delay in the exercies of this mandatory obligation can probably be the basis of a suit by aggrieved private persons in court, requestion an order directing the agency to perform

[2]See 28 USC 1361; 28 USC 1391 (e).

its statutory duty.

The Nature of Agency Orders Under 602

Since the rules, regulations or orders issued under 602 are to be of general applicability, specific provisions on specific arrangements do not seem to be required. Also, general applicability, according to the legislative history, requires the Agency to make regulations uniformly applicable to all the states. However, regional problems and differences necessitate some specificity -- if actual non-discrimination is to become a reality. Those who attempt to influence the character of agency decisions should keep this in mind.

Orders shall be "consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." The witholding of federal funds could deprive many persons of assistance invaluable to their livelihood and well-being. Thus orders may be devised to assure the non-discriminatory use of such finds by willing recipients. If necessary substitute or alternative recipients, capable of allocating federal funds, can be designated. Orders concerning cutoff must be limited to the particular assistance program involved. Highway funds cannot be cutoff because a state's educational facilities discriminate. In addition, the consistency clause raises the question of plans and action for compliance, e.g., federally assisted educational programs, exceeding desegregation plans or integration orders issued by the courts under other titles or the Constitution.

Presidential Approval

The apparent burden of section 602 is that the effectiveness of agency rules, regulations or orders issued under this section depends on Presidential approval. Hopefully, the President will use his power in favor strong anti-discrimination rules; in fact, he can be encouraged to advise and remind an agency that it has sufficient authority to devise strong, unhesitiating regulation that may definitely provide for cutoff when and if recipients fail to comply. In fact, the Executive has in the past issued orders more stringent than those that title VI, section 601, seems to require. The positive policy against discrimination in 601, and the unambiguous Congressional authorization for the issuing of orders combined, demands no soft-peddling by the agency.

TERMINATION OF ASSISTANCE OUTSIDE OF SECTION 602:

Title VI is a remedial, not a punitive statute; if anything, it should be interpreted so as to clarify and expand the power to withhold financial a assistance. The "grant" of power in section 602 to the President to approve agency regualtions is in a sense creating an executive, not a judicial function, to the ChiefExecutive. It seems to verge on legislating a political power. Also, the requirement of Presidential approval of immediate agency action as a precedent to cutoff is not subject to judicial review. Congress could not have intended in this way to render existing cutoff or all other agency rulemaking authority with respect to the use of federal funds so

so much more difficult. Thus, if section 602 is seen in the above light -- if cutoffs under section 602 are to be judicially unreviewable with respect to the prerequisite Presidential approval or disapproval of prior requirements -- then both (1) the grant of an independent right of action to persons -- participants and beneficiaries -- subjected to discrimination under 601 and (2) the continued existence of agency power otuside of section 602 are reaffirmed.

In the analysis of section 601, above, various ways of using section 601, irrespective of section 602 procedures, were suggested. These means of by-passing section 602 involved either (1) complaints in court by private person, or (2) direct or judicial action by a federal agency,

(a) Agency Action Under Section 601

The main argument supporting agency action under section 601 is that section 601 should be construed as a clarification of the agencies' constitutional right and duty to see that federal funds are used non-discriminatorily. Thus if the agency cannot get the recipients of its aid to cease discriminating or to comply with approved and agreed upon plans, it can (1) use the courts to obtain (a) specific performance of contractual obligations imposed by vir ue of its authority under statutes empowering it to extend financial assistance and definitely enforceable because of section 601, (b) return of disbursements, or (c) other relief, or (2) it can take action to cutoff funds under existing contracts or any other proper action. Provisions for cutoff in contracts made after the effective date ff the Civil Rights Act of 1964 should be similarly inforced outside of section 602 because the word "requirement" in section 602 should relate only to conditions of discrimination that the agency is required to prohibit in unilateral orders and not to contractual obligations of the recipients which may be imposed under existing statutory authority.

(b) Private Action Under Section 601.

The theories supporting private action in the courts are analyzed extensively above. Where orders from Washington under section 602 may affect most strongly recipients receiving aid directly from the federal agency, private persons using their right of action under section 601 can have local and private entities enjoined from misusing federal funds, by approaching the problem from the bottom up. Since section 601 states that no person shall be denied the benefits of federal assistance, the prohibiton barring suits by private "taxpayers" should not apply. (Reference is made generally at this point to earlier discussions under 601.)

Private persons, under section 601 coupled with the Fifth and Fourteenth Amendments can sue to require the agency to act immediately, and effectively to end discriminatiin in federally assisted programs. Primary jurisdiction and exhaustion of remedies arguments based on the existence of section 602 may be countered by noting that (1) using 602 only would be derogatory of the enforcement of constitutional rights and (2) Congress did not intend to make section 602 an exclusive procedural remedy, since in other parts of the Act it specifically stated such procedures were exclusive when it so intended

(e.g. Titles IIand VII).

Also as mentioned under the section 601 discussion, private persons suing the federal agency and/or state, local or private subdivisions may use a third party-beneficiary-type theory to support a claim for relief against deprivation of the benefits of a federally assisted programs. One suggested mode of relief is the rechanneling of funds or surplus food disposal programs through agencies or private institutions that will not discriminate.

TERMINATION OF ASSISTANCE UNDER SECTION 602.

In section 602, Congress has enacted two principal ways of securing compliance with repqirements adopted pursuant to section 602. These may be discretionarily used by the agency: (1) termination of assistance or (2) any other means authorized by law.

The federal agencies power under section 602 to cutoff or withhold funds seems to involve a rather limiting, complicated, and prolonged procedure. The steps set out in section 602 are, as follows: (1) the agency must adopt a non-discrimination requirement by rule, regulation or order of general applicability (2) the President approves the foregoing (3) if there is a finding of discrimination the agency advises the recipient of failure to comply with the requirement (4) the agency determines that compliance cannot be secured by voluntary means before cutoff is considered (5) prior to termination the recipient must have a formal hearing resulting in an express finding on a written record that such recipient has failed to comply with the non-discrimination requirement (6) a full written report must be submitted by the agency to Congress explaining the circumstances and grounds for the proposed action and (7) no such action shall be effective until thirty days after filing a report with Congress. It should be noted, again, that the hearing, finding on the record, report to Congress, and thirty day delay requirements (1) only apply to the termination of or refusal to grant or to continue assistance and (a) apply only with respect to any requirement adopted pursuant to section 602. In spite of some legislative history to the contrary, there seems to be no verbal warrant in section 602 for the interpretation that this is an exclusive procedure for the cutoff of funds. Note the word "may" precedes the discussion of terminatoon and other means authorized by law. An agency having power under other statutes and using other procedural devices to terminate assistance or a court issuing an injunction in an action under the Constutution or under section 601 should be able to achieve cutoff if such court or agency determines that cutoff is the proper way to secure non-discrimination.

Particular Programs and Particular Recipients

Understanding this point is important, although its interpretation seems to have no negative effects on the anti-discrimination policy. Congress, with these words - "but such termination or refusal shall be limited in its effect to the particular program, or part thereof, in which noncompliance has been so found" - seeks to prohibit, if unnecessary, the wholesale cutoff by localizing it. The rationale is that an entire state should not be deprived

of funds, even funds for a particular program, if a single non-complying political subdivision, cality, or private entity is guily of discrimination. Thus, cutoff is to be limited to a particular program or activity governed by a particular recipient.

The federal agencies' power, however, is not proscribed by the fact that it is the state which actually gives the federal funds to the local agency or entity. The federal agency can either direct the state not to pay funds to the non-complying program and/or recipient or the federal agency can proportionately reduce the amount of funds the state is to receive by the amount normally distributed by the non-complying entity. If the state, e.g., its Governor, refuses to obey an agency directive, all the state funds with respect to the statewide activity or program of which the particular program is a part can be withheld. The legislative history is clear on the point. All of the state's funds may be withheld if a state refuses to obey an agency directive or issues violative instructions or policies or if there is statewide discrimination. Thus, although individual schools or single counties can be deprived of their share of federal funds while the state continues to receive aid for other schools or other counties, an entire non-complying state is not exempt from the cutoff sanction. For example, in Mississippi, where surplus food disposal is probably carried on on a statewide discriminatory basis, the whole state can be deprived of free surplus food. (However, the "consistency clause" in Section 602 would probably weigh against this action). Nevertheless, an alternative course of action, as effective as a cutoff and more in accord with the "consistency clause" of Section 602, would be for the agency to channel surplus food disposal through other agencies.

SECTION 602 (2) - BY ANY OTHER MEANS AUTHORIZED BY LAW (See discussion of remedies under Section 601)

Specific Performance

The agency can get a court order to make recipients specifically perform their contract obligations. If the suit uses Section 602 requirements as the basis for a right of action, then the adoption and Presidential approval procedure would have to precede court action. The only additional procedure required preliminary to suit under Section 602, since the facts of discrimination can be tried de novo, is that "the appropriate person or persons" be advised of the failure to comply with the requirement and that the agency determine that "compliance cannot be secured by voluntary means."

In the long run specific performance may be one of the most effective devices at the agencies' disposal. It is a way, also, for the agency to reach a local agency or private institution with which it may lack direct contact. If the state contracts - and the agency should so require - to allocate funds through an appropriate arrangement to smaller entities on a non-discriminatory basis only, then the agency through the court can demand the performance of such "sub-contracts" as well as performance of the primary agreement between the agency and the state. A state's failure to act in terms of an approved arrangement or to supervise the good faith carrying out of the arrangement by state agents may be considered failure to perform contractual obligations and be the basis for a far-reaching specific performance decree.

RELATION TO OTHER TITLES OF THE CIVIL RIGHTS ACT OF 1964

If the recipient under an educational program is a school district or college, the agency can ask the Attorney General to initiate a lawsuit under title IV as well as to take other appropriate action under title VI to complement title IV. Although a federal official in an agency administering a federally assisted school program or activity is not authorized under title IV to prescribe pupil assignments or to select faculty, he does have authority, viz., under Section 602, to adopt with approval of the President a general requirement that the local school authority refrain from racial discrimination in treatment of pupils and teachers. He also has the authority, by a specific performance suit, to achieve compliance with that requirement, and to use a cutoff of funds or other means authorized by law to secure the same end.

Similarly, if the recipient is an employer, employment agency or labor organization using federal assistance primarily for an employment objective, the Attorney General can be asked to bring a suit under title VII. (See discussion of Section 604). Procedurally, prior to suit, the agency only has to advise the non-complying party of the proposed referral and to give it an opportunity to avoid litigation by voluntary agreement to comply.

If the statute empowering the federal agency to give financial assistance already provides authority to cut off funds it would seem that Section 602 (2) may also enable the agency in a different way to bypass Section 602 (1) and the procedure for administration of cutoff. For example, under the School Lunch Act, 42 U.S.C. 175 (b), payments to the states are authorized through agreements between the Secretary of Agriculture and the state educational agency. Also, arrangements between the states and private and public schools require the Secretary's approval. Although there is no statutory provision for notice, hearing or judicial review, the Secretary has the authority to deny a grant to a state or school which refuses to agree to terms approved by the Secretary and to terminate assistance for failure to comply with the agreements thereto. Title VI, Section 602, contains no statement which can be interpreted as amending the administrative authority under an act such as this.

Public accomodations receiving Small Business Administration assistance may involve an overlap with title II. Municipalities enjoying Area Redevelopment or Community Facilities Administration assistance would involve title III as well as title VI.

18 U.S.C. 601 - CRIMINAL SANCTIONS FOR DEPRIVATION OF EMPLOYMENT OR OTHER BENEFIT

A criminal proceeding, resulting in a maximum penalty of $1000 or one year imprisonment, can be brought against any person who "directly or indirectly deprives...or threatens to deprive any person of any employment, position, work, compensation or other benefit provided for or made possible by any Act of Congress appropriating funds for work relief or relief purposes, on account

of race, creed, color..." Many of the programs and activities for which Congress has appropriated funds and which definitely come under title VI also can be included under this criminal statute. Deprivation of employment in accelerated public works programs, highway, airport, school and other construction activities or discrimination by employment agencies would be covered. The Attorney General should be encouraged by the federal agencies and private persons to use this section of the code vigorously. It provides a complementary saction which may be as effective as cutoff and which does not require Presidential approval, hearing, thirty day delay and the other procedural "safeguards" of Section 602.

Important note: See the discussion of Section 1103 below in the analysis of title XI for Section 1103's probably pervading effect on all of the prior discussion of the Sections 601 and 602 dealing with agency action independent of the restrictions of Section 602.

SECTION 603 - JUDICIAL REVIEW; THE ADMINISTRATIVE PROCEDURE ACT

Judicial Review of Action Other Than Termination

Any department or agency action pursuant to Section 602 shall be subject to judicial review as otherwise provided by law for similar action taken by such department or agency on other grounds. In light of the second sentence of this section concerning judicial review of agency action terminating assistance, it seems obvious that if other forms of action are used by the agency, e.g., requirements of contractual stipulations barring discriminatory practices, which are not ordinarily subject to review, judicial review is not absolutely required by Section 603. Note the last sentence of the section -"such action shall not be deemed committed to unreviewable agency discretion within the meaning of (Section 10 of the Administrative Procedure Act)." "Such action" is a reference to termination of assistance only.

Under this part of Section 603, agency action continuing assistance in spite of or in the absence of the orders and regulations which must be issued pursuant to Section 602 may be reviewed. An agency can be required by the court to see that contractual obligations are specifically performed and to carefully watch recipients to make sure that approved arrangements are carried out according to plan. (Also, see the brief discussion of the Administrative Procedures Act below). Persons discriminated against and dissatisfied with agency initiative and action should try to use this part of Section 603 as much as possible to obtain judicial review of all actions other than termination of assistance.

It is obvious that a state will be aggrieved (ie., suffer pecuniary har - the usual legal definition of"person aggrieved") by federal agency action terminating assistance. It is less obvious legally, but certainly true, that the persons - participants and beneficiaries subjected to discrimination - will be "aggrieved." Thus such persons may want judicial review; nothing in the phrasing of this section deprives them of this right. The words "any person" are used, and it would be absurd to consdier the parenthetical to be an exhaustive or definitive listing of those intended

to have a right to review.

A private person might, on review, object to termination on the following grounds: (1) adequate alternatives to cutoff, such as the rechanneling of funds through private or local agencies that would not discriminate, were not considered or tried out by the agency or (2) the scope of agency proposed termination is inadequate and more relief seems necessary if the policy of section 601 is to be effectively carried out. As an illustration of this second point consider the possibility of discrimination in educational or hospital activities in almost every county in the state. Suppose the agency only decided, after trying all other means of compliance short of cutoff, to terminate assistance to only one county as a kind of test case or example. If the state and county's violation of federal law and the Constutution has been continuous and flagrant, obviously statewide cutoff would be the only effective means of enforcement. The agency's failure to use this ultimate weapon to its fullest should be and can be challenged in court. Congress itself has stated that while cutoff is to be a last resort, there is not to be too much toleration of unbending, unlawful discrimination.

Note On Section 10 of the Administrative Procedure Act

The decision to terminate assistance is definitely, by virtue of the last clause of section 603, not committed to unreviewable agency discretion within the meaning of section 10 of the APA. Under Section 10 (b)"...any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction ...) in any court of competent jurisdiction" is appropriate. Thus the agency can be enjoined from terminating a assistance without trying other available means of securing compliance or it can probably be ordered to extend termination to non-complying agencies not covered by its action or decision prior to review.

Under Section 10 (c) "(A)ny preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. This section subjects, finally, the orders, regulations and rules issued under 602 to judicial review. A private person aggrieved, i.e., one who finds the agency's rule insufficient to satisfy the end of non-discrimination, can have such rule reviewed and declared inadequate. The declaration can be accompanied by judicial suggestions for a stronger rule, more in keeping with Congress' direction that the agency must act and act effectively.

Section 10 (e) Scope of Review is applicable to any review allowed under the first part of section 603 providing for review of actions other than termination as well as to review of decisions to terminate assistance. Especially if other attempts, e.g., under section 601, to obtain judicial interpretation of title VI fail, the section 603 means of obtaining judicial interpretation of the provisions of title VI, particularly interpretation of section 601 in connection with the Fifth and Fourteenth Amendments of the Constitution, should be employed. In connection with an effort to have rules, regulations, or orders declared too narrow, one should note section 10 (3) (B) (2) of the APA which states that the court may hold unlawful and set aside agency action short of statutory rights. A too limited termination of assistance may be covered by section 10 (3) (B) (6) stating that the court may consider and declare unlawful agency action "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."

SECTION 604: EFFECT OF TITLE VI ON EMPLOYMENT PRACTICES

The "except" clause in section 604 practically nullifies the prohibition that "nothing in this title shall be construed to authorize action with respect to any employment practice of any employer, employment agency or labor organization," for wherever "a primary objective" of the federal financial assistance is to provide employment, the prohibition on using title VI does not apply. Innumerable federally assisted programs, especially important construction projects, have the provision and stimulation of employment as a primary objective. (See earlier section 601 discussion.)

Congress has definitively spoken with respect to the interpretation of section 604 by stating, for example, that stimulation of employment is typically a significant purpose of federal grants for construction of highways, airports, schools, hospitals, and other public works. Illustrative of such purpose is the statement in section 12 of the Public Works Acceleration Act of 1962 (42 USC 2641 (a)) that the acceleration of public works construction, including construction assisted by federal grants or loans was : "necessary to provide immediate useful work for the unemployed and underemployed." Thus construction companies -- employers -- are certainly covered under title VI. Moreover racial discrimination in construction financed by federal grants and loans is now prohibited under Executive Order No. 1114. Title VI provides statutory support to the policy reflected in the order and requires its extension to those agencies which took the position that they were unable to legally comply with it.

Labor organizations providing the labor to such programs and activities are indirectly recipients of assistance, since the assistance makes the employment of their members possible. Therefore, they too can be barred from discriminating.

State agencies administering the unemployment compensation programs which participate in the Federal Unemployment Trust Fund would be prohibited from denying payments to otherwise elegible beneficiaries because they were Negroes -- or because they had participated in voter registration or sit-ins. Such agencies would also be prohibited from maintaining segregated lines or waiting rooms for or otherwise differentiating in their treatment of white and Negro beneficiaries. Title VI also authorizes the adoption of regulations requiring the elimination of racial discrimination in referral practices, treatment of job applicants, and so forth. Federally assisted vocational training programs are also covered.

The possible overlap of titles VI and VII as to title VI employment requirements should be noted. Both titles call for initial reliance on voluntary methods for achieving compliance. If such methods fail then the department or agency administering a federal assistance program would consider the availability of a suit under title VII in determining what means of obtaining compliance with its employment nondiscrimination requirement would be most effective and consistent with the objective of the federal assistance statute. It is difficult to see how a judicial determination of cutoff in a suit under title VII would have to satisfy the complex termination of assistance requirements of section 602.

SECTION 605: CONTRACTS OF INSURANCE AND GUARANTY

(Important: See discussion of section 605 under the exceptions part of the analysis of section 601.)

Federal deposit insurance, federal savings and loan insurance, federal crop insurance and certain FHA and VA loans are the kinds of contracts of insurance or guaranty considered by section 605.

Section 605 is a Senate amendment inserted in title VI to make certain that the exemption of contracts of insurance and guarantee from agency authority in section 602 would not be nullified by the independent authority under section 601. The effect of this amendment in stressing that 601 does provide independent authority has been mentioned at greater length above.

A crucial point in section 605 is that although nothing in title VI shall add to existing authority, nothing in the title shall detract from existing authority. Executive authority is therefore left intact; as for example, the President's housing order. Agencies dealing with programs that are affected by the President's order must act in terms of Presidential policy -- and despite the title VI exemption section 601 makes it clear that Congress also approves the public and constitutional policy of non-discrimination in any federally assisted program or activity.

TITLE VII - EQUAL EMPLOYMENT OPPORTUNITY

Title VII is perhaps the most crucial title in the Civil Rights Act of 1964. It requires employers, employment agencies, and labor organizations not to discriminate in employment. It sets up a federal commission to review cases of discrimination and provides for enforcement by bhe Attorney General of non-discriminatory hiring policies. Title VII suffered during the Senate debate, but still it may be used effectively to better the critical employment situation. One caveat must be made immediately: that is that almost all of the Title is not effective until one year after it becomes law.[1]

SECTION 701: EMPLOYERS, EMPLOYMENT AGENCIES, LABOR ORGANIZATIONS

The coverage of the bill is broad, although its full scope is not achieved until four years after the title takes effect. An employer, to be covered, must hire more than 25 employees (100 during the first year of the Act's existence, etc., as provided in Section 701(c)) each day for twenty weeks within the previous calendar year. The twenty-week provision is intended to protect employers of seasonal employment. Note that the weeks do not have to be consecutive, nor need the employees work full time. In fact, employees on the payroll, but not working, could constitute the requisite number.

The employer must be engaged in an "industry affecting commerce," as defined by Section 701(h). This section referes to the definition in the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 142) which reads:

> The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or the free flow of commerce.

1. A short comment on the constitutional basis of this title is in order. Senator Clark, floor manager for the title, discussed in detail the constitutional basis of the provision (Congressional Record, April 8, 1964, p. 6989). The power of Congress to regulate employment practices comes from the Commerce Clause; the present title does not go beyond earlier legislation nor beyond the scope of federal power as interpreted by the courts. In United States v. Darby, 312 U.S. 100 (1941), the Supreme Court, in dealing with the Fair Labor Standards Act, found that power of Congress under the Commerce Clause was very broad: "(this power) extends to those activities intra-state which so affect interstate commerce or the exercise of the power over it so as to make the regulation of them appropriate means to the attainment of a legislative end." Senator Clark introduced a memorandum from Secretary of Labor, W. Willard Wirtz, citing Darby, supra, NLRB v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937), New Negro Alliance v. Sanatary Grocery Co, 303 U.S. 552(1938) and other cases which seem to shatter any claim that this title is not based on solid Constitutional precedent. The Senator himself concluded "that objection to the consitutionality of Title VII can be nothing other than frivolous and not worthy of serious consideration." (Congressional Record, April 8, 1964, p. 6991)

This definition would seem to include almost any activity and should block little litigation. However, Section 701(g) requires that "commerce" be interstate commerce, and, although "interstate commerce" has been broadly defined, it is possible that some employers may escape coverage by limiting their activities.

The United States, corporations wholly[2] owned by the United States, and states or political subdivisions of the states are not included within the meaning of "employer". This exception should cause little trouble as the federal government and corporations owned wholly by it are subject both to executive order and to the President's Commission on Equal Employment Opportunity. The states and political subdivisions are covered by the equal protection clause of the 14th Amendment.[3] In fact, that state agencies are exempted from Title VII may subject them to immediate judicial review on a Constitutional basis without the delay incident to the administrative action required by Title VII.

A bonafide private club is also exempt from coverage under Title VII (Section 701 (b)). Schemes which establish "private club" department stores would seem easily challenged under this provision, if not in the district courts in the South, at least at the circuit court level.

"Employment agencies", broadly defined, are also included within the coverage of this title--regardless of size or other such measurement. A newspaper advertising job opportunities or situations wanted might be found to fall within the category of employment agencies. Even "agencies" receiving no compensation for the service they provide are included within this definition. The general exemption of state and federal employment agencies from coverage by Section 701(c) should not present difficulties since an executive order may be sought to apply to agencies of the federal government and the 14th Amendment provides a means for curbing state agency abuses. The inclusion of local employment services receiving federal assistance within the term "employment agency" provides another means of attack against these bodies which is supplemental to the powers under Title VI. The broad scope of Section 701(c) should never be forgotten when dealing with labor organizations which may be in any way exempt under Section 701(d).

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2. Thus institutions such as Telecom and the Federal Reserve System would be employers within this definition.

3. The 14th amendment would seem to require that when a state hired policemen, for example, it must, in keeping with the equal protection clause, view the qualifications of all citizens without regard to race, color, or creed. Just as equal protection involves the right to go to the same schools, to be treated equally when applying to state schools, when applying for a job with the state, the laws which determine qualifications must be applied in the same sense to all citizens.

A second argument which can be made in this connection is that an employee of the state in exercising descretion--thus in the selection of other employees for the state--is taking "state action." "State action" which enforces discrimination is unconstitutional. Shelly v. Kraemer, 68 S. Ct. 836 (1948).

The third type of institution covered by Title VII is a "labor organization," as provided in Section 701(d). This section seems to provide three bases of definition of the term "labor organization." The first would be any labor organization "engaged" (as defined by Section 701(e)) in an industry affecting commerce. (see discussion of "industry affecting commerce" under employer, supra) The second would seem to be any organization "of any kind, any agency...or plan" which exists for the purpose of, in whole or in part, dealing with employers concerning grievances, labor disputes, and similar problems. The third would seem to be any conference or council "so engaged which is subordinate to a national or international labor organization."

Such a reading of Section 701(d) is not impelled by the language and may run counter to the legislative intent, and yet the sentence structure of the section seems to indicate such an interpretation. If the clause "and includes any organization" read "and which includes any organization:, this clause would have to be taken as a modification of the first definition of labor organization as "a labor organization engaged in an industry affecting commerce." As written, however, "and includes" must be taken to refer to "term", the second word in the section.

The result of this interpretation would seem to exempt any organization which fell into the second or third definition of the term "labor organization: from the complex and perhaps burdensome limitations of Section 701(e), which deals with labor organizations as defined by the first definition of Section 701(d). In any case, the language of Section 701(d) is so broad that it is hard to conceive of a labor organization not included. Even the limitations of subsection (e) seem to salvage little from coverage. Note that a labor organization maintaining a hiring hall is covered regardless of its size. If it does not conform to clause (1) of Section 701(e), then it is still covered by meeting the requisite number prescribed in clause (2). (Again, if the author's reading of Section 701(d) is correct, these limitations exist only for labor organizations covered under one of the first three definitions of labor organization in that section.) The labor organization, if subject to Section 701(e), must then also fall within the requirements of one of five broadly defined areas. The most lenient of these is Section 701(e)(2) which provides that labor organizations--national, international, or local--"recognized or acting as representative of employees of an employer..." shall be covered.[4]

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4. It must always be remmebered that this title is subject ot the Constitutional limitations of the Commerce Clause. No matter how cleverly section 701(d) may be read, no court will enforce federal power, as interpreded by Congress, or as allowed by a loosely worded statute, beyond the scope of the constitutional authority granted to the federal government.

NOTE ON 18 U.S.C. 601 - CRIMINAL LIABILITY

Other provisions of the United States Code also prohibit discrimination in employment connected with federal programs. Section 601 of Title 18 imposes criminal liability on anyone who deprives, attempts to deprive, or threatens to deprive anyone on the basis of race, creed, or political activity of employment, compensation, or "other benefit provided for or made possible " by any Act of Congress which appropriates funds for "work relief or relief purposes." This section provides another remedy which could be used in conjunction with title VI where the federal program involved work relief or relief purposes. Also, for example, a private employer who discriminated in the administration of a relief program or social security could be prosecuted criminally.

SECTION 702 - EXEMPTION FROM COVERAGE

Section 702 provides further exemptions for employers. The first exemption, employment of aliens outside any state requires little comment. First, it must be noted that "state" as defined in Section 701 (i) includes the District of Columbia, Puerto Rico, and other minor American possessions. Thus an employer in Guam is covered. Secondly, the section does not exempt employers, as defined by Section 701 (b), from coverage when they employ non-aliens outside the United States.

The two other exemptions provided for in this section are less clear. The first provides that a religious corporation or society may employ individuals of a particular religion "to perform work connected with the carrying on ... of its religious activities." Salesmen distributing religious material have been said to fall within this category (see Clark, Congressional Record, April 8, 1964, p. 6992) but perhaps janitors would not. The second exemption, concerned with educational institutions, appears to allow educational institutions to discriminate on the basis of race, religion, sex, color, or national origin "with respect to the employment of individuals to perform work connected with the educational activities of such institution."[5] It is possible that this exemption was only to apply to discrimination on religious grounds, as is provided for the religious corporations in the clause which proceeds this clause. This interpretation - that only religious discrimination was intended to be allowed - is given weight when read in conjunction with Section 703 (e) (2):

> It shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if (emphasis added) such school...is, in whole or in substantial part owned, supported, controlled, or managed by a particular religion...or if the curriculum of

5. Senator Clark, in his discussion of this section, says nothing to indicate that educational institutions may discriminate on the basis of race or national origin (Congressional Record, April 8, 1964, p. 6992). Neither did Senator Humphrey in his discussion indicate that Congress intended to allow racial discrimination by educational institutions (Congressional Record, June 4, 1964, p. 12297).

such school...is directed toward the propagation of a particular religion.

This section says nothing of color, race, or national origin, but by implication would seem to exclude discrimination based on these standards. If Section 702 were taken on its face, this provision of Section 703 (e) (2) would seem to be redundant. Furthermore, there would seem to be no justification for authorizing discrimination based on race as Section 702 would appear to do. Of course, the words "connected with" in Section 702 could be construed narrowly to avoid the inclusion of racial discrimination, but this would be a strange approach to a curiously vague provision. As a final note to this discussion, it should be remarked that state institutions in no case could be allowed to discriminate, particularly on a religious basis, by virtue of the First Amendment of the Constitution as applied to the states by the Fourteenth Amendment, except insofar as religion might constitute a bona fide qualification for employment.

SECTION 703 - UNLAWFUL DISCRIMINATION IN EMPLOYMENT

Section 703, which prohibits discrimination against an individual on the basis of his race, color, religion, sex or national origin, is largely self-explanatory. Language like "or otherwise to discriminate" in (a) (2) and repeated in both (b) and (c) should be noted as facilitating language for the prosecuting party. "Or otherwise" would seem to prohibit discrimination in promotion of employees and in job allocation. Clause (c) (3) specifically makes unlawful an attempt by a labor organization to cause an employer to discriminate unlawfully. Presumably, as it is the employer who is primarily the one protected here, he would have standing to bring an action against a union which pressured him to discriminate or which prevented him from maintaining a non-discriminatory policy on all levels of employment.

Subsection (d) of Section 703, although legally straight forward, is of great importance in that an end to discrimination in training and apprenticeship programs may have a more profound effect socially that the end of discrimination in conventional employment practices. Crucial to the improvement of the Negro employment situation is the training of skilled labor within that class. An aggressive use of this subsection would help achieve qualification for jobs made available by other sections of this title.

SECTION 703 (e) - EXCEPTIONS TO ILLEGALITY

Provisions allow discrimination in two particular situations. The first is where religion, sex, or national origin (not race or color) are "bona fide occupational qualifications reasonably necessary to the normal operation of that particular business or enterprise." The classic example given in this connection is that of a French restaurant's need of a French cook. Since the Civil Rights Act of 1964 mainly concerns itself with race or color, abuse of this section does not present a great threat. Furthermore, the terms "bona fide" and "reasonably necessary" should give the courts adequate power to limit abuses.

The second situation in which discrimination otherwise prohibited by this title is allowed is in the case of educational institutions. One note should be added to the earlier discussion of this topic (see discussion of Section 702, *supra*). Wheras under Section 702, as pointed out, discriminatory hiring practices are allowed only where they are "connected with the educational activities of such institution," under Section 703 (e) the institution is allowed to discriminate on a religious basis as regards *all* employment. Thus Section 703 (e) would allow discrimination based on religion throughout the range of jobs in the institution, while Section 702, if taken on its face, would allow discrimination of any sort for a limited range of jobs. It is difficult to conceive this to have been the intent of Congress.

Subsections (f) and (g) of Section 703 require little comment. One makes the title inapplicable to discrimination against Communists; the other explicitly provides that this title shall not affect security provisions elsewhere designated.

SECTION 703 (h) - SENIORITY AND MERIT SYSTEMS

Title VII also does not affect bona fide seniority or merit systems nor payment of wages based on a piece-work system. The key words here, of course, are "bona fide." Policing any system which allows subjective judgments by the employer as to merit is always difficult. Part of the difficulty is that there is a presumption that any seniority system is in good faith so that the complainant assumes a heavy burden of proof. But where abuse is made of a merit system to protect segregated employment, this burden is not impossible.

Employers are also entitled to pay different wages in different locations. This provision reflects the different price levels in different areas of the country as well as different levels of productivity between plants owned and operated by the same employer. However, such differences in pay may be "the result of an intention to discriminate" unlawfully. This intention, for example, would presumably be evidenced by different pay scales at factories of equal productivity in the same town. It might also be evidenced by an employer's refusal to advance the technology in one plant while automating others. In fact, one might press for equal treatment of *plants* with the argument that differences between plants show an intention to discriminate against employees of one plant on the basis of race or national origin. The type of equality involved here must, of course, be regional economic equality.

Subsection (i) of Section 703 provides that nothing in this title shall affect the status of Indians living on or near reservations.

SECTION 703 (j) PREFERENTIAL TREATMENT

Subsection (j) deals with the difficult problem of preferential treatment based on race, color, religion, sex or national origin. It provides that nothing in this title shall be interpreted to require preferential treatment to correct racial imbalance. Senator Clark pointed out during the discussion of the title (*Congressional Record*, April 8, 1964, p. 6992) that

waiting lists for employment made previous to the passage of the Act and based on discriminatory policy could be struck down to give minority groups a better situation than that existing with these lists. This really is not an exception to the policy of no preferential treatment under the title, as revising lists would simply give minority groups an equal chance.

This provision does not forbid preferential treatment, yet it does not seek to promote it. Other law, Hughes v. Superior Court, 70 S.Ct. 718 (1950), rejects state action to enforce preferential treatment or quota hiring. But neither Hughes nor subsection (j) of Section 703 forbids the making of (as opposed to the legal enforcement of) private agreements to give preferential treatment. Direct action or collective bargaining aimed at equal opportunity could be used to achieve private agreements with employers in which employers agree to actively seek and hire Negroes. In fact, such agreements are now common practice in the North. It is true that quotas as such are not enforceable at law, but the absence of a legal remedy does not make the contract meaningless. Enforcement of such a contract would have to come from social pressure or from further direct action. A court, while unwilling to enforce a contract granting "positive discrimination," might also be unwilling to grant an injunction relieving the employer from adverse direct action where the employer was in default on a contract. Thus, subsection (j) does not give force to preferential treatment, but it does not preclude private agreements or social pressure or self-help as means to achieve that end.

SECTION 704 - OTHER SPECIFIC UNLAWFUL ACTS

Section 704 (a) prohibits discrimination against those who believe in fair employment practices on account of that belief or against those who take part in proceedings under this title on the basis of that belief. This, in effect, says that discrimination against an individual because he believes in and cooperates with the law is unlawful.

Employers, employment agencies, and labor organizations are further prohibited by Section 704 (b) from expressing preference, or specifying limitations based on race, color, religion, sex, or national origin in advertisements for jobs or employment opportunities. This provision simply follows from the general content of this title, as such an advertisement would be evidence of actionable discrimination as provided in this title. The newspapers which publish these forbidden advertisements would not be liable for such publication as the section prohibits advertisements "relating to employment by such an employer." (Congressional Record, April 8,1964, P.6992) This limitation strictly construed might allow one employer to advertise for another without violating this provision. The language of the subsection, however, reads "publish or cause to be printed or published", and the court undoubtedly would hold that where another individual published for the defendant a discrimatory ad, that defendant had caused the ad's publication. Where discrimination is privileged as provided in Section 703 (e)--where religion, sex, or national origin are a bona fide qualification for the job--an employer is entitled to solicit through ads a person with the qualities sought. Thus, he who wishes a French cook may let the world know.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The enforcement of this title will rest largely in the hands of this Commission (for enforcement see _infra_, Sections 706 and 707). The Commission shall be composed of five members, not more than three of whom may be of the same political party. Normally each member will be appointed for five years, although at first to achieve staggered appointments, appointments will be of lesser duration than as provided in Section 705. One of the five will be designated to be the chairman, and he shall be responsible for the selection of staff, as well as for the operation of the staff. Immediately it should be noted that these appointments are of great importance, since much of the work of the Commission is discretionary. The chairman has very wide-reaching powers, and the staff he develops, its competence and interest in racial equality, will determine, along with the attitude of the Justice Department, the impact of this title. As this may be the most far-reaching title of the entire Act, the success of the Act may turn on the diligence or neglect which the enforcement of this title receives. Unhappily, the civil rights struggle is mainly a struggle of men and not laws. Not only should a great effort be made to get an aggressive chairman, but the individual members, by themselves, are of great importance. One member, on his own initiative, can initiate proceedings or an investigation. (Section 706 (a)). An unfavorable Commission could preclude private judicial action (Section 709 (b)) or could excuse an employer by finding good faith on his part, a determination not reviewable by the courts (Section 713 (b)).

Three members shall constitute a quorum when the Commission is required to act as a body. This provision frees two members, or may free two members, to do other vital supervisory work. Subsection (f) allows the Commission to establish regional or state offices as it deems necessary, so that the two members not needed for a quorum may be able to take charge of the diffuse work of the Commission in critical regional offices. Again, the location of these offices, a matter wholly within the discretion of the Commission, may be determinative of the success of this title in particular areas. Lobbying or letter writing which requests particular office locations, as well as particular appointments to the position of Commissioner and to the staff, can serve a very useful function here.

Section 705 (g) defines the procedural powers of the Commission. The sections that follow (Sections 706,707, 709, and 710) deal with these powers in much greater detail, so that a clarification of Section 705 (g) will be delayed until the consideration of those sections. Note, here, the right of the Commission to engage in conciliatory work, as well as its power to conduct investigations. Paragraph (4) allows the Commission to intervene at the request of an employer or labor organization in a dispute between the petitioner and his employees or members, when the latter refuse or threaten to refuse to cooperate in effectuating the provisions of title VII. Nothing in the title, it should be recalled, makes unlawful _unorganized_ labor resistance or organized consumer resistance to the ends of this title. In disputes between employer and employees, the Commission, then, may attempt conciliation or might, perhaps, effect the intervention of the Attorney General who could bring a court action to enjoin the employees. The employer, himself, might have this remedy available without seeking the aid of the Commission.

The problem of consumer resistance is more difficult because consumers do not form a definable class, not even a spurious class as envisioned in Rule 23 of the Federal Rules of Civil Procedure. The injunctive remedy is not possible to prevent a consumer boycott, nor may it be effective against employees even where it is procedurally possible. An employer or labor organization could not, however, use as a defense to an action against it the argument that compliance with this title would lead to economic destruction. That others act illegally or act to frustrate the law, will relieve no one of his duty to conform to the law. The only real remedy for such threats from the consumer or from employees is to put all employers and labor organizations on the same footing. Here the Commission might choose to cooperate with the Community Relations Service (title X) which was created to negotiate between and within various groups to effect social change. The motivating idea for those affected by the change contemplated is that there is safety in numbers.

Subsection (h) of Section 705 is intended to facilitate the work of the Commission, to enable the Commission to handle the massive load with which it may be burdened. This provision makes possible greater scope of activity. Lawyers working independently in regional offices could be of great service without placing any further work on the five Commissioners themselves. It is conceivable that three lawyers in Jackson, Mississippe, could apply to join the staff of the Commission and offer to set up a region office and, once authorized, could operate that office, representing the Commission in court, without consulting the central office at all. The argument that a regional office could function independently of the central office, and without increasing the work of that office, should be used to encourage the Commission to expand the work it is undertaking.

Subsection (i) recognizes the possible activities of this Commission. Any body of this sort has prestige, standing, and influence and is able to serve the community in many ways, not the least of which can be educational and promotional. Imaginative programs or campaigns developed with the cooperation of the other departments of the government to promote equality and educate the people in the economic and social value of equality should not be overlooked as an important means to achieve the ends of this title.

SUMMARY OF PROCEDURES UNDER SECTION 706

A) Where the charge is filed by the person aggrieved and the state or locality where the unlawful employment practice occured has no state or local law:

1) The aggrieved person files a charge in writing under oath with the Commission. This must be done no later than ninety days after the unlawful employment practice occurred. (Section 706, (a) and (e)).

2) Upon receipt of the charge, the Commission notifies the respondent and furnishes him with a copy of the charge. It may not make the charge public. (Section 706 (a)).

3) The Commission investigates the charge in order to determine whether there is reasonable cause to believe that it is true. If the Commission so determines, it then attempts to eliminate the unlawful practice by informal methods designed to secure voluntary compliance. Nothing said or done during

such efforts may be made public by the Commission without the written consent of both the person aggrieved and the respondent. (Section 706 (a)).

4) The Commission has thirty days to attempt to secure voluntary compliance, but may extend such period thirty additional days. At the culmination of such efforts or of such time period, the Commission must notivy the person aggrieved. (Section 706 (e)).

5) Not later than thirty days after receiving notice of the Commission's inability to secure voluntary compliance, the person aggrieved may commence a civil action against the respondent. (Section 706 (e)).

6) The court may, upon request, stay proceedings for sixty days pending further efforts by the Commission to obtain voluntary compliance. (Section 706 (e)).

Comment: The maximum time an effective court action can be delayed by reasons other than the inaction of the person aggrieved is 120 days or four months. There can be a sixty day delay at the discretion of the Commission and a sixty day delay at the discretion of the court. Such delay at the instance of the court is only "upon request," and presumably this is at the request of the Commission rather than at that of the person aggrieved or of the respondent. (See Section 706 (e)). There seems to be no minimum delay required by the statute. Section 706 (e) does not seem to prohibit the Commission from notifying the aggrieved person before the end of thirty days that its efforts to secure voluntary compliance are having no effect, rather it provides only that the Commission must notify him within thirty days if it has been unable to secure voluntary compliance, unless it determines to extend such period to sixty days.

B) Where the charge is filed by a member of the Commission and the state or locality where the unlawful employment practice occurred has no state or local law:

1) The member of the Commission files a charge in writing with the Commission. This may be done only if there is reasonable cause to believe that a violation of title VII has taken place, and it must be done within ninety days after the occurrence of the unlawful employment practice. (Section 706 (a) and (e)).

2) The Commission notifies the respondent and furnishes him with a copy of the charge. The charge may not be made public by the Commission. (Section 706 (a)).

3) The Commission investigates the charge. If it determines that there is reasonable cause to believe that it is true, it then attempts to eliminate the unlawful practice by informal methods designed to secure voluntary compliance. Nothing said or done during such efforts may be made public by the Commission without the consent of the parties. (Section 706 (a)).

4) The Commission has thirty days to attempt to secure voluntary compliance but may extend such period thirty additional days. At the culmination of

such efforts or of such time period, the Commission must notify the person alleged by the charge to have been aggrieved. (Section 706 (e)).

5) Not later than thirty days after receiving notice of the Commission's inability to secure voluntary compliance, the person alleged by the charge to have been aggrieved may commence a civil action against the respondent. (Section 706 (e)).

6) The court may, upon request, stay proceedings pending further efforts by the Commission to secure voluntary compliance. (Section 706 (e)).

Comment: The maximum possible delay due to causes other that the inaction of the person aggrieved is 120 days or four months. This and the minimum delay are the same whetær the charge is filed by the person aggrieved or by a member of the Commission.

C) Where the charge is filed by the person aggrieved and the state or locality where the unlawful employment practice occurred has a state or local law:

1) The person aggrieved commences proceedings with the appropriate state or local authorities by mailing by registered mail a statement of the facts upon which the proceeding is based. (Section 706(b)).

2) Not before sixty days after the commencement of such state proceedings, the person aggrieved may file a charge with the Commission. During the first year of operation of a state or local law, such waiting period is extended to 120 days. Such a charge must be filed with the Commission within 210 days after the occurrence of the unlawful employment practice or within thirty days after the termination of the state proceedings, whichever is earlier. (Section 706 (b) and (d)).

3) The Commission notifies the respondent and furnishes him with a copy of the charge. The charge may not be made public by the Commission. (Section 706 (a)).

4) The Commission investigates the charge. If it determines that there is reasonable cause to believe that the charge is true, it then attempts to eliminate the practice by informal methods designed to secure voluntary compliance. Nothirg said or done during such efforts may be made public by the Commission without the written consent of the parties. (Section 706 (a)).

5) The Commission has thirty days to attempt to secure voluntary compliance but may extend such period thirty additional days. At the culmination of such efforts or of such time period, the Commission must notify the person aggrieved. (Section 706 (e)).

6) Not later that thirty days after receiving notice of the Commission's inability to secure voluntary compliance, the person aggrieved may commence a civil action against the respondent. (Section 706 (e)).

7) The court may, upon request, stay proceedings for sixty days pending the termination of state proceedings or of further efforts by the Commission

to obtain voluntary compliance. (Section 706 (e)).

Comment: During the first year of the operation of a state or local law, the shortest that the time from the occurrence of the unlawful practice to the commencement of an action in federal court can be is 120 days or four months. Through the exercise of Commission and court discretion this period can be extended to seven months. After the first year of operation of a state or local law, the shortest period will be three months and the longest period will be five months.

D) Where the charge is filed by a member of the Commission and the state or locality where the practice occurred has a state or local law:

1) A member of the Commission, if he has reasonable cause to believe that a violation of title VII has occurred, files a written charge with the Commission. Such charge must be filed within ninety days of the occurrence of the violation. (Section 706 (a) and (e)).

2) The Commission, before taking any other action, notifies the appropriate state or local officials that a charge has been filed. (Section 706 (c)).

3) If the state or local officials request, the Commission must afford them a reasonable time, which cannot be less than sixty days, to act to remedy the practice alleged. During the first year of operation of such state or local law, the reasonable time afforded the state or local officials cannot be less that 120 days. (Section 706 (c)).

4) After the reasonable time accorded the state or local authorities has expired, the Commission has thirty days to attempt to secure voluntary compliance but may extend such period thirty additional days. After the culmination of such efforts or of such time period, the Commission must notify the person alleged by the charge to have been aggrieved. (Section 706 (e)).

5) Not later than thirty days after receiving notice of the Commission's inability to secure voluntary compliance, the person alleged by the charge to have been aggrieved may commence a civil action in federal court against the respondent. (Section 706 (e)).

6) The court may, upon request, stay proceedings for sixty days pending efforts of the Commission to obtain voluntary compliance. (Section 706 (e)).

Comment: During the first year of operation of a state or local law, the shortest period from the filing of a charge to the commencement of a federal court action is 120 days or four months. If the Commission takes the minimum time allowed for action by it (Section 706 (e)), the time will be 150 days or five months. There is no precise limit on the maximum delay, since under Section 706 (c) the time of referral by the Commission to a state or local authority is to be a "reasonable time," but the total time from the filing of a charge by a member of the Commission to the commencing of a civil action in a federal district court can be extended to over seven months.

Conclusion: In any situation, the proceedings against an employer unwilling to comply can be delayed by the slowness of state or local agencies and by a

lack of insistence on speed by the Commission and by the courts.

The minimum delay is increased by the presence of state or local agencies and laws. But, given the existence of such agencies or laws, it makes little difference, if speed is the sole concern, whether the charge is filed by the person aggrieved or by a member of the Commission.

PROBLEMS OCCASSIONED BY STATE PROCEEDINGS

In order for the state or locality to qualify under Section 706 (b) and (c) and thus get first chance at handling the situation, the state or local law must both (1) prohibit the specific unlawful employment practice alleged and (2) authorize the granting or seeking of relief from the practice or authorize the institution of criminal proceedings against the violator.

It is expected that many states will pass such laws in order to secure the "benefits" which accompany them. The federal government is kept more in the background and the actual problem-solving can be done by the states. In states where there is little desire to solve such problems, these laws can serve as a means to delay and confuse the solutions sought by the Commission, by the aggrieved, and by the federal courts.

Nowhere in title VII does it state that securing relief under a state law precludes pursuing a rmemdy with the Commission or in the federal courts. A state statute which made an unlawful employment practice punishable by the payment of a fine to the state would be of little help to the aggrieved person. All that is required by Section 706 is that the state or local authority be given an opportunity to act, and such action does not preclude subsequent federal action through the Commission or through the courts.

Even though the securing of a state remedy does not bar future federal action, it is arguable that findings in state proceedings are binding, through res judicata or collateral estoppel, in federal civil actions. It has been recognized that the decision whether a federal statute has been violated is not limited by findings in a state court. The same has been held true for conclusions from historical fact where a strong federal policy was involved. For example, in Sewell v. Commissioner, 151 F. 2d 765 (5th cir. 1945), a state court's finding as to the intent of a person at the time he made a transfer of property was held not to be binding on a Federal Tax Court.

The problem of the binding effect of state or local action often may depend on the kind of state or local action. A state administrative agency would most likely be given no more power to bind subsequent proceedings than is the EEOC itself given. The EEOC is not empowered to make findings but rather to determine if there is reasonable cause to believe that a charge of an unlawful employment practice has occurred and then, on that basis, to act to secure compliance. A determination that there was reasonable cause to believe that a violation had occurred is not binding on a court which must determine whether in fact there has been a violation.[6]

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6. If the EEOC determines that there was not reasonable cause to believe

Certainly no greater effect than this would be given to state or local administrative proceedings, and thus such proceedings would have no res judicata or collateral estoppel effect in subsequent civil actions in federal courts.

Problems such as these will arise primarily in connection with Section 706 (b) which provides that proceedings cannot even be commenced with the Commission until the state or local authority has had time to act. There will be some problems also with 706 (c), where the Commission refers the case to the state or local authorities which are authorized "to act to remedy the practice alleged," but this language of Section 706 (c) could well be used to indicate that it was the intent of Congress That the state or local authority to whom the Commission refers the case was to have no more than an opportunity to act to remedy the practice of which it was informed by the Commission. Thus, under Section 706 (c), any findings to be made are to be made by the Commission and not by the state or local authority. Such rationale cannot be used under Section 706 (b) where the first action by the Commission is not taken until after the person aggrieved has commenced preceedings with the state or local authority.

Further support for such a distinction between 706 (b) and 706 (c) is the fact that Section 707 (e), in the last sentence of the subsection referring to the power of the court to stay proceedings, speaks of "state or or local proceedings described in subsection (b)" and of "efforts by the Commission to abtain voluntary compliance." Thus state efforts on referral by the Commission under subsection (c) seem to be regarded in subsection (e) as part of the efforts of the Commission.

Section 706 (c) speaks of state or local proceedings on referral by the Commission after a charge has been filed with the Commission by a member of the Commission. Since, under that section, the person alleged by the charge to have been aggrieved does not perticipate in any actions taken before referral by the Commission to the state or local authorities, it seems that such state or local authorities should not be able to require the participation of such person in state or local proceedings. Neither does it seem that such state or local authorities would have subpena power over the member of the Commission who filed the charge. This non-participation by the person alleged to have been aggrieved and by the members of the Commission seems a valid reason for not giving state or local proceedings under Section 706 (c) any binding effect as against such non-participants.

Thus in regard to the problems of res judicata and collateral estoppel posed by state proceedings it is better that the proceedings be commenced by a Commissioner rather than by the person aggrieved.

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that a violation had occurred, it would presumably notify the complainant (or the complainant could secure notice on his own initiative). Such notice will most likely be regarded by the courts as a notice that "the Commission has been unable to obtain voluntary compliance," and thus the person aggrieved would then be able to commence a civil action under Section 706 (e).

MAKING THE CONTROVERSY PUBLIC

Section 706 (a) provides that a "charge shall not be made public by the Commission," and that nothing said or done during endeavors by the Commission to obtain voluntary compliance "may be made public by the Commission without the written consent of the parties." Since publicity is an important element in civil rights cases, it is important to note that nothing in title VII prohibits the person aggrieved or the respondent from making any of these things public, each without the consent of the other.

APPOINTMENT OF ATTORNEYS AND ACTIONS COMMENCED WITHOUT COSTS

Section 706 (e) provides that the court, in a civil action, "may" appoint an attorney for the complainant and "may" authorize the commencement of the action without payment of fees, costs, or security, in circumstances as it deems just. Frequent use of this power by the court would greatly encourage the bringing of otherwise impracticable, but worthwhile, actions. The exercise of this power does not seem to be a matter of court discretion because, in very many instances in title VII and in the entire bill, the language provides that the court "may, in its discretion" take certain actions, whereas, in the sentence regarding the appointment of attorneys and the commencement of actions without payment of costs, the phrase "in its discretion" does not appear, although it is used in the sentence immediately following. Thus the failure to exercise this power may be reviewable as a failure to exercise statutory authority rather than as an abuse of discretion.

SECTION 707 SUITS BY THE ATTORNEY GENERAL

Before bringing suit, the Attorney General must have reasonable cause to believe that there is a pattern or practice of resistance and that the pattern or practice is intended to deny the full exercise of rights described in title VII.

Section 707 (a) refers to "any person" engaged in a pattern or practice. Thus there need be only one violator, and some have said that pattern or practice means two or more acts. It should be noted that "practice" here refers to a practice of resistance and is thus distinct from "unlawful employment practice," but the fact that it takes only one act to establish an unlawful employment practice should give an indication that the requisite acts to establish a practice of resistance need not be numerous.

Om Section 707 (a) it is stated that the pattern or practice of resistance must be "intended" to deny the full exercise of rights described by title VII. This would seem to mean only that those who did discriminate must have intended to discriminate and would not seem to mean that there must have been a specific intent to violate the law. A similar analysis of "intent" was given during the debate by several Senators in connection with Section 706 (g).

It is provided in Section 707 (a) that the complaint request "such relief" as the Attorney General deems necessary. It is significant that Scetion 206 (a) of title II is identical to Section 707 (a) except that it provides that the Attorney General's complaint request "such preventive relief." Thus under Section 707 (a) the Attorney General presumably may request compensatory or punitive relief, including back pay (see Section 706 (g)) and perhaps even damages.

To get a three judge court appointed, the Attorney General files a request and a certificate of the public importance of the case with the clerk of the district court. This is all that need be done by the Attorney General to get a three judge court. The request need not be seen by the district judge, for the clerk handles everything which occurs in the district court. It must be noted that here, unlike in title I, the defendant may not request a three judge court.

The clerk immediately sends the request to the chief judge of the circuit whose duty it is to appoint the three judge court on receipt of the request.

Section 707 (b) provides that it is the duty of the chief judge of the circuit to designate three judges "in such circuit." One of the three must be "a circuit judge," and one must be "a district judge of the court in which the proceeding was instituted." This language supports the proposition that, except for the one member appointed from the district court, the three judge court may be composed of judges in the circuit, whether there by appiontment, designation, temporary assignment, or independent business.

Section 707 (b) provides for a direct appeal to the Supreme Court from a "final judgement" of a three judge court. Presumably the absence of a provision for appeals from temporary restraining orders and other interlocutory orders indicates that from them a direct appeal to the Supreme Court would not lie.[7]

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7. This analysis seems correct. Section 1253 of Title 28 of the United States Code provides: "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, in interlocutory or permanent injunction in any civil action, suit, or proceeding required by an Act of Congress to be heard and determined by a district court of three judges."

Section 29 of Title 15 of the United States Code provides for appeals from "final judgements" where the United States is a complainant in a civil action brought under certain enumerated Acts of Congress. This section does not mention interlocutory orders, and thus by its language neither includes them or excludes them, But Section 29 is within the "except as otherwise provided by law" clause of Section 1253 of Title 28 and thus no direct appeal from an interlocutory order lies to the Supreme Court. (see Moore's Federal Practice 6:29)

Since the language of Section 707 (b) of the Civil Rights Act of 1964 is the same as the language of Section 29 of Title 15 of the United States Code, neither mentioning interlocutory orders, it would seem that the same result would follow for both.

If the Attorney General does not request a three judge court, the chief judge of the district must immediately designate "a judge in such district" to hear the case (Section 707 (b)). This language supports the proposition that the chief judge of the district may designate any judge, circuit or district, who is "in" the district, whether there by appointment, designation, temporary assignment, or independent business.

Actions by the Attorney General clearly involve less time and procedural complexities for the person aggrieved than would an action brought by himself. The Attorney General's suit by-passes state proceedings and the Commission, both of which are mandatory in proceedings commenced by the person aggrieved. The general expediting clause for the court at the end of Section 707 applies only to that section, which does not mention proceedings commenced by the person aggrieved.

JURISDICTION OF THE DISTRICT COURT

Section 706 (f) refers to "jurisdiction of actions brought under this title" and thus contemplates both actions by the person aggrieved (Section 706) and by the Attorney General (Section 707).

An action may be brought in a district court in the state where the unlawful employment practice occurred, where the employment records are kept, or where the plaintiff would have worked but for the unlawful practice. If the respondent is not found in such states then the plaintiff has the additional option of bringing the action in the district in which the respondent has his principal office. Thus in most cases it will be difficult for the plaintiff to sue the defendant in a locality not sympathetic with the white employer. This would become important in case there is criminalcontempt for which there must be a jury trial under title XI and in case the bias of a district judge is feared.

If the defendant is a large corporation, duplicate employment records may be kept in a state other than the state in which the unlawful employment practice occurred. If so, the the plaintiff, according to the language of Section 706 (f), may sue in the district courts of such a state.

Section 1406 of title 28 of the United States Code provides for transfers of actions brought in the wrong district to districts where they might have been brought, and the district in which is the principal office of the respondent is deemed by Section 706 (f) to be such a district where the action might have been brought. Thus an action brought -- by advertence or inadvertance -- in a wrong district may be transferred to a district in which it could not have been brought in the first place.

RELIEF GIVEN IN THE COURTS

"The court" in Section 706 (g) presumably refers to the courts specified in Section 706 (f), which includes courts having jurisdiction of actions brought by the Attorney General. This interpretation seems correct since Section 707 (a) states that the Attorney Gereral may request "such relief" as he deems appropriate. A nearly identical section, Section

206 (a) of title II speaks only of "preventive relief." This difference in language is meaningful because the relief specified in Section 706 (g) is not all preventive· some is compensatory.

The court must find that the unlawful employment practice was intentional before it can grant relief. "Intent" here means the intent to discriminate and not the specific intent to do something unlawful.

The court is explicitly given power to order reinstatement or hiring of the person aggrieved with back pay. The language does not preclude the granting of back pay without ordering reinstatement or hiring, since the section provides that the court may "order such affirmative action as may be appropriate."

Title VII provides for much delay in proceedings through compulsory referral to state or local agencies and through the exercise of Commission and court discretion. The back pay could run for these delays, because but for the unwillingness of the respondent state or local and Commission actions to obtain voluntary compliance would have been successful. For this reason, the possibility of a back pay award can be an effective deterrent against delay and disobedience of court orders by the respondent, without necessitating resort to criminal contempt proceedings.

The back pay remedy is in the nature of a damage award, but is contemplated as aprt of a court order under a statutory form of action. Thus even if this were the only relief sought, it seems as though the defendant would have no right to a trial by jury.

Section 706 (h) makes clear that the injunctive power of the court is not limited by the Norris-LaGuardia Act.

Section 706 (k), unlike Sections 706 (f) and (g), does not apply to actions brought by the Attorney General. In actions brought by the person aggrieved, if the defendant does not comply with the court order, then the Commission "may commence proceedings to compel compliance." This type of proceeding does not seem limited to court proceedings, but may include petitioning local officials to act or making public the fact of recalcitrance, as well as court proceedings for an order to show cause why the defendant should not be held in contempt.

INTERVENTION BY THE PERSON AGGRIEVED IN AN ACTION BROUGHT BY THE ATTORNEY GENERAL

It has been stated that the Attorney General may seek compensatory relief for the person aggrieved, but he may not choose to do so. Thus it seems that the representation of the aggrieved person may not be adequate. It also seems that the aggrieved person may be bound by a judgment in the action. These are the two requirements for intervention as of right under Rule 24 (a) of the Federal Rules of Civil Procedure, and thus it appears that the person aggrieved may have a right to intervene in an action brought by the Attorney General.

The same Rule 24 of the Federal Rules of Civil Procedure permits the court in its discretion to allow intervention when the applicant's claim and the main action "have a question of law or fact in common.". This would almost certainly be the case in an attempted intervention in an action brought by the Attorney General.

Independently of Rule 24, it was held in a leading case by the Supreme Court that an applicant could intervene in an anti-trust action brought by the Attorney General, irrespective of the district court's exercise of discretion to the contrary. Missouri-Kansas Pipe Line Co. V. United States, 312 U.S. 502, 61 S.Ct. 666 (1941). The Court stated:

> "(W)here the enforcement of a public law also demands distinct safeguarding of private interests by giving them formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in keeping of the district court's discretion." 61 S.Ct. at 688.

Thus the provability of success of an attempt to intervene appears high. It would be a great advantage to the person aggrieved to be able thus to escape the time-consuming procedures elaborated in Section 706 and to secure the expedition and impartiality incident to a hearing by a three-judge court.

EFFECT ON STATE LAWS

Section 708 provides that nothing in Title VII shall relieve any person of liability or duty under the laws of a state unless the law "purports to require or permit the doing of any act which would be an unlawful employment practice under this title." The implication of this provision would seem to allow states to pass law to frustrate the ends of Title VII. For example, a trespass law, strictly enforced, which did not " purport" to permit unlawful employment practices, might be used to prosecute Negroes who entered to apply for a job where not welcomed. Clearly, a Negro who entered, applied, and left when asked to leave could not be criminally liable under a trespass law. But what of Negroes who attempt direct action to get a job? For example, could Negroes be arrested and convicted under a state trespass law for "standing-in" under color of law. One can make a good argument that the employer cannot eject anyone on an unlawful basis and that any such expulsion is initiated by an unlawful intent to discriminate.[8]

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8. Prior to this bill, the argument that the 14th Amendment prohibits "state action" to enforce discrimination has been used to avoid conviction under trespass laws of demonstrators who have sought equal employment opportunity. Attorneys have argued that enforcement itself of such laws where they tend to aid in discriminatory practices is "state action." Most of these cases have involved lunch counter sit-ins or the like rather than employment, but the argument is equally relevant to employment. The

Important implications follow from a holding that individuals who violate the trespass laws of a state for the purpose of implementing the ends of this title cannot be prosecuted. If direct action including "trespassing" is not unlawful, direct action may be used to effect the ends of this title without suffering the delays of the administrative and judicial practice required. (Whether the police could be enjoined from preventing trespass would seem more dubious and difficult than staying prosection for trespass in the courts. But if such an injunction were obtained, direct action would be very effective.) The owner would be forced to accept either constant disruption of his employment activities -- although the physical area of legal trespass would be confined to the area used for hiring -- or an end to his policy of discrimination. In attempting to implement both titles II and VII a careful consideration should therefore be given to direct action. Direct action may not only force the hand of the employer, but it may also make the Commission, state and federal, more willing to act with speed where the threat of direct action leading to violence exists.

INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES, SECTION. SECTION 709(a) AND SECTION 710.

Section 709(a) provides that the Commission shall at all times have access to and the right to copy any evidence of any person under investigation or being proceeded against. The right to copy would seem to allow the Commission, without a court order, to inspect documents and records, as well as to take depositions of material relevant to the charge under investigation. Section 710(a) deals with this same power. That section would expand the right of the Commission to take depositions and even to inspect documents by allowing it to "examine witnesses under oahh and to require the production of documentary evidence relevant" to the charge under investigation. This authority goes beyond the normal discovery procedure in that a court order is not needed to inspect documents.

8 (cont'd). Supreme Court has never accepted this argument. Enforcing a covenant where it had been violated has been found to be "state action," Shelley v. Kraemer, 68 S.Ct. 836 (1948), but protecting a person's right to exercises exclusive control of his property has not been found to be "state action," at least not by the Supreme Court. Bell v. Maryland, (decided June 23, 1964)

Prior to this Act of 1964, two difficulties have existed: 1) that criminal prosectuion for the violation of another's rights has not been found to be "state action" -- a concept which is normally though of for example as a law, public statement of policy, or executive order, or a judicial injunction; 2) that the person who discriminated was thought to do so legally, by rights attached to the ownership of land. (Justices Goldberg, Douglas and Warren concurring, argued in Bell, supra, that the 14th Amendment prohibited discrimination in public accommodations but so far this argument is also not accepted. Goldberg discussed legislative history, but an arguement based on state licensing as "state action" or on a duty of the state to guarantee in public facilities equal protection

JUDICIAL REVIEW OF THE COMMISSION'S REQUESTS.

Should respondent fail to comply (Section 710 (b)) with the Commission's request to take a deposition or to inspect documents, the Commission may appeal to the United States district court for compliance. Any district court in a district in which respondent is found, resides, or transacts business has jurisdiction to grant an ordär demanding compliance. This provision presumably applies to subject matter jurisdiction. Personal jurisdiction and venue requirements would still have to be met. In the case of a corporation, however, both of these requirements would be satisfied where the corporation was doing business or where the corporation had consented to service through the Secretary of State. Thus, United States Steel could be ordered by a Pennsylvania court to comply with requests to show its Birmingham, Alabama, records. Section 710 (b) does not grant authority to any court to require attendance of a witness outside of the state in which he is foynd, or resides, or transacts business, nor could the court demand the production of the records outside of the state in which they are kept.

8 (Cont'd). of the laws can be made.) The passage of this Act has removed the second difficulty in areas of public accommodations and employment covered by titles II and VII. Discrimination is no longer privileged.

Where direct action is being used to enforce legal ends, however, the problem of the bounds of law enforcement of laws to maintain the peace remains. The problem arises where Negroes, being refused jobs on the basis of discrimination, refuse to leave quietly. The owner then gets the police to evict the Negroes and the state brings an action against the Negroes for illegal trespass. Enough has been said about the defense of "state action". It may be just a matter of time until the Supreme Court accepts this argument where defendants were making a bona fide effort to exercise their rights.

A second defense to trespass would presumably be that the defendants were rightfully (under color of law) on the prosecutrix's land, seeking jobs. It seems unconscionable that such a defense would not suffice. Yet an examination of Section 708 puts such a defense in doubt for a number of reasons. The first is that 708 provides that liability and duty under state law shall remain in force except where the law "purports to require or permit" acts unlawful under title VII. This provision may just embody laws which would fall before a "state action" argument, that is, those laws would fall which of themselves deny equal protection of the laws. To date, then, the court have not struct down such the application of the trespass laws so that this argument would not provide a defense where Negroes wrongfully denied jobs failed to leave upon request.

A second reason why the defense or rightful entry under title VII might not be adequate in the hypothetical given is that this title has provided legal remedies which would seem to exclude self-help remedies. Just as one must use administrative remedies under title VII (this point may be debatable in itself) before seeking judicial remedies, one must perhaps use the legal remedies available before using self-help remedies. This argument is substantiated by the reasoning that finds an employer, employment agency, or labor organization not to have discriminated until it is

SECTION 710 (c) -- RESPONDENT'S RIGHT TO CHALLIENCE THE COMMISSION

Under this section, respondent has access to federal courts to modify the demand of the Commission for evidence, but this is limited to demands made under Section 709 (a). Thus he could initiate no action to modify a demand nnder Section 710 (a), which is broader than Section 709 (a) (See discussion of Section 710 (d), infra, p.). This right is lost

8 (cont'd). so proven. Until so proven, it may be argued, civil rights groups will have to wiat patiently or suffer punishment under the trespass laws.

Still another argument supporting conviction of the "trespassers" even where ejectment is motivated by unlawful intent, is that even the outlaw is entitled to equal protection of the laws. Justice Black, in his dissent in Bell, supra, urged this argument upon the court, only three of whose members rejected it. None would argue that when an employer discriminates it is permissable to shoot him. Some line must be drawn, and perhaps that line will require lawful conduct -- within the trespass laws of the state -- even where the defendants are treated unlawfully.

These are the arguments which those engaging in direct action to achieve the ends of this title will confront. It would, however, be severe to hold that the Civil Rights Act of 1964 had weakened the legal status of people attempting through direct action to achieve equal employment opportunity. The Act may lessen the need for direct action, but it does not end that need. The arguments presented are not definitive and a flexible court may accept arguments which avoid liability.

First, the court might be urged to find that the law under which the action was being brought within its meaning in Section 708 "purports" to require or to permit unlawful practices. If legislative history showed that the state law was motivated by a desire to frustrate civil rights efforts, or if it applied only to those areas of commerce threatened by imminent desegregation, or if the language of the law allowed for any other reasons such a construction, then the court might be willing to strike down the state law. This approach would be adequate, it would seem, in few instances.

A second approach would seem effective and more universally applicable. It should be argued that no man may exercise any right to achieve an unlawful end. No more than does exclusive control or ownership of land entitle a man to create a nuisance on his land, does ownership entitle a man to unlawfully evict others from his land. The employer, or labor organization, would not be justified in exercising his right to exclude the defendants on the basis that he did -- that defendants were rightfully present under color of law -- and, thus, defendants, in violating the right of no citizen, violated no law.

after twenty days following the request of the Commission. Should respondent initiate such an action, he is entitled to choose his forum, limited only to those judicial districts where he resides, is found, or transacts business. Presumably the Commission would have to answer anywhere although certainly the doctrine of forum non conveniens would give a court discretion to transfer the petition to a more suitable court if the respondent's choice of court was particularly outrageous.[9]

Respondent may base his petition on limitations imposed on the Commission by this title on constitutional arguments, or on other legal arguments. Commission demands must conform to the constitutional demands of search and seizure, for example. The subsection continues: (Subsection (c)): "No objection which is not raised by such a petition may be urged in the defense to a proceeding initiated by the Commission" -- discussed above -- unless the Commission initiates its action within 20 days of the day upon which it serves respondent with the request, or unless the court determines that at the time respondent asked for relief he "could not reasonably have been aware of the availability of such ground of objection" (Sec. 710 (c)). What this presumably means is that once reppondent has chosen his grounds for objection, he must stick to those alone unless one of the above two conditions would allow him other defenses. It does not mean that respondent's failure to petition at all will prevent him from raising a defense in response to an action brought by the Commission. Once having petitioned, the respondent will be totally barred by res judicata from raising the same objections and different objections are denied to him by this language.

The confusion of Section 710 (b) and (c) is compounded by subsection (d) which reads in its entirety:

> In any proceeding brought by the Commission under subsection (b), [which simply authorizes the Commission to ask for a court order compelling compliance to Commission demands made under Secs. 709 (a), (c), and (d), and 710 (a)] except as provided in subsection (c) [which authorizes respondent to petition for relief fo demands made under 709 (a, as discussed, supra] of this section, the defendant may petition the court for an order modifying or setting aside the demand of the Commission.

As a whole these subsections would seem to mean that when the demand for evidence is made by the Commission under Section 709 (a), the respondent may initiate an action as authorized under Section 710 (c) to modify the demand, subject to the dangers of re judicata as discussed. Where the Commission acted under Section 710 (a) the respondent must, if he wishes to object to the Commission's request, wait -- as he may also opt to wait against a request made under 709 (a) -- and then may raise his defenses. The import of this restriction is that the Commission alone will have a choice of forums. Note that when respondent initiates an action under Section 710 (c), the Commission may, if it finds the forum undesirable, argue that the demand for evidence was obtained under Section 710 (a), as opposed to 709 (a). As Section 701 (a) would seem to encompass all of 709 (a) except perhaps the right to copy such an assertion by the Commission would appear creditable.

SECTION 709 (b) - COMMISSION DISCRETION TO CEDE AUTHORITY

Section 709 (b) gives the Commission discretion in its conduct and permits it to cooperate with state and local agencies to carry out its functions. This discretion extends to the right to make contracts with state agencies giving up jurisdiction over particular cases or over a class of cases where the state agency is competent to or is acting to bring about settlements. Such agreement could preclude citizens' rights to bring a civil action under Section 706. The Commission is free to rescind any such agreement whenever it feels that the agreement no longer serves the interest of effective law enforcement of this title.

As is clear this is a vast discretionary power. Abuse of such discretion would damage the effect of the title The Commission must be discouraged from encroaching upon a citizen's seeking relief in Federal Court.

Even where the state is acting, a federal remedy may be very valuable as it provides an alternative remedy. The existence of alternative relief may encourage more rapid state action. The Commission need not handle each case in which the state fails to find a settlement, but rather may allow the required time to elapse and permit the courts to settle the dispute. Here again the role played by the Commission is critical and that role will be determined by men serving on the Commission.

SECTION 709 (c) - RECORDS KEPT BY EMPLOYERS

Section 709 (c) must be read in conjunction with 709 (d), as subsection (d) greatly qualifies the powers given the Commission in subsection (c). Subsection (c) provides that employers, employment agencies, and labor organizations "subject to this title"may be required to keep such records as the Commission requests. Records of apprenticeship programs are specifically provided for, another recognition of the crucial role these programs could play in training members of minority groups. It should be noted particularly that a list of applicants "who wish to participate in such program, including the chronological order in which such applications were received," may be required and that <u>this provision goes into effect immediately upon the passage of the Act</u>. (See the discussion of Section 7[illegible] infra and also the discussion of Section 703 (j) supra) This section also provides that the employer "shall furnish to the Commission, upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or training program." This language is is so strong and the area of its concern is so critical that it <u>must</u> receive immediate attention upon the passage of the Act.

The authority to require records is limited (by subsection (d)) where records are required by state fair employment practice laws, with respect to matters covered by those laws. This limitation is likely to affect Northern employers alone, at least until Southern states require such records. Where this limitation exists, the Commission is entitled only to require <u>notations</u> which "are necessary because of differences in coverage or methods of enforcement between the State or local law and the provisions of this title." This language seems to vest still broader powers to the Commission in this area. A second limitation exists where an employer is required by Executive Order 10925 (issued March 6, 1961) or any other executive order to file reports concerning employment practices

with a federal agency or committee. This limitation applies only to reports required, not to records which the Commission may demand. The Commission could require additional records and inspect these from time to time to supplement the reports it received.

From a practical viewpoint, the scope of the Commission's power to demand records or special notations will be determined by judicial review as provided in Section 709 (c). (In this connection, refer to the discussion, supra, of Section 710 (b), wherein the employer can await a Commission action to enforce its demands and object to the requirements at that proceeding.) The employer may, under Section 709 (c), where the Commission's demands would result in undue hardship," ask the Commission for an exemption -- note: not for a change of the requirements -- or may bring a civil action to request relief. The Commission or the court must find that "undue hardship" would result, not that, for example, the information demanded is not needed, or that the employer does not seem to be discriminating any more. Relief granted on either of these bases would be an abuse of discretion. Furthermore, proof of "undue hardship" does not compel relief but simply provides grounds on which appropriate relief may be granted. Such a denial of relief would be appropriate where the employer's activity strongly indicated discriminatory practice and the records required would furnish solid proof.

PUBLIC DISCLOSURE OF INFORMATION

Section 709 (e) prohibits the members of the Commission or the staff from disclosing information obtained by the Commission "pursuant to its authority under this section," before the institution of any proceeding under this title "involving such information." One might first ask, can a Commissioner disclose, or make public, information obtained under Section 710? The conflict between these two sections has been discussed before. (See the analysis of Section 710 (d), supra) Under Section 710 the Commission appears to remain unrestrained, whereas under 709 the employer is guaranteed certain protections. Yet 710 (a) and 709 (a) seem to overlap, the former appearing to have greater scope.

Secondly, it should be noted that this restriction ends as soon as any proceeding is instituted under this title "involving such information." Thus, in a suit by a private party against an employer, a deposition could be taken of the Commission concerning any relevant information even though this information was obtained in connection with a hearing which never led to litigation. In fact, where the discovery rules of the Federal Rules of Civil Prodedure restricted a party from ascertaining certain information, the Commission, with extensive powers under Sections 709 (a) and 710 (a) to copy evidence and review documents, might be required under the discovery rules rules of the FRCP to exercise its powers to obtain evidence. That is, as the Commission has access to documents without a court order, it would be forced to give out the information available to it in response to a list of interrogatories or in response to an oral deposition taken of it as a witness by a party to a suit.

Section 710 haa been discussed in detail following the discussion of 709 (a).

NOTICES OF PROVISIONS OF THIS TITLE

In keeping with the ends of this title, Section 711 requires employers, employment agencies, and labor organizations to post notices or summaries prepared by the Commission analysing the provisions of this title as well as information pertinent to filing a complaint. Policing this provision may present problems. The chief concern here should be to see to it that these notices are clear and that the procedure is not made to seem too complex and burdensome so as to discourage claims. More important still is that this information be distributed at once, upon the passage of this Act. Education should not wait until the moment it becomes of use. Familiarity with this title will aid a more rapid implementation of it when Sections 703, 704, 706, and 707 go into force. Applicants for job opportunities should be encouraged to attempt application on the very day the bill is passed. Upon being refused they should register their application with the Commission which should then record the list of applicants. When discrimination subsequently becomes unlawful, an action should be brought by the Commission to strike down the discriminatory list and replace it with a non-discriminatory list. (See the discussion of 703 (j)) This provision may also be used to educate employers and employees before this title is fully effective. From education, conciliation and compliance might follow at least in areas where discrimination is not zealously guarded. The possibilities here are impressive and important. Notice of the sort provided for here should be the first order of business of the Commission.

In connection with the veteran's preference (Section 712), it need only be said that Negroes are, as others, entitled to exercise the privileges attached to being a veteran and Negro veterans; once discriminated against, may now be able to exercise these privileges.

SECTION 713 (b): CIVIL LIABILITY MUST BE BASED ON MAL-INTENT

Section 713 (b), which deals with actions and proceedings brought under this title for unlawful employment practices, excuses the wrong-doer from "liablility or punishment" if his act or omission was done in good faith or in reliance on an interpretation of this title by the Commission. It also excuses the wrongdoer when he fails to publish or file information required by this title, if failure resulted despite good faith. "Such a defense ... shall be a bar to the action...." This language would seem to indicate that claimant could not even demand employment, let alone back pay or other damages which he might otherwise collect. Of course, a subsequent breach of the same provision would result in liability and punishment, as good faith would be difficult to show where the offense was repeated.

SECTION 716: EFFICTIVE DATE

Section 716 (a) provides that this title shall not become effective for one year after the date of its enactment, but subsection (b) limits those that do not become effective to sections 703, 704, 706, and 707. Thus immediately upon passage of the Act the Commission (Section 705) comes into existence. Appointments must be made, offices established,

policy thought out. Section 709 and 710 (which provide for investigatory powers) become effective at once. These should be used to require record keeping, including lists of job applicants for training programs so that when the other provisions take force, new non-discriminatory lists may replace lists which were unfairly compiled. (See the discussion of Section 703 (j) supra) Information as to prime targets could be assembled and recordkeeping requirements could be determined. Notices of the provisions of this title must be written and posted immediately, as education will not wait. (See the discussion of Section 711 supra) Procedural rules will have to be determined and, of course, a staff competent to deal with the problems covered by the title will have to be organized. Much can be done in this first year, especially in the area of establishing application preferences as indicated in the discussion of Section 703 (j).

The last provision, subsection (c) of Section 716, authorizes the President to convene conferences to enable leaders of various groups affected by this title to become familiar with the provisions of the title. Here, creative thought as to the direction of this education, or as to what groups should be invited could be of great use in motivating the President to exercise this discretion. The second part of this subsection seems to limit the people whom the President is authorized to invite. Clause (4) includes "representatives of private agencies engaged in furthering equal employment opportunity"." This might include civil rights leaders, leaders of the NAACP, church groups, or any group whom the President thinks affected by the law. Conferences of this sort could aid greatly in the implementation of this title.

TITLE VIII - REGISTRATION AND VOTING STATISTICS

"In the problem of racial discrimination, statistics often tell much, and courts listen."
State of Alabama v. United States, 304 F2d 583, 586

Section 801

Section 801, the sole section of Title VIII, directs the Secretary of Commerce to conduct promptly a survey in order to compile registration and voting statistics in such geographic areas as may be recommended by the Commission on Civil Rights. Such statistics will fill the deficiency of data on voter eligibility, registration, and turnout broken down racially on a comparative geographical basis.

This information will be of crucial importance to the Civil Rights Commission in its fact-finding functions and the the Justice Department and other persons in their litigation efforts to enforce voting rights. But the statistics will have an even greater significance. Hopefully, they will form the basis for the enforcement of Section II of the Fourteenth Amendment, which has been almost totally ignored since its adoption. Enforcement would mean that any State which has in any way abridged the right to vote of any adult inhabitant--for example, through the use of literacy tests, interpretation tests, or poll taxes--will have the basis of its representation in the House of Representatives reduced. Even the threat of such a sanction would tend to curb the most blatant voter abuses. The House of Representatives has the constitutional power to judge the qualifications of its own members and, therefore, by resolution, could refuse to seat those representatives of states where an appreciable proportion of the citizens are systematically denied the right to vote. Therefore, it is very important that civil rights groups immediately begin a concentrated pressure campaign to secure such enforcement before the next term of Congressconvenes. A similar campaign should be directed towards the Commission of Civil Rights to make an immediate recommendation of a specific geographic area to the Secretary of Commerce. The Secretary has no choice but to promptly conduct a survey. If he is reticent about doing so, an action for mandatory relief may be brought or a pressure campaign may be instituted. Finally, appeals may be made directly to the White House.

Even if Congress refuses to enforce this provision, it may still be judicially enforced in a drastic way. Article II, section one of the Constitution provides that the number of Presidential electors in each state shall be "equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress." Presumably, therefore, a defeated Presidential candidate might challenge, in court, many of the electoral votes claimed by his opponent.

Any survey conducted pursuant to this Title is governed by the protective provisions of Section IX and Chapter 7 of Title 13 of the United States Code. Administrative rules may be enacted to ensure that these protections will not

be used to defeat the purpose of the survey. For example, the survey taker can certainly observe the race and name of the person questioned even if that person refuses to answer any questions. He should be instructed to note these factors so that they might be used together with existing information to complete accurate and effective statistics (lists of registered voters, etc.).

TITLE IX - INTERVENTION AND PROCEDURE AFTER REMOVAL

IN CIVIL RIGHTS CASES

Section 901 AMENDMENT TO SECTION 1447 (d) OF TITLE 28 OF THE UNITED STATES CODE

Section 1447 (d) of Title 28, U.S.C., prior to the amendment by Section 901 prevented all forms of federal appellate review of an order by a U.S. District Court judge remanding a removed case to the state court in which it was begun. The new amendment now permits federal review "by appeal or otherwise" of such an order if the case was originally removed pursuant to section 1443 of Title 28, U.S.C.

Section 1443 of Title 28, entitled "Civil Rights Cases," provides for removal by the defendant to the U.S. District Court of two general classes of civil and criminal cases. This section was derived from Revised Statute 641 and was first enacted as part of the Civil Rights Bill of 1886, 14 Stat. at L. 27, Chap. 31, sect. 1.

Historically, subsection (1) of what is now Section 1443 was limited to allowing removals only where a state statute on its face denied equal rights to the defendant. But this limitation was imposed by the Courts, Kentucky v. Powers, 201 U.S. 1, not by the Congress. Apparently what the Congress of 1866 intended and what is of crucial importance today is that a defendant be able to get into federal court whenever he is denied or cannot enforce procedural as well as substantive rights.

A rational for the narrow construction of subsection (1) given more than a half century ago may have been that, without a statute discriminatory on its face, there was no way to determine that a Negro defendant would actually be deprived of procedural rights. Today with 50 years more experience there can be no question of the commonplace deprivation of such rights in the South and the overriding importance of these deprivations.

However, since Kentucky v. Powers, the case law has been frozen on the subject. No federal Court of Appeals could review the old standard since no means of review were available. The present amendment will allow for review of the standard used by the district courts in determining federal jurisdiction .

In all such appeals Constitutionally guaranteed procedural rights of equality must be stressed as bases for federal jurisdiction. In fact it can be persuasively argued that prejudice to procedural rights should be more important bases for removal than discriminatory statutes. Violations of procedural rights in a state court are inherently more difficult to isolate on later appeal to the Supreme Court than are decisions based on a state law which is squarely opposed to a federal statute guaranteeing equal rights. Removal therefore should be permitted where the court process is used as a means of intimidating the defendant.

Further, analogies between state statutes and state, county, or city court orders or injunctions should be drawn on the basis that all regulate the actions of people. A court order which denies a Negro equal rights, procedural or substantive, is just as oppressive to the actual defendant as a State statute. In addition executive orders or statements by the executive departments of states or political subdivisions which deny or tend to deny equal rights to Negroes should be grounds for removal under section 1443. In support of this analogy to a state statute is the 1963 Supreme Court decision in Lombard v. Louisiana, 83 S.Ct. 1132 (A63), where the Court said that statements of officials were to be treated exactly like city ordinances.

It would seem that in any criminal or civil case which has been commenced against a Negro and in which discrimination is suspected, the attorney attempting to remove to the federal courts should concentrate upon both procedural and substantive inequalities which prejudice the defendant.

Subsection (2) of section 1443 allows for removal by the defendant when a criminal or civil action is brought against him for acting "under color of authority derived from any law providing for equal rights, or for refusing to do an act on the ground that it would be inconsistent with such law."

Only one case, Hodgson v. Millward, 12 Fed. Cases No. 6, 568, 3 Grant Cases 418 (c.c. Pa. 1863), has discussed the meaning of "under color of authority". There it was said that a person's act need only purport to derive from the authority of a statute granting equal rights to all to come within the meaning of the phrase. In other words, if a person acts or omits to act because he believes such course is required or permitted by a federal statute guaranteeing equal rights, and as a result of such act or omission, he is prosecuted civilly or criminally in a state court, he may remove to the U.S. District Court under section 1443(2).

The actual authority or actual right to act or refrain from acting is not what permits the removal. The existence of real authority is determined at the trial; "colorable authority" is sufficient for removability. Since this is the only criterion under this subsection, it follows that no showing of prejudicial court proceedings, coercion, discriminatory state statutes, discriminatory municipal ordinances, etc., need be made. Thus whenever the defense to a state criminal or civil action is based upon a right derived from a federal statute guaranteeing equal rights, the defendant can remove the case to the U.S. District Court under section 1443 (2) of Title 28.

It is quite clear that the provisions of section 1443 are broad enough to cover any proceedings by a state or private person against any person acting in conformity with the substantive provisions of the Civil Rights Act of 1964. If a state brings a trespass action against a Negro attempting to eat in a "white" restaurant, the case is properly removable to the U.S. District Court. And generally, if any reasonable defense to a criminal or civil action in a state court can be made out

under the Civil Rights Act of 1964, even if the defense should prove to be invalid, the case is properly removable.

STAY OF REMAND AND STATE PROCEEDINGS

One of the most important procedural aspects of the new amendment by Section 901 to 28 U.S.C. 1447(d) is what happens to a removed case which has been remanded to the state court pending appeal of the remand to the U.S. Court of Appeals. Prior to the amendment the situation was expressly covered by section 1447(c) of Title 28, U.S.C. which provides, in part, that upon remand the "State court may thereupon proceed with such case." This section has not been changed, but it is clear that very frequently a stay of proceedings in the State court pending the U.S. Court of Appeals' determination of the propriety of the remand is in order.

Section 2238 of Title 28, U.S.C. allows for a federal court to enjoin state court proceedings in certain cases. Specifically this is permitted "as authorized by Act of Congress, or in aid of its (the court's) jurisdiction, or to protect or effectuate its judgments." Under this section it should be possible for a defendant, after remand of his case to the state court to obtain an order staying the state court proceedings pending the appeal of the remand order.

However, a much more desirable procedure, one which will be more advantageous to the defendant, is to obtain an order staying the remand rather than the state court poceedings pending this appeal. If a stay of the remand is granted and the state court proceeds, it does so with absolutely no jurisdiction, real or colorable. Any state court judgement rendered prior to the determination of the appeal of the remand is then void on its face. On the other hand if the defendant merely obtains an order staying the state court proceedings, the state may proceed with colorable if not actual jurisdiction. The correctness of the stay order might be challenged by the state, and this challenge conceivably could be upheld. But the state is in no position to challenge a stay of the remand because the remand is in effect only conditionally pending the outcome of the appeal. Practically, also, a federal court is more likely to stay one of its own orders than to enjoin the proceedings of a state court.

Moreover, it should be strongly argued that a remand of a civil rights case removed under section 1443 of Title 28 is automatically stayed pending appeal of that remand. Congress, by enacting section 1443, intended to afford defendants in certain types of state actions the opportunity to remove to and be tried in the federal court system. Prior to this new amendment by Section 901 to section 1447(d), unsympathetic Southern federal district judges easily defeated Congressional intent by remanding cases to the state courts. Since no review of the remand was possible, the state courts then proceeded unhindered to hear these cases.

Congress in presently amending section 1447(d) has reasserted its intention to provide a defendant in a civil rights case the opportunity to be tried in a federal forum. If a U.S. District court judge does not

automatically prevent his remand order from becoming operative pending appeal of that order to the U.S. Court of Appeals, he is countering clear Congressional policy.

It might be argued that the state should be able to proceed pending the outcome of the appeal of the remand because if said appeal is won and the remand is reversed, the state court porceedings will be vacated and the defendant will not be harmed. But the defendant may be greatly harmed by being convicted criminally and jailed, subjected to an illegal injunction or order or deprived of constitutionally guaranteed civil rights. In short, by permittnng the state to proceed at all the defendant may be subjected to irreparable harm whereas the state or private plaintiff can almost always bear the delay with little or no prejudice. Because of this likelihood of serious harm to the defendant if the state can proceed pending the appeal, the new amendment to section 1447(d) may well be meaningless if the stay is not automatic.

If it should turn out that the stay of the remand is not automatically forthcoming in all civil rights cases, application should immediately be made to the District Court judge for a stay of the remand. If this is denied, application should then be made to the U.S. Court of Appeals for a stay pending appeal of the remand. This stay will probably be granted in all but frivolous cases. If the state court is about to proceed, the applications should be accompanied by a petition for an injunction to stay the state court proceedings under secton 2238, Title 28, U.S.C.

PRACTICAL USE OF SECTION 1443 OF TITLE 28

Section 1443 can be invaluable in cases of mass prosecutions. Where large numbers of integrationists are prosecuted criminally for trespass for "sitting in" at a "white" restaurant, etc., all of the cases can be removed at any time prior to trial. Because of the possible need for rapid steps, as where the state attempts an immediate railroad or kangaroo trial, the attorneys for the defendants should have large numbers of removal applications on hand with spaces left blank on which names, dates, etc. can be inserted. Removals can then be effected speedily and before the state trial commences.

MISSISSIPPI

Because of Mississippi's interesting criminal procedure, removals to the federal courts can be effected there even after a trial and conviction. An appeal to a Mississippi County Court from a conviction in a Justice of the Peace Court results in a trial de novo on the merits. Removal under section 1443 of Title 28 prior to this trial de novo should be permissable. An appeal from a conviction in the County to the Mississippi Circuit Court which is reversed results in a trial de novo on the merits in the Circuit Court. R moval should also be allowed prior to this trial de novo.

SECTION 902: INTERVENTION BY ATTORNEY GENERAL

This section is potentially one of the most powerful in the Act, especially when joined with a private action brought under section 601. The Attorney General's right of intervention is not predicated upon the Court's discretion, but upon his own, assuming the plaintiff has alleged a denial of equal protection of the laws under the Fourteenth Amendment. Under this section the Attorney General's right of intervention is probably not limited to that part of hhe case dealing with denial of equal protection of the laws. Rather, under the language of the section, he may intervene in all facets of the case. If, on the other hand, a narrow construction of the Attorney General's right of intervention was intended, Congress would have indicated this in the Act. It is therefore likely that where the equal protection point is only one of a number of plaintiff's allegations, the full force of the U.S. may be available to aid him in the entire case.

The relief to which the U.S., through the Attorney General, is entitled is "the same as if it had instituted the action." If the U.S. is in the case for all purposes, as the language of the section strongly suggests, such relief should include helping the plaintiff obtain damages as well as seeking injunctive relief. This is supported further by the language "for or in the name of the Unieed States, the Attorney General may intervene..." If the relief to which the Attorney General were entitled was solely injunctive and for the United States, the language "in the name of" would be surplusage. Its presence denotes meaning, and the only meaning is that all relief may be sought for the plaintiff by the Attorney General by the authority of the United States.

The language of the section is also broad enough to allow the Attorney General to intervene on the side of the defendant in proper cases removed to the federal court under section 1443, Title 28, U.S.C. The removal is in effect the commencement of a suit in the federal court. If the Attorney General could intervene only as a plaintiff, the section should have so stated. If the Attorney General can, in fact, come in to aid the defendant in such cases, state prosecutions under void statutes or utilizing porcedures violative of equal protection and due process may well be deterred.

Since all of the Attorney General's actions are discretionary under Section 902, it will be necessary for civil rights attorneys to discuss the potential of the section wtth him and to encourage its frequent use, both on the side of plaintiffs and of defendants in removed cases.

One final point: if a criminal comtempt proceeding arises out of the Attorney General's intervention under section 902, the defendant has no right to trial by jury, since cases arising under Title IX are exempted from the jury trial provisions of Title XI.

TITLE X - COMMUNITY RELATIONS SERVICE

Tiltle X, creating the Community Relations Service, may or may not be of great utility to the practicing attorney. The Service will act as a conciliatory body, incapable of compelling parties to act or even of compelling parties to talk. The body will serve a social, but not a legal, r role.

The title provides that the Service shall be headed by a director appointed by the President with the advice and consent of the Senate for a period of four years. Lesser appointments to,the Service will be made by the director, who may appoint "such other personnel as may be necessary to enable the Service to carry out its functions and duties." The director, then, has vast discretionary powers: he may expand the Service putting personnel in many cities, or may appoint no one. The tile will have an impact only if the director is an imaginative and aggressive civil servant.

The Service shall provide assistance to communities or persons in resolving disputes or difficulties relating to discriminatory practices based on race, color, or national origin--not religion--which impair the rights of persons in the community under the Constitution or laws of the United States or which affect or may affect interstate commerce. The two categories: (1) which impair rights under the Constitution or laws, and (2) which affect or may affect interstate commerce: would seem to give the Service authority to act in many areas. As the consent of the parties disputing is needed, it is unlikely that any party would question the Service's authority to mediate once consent is achieved. This title also provides that the Service may offer its assistance to settle disputes arising from discriminatory practices "whenever, in its judgment, peaceful relations among the citizens of the community involved are threatened thereby..." Thus, there seems no limit to the number of disputes in which the Service might become involved. As an example of this breadth, the Service might intervene where one restaurant owner, reluctant to integrate his restaurant alone, would integrate it if other owners did the same. Here the Service could encourage a sttlement where "difficulties" rather than "disputes" were involved.

In disputes arising under Title II, the court may refer the matter to the Service to seek agreement between the parties. The Service is given 60 days, which may be extended 60 more, if the court finds that compliance is reasonably possible. In these cases, the Service, under Section 205, is authorized to make a full investigation and to hold hearing in executive session, keeping information in confidence unless the parties agree to disclose it. In this connection, the Service can be influential in the court's decision to refer the case to the service, by voicing its belief in the possibility of compliance. And where the Service feels that compromise is not possible, it should attempt to persuade the court to handle the case immediately.

The chief limitation is that the Service cannot force itself on parties or communities unwilling to recerive aid, except as provided under Title II as discussed above. Both parties must desire, or be willing to accept, mediation. Here the record that the Service establishes and the personnel which are chosen for the Service may be determinative of its acceptability

to disputing parties. An overly aggressive or effective Service might, for example, become ineffective in the South.

Section 1003 - LIMITATIONS ON THE SERVICE

Two limitations have been placed on the service: (1) that it shall conduct its assistance in confidence and without publicity and "shall hold confidential any information acquired in the regular performance of its duties upon the understanding that it would be so held; and (2) that no officer or employee of the Service shall take part in the performance of "investigative or prosecuting functions of any department or agency in any litigation arising out of a dispute in which he acted on behalf of the Service." The confusing nature of the first restriction is not clarified by Congressional comment. Presumably, the language requiring that the Service "shall hold confidential any information acquired in regular performance of its duties upon the understanding that it would be so held" does not require the Service to withhold that information acquired without such an understanding. Thus a member of the Service would seem to be privileged to withhold information only if it is shown that such an understanding existsd explicitly or perhaps implicitly.

The second restriction is equally vague. While an officer is precluded from participating in investigative or prosecuting functions of any agency or department, there seems no restriction on the scope of his role in private litigation. It seems that an opponent of the Service could serve in an investigation by a private party. Whether he is free to be a witness also is unclear. Senatorial comment seems to indicate a strict interpretation of both restrictions in question, but little time was devoted to consideration of this title so that interpretation must be left to the courts.

Conclusion

In general, the Service will encourage mediation and communication between disputing parties. The extent of its activity will be determined by the quality of its leadership. The Service clearly cannot initiate litigation, but it may be possible to involve its officers or employees as witnesses in court between adverse parties. As a witness, the members of the Service may be privileged to withhold all information although a flexible court may find this privilege limited.

TITLE XI - MISCELLANEOUS

SECTION 1101: CRIMINAL CONTEMPT AND CIVIL CONTEMPT

Trial by jury in Criminal Contempt Proceedings

Section 1101 provides for jury trial as a matter of right in any proceeding for criminal contempt arising under title II (public accomodations), III (public facilities), IV (public education), V (Commission on Civil Rights), VI (federally assisted programs), or VII (equal employment opportunity). Significantly, section 1101 does not apply to title I (voting rights) or to title IX (intervention and removal in civil rights cases); titles VIII, X and XI are, less importantly, also exempted from Section 1101.

Title I is an amendment to "Section 2004 of the of the Revised Statutes...as amended by section 131 of the Civil Rights Act of 1957... and as further amended by the Civil Rights Act of 1960." (See also 42 USC 1995.) Section 151 of the Civil Rights Act of 1957 provides for jury trial in criminal contempt proceedings arising under that Act (1957) in the event the punishment exceeds a $300 fine or 45 days imprisonment. It is suggested that this jury trial provision of the 1957 Act may not apply to title I of the 1964 Act (indeed, nor to the 1960 Act). Thus, in proceedings under title I for criminal contempt, the only limitation on the power of the court to punish contempt summarily without a jury, may be the dictum of the Supreme Court in United States v. Ross Barnett, April 1964, U.S. S. Ct. #107, to the effect that there must be a jury trial in criminal contempt cases where the punishment is more than that provided for "petty offenses." (But see the discussion of 18 USC 3691 below in regard to a private suit based primarily on title I of the 1964 Act.)

Title IX authorizes the Attorney General to intervene in actions brought by private citizens "seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution." In such actions brought by private citizens under the Constitution, the court has the power to punish disobedience of its orders by criminal contempt proceedings without a jury, except as limited by United States v. Ross Barnett. Intervention by the Attorney General under title IX in such private actions will not affect this power of the court because title IX is not covered by section 1101.

Suits Not Under the Civil Rights Act of 1964

Of course, if a person sues to obtain an injunction to secure constitutional or statutory rights, secured other than by the Civil Rights Act of 1964, such as to secure admission to a university under Brown v. Board of Education, the suit does not arise under titles II throught VII of the Civil Rights Act of 1964, and section 1101 will not apply. There need not be a jury trial if the penalty for criminal contempt is such that it falls under the limits of the Barnett case which sets a maximum penalty for which there need not be a jury.

Note on the Barnett Decision

The use of criminal contempt proceedings without a trial by jury under titles I and IX and in injunctive suits to secure constitutional rights or rights secured by other statutes (as discussed above) depends a great deal on the narrow five to four Barnett decision. Although the court held that Governor Barnett had no constitutional right to trial by jury in the contempt proceedings against him, the majority dictum stated that some members of the court felt that "punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." (See footnote # 12 in Barnett.) However, the petty offense limitation in titles II through VII, ie., the limitation to a cumulative 30 days and $300 (non-cumulative 45 days and $300 under the 1957 Act) provides a hedge against a shift in the balance of the court.

Jury Trial in spite of Section 1101: Crime Constituting Contempt Also A Crime Under the United States Code

Under any title of the Civil Rights Act of 1964, or any other United States statute for that matter, if the civil suit for an injunction is brought by a private individual and the disobedience constituting the criminal contempt also constitutes a crime under the United States Code, then under section 3691 of title 18 of the United States Code the accused is guaranteed a jury trial. The crimes which such conduct may constitute would be, for example, conspiring to oppress a citizen in the enjoyment of a privilege secured to him by the laws of the United States (18 USC 241) or wilful obstruction of court orders (18 USC 1509). See also the closely analogous double jeopardy amendment, section 1102, discussed below.)

Contempts Committed in the Presence of the Court

No jury trial is required for contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to the misbehavior, misconduct, or disobedience of any officer of the court in respect to writs, orders or process of the court. This provision should be vigorously used against any officers of the court, especially in the South, who obstruct the administration of justice.

Civil Contempt: Broad Power of the Court

The effect of this jury trial provision (section 1101, paragraph 1) on the titles covered by it need not be disastrous. But the anticipated reluctance of Southern juries to convict fellow white citizens of criminal contempt may make necessary resort to stringent use of the court's civil contempt powers. These civil contempt powers are exercised without a jury, are not subject to United States v. Barnett, and are explicitly exempted from coverage by paragraph one of section 1101. Any order issued under titles II through VII, as well as I and IX, can be enforced through civil contempt proceedings without a jury trial and regardless of the severity of the penalty. The Supreme Court

has broadly interpreted civil contempt. (See Green v. United States, 356 U.S. 165, 197.)

Civil Contempt: Effective Means of Enforcement

Enforcement of all sections of the Civil Rights Act of 1964 and effective deterrence of noncompliance may be achieved by the vigorous use of civil contempt proceedings. As examples, the following remedies may be employed.

a) To enforce title II (public accommodations) the establishment of an offender may be closed. Similarly, the place of business of any employer who fails to hire non-discriminatorily or otherwise violates title VII can be shutdown.

b) Posting of federal marshals: The court could, if necessary, order federal marshals to station themselves at the defendants establishment and to remove all customers when there is a Negro waiting outside and being refused entry.

c) Requiring the posting of bond: The use of this remedy may come closest to bringing offenders into line short of an effective criminal contempt conviction. Consider the following step-by-step illustration. The owner of a public accommodation refuses to comply with the requirements of title II. He is sued. Plaintiffs are successful and the court not only issues an injunction ordering his public accommodation, e.g., his restaurant, to be opened to Negro and white alike but in addition requires that he post a sizable bond, e.g., $10,000.00 conditioned upon his obeying the injunction and to be kept by the court for a certain period of time, e.g., one year. A single act violating the court order would involve forfeiture of this sizable sum of money (perhaps in compensatory payments to those turned away), certainly an amount no small businessmen would voluntarily sacrifice. And if the plaintiff refuses to post the bond, his establishment can be closed.

Back Pay Provision of title VII as a Mode of Deterrence

Althougth the jury trial provision of section 1101 may somewhat limit the deterrent effect of title VII in the South, section 706g weighs as a countervailing deterrent factor. Under section 706g employees may be reinstated or hired with back pay running from the time of refusal on discriminatory grounds. Thus, an employer will in effect receive punishment for intentionally having engaged in an unlawful employment practice.

SECTION 1102: SENATE DOUBLE JEOPARDY AMENDMENT

Section 1102 provides that prosecution for a federal crime will bar a proceeding for criminal contempt under the Act (and vice versa), if the proceeding is based on the same act or omission which constituted the crime. This amendment is not based on sound legal doctrine; under

normal legal procedures, a person who performs a single act can be prosecuted for two separate crimes if the single act performed is made through law two separate crimes. However, contempt under this Act will usually involve a series of acts; and nothing in section 1102 prevents prosecution for a crime based on one act in the series and contempt proceedings based on another act in the series.

Before the adoption of this section, drastic modification of the section and the legislative history clarified confusion as to whether this section would have a double jeopardy effect on criminal proceedings for the same crime in the state and federal courts by inserting "under the laws of the United States" in three places. Thus a state court proceeding is definitely not prohibitive of a federal court action for the same criminal act.

SECTION 1103: NON-IMPAIRMENT OF RIGHT OF ATTORNEY GENERAL OR OF THE UNITED STATES OR ANY AGENCY OR OFFICER THEREOF TO INSTITUTE AN ACTION OR TO INTERVENE UNDER EXI TING LAW

This section is self-explanatory but is extremely important, particularly in preventing any interpretations of any sections of the Act to restrict existing authority. The protective effect on a possible interpretation of title VI that would restrict existing agency contract-cutoff authority is most important. (See title VI discussion).

SECTION 1104: PRE-EMPTION CLAUSE -- NO OCCUPATION OF THE FIELD: INVALIDATION OF INCONSISTENT PROVISIONS OF STATE LAW

The first clause and the first part of the second clause of this section are important to the continued effectiveness of existing state civil rights laws, especially in the North, which may be stronger in principle and in enforceability than the Civil Rights Act of 1964. Also, states retain power to enact in the future civil rights statutes that constitutionally reach beyond the provisions of this 1964 Act.

The breadth of the second clause is highly significant with respect to the voidability of "unconstitutional" state laws (such as many recently passed in Mississippi). It is worthy of repetition herein:..."nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof." It is important to note that the state laws may be voided not only if they are inconsistent with the provisions of this Act but if they are inconsistent with any of its purposes. Since the purposes of this act, broadly and generally construed, entail complete and total integration of the Negro in society throughout the entire United States, the most subtly discriminatory provisions of state law can be considered "inconsistent" with one of the purposes of the Act and, hence, invalid.

SECTION 1105: APPROPRIATIONS TO CARRY OUT THE PROVISIONS OF THIS ACT

Reminder! The effectiveness of this act can be severly limited through insufficient appropriations. For example, the expanded powers and duties of the Attorney General require considerable funds to supply the lawyers and other support for the Civil Rights Division necessary for the effective implementation of the Act.

SECTION 1106: SEVERABILITY CLAUSE

The invalidation of a provision of this Act does not affect any other provision. Also a provision may remain valid with respect to some persons or circumstances although held invalid with respect to others. The latter, very broad severability clause, may be especially significant when the constitutionality of title II (public accomodations) and other such titles of the Act are tested in the courts in applications to very small establishments.