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cc: Files
Mr. Kramer
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Miss Lawton

AUG 10 1960

MEMORANDUM FOR LAWRENCE E. WALSH
DEPUTY ATTORNEY GENERAL

In response to your request, I am transmitting herewith a memorandum prepared by this Office on the question of the President's authority to deal with racial discrimination in housing projects constructed with the aid of the Federal Government. In view of the urgency of your request, we have not had the opportunity to conduct all the research and study the questions involved would seem to require. We have not, for example, considered or examined the questions as they affect the housing programs under the jurisdiction of the Veterans Administration. If there are any points which you think need further development, please let me know.

Robert Kramer
Assistant Attorney General
Office of Legal Counsel

Attachments

C - Civil Rights Div

4 MEMORANDUM

This memorandum deals with the authority of the President to take appropriate action directed to all federal housing agencies requiring them to take the necessary steps to insure that federal assistance will not be advanced for the benefit of any housing or housing project in connection with which persons are excluded on the basis of their race, color, or creed. It is assumed herein that any presidential action that may be taken will be prospective in its operation, and it is concluded that the President in all probability has the authority to take the proposed action. Indeed, so far as can be perceived, the only substantial argument that can be made against the legality of the proposal rests upon the contentions which might be made as a result of the defeat in 1949, 1953, and 1959 of legislation which would have required the result now proposed to be achieved by presidential action. For the reasons set forth below, it is believed that such contentions have little merit. The discussion in the memorandum as to the details of the action the President may take to deal with

the problem is not intended to be definitive. We do not have sufficient familiarity with the practical operations of the housing agencies to set forth the content of the President's action in more than a general way.

We have examined the 1959 Report of the Commission on Civil Rights (Part Four - "Housing," Chapter IV, "Federal Laws, Policies, and Housing Programs," pp. 451-505; Chapter VI, "Findings and Recommendations," pp. 534-543), and the memorandum of the Civil Rights Division of April 1960, on discrimination in housing. The Commission, of course, did not have the occasion to deal fully with the problem of presidential authority. Similarly, the memorandum of the Civil Rights Division deals with the question only in a general way. The aim of this memorandum is to cover the question, within the time available for its preparation, in a more complete manner and to respond to specific questions which you have raised.

13 INTRODUCTION

It may be helpful at this point to discuss briefly the legal position of the housing agencies themselves as to their authority to deal with racial discrimination in

connection with the programs they administer. We are aware of no general legal analysis in those terms. We have obtained a copy of an internal memorandum of a recent date apparently prepared by the Office of the General Counsel of HHFA on the subject of "Racial discrimination in public housing and publicly assisted housing."[1] The memorandum contains a good discussion of the decisions in the field but reaches no conclusions and makes no recommendations. It does state (p. 7) that "the broad view of state action taken in Shelley v. Kraemer [334 U.S. 1 (1948)] and the holdings in the school segregation cases may be significant in pointing the way toward an eventual condemnation of segregation practices in public housing projects." As to publicly assisted private housing, it suggests that a different result may be reached because "the influence of the state is far more remote" (p. 10). It is a matter of public record, of course, that shortly after the Supreme Court held that racially-restrictive covenants were not

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1/ This memorandum bears the notation "Not for release - Discussion draft for internal office of General Counsel only."

judicially enforceable (Shelley v. Kraemer, supra; Hurd v. Hodge, 334 U.S. 24 (1948)), FHA promulgated a regulation (discussed in more detail, infra) to the effect that it would not extend government credit where such covenants were in force. We have found no legal discussion of the Agency bearing on its authority to take such action.

It appears that on November 25, 1959, the Commissioner of the Federal Housing Administration advised a correspondent that "Under the National Housing Act, FHA does not have legal authority to impose penalties against persons by reason of alleged racial discrimination in the field of housing." On the other hand, he advised the same correspondent that if FHA is satisfied that a person has violated a State nondiscrimination statute and refuses to take corrective action, FHA will "suspend the violator from the further benefits of participation in the FHA programs." The Commissioner also refers to FHA's restrictive covenant regulation.

In a memorandum dated November 12, 1959, from the Deputy Director of FHA's Legal Division to its General Counsel analyzing the housing recommendations of the

Report of the Civil Rights Commission the writer stated that he would not comment on the recommendation that the President issue an Executive order directing all federal agencies 'to devote maximum effort to achieve equal opportunity in housing" since the recommendation "involves a presidential policy determination." FHA's General Counsel in a memorandum dated July 29, 1959, stated that "[i]t would seem doubtful that withdrawal of approval of a mortgage because of alleged discrimination against minority group applicants for financing would constitute a valid ground for the withdrawal, in the absence of a State or Federal statute which made such discrimination a violation of law." The General Counsel, in presenting a statement to the Civil Rights Commission on June 10, 1959, did not discuss the question of FHA's authority to go further than it already had to eliminate racial discrimination in FHA-financed projects.

At the outset of this discussion it should be borne in mind that the question of the President's authority to act in this area is complicated by the fact that the

housing statutes on their face are silent as to the question of racial discrimination in the administration of housing programs and the further fact, as pointed out by the Civil Rights Commission (Report, p. 451), that "[a]lthough there have been several attempts in Congress to enact antidiscrimination amendments to Federal housing statutes, none has succeeded." The Commission states that "the sole federal statute specifically relating to racial discrimination in housing" is 42 U.S.C. § 1982, R.S. § 1978, one of the original Civil Rights statutes. This provides that--

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

The Commission and the Civil Rights Division apparently are of the view that this statute may support an Executive order of the comprehensive nature contemplated.

The Commission also expresses the view (pp. 451-452), as does the Civil Rights Division, that Federal housing programs "are governed by the constitutional requirements

of equal protection of the laws and due process. The Supreme Court has done more than consistently hold that the Fourteenth Amendment prohibits State (or city) action to enforce racial zoning or racially restrictive private covenants in housing. It has also held that this anti-discrimination rule expresses the public policy of the United States and is applicable to the action of Federal as well as state agencies." Reference is made to Hurd v. Hodge, supra, at 34-36. In that case, in holding that a federal court could not lend its aid to the enforcement of a private racially-restrictive covenant, the Supreme Court stated (pp. 34-35):

> 10 " * * * enforcement of restrictive covenants in these cases is judicial action contrary to the public policy of the United States, and as such should be corrected by this Court in the exercise of its supervisory powers over the courts of the District of Columbia. The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power."

Since enforcement of a racially restrictive covenant by a state court violated the Fourteenth Amendment (Shelley v. Kraemer, supra), the Court stated that "it is not consistent with the public policy of the United States to permit federal courts in the Nation's Capitol to exercise general equitable powers to compel action denied the state courts where such action has been held to be violative of the guaranty of the equal protection of the laws" (p. 35). The doctrine of Hurd v. Hodge is presumably thought by the Civil Rights Commission and the Civil Rights Division to furnish a valid basis for broad Executive action denying federal housing assistance to public agencies and private entities which utilize such assistance in a racially discriminatory manner. It would seem that the housing agencies do not subscribe to this view.

Finally, the Civil Rights Commission and the Civil Rights Division point to the Executive orders requiring a nondiscrimination clause in government contracts as a precedent for an Executive order in the housing area.

We conclude, first, that R. S. § 1978, 42 U.S.C. § 1982, may properly be cited as authority for the proposed Executive order. Second, we conclude that an Executive order of the nature contemplated may be viewed as a reasonable direction to the housing agencies as to the exercise of the rule-making power conferred upon them by the housing statutes. It is also our view that the refusal of Congress to enact an antidiscrimination amendment to these statutes cannot properly be regarded as a limitation on the rule-making power in this respect. We further conclude that the Executive orders requiring a nondiscrimination clause in government contracts are of some value as precedents. We also conclude that there are significant distinctions between the present question and the land-grant college problem. Finally, we comment on the form and content of the proposed presidential action.

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I.

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THE SIGNIFICANCE OF R.S. §1978, 42 U.S.C. § 1982

42 U.S.C. § 1982 embodies the provisions of R.S. §1978. Section 1978 is derived from § 1 of the first Civil Rights Act of 1866, 14 Stat. 27, the purpose of which was to implement the provisions of the Thirteenth Amendment abolishing slavery. Although the section became law before the adoption of the Fourteenth Amendment, the Supreme Court has stated the section "was vindicated by" that amendment.[2] Section 1 in its entirety read as follows:

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> "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

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2/ Oyama v. California, 332 U.S. 633, 640 (1948).

This provision, along with an authorization to the President to employ the land and naval forces in its execution, was specifically re-enacted in 1870.[3]

The provision has remained law since that time. The authorization for the use of the armed forces, however, was repealed by the Civil Rights Act of 1957.[4]

1. The legislative background of R.S. §1978.

S. 61, 39th Cong., 1st Sess., a bill "to protect all persons in the United States in their civil rights, and furnish the means of their vindication," passed the Senate on February 2, 1866.[5] The bill was amended in the House and passed on March 13,[6] and the Senate concurred in those amendments.[7] As amended, it contained the provisions of § 1, supra. On March 27, President Johnson returned the bill to the Senate with his objections.[8]

3/ Act of May 31, 1870, §§ 13, 18, 16 Stat. 144.

4/ 71 Stat. 637 (1957), 42 U.S.C. § 1993.

5/ Journal of the Senate of the United States, 39th Cong., 1st Sess. 132 (1865-66).

6/ Journal of the House of Representatives of the United States, 39th Cong., 1st Sess. 396 (1865-66).

7/ Journal of the Senate, supra, at 237.

8/ Id., at 279.

After some debate the Senate overrode the Presidential veto by a margin of 33 to 15,[9] and the House followed its example.[10] The bill became law on April 9, 1866.

The sponsor of the bill, Senator Trumbull of Illinois, was the chief spokesman during the debates. As Chairman of the Judiciary Committee, he was called upon to explain the bill and to justify it both practically and constitutionally. In so doing, he described § 1 as "the basis of the whole bill,"[11] and went on to point out, "the very object of the bill is to break down all discrimination between black men and white men."[12] The Senator pointed out, "It is intended, if this bill becomes law, to clothe the officers charged with its execution with all the power necessary to make it effective."[13]

The proponents of the bill never clearly defined its scope, but its opponents indicated that they viewed it as a

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9/ Id., at 317.

44 ## FN10

10/ Journal of the House, supra, at 528.

44 ## FN11

11/ Cong. Globe, part 1, 39th Cong., 1st Sess. 474 (1866).

44 ## FN12

12/ Id., at 599.

44 ## FN13

13/ Id., at 476.

sweeping ban on all discrimination. Senator Cowan objected, "This is a bill for the abolition of all laws in the States which create distinctions between black men and white ones,"[14] and at other times expressed the fear that it would prevent segregation in the schools[15] and extend freedom to contract to both married women and minor children.[16] Senator Saulsbury of Delaware emphasized the argument that it would infringe upon the reserved powers of the States,[17] and Senator Johnson added "there exists [in the States] a power to legislate in relation to the prejudices of the people, a power not to legislate against their prejudices."[18] Senator Williams construed the property provisions of the bill as invalidating the laws prohibiting the sale of liquor to the Indians,[19] and Senator Johnson thought that the contract clause extended to an invalidation of the miscegenation statutes of the various States.[20] Considered in their entirety, the debates are indicative of the wide scope of § 1.

14/ Id., at 603.

15/ Id., at 500.

16/ Id., at 606.

17/ Id., at 478.

18/ Id., at 505.

19/ Id., at 573.

20/ Id., at 505.

2. Judicial Interpretation of R.S. § 1978.

Some of the provisions of the Civil Rights Act were challenged in 1882 and were struck down on the ground that Congress had no power to pass laws for the protection of individuals against private action in which a State did not participate. United States v. Harris, 106 U.S. 629 (1882).

Two 1948 cases relied directly on R.S. § 1978 with respect to racial discrimination involved in the disposition of real property. Oyama v. California, 332 U.S. 633 (1948); Hurd v. Hodge, 334 U.S. 24 (1948). In Oyama, involving Japanese, the discriminatory operation of the state alien land law upon citizens whose parents were aliens ineligible themselves to become citizens was held void, in part on the basis of that section. The Court said (p. 646):

> "[W]e start with the proposition that only the most exceptional circumstances can excuse discrimination on that basis in the face of the equal protection clause and a federal statute [R.S. § 1978] giving all citizens the right to own land."

In Hurd v. Hodge, supra, the Court held that R.S. § 1978 prohibits federal courts from enforcing private racially restrictive covenants.

In the earlier case of Buchanan v. Warley, 245 U.S. 60 (1917), the Supreme Court struck down a city ordinance prescribing segregated residential areas. Although relying primarily upon the Fourteenth Amendment, the Court added (p. 79):

> "These enactments [Civil Rights Acts of 1866 and 1870] did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color."

Whether R.S. § 1978 was relevant in the case of a municipal housing project financed by the Federal Government was raised but not passed upon in Hayward v. Public Housing Administration, 214 F. 2d 222 (C.A. D.C., 1954); 238 F. 2d 689 (C.A. 5, 1956). Since 1953, several cases have challenged racial discrimination in public and publicly-assisted housing projects. In Vann v. Toledo Metropolitan Housing Authority, 113 F. Supp. 210 (D.C. N.D., Ohio, 1953), the court relied upon R.S. § 1978 in part, in holding that Negroes could not be excluded from a municipal housing project erected with the aid of federal funds. In Jones v. City of Hamtramck, 121 F. Supp. 123 (D.C. E.D. Mich., 1954), the court reached a like

result on the authority of the Yann case. In Detroit Housing Comm'n v. Lewis, 226 F. 2d 180 (C.A. 6, 1955), it was suggested that R.S. § 1978 was a valid basis for striking down the exclusion of Negroes from a public housing project built with federal aid.

The language and legislative history of R.S. § 1978 show that it was intended to have a wide reach in placing Negro citizens of the United States on an equal plane with respect to real property rights--all citizens were to have the same right as enjoyed by white citizens "to inherit, purchase, lease, sell, hold, and convey real * * * property." It has been broadly interpreted by the courts, particularly in Hurd v. Hodge, in order to accomplish its purpose. In Hurd the Supreme Court stated that the "explicit language employed by Congress to effectuate its purposes leaves no doubt that judicial enforcement of the restrictive covenants by the courts of the District of Columbia is prohibited by the Civil Rights Act." 334 U.S., at 33-34. Lower court cases have cited R.S. § 1978, in holding that Negroes cannot be excluded from public housing projects constructed with federal funds.

In our opinion, R.S. § 1978 may be viewed as lending support to the proposed action of the President. The principle of Hurd v. Hodge is that this statute and public policy considerations preclude the Federal Government from giving its aid to the enforcement of racially restrictive covenants executed by private persons. This principle has been regarded by FHA as authorizing it, as an agency of the Federal Government, to refuse to extend credit facilities to those who employ racially restrictive covenants, merely one means of discrimination against Negroes in housing. It seems to us reasonable to extend the principle to all forms of discrimination practiced in connection with government assisted housing, in order to accomplish the purpose of the statute and the public policy of the United States. On the analogy of Hurd v. Hodge, it would seem immaterial whether the racial discrimination is practiced by private individuals or public agencies. R.S. § 1978 is equally relevant to both situations so long as an instrumentality of the Federal Government extends financial aid to private individuals or public agencies, with knowledge that this aid will be used in a racially discriminatory manner. Of course, as to public agencies, the cases cited above lend direct support to this view.

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II.

THE PRESIDENT'S AUTHORITY VIEWED FROM THE STANDPOINT OF THE RULE-MAKING POWERS OF THE HOUSING AGENCIES

If the heads of the various housing agencies have rule-making [21] powers which extend to requiring Federal financial assistance to be conditioned by an undertaking on the part of the applicants not to follow racially discriminatory practices in utilizing the assistance, we believe that the President may properly direct those officers to exercise their powers in this respect. The Executive orders requiring the inclusion of a nondiscrimination clause in all government contracts are precedents for a presidential directive to the heads of Executive agencies requiring them to take certain action in the discharge of their duties. As pointed out in the Report by the Subcommittee of the President's Committee on Government Contracts, p. 12, (discussed infra), the President would appear to possess "general administrative control of the ordinary duties of officers prescribed by statute."

In the various housing statutes Congress has conferred rule-making powers on the officials entrusted with their

[21] It appears that the housing agencies have effectuated some of their basic policies by means other than through the issuance of formal rules and regulations, i.e., by announcements of policies, adoption of contract terms and the like. As used herein the term "rule-making," is intended to include all such means of effectuating policy.

administration. The Housing and Home Finance Agency (HHFA) was established by Reorganization Plan No. 3, effective July 27, 1947, to provide a single agency to supervise the principal housing programs and functions of the Federal Government. HHFA is headed by an Administrator who is directly responsible for general supervision and coordination of the constituents of the Agency and who has certain functions vested in him by the various housing statutes. He has been given the authority by Congress to make "such rules and regulations as may be necessary to carry out his functions, powers, and duties." 12 U.S.C. § 1701c(a). HHFA has two constituent units--the Community Facilities Administration (CFA) and the Urban Renewal Administration (URA), and three constituent agencies--the Federal Housing Administration (FHA), the Public Housing Administration (PHA), and the Federal National Mortgage Association (FNMA). FNMA is operated like a corporation; it has a President and Board of Directors, of which the HHFA Administrator is chairman. Each of the others is headed by a Commissioner. The heads of most of the constituent agencies have been expressly given rule-making power as to the specific programs they operate:

1. Under Title I, § 2, of the National Housing Act, 12 U.S.C. § 1703, relating to insurance programs, the Federal

Housing Commissioner is authorized "upon such terms and conditions as he may prescribe" to insure financial institutions against loss on loans made to finance alterations, repairs, and improvements to existing structures, and the building of small new non residential structures. He is also "authorized and directed to make such rules and regulations as may be necessary to carry out" the provisions of the title. Under § 203(b) of Title II of the National Housing Act, 12 U.S.C. § 1709, the Federal Housing Commissioner is authorized "upon such terms as the Commissioner may prescribe" to make commitments for mortgage insurance on one-to-four-family homes. To be eligible for insurance a mortgage must contain such terms and provisions with respect to insurance, repairs, payment of taxes, etc., "and other matters as the Commissioner may in his discretion prescribe." 12 U.S.C. § 1709(b)(7). Under § 207 of Title II, 12 U.S.C. § 1713, the Commissioner is authorized to insure mortgages on rental projects of eight or more units, and in this connection he "is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions" of the title. 12 U.S.C. § 1715b. Under § 220 of Title II of the National Housing Act, 12 U.S.C. § 1715k, the Commissioner is authorized to extend insurance to assist in financing the rehabilitation of existing housing

and the replacement of slums in areas for which urban renewal plans or urban redevelopment plans have been certified to FHA by HHFA. Under § 701 of title VII of the National Housing Act, 12 U.S.C. § 1747, the Commissioner is authorized "upon such terms and conditions as the Commissioner shall prescribe" to insure investments in rental housing for families of moderate income; and under § 712, 12 U.S.C. § 1747k, he may make such rules and regulations "as may be necessary or desirable to carry out the provisions" of that title. Finally, under § 810 of Title VIII, 12 U.S.C. § 1748b, he is authorized to insure mortgages on rental housing for personnel of the Armed Forces; in this connection he is also "authorized and directed to make such rules and regulations as may be necessary to carry out the provisions" of that title. 12 U.S.C. § 1748f.

2. Under § 401 of Title IV of the Housing Act of 1950, 12 U.S.C. § 1749, the Community Facilities Commissioner is authorized to make loans to educational institutions of higher learning to finance student and faculty housing and related facilities, and to make loans to hospitals for housing facilities for student nurses and internes. Under § 402, the Commissioner, notwithstanding the provisions of any other law, may inter alia, "prescribe such rules and regulations as may

be necessary to carry out the purposes" of title IV. 12 U.S.C. § 1749a(c).

3. Under the Housing Act of 1937, as amended, 12 U.S.C. §§ 1409, 1410-1411, the Public Housing Commissioner may make loans to State and local public housing agencies to assist in the development, acquisition, or administration of low-rent housing or slum-clearance projects by such agencies (12 U.S.C. § 1409); and may make annual contributions to public housing agencies to assist in achieving and maintaining the low-rent character of their housing projects; alternatively, he may make capital grants to such agencies. (12 U.S.C. §§ 1410-1411). The Public Housing Commissioner may "make such rules and regulations as he may find necessary to carry out his functions, powers, and duties." 12 U.S.C. § 1404a.

4. Under § 102 of the Housing Act of 1949, 42 U.S.C. § 1452, the Urban Renewal Commissioner is authorized to make loans to local public agencies for the undertaking of urban renewal projects; under § 314 of the Housing Act of 1954, 42 U.S.C. § 1452a, he is authorized to make grants to public bodies for developing, testing and reporting on new techniques for preventing and eliminating slums and urban blight; and under the Housing Act of 1956, to make grants for relocation payments to persons displaced by urban renewal projects and

to prescribe rules and regulations respecting such payments, 42 U.S.C. § 1456. Apparently, no express authority for rule-making is provided by these statutes.

5. The Voluntary Home Mortgage Credit Program is authorized by the provisions of Title VI of the Housing Act of 1954, 12 U.S.C. § 1750aa. It is operated by a National Committee of which the Administrator of HHFA is chairman. Its purpose is to help obtain private mortgage credit for FHA-insured and VA-guaranteed loans in areas where there may be a shortage of local capital for, or inadequate facilities for access to, such loans. This assistance is available to minority groups in any area where financing for such housing is not available on terms comparable to those offered others. See U.S. Government Organization Manual, 1960-1961, p. 433. The Administrator is vested with the power, after consultation with the National Committee, to issue "general rules and procedures for the effective implementation" of the program. 12 U.S.C. § 1750hh.

6. FNMA, originally chartered in 1938, pursuant to Title III of the National Housing Act, 12 U.S.C. § 1716, was re-chartered under the Housing Act of 1954, 12 U.S.C. §§ 1701, 1716, and made a constituent agency of FHHA. Its general policies are determined by its Board of Directors, of which

the HHFA Administrator is chairman. The President of the Association is the chief executive officer. Its general function is to provide a financial facility for a secondary market for home mortgages.

As the foregoing shows, there has been conferred upon the HHFA Administrator and the heads of HHFA's constituent units and agencies broad rule-making power. It may be contended that the rule-making power is confined to carrying out the purposes of the various housing acts, which do not specifically deal with questions of racial discrimination in housing. This, however, has not been the administrative interpretation. Rather, the rule-making power has been exercised with respect to some problems of racial discrimination in housing. Thus, following the decisions of the Supreme Court in 1948 in Shelley v. Kraemer and Hurd v. Hodge, supra, holding that neither a state court nor a federal court could lend its aid to the enforcement of racially-restrictive covenants, regulations were issued by the housing agencies to deal with the subject as it arose in connection with federally-assisted housing.

The Federal Housing Commissioner acted with respect to mortgage insurance. It was provided by regulation (see

24 CFR 203.19, 203.24, 203.29) that mortgages must contain a covenant by the mortgagor that until the mortgage was paid he would not file for record any instrument imposing a restriction on the sale or occupancy of the property on the basis of race, color, or creed; that he must certify that he would not execute any agreement, lease, or conveyance imposing any such restriction upon the sale or occupancy of the property; and the mortgagee had to establish that no restriction upon the sale or occupancy of the property on the basis of race, color, or creed had been filed of record subsequent to February 15, 1950. Similar regulations were issued with respect to the one-to-four-family dwelling program (24 CFR 221.29, 221.34, 221.40), the rental housing program (24 CFR 232.16), and other programs. See 24 CFR 241.16, 243.19 243.23, 243.29, 290.8.[22] These regulations, however, do not satisfactorily meet the problem. As stated by the Civil Rights Commission in its report (p. 465):

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> "While the unenforcibility of racial restrictive covenants has undoubtedly increased Negro participation in FHA's insurance programs by making available to them additional existing housing, it has done little in the way of new housing or of apartment units in suburban

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[22] The Veterans Administration has a similar regulation promulgated in 1950.

and outlying areas. There the discriminatory practices of the real estate business, home building industry, and financial institutions continue for the most part unabated. FHA insurance remains available to builders with known policies of discrimination. With the help of FHA financing, all-white suburbs have been constructed in recent years around almost every city. Huge FHA-insured projects that become whole new residential towns have been built with an acknowledged policy of excluding Negroes."

The difficulty with the racial restrictive regulation is that it does not prevent the borrower from refusing to deal with Negroes; it merely prevents him from executing a racially restrictive covenant.

FHA has taken another step of interest in this area. It refuses to insure loans for builders following discriminatory practices in States that have enacted anti-discrimination housing laws. It apparently has not issued any express regulations on the subject. As stated in the Commissioner's 1959 letter referred to in the introductory part of this memorandum, "[t]his policy is disseminated to the public by means of an informational sticker attached to all applications for FHA mortgage insurance in States which have passed anti-discrimination legislation."

FHA has also adopted a "racial equity formula." (See Report of the Civil Rights Commission, pp. 474-475). This policy was formally promulgated and included in 1951 in the

Low-Rent Housing Manual as follows:

> 10 "Programs for the development of low-rent housing, in order to be eligible for PHA assistance, must reflect equitable provision for eligible families of all races determined on the approximate volume and urgency of their needs."

According to the Report, supra, p. 475, while on its face this formula is applicable to all sections and localities of the country, in practice, PHA has applied it only in localities that operate their low-rent housing on a "separate but equal basis" and only there to protect Negro interests.

As the above shows, the housing agencies have themselves regarded their rule-making powers as authorizing them as agencies of the Federal Government to deny their aid to the enforcement of racial covenants, a principle laid down with respect to a federal court in Hurd v. Hodge. This action was presumably taken on the theory that both statute, (R.S. § 1978) and the effectuation of the public policy of the United States required it. We see no reason why in the application of the principle it must be regarded as confined to the three measures which have already been taken relating to racial covenants, state anti-discrimination laws, and equitable occupancy by all races of public housing projects. The adoption of these policies does not mean that others are not equally

available, especially since the existing policies have failed to meet fully the problems of racially discriminatory practices in connection with the several federal housing programs. We do not think that the Executive branch must await the enactment of specific federal anti-discrimination legislation or an adjudication by the Supreme Court that a federal agency cannot lend its aid toward the perpetuation of racial discrimination. Both R.S. § 1978 and the public policy of the United States are not so circumscribed as to warrant the belief that racial covenants alone are encompassed. In implementing State anti-discrimination policies in the housing fields, the housing agencies themselves must be considered as viewing their rule-making powers in the area as vesting them with broader authority. We believe they are correct in so doing, and that they possess the power to take whatever action is necessary to insure that the assistance of the United States will not be extended to those who employ it to the detriment of citizens on the basis of their race, color, or creed.

In determining the scope of administrative rule-making power the standard is whether the agency rule is inconsistent with the statute or is in itself unreasonable or inappropriate.

United States v. Morehead, 243 U.S. 607, 613-614 (1917); Boske v. Commingore, 177 U.S. 459, 470 (1900); and see the Attorney General's opinion of July 2, 1959, on the rule-making power of the Secretary of Labor, 41 Op. Atty. Gen. No. 74, p. 6. Moreover, the fact that the agency statute does not contain either an express or necessarily implied delegation of power to the agency to deal with the subject of a particular rule is not sufficient to establish a lack of power. It may be found in the legislative grant to the agency of general rule-making power. American Trucking Associations v. United States, 344 U.S. 298, 309-312 (1953); 41 Op. Atty. Gen. No. 74, id; 41 Op. Atty. Gen. No. 41 (November 29, 1957). Viewed in the light of these standards, it can hardly be said that it would be beyond the rule-making powers conferred upon the housing agencies for them to deal effectively and fully with questions of racial discrimination.

Finally, in considering the scope of the rule-making power of the housing agencies in the area of racial discrimination, weight must be given to the fact that Congress has had notice for ten years of the restrictive covenant regulations promulgated by the agencies and has not challenged the authority of the agencies to act in this regard. In this

posture Congress may reasonably be regarded as having accepted as valid the authority of the housing agencies to act in the field of racial discrimination. And, as is shown below, the rejection of anti-discrimination amendments by Congress should not properly be viewed as limiting this authority.

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III.

THE SIGNIFICANCE OF THE REFUSAL TO ENACT ANTI-DISCRIMINATION PROVISIONS IN HOUSING LEGISLATION

On three different occasions[23] amendments designed in one form or another to deal with the problems of racial discrimination in the national housing program have been introduced on the floor of the Congress and have failed of passage. In this posture, consideration must be given to the circumstances surrounding the congressional action, or more properly, inaction, in order to determine its relevance to the question of Executive branch authority to deal with the subject.

1. On April 21, 1949, Senator Bricker of Ohio proposed an amendment to the then pending National Housing Act of 1949, which read as follows (95 Cong. Rec. 4849):

> "In recognition of the fact that public policy requires equality of treatment of all people and prohibits discrimination or segregation on account of race, color, creed, national origin, or ancestry in regard to public housing, every contract made pursuant to this act for annual contributions for any low-rent housing project initiated after March 1, 1949, shall provide that the housing

23/ 81st Cong., 1st Sess. (1949); 83rd Cong., 1st Sess. (1953), 83rd Cong., 2d Sess. (1954).

project to which the contract refers shall be operated without discrimination or segregation. Any person who in the management or operation of such housing discriminates or attempts to discriminate against any person, family, or group of people on account of race, creed, or color shall be guilty of a violation of this section and shall be punished by a fine of not more than $1,000 or imprisonment for not more than 1 year, or both such fine and imprisonment. Any citizen or organization may enjoin the violation of this section in any court, State or Federal, of competent jurisdiction."

Senator Douglas of Illinois opposed the amendment, stating that its purpose was to alienate the votes of some 25 to 30 Southern Senators who would be compelled to oppose the entire housing bill should it contain an anti-discrimination amendment. He said (Id., 4851):

"What would happen if we voted for and hence adopted the Bricker amendment? The answer is very simple. It would inevitably defeat the whole housing bill itself. I think every Member present in this Chamber knows that to be a fact, and knows why it is so. But it needs to be made plain to the people of the country.

"In the first place, it would compel virtually all of the some thirty southern and border State Senators to vote against the housing bill as a whole, once this amendment were included in it. Many of them would do this with a heavy heart, for they believe in this bill and want to see it passed. But their sentiments and those of the people whom they represent are so intense

on this question that if the choice is presented between added housing with the abolition of segregation in the housing projects of the South and no housing at all, they will choose no housing. We may deplore their feelings, as I personally do, but let us judge not, lest we ourselves be judged.

"Let me emphasize the fact that from all I can learn a large majority of the southern Senators are in favor of the bill in its present form without the Bricker amendment."

In the course of debate, it was pointed out that various Negro groups were opposed to the Bricker amendment because they believed it was designed to impede the passage of any public housing bill (Id., 4853). However, the NAACP supported the amendment on the ground that "We would rather go down fighting here and now and not have any housing, than to compromise in this fashion." (Id. 4854, 4857)

On the question of the implication to be drawn from failure to pass the anti-discrimination amendment, the following exchange took place (Id., 4855-4856):

"Mr. IVES. The Senator from New York does not want to enter into any debate that would in any way do damage to the bill itself, because the Senator from New York favors the bill, but the Senator from New York would like to ask the distinguished Senator from Illinois a question which I think, is rather far reaching. Assuming the pending amendment comes to a vote and is rejected, will not its rejection be at least an

implication, if not a direct indication, that the Senate of the United States condones and approves segregation and discrimination in public housing?

"Mr. DOUGLAS. I do not believe that any such implication or inference can be drawn. I do not believe in segregation in public housing. We are moving away from it in the North, and we shall continue to move away from it if this bill is passed. It is simply that we who oppose this amendment place the cause of existent housing as the most important thing, and we do not want to endanger it by adopting a provision which will throw the whole South into opposition to the measure. I think, as a northerner, I perhaps can speak on this subject, because, without indulging in mock heroics in the slightest, I know that I am taking a political hazard in making this speech."

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"Mr. TOBEY. Referring to the remarks of our distinguished friend from New York, I ask this question: In view of the fact that the court always looks at the committee hearings and the record of debate on the floor in considering legislation, will not any fair-minded person examine the record and see the motivating purpose behind the legislation?

"Mr. DOUGLAS. That is the reason I rose today to speak. Some persons have been telephoning me all day long, saying, 'Do not speak on this issue, because whatever you say will be misunderstood and used against you.' But I felt it was important to make the issue clear. Every Senator knows what the issue is, but the public does not know, and the courts may not know what the issue is. That is why I rose and, in my humble and incomplete way, tried to make clear what is the real issue."

In addition to Senator Douglas, Senators Taylor and Morse explained the practical political reasons for their opposition to the amendment (Id., 4857-4858).

The amendment was defeated by a vote of 49 to 31 (Id., 4860).[24]

The debate in the House of Representatives on an analogous anti-discrimination amendment[25] introduced by Representative Marcantonio that year was along the same lines (Id., 8656-8658), the measure being defeated by a vote of 173 to 122 (Id., 8658).

24/ Senator Bricker immediately offered another amendment identical with the defeated measure but omitting the word "segregation" and leaving only a prohibition against "discrimination." Id., at 4861. This was defeated 46 to 32. Ibid.

25/ "Sec. 503. Prohibition against discrimination: No person possessing all other qualifications which are or may be prescribed by law shall be disqualified for admission, rental, or tenancy through discrimination by segregation or otherwise, in any housing developed under this act, by reason of the race, color, creed, or national origin of the person otherwise qualified; and any officer or other person charged with any duty in the admission, rental, or tenancy of projects provided for under this act who shall exclude or discriminate against any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor and be fined not more than $5,000.

"Every contract or commitment entered into by the Government or any agency or instrumentality thereof as authorized herein with regard to any housing provided for in this act shall contain a provision prohibiting discrimination by reason of race, color, creed, or national origin, and shall carry a warning of the penalty of this act for violation thereof."

2. In February 1953, Representative Roosevelt of New York introduced an amendment to Section 2(a) of the National Housing Act to provide that:

> " . . . any insurance which may hereafter be granted under this section shall be limited to such loans, advances of credit and obligations purchased, in connection with which the lenders, borrowers, owners, obligors and obligees have first undertaken in writing that lettings, rentals, leases, uses, occupancies, purchases and sales of properties, including land and buildings, shall be in no way restricted or limited to persons on account of race, color, creed or place of origin."

Opposing the amendment, Representative Wolcott stated (99 Cong. Rec. 1429):

> "It would be idle for us to try to legislate antidiscrimination policies on any bank or lending agency. That is the foundation upon which you have got to build this. That is not to be legislated upon. It cannot be legislated upon. It is a matter of social education perhaps, overcoming discrimination in the minds of the lending institutions, if it exists."

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> "I would think that probably the gentleman might proceed through his State bank laws, through his city ordinances, if there is discrimination upon the part of any public service institution, be it financial or otherwise. This is not the place to put in an antidiscrimination provision, because, as I have said, it follows, ipso facto, that if a loan is made it shall be insured. So we would not attempt to tell a bank whether they would or would not make a loan regardless of a

man's race or color or religious belief."

In addition, the following exchange took place between opponents of the amendment (Ibid.):

> "Mr. McDONOUGH. Would not the gentleman agree that in the absence of any such language, the bill is more liberal than if the language were placed in there?
>
> "Mr. WOLCOTT. I would think so. As far as I know, there has not been any discrimination in this program by any bank or lending institution. Surely there has not been any discrimination on the part of the FHA in limiting the insurance or discriminating against even lending institutions, to say nothing about the individual."

Representative Powell denied that the amendment constituted "piecemeal legislation" inappropriate for dealing with a larger problem, and supported it in general terms. Ibid. The amendment was defeated by a vote of 49 to 16.

3. Once again, in April of 1954, an anti-discrimination amendment to a housing bill was proposed. Representative Powell offered the following amendment (100 Cong. Rec. 4487):

> "The aids and powers made available under the several titles of this act are not to be conditioned or limited in any way on account of race, religion, or national origin of the builders, lenders, renters, buyers, or families to be benefited."

He asserted that the program was currently being administered in a discriminatory manner (Ibid.):

10 "The way the act is now set up it is not administered fairly. This is a confession that we have received from previous administrators and from the new one."

Representative Javits offered a substitute amendment, which he believed would accomplish the purpose of the Powell amendment in a different manner. His amendment read as follows (Id., 4487):

10 "The Federal Housing Commissioner shall make such rules and regulations in connection with his functions under the National Housing Act as may be necessary to cause the issuance of commitments for mortgage insurance under the titles of the act to give adequate consideration to the housing needs of minority groups without discrimination or segregation not now adequately supplied by new or sound or reconditioned existing housing."

He claimed that "[m]inority groups are not being adequately housed and the fault is lack of mortgage money." (Ibid.) Representative Powell supported the Javits amendment on the floor of the House, as did Representatives Multer and Pelly. Both proposals were defeated (Id., 4488.)/26/

During the course of Senate consideration of the 1954 housing bills, Senator Maybank of South Carolina viewed racial

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4/ 26/ The Powell amendment -- 113 to 74; The Javits amendment -- 110 to 87.

discrimination in housing in a somewhat unique manner. He proposed an amendment which would have terminated all public housing after 1954 on the ground that the refusal of the Supreme Court to review a lower court decision[27] that segregation in housing in a public housing project by municipal ordinance violated the Fourteenth Amendment, amounted to judicial outlawing of the "separate but equal doctrine" in public housing. 100 Cong. Rec. 7618.

It does not seem appropriate to conclude from the circumstances attending the defeat of the 1949 anti-discrimination amendment that Congress thereby intended to deprive the housing agency of discretion to deal with questions as the amendment would have directed. The Housing Act of 1948 (62 Stat. 1283) had already conferred general rule-making powers to be exercised in the discretion of the Administrator of the HHFA (12 U.S.C. § 1701c(a)). The 1949 amendment merely would have had the effect of directing the manner in which that discretion should be used. The defeat of the amendment in the context of the complex political motivations existing in 1949 should not be regarded

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44/ 27/ Banks v. Housing Authority, 120 Cal.App. 2d 1, 260 P.2d 669 (1953), cert. denied, 347 U.S. 974 (1954).

as fettering the exercise of the earlier existing rule-making power.

The 1953 rejection of Representative Roosevelt's amendment relating to FHA-financed housing is similarly inconclusive. There existed uncertainty regarding the effectiveness of his approach and its need outside of New York. The absence of any extended floor debate in connection with the rejection of anti-discrimination housing amendments in 1954 makes it difficult to ascertain the reasons therefor. Further, the rule-making power had been exercised in this area prior to 1953 by the adoption of the restrictive covenant policy.

It is plain that the rejection by Congress of legislation cannot be viewed as equivalent to the enactment of legislation of an opposite tenor. In United States v. Southeastern Underwriters Association, 322 U.S. 533 (1944), the Court considered the question whether the insurance business was exempted from the Sherman Act of 1890. It was argued that weight must be accorded the fact that several times Congress had refused to pass legislation regulating the insurance business. Mr. Justice Black, speaking for the Court, stated (pp. 560-561):

10 "The most that can be said of all this evidence considered together is that it is

inconclusive as to any point here relevant. By no means does it show that the Congress of 1890 specifically intended to exempt insurance companies from the all-inclusive scope of the Sherman Act. Nor can we attach significance to the omission of Congress to include in its amendments to the Act an express statement that the Act covered insurance. From the beginning Congress has used language broad enough to include all businesses, and never has amended the Act to define these businesses with particularity. And the fact that several Congresses since 1890 have failed to enact proposed legislation providing for more or less comprehensive federal regulation of insurance does not even remotely suggest that any Congress has held the view that insurance alone, of all businesses, should be permitted to enter into combinations for the purpose of destroying competition by coercive and intimidatory practices."

In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), the Court struck down presidential seizure of the nation's steel mills in the absence of statutory or constitutional authority for such action, on the ground, among others, that not only was the seizure technique to resolve labor disputes unauthorized by Congress, but that "prior to this controversy, Congress had refused to adopt that method of settling labor disputes" (p. 586), and had selected another alternative method. Youngstown is distinguishable. In contrast to Youngstown, Congress has here refused to deal at all in the housing statutes

with the problem of racial discrimination; it did not, however, as in Youngstown, select another competing method for dealing with the problem. Rather, the circumstances present here are similar to those involved in Gemsco, Inc. v. Walling, 324 U.S. 244 (1944). There the Administrator of the Wage and Hour Division of the Department of Labor by order prohibited industrial homework as a necessary means of making effective a minimum wage order for the embroideries industry. This order was challenged on the ground, among others, that Congress had failed to adopt in the original act (the Fair Labor Standards Act of 1938) a section expressly including homework among other specified practices which the Administrator was authorized to restrict or prohibit. Justice Rutledge, writing for the Court, said (p. 263):

10 "* * * It is mere negative inference drawn from the bare fact that the illustrative parenthetical clause [dealing with homework] was omitted from the final conference draft which became the Act. Nothing in the committee or conference reports or in the debates indicates a purpose to put homework, or the other practices enumerated at one time or another within the parentheses, beyond the purview of the Act or of the Administrator's power wherever these practices are shown to prevent achievement of the statute's ends."

In addition, the effect of the failure of Congress to pass amendments authorizing the homework restrictions in subsequent

years was also urged on the Court as a basis for the invalidity of the Administrator's order. As to this argument, Justice Rutledge stated (p. 265):

> "* * * Congress' failure in 1939 and 1940 to adopt an amendment proposed by the Administrator to authorize explicitly prohibition of homework cannot operate retroactively, as is urged, to give the statute enacted in 1938 a different meaning from what it then acquired."

Thus, it would appear that congressional failure specifically to adopt directions concerning the details of administration of a broad statute is not to be construed as precluding the adoption by the agency under authority which it already possesses of policies which Congress merely failed to make compulsory.

In a lower State court case (Ming v. Horgan, 3 Race Rel. Rep. 693 (Superior Court, Cal., 1958)) it was held that real estate agents and builders of housing being sold under mortgage insurance granted by FHA and VA were civilly liable to a Negro to whom they refused to sell a house on the basis of his race. In so doing, the Court rejected the argument that under the federal housing statutes there was no requirement of non-discrimination because Congress had in fact refused to enact such a provision; the court stated (3 Race Rel. Rep., at 698):

10 "If it be objected that Congress refused to so ordain, it must be replied that Congress could not ordain otherwise--the law does not permit it to differentiate between races, and whether it expresses that limitation in so many words or not, those who operate under that law and seek and gain the advantage it confers are as much bound thereby as the administrative agencies of government which have functions to perform in connection therewith. Congress must have intended the supplying of housing for all citizens, not just Caucasians--and on an equal, not a segregated basis. If the courts were to hold otherwise and accord to builders and realtors the unfettered freedom of contract here contended for, the constitutional guaranties of equal protection and non-discrimination would be accorded only secondary importance and they would have to recede from a good deal that has been laid down in recent years as fundamental doctrine. Even though it may be thought our highest courts can and would do that, this court is not at liberty to do so, but is bound to follow the principles and interpretations announced by those courts as correct expositions of the law."

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IV.

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THE EXECUTIVE ORDER RELATING TO RACIAL DISCRIMINATION BY GOVERNMENT CONTRACTORS AS A PRECEDENT

In Executive Order No. 10479 of August 13, 1953, establishing the Government Contracts Committee, President Eisenhower declared the policy of the Federal Government "to promote equal employment opportunity for all qualified persons employed or seeking employment on Government contracts because such persons are entitled to fair and equitable treatment in all aspects of employment on work paid for from public funds." This order reaffirmed existing Executive orders that "require the Government contracting agencies to include in their contracts a provision obligating the Government contractor not to discriminate against any employee or applicant for employment because of race, creed, or color." See also Executive Order No. 10557 of September 3, 1954, amending the contract provision.

Both the Commission on Civil Rights in its 1959 Report (p. 457) and the Civil Rights Division in its memorandum of April 1960 (p. 23), refer, without supporting argument, to

these Executive orders as a legal basis for a similar order in the housing field. An examination of the Department's files (File No. 144-01-13, Section 1 E) discloses a letter dated October 22, 1953, from Deputy Attorney General Rogers to the Executive Director of the President's Committee on Government Contracts transmitting a "Report by Subcommittee on Revision of the Contract Clause on the Power of the President to Require the Inclusion in Government Contracts of the Nondiscrimination-in-Employment Provision," dated October 19, 1953. It appears that this report was prepared by this Office and adopted by the President's Committee on October 29, 1953. The report of the Subcommittee was signed by its members, including its Chairman, the Deputy Attorney General. Apparently it was not released or published by the Committee. A copy of the report is attached. For convenience, a summary description follows:

(a) The history of nondiscrimination clauses in Government contracts goes back to 1941. Section 1 of Executive Order No. 9346 of May 27, 1943, which reconstituted the Fair Employment Practices Committee (FEPC), directed the

inclusion of such a provision in all Government contracts. Subsequent Executive orders were directed to specified agencies in 1951 (Departments of Defense, Commerce, Agriculture, and the Interior; the Atomic Energy Commission, Government Printing Office, General Services Administration, and Federal Civil Defense Administration).

(b) The provision is sustainable "under the discretionary authority vested by Congress in the executive, and the discretionary authority inherent in the executive in the absence of congressional prohibition, to determine the provisions of the contracts into which the government enters and to enforce them". The action of Presidents Roosevelt, Truman, and Eisenhower in the area "is in keeping with the national policy for the fullest utilization of available manpower, and against racial and religious discrimination as expressed in the Constitution, laws, and judicial decisions; and the action taken has been approved and ratified by the Congress."

(c) The provision is supported by the opinion of the Supreme Court in Perkins v. Lukens Steel Co., 310 U.S. 113

(1940), which sustained the power of Congress in the Public Contracts Act to direct the Secretary of Labor to determine the prevailing minimum wage to be paid employees of Government contractors engaged in the manufacture or furnishing of materials covered by a Government contract. The Court observed that "[L]ike private individuals and business, the Government enjoys the unrestricted power * * * to fix the terms and conditions upon which it will make needed purchases" (p. 127), and that the Act did "not represent an exercise by Congress of regulatory power over private business or employment" (p. 128). The First War Powers Act of 1941 appears to furnish statutory support for the nondiscrimination clause. In 1953, in extending the provisions of that act, the House Judiciary Committee referred with approval to the delegation by the President, through Executive orders, of the powers conferred upon him by the Act, each of which orders contained the nondiscrimination clause.

(d) Further statutory support is to be found in the Defense Production Act of 1950 and the amendments thereto

announcing a national policy of "expansion of productive facilities beyond the levels needed to meet the civilian demand." The act authorized the President to make such rules, regulations, and orders as he deemed necessary or appropriate to carry out its provisions. The elimination of discrimination in employment could be properly regarded by the President as necessary for the expansion of productive facilities.

(e) Additional statutory authority is found in the Federal Property Act of 1949, which conferred "upon the President and the heads of the contracting agencies of the government broad discretion in the fixing of contract terms and the determination of who are responsible bidders and contractors."

(f) Congress had in effect ratified, or at least acquiesced in, the practice of including the nondiscrimination clause in Government contracts.

(g) Apart from statutory support, it is established that the right to equal treatment before the law "is basic to the free, democratic way of life established and protected by the Constitution of the United States." This

doctrine embraces an exertion of governmental power of a racially discriminatory nature. In Steele v. Louisville and Nashville R. Co., 323 U.S. 192 (1944), it was held that a private association, a labor union, which has been given power by Congress to bargain for a craft had "a constitutional duty" to discharge its functions without discriminating against Negroes.[8] Numerous other cases

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8/ A careful reading of the Steele case does not support this proposition. The Court did not reach the constitutional question presented by the petitioner. See 323 U.S., at 198-199. The holding of the Court was limited to the construction of the statute: "* * * we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority." (p. 199). "We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them; * * * the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations." (pp. 202-203). It was Mr. Justice Murphy who, in his concurring opinion (pp. 208-209), thought that the constitutional issue should be squarely faced; in his view, the statute would be unconstitutional if interpreted to permit racial discrimination.

hold that private discriminatory conduct is violative of the constitutional protection involved when that conduct is assisted or rendered effective by an assertion of state power. The fact that the public action operates only indirectly to support the discrimination makes it no less real and the subject of relief, Anti-Fascist Committee v. McGrath, 341 U.S. 123, 141 (1951). Nor, is it less real or permissible, where, as in this case, it is the subject of avoidance by anticipatory administrative action.

(h) Since the right to be protected from racial discrimination in employment is derived from the Constitution and from statutes which contain no specific directions to the President, he is not limited to any specified means in accomplishing the constitutional objective. In re Neagle, 135 U.S. 1, 64 (1889); 22 Op. A.G. 13, 26 (1898).

On the basis of the report, the statutory support for the President's actions in requiring a nondiscrimination clause in Government contracts would appear to be somewhat stronger than the support which can be enlisted for similar

action of the President in the housing field. For example, the termination of discrimination on government contracts could be said to be directly related to the objective of expanding productive facilities contained in the Defense Product Act of 1950. It will also be noted that the 1953 action of the President merely reaffirmed the inclusion of a nondiscrimination clause in Government contracts and was not a new policy. It was a continuation of Executive policy that had its beginning in 1941 and which, according to the report, had at least the tacit approval of Congress.

While R.S. § 1978 does furnish some support for the action here under consideration, there is no other express statutory authority which would support the action. Further, only to the extent that it can fairly be said that Congress has acquiesced in the authority heretofore exercised by the housing agencies, beginning in 1950, to deal with problems of racial discrimination, is there a comparable history. However, there is no history to back up Executive action of the broad nature now contemplated.

To the extent that the constitutional argument for the President's authority to deny Government contracts to those who make racial distinctions in employment practices is valid, it would seem equally to justify the President's authority to deny the benefits of federal aid to those who use it in a racially discriminatory manner. In any event, it is also arguable that just as the Railway Labor Act, as construed by the Supreme Court in the Steele case, footnote 28, supra, did not permit it to be used to discriminate unfairly against minorities, the housing statutes may be appropriately construed as not authorizing their employment in a racially discriminatory way. On this basis the President may properly direct the housing agencies to administer the statutes to the end that the federal aid authorized by Congress will not be employed to perpetuate, in the words of the Supreme Court, "irrelevant and invidious" discriminations based on race. 323 U.S., supra, at 203.

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V.

THE SIGNIFICANCE TO THE PRESENT QUESTION OF THE LAND-GRANT COLLEGES PROBLEM

The question has been raised as to the significance to the present question of the failure of the Executive branch to discontinue federal aid to state land-grant colleges maintaining racially discriminatory practices in the admission of students. The latter question was raised with this Department by the Department of Health, Education, and Welfare in July 1955. The matter was submitted in the form of a letter to Mr. Rankin, then in charge of the Office of Legal Counsel, from Assistant Secretary Roswell Perkins. The question put was whether under the proviso to § 1 of the Second Morrill Act of August 30, 1890, 26 Stat. 417, 7 U.S.C. § 323,[29] considered in the light of the unconstitutionality of racial segregation in public education, the Secretary of Health, Education, and Welfare was entitled to certify the grants

[29] Provided, That no money shall be paid out under this act to any State or Territory for the support and maintenance of a college where a distinction of race or color is made in the admission of students, but the establishment and maintenance of such colleges separately for white and colored students shall be held to be a compliance with the provisions of this act if the funds received in such State or Territory be equitably divided as hereinafter set forth ***."

authorized by the act on the same terms as in the past.[30]

Under date of January 26, 1956, Attorney General Brownell transmitted to the Secretary of Health, Education, and Welfare, a memorandum prepared by this Office concluding that he was precluded from further certification of payments for the benefit of land-grant colleges following racially discriminatory admission practices. The Attorney General stated that he agreed with this conclusion. HEW then asked leave to submit a memorandum on the question which it had not theretofore done. In April 1956, it submitted an 83-page memorandum entitled "The Second Morrill Act and the Segregation

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30/ The Second Morrill Act authorizes annual appropriations to each State and Territory for the more complete endowment and maintenance of agricultural and mechanical arts colleges established by them in accordance with the provisions of the First Morrill Act of July 2, 1862, 12 Stat. 503, 7 U.S.C. §§ 301-308. These are the so-called land grant colleges. The act further provides that on or before July 1 of each year the Secretary of Health, Education, and Welfare (to whom administration of the program had been transferred) shall certify to the Secretary of the Treasury as to each State and Territory whether it is entitled to receive its share of the annual appropriation "for colleges, or of institutions for colored students." If a certificate is withheld by the Secretary of Health, Education, and Welfare, he must report the facts and reasons therefor to the President, and the State or Territory affected may appeal to Congress; if Congress does not direct payment the amount shall be covered into the Treasury. 7 U.S.C. § 326.

Cases." This memorandum took the position that, despite the Segregation Cases, the provisions of § 1 supra, regarding separate colleges for white and Negro students, were constitutional. In essence, the argument was that the Segregation Cases were limited to the constitutionality of statutes dealing directly with the admission of students; that "constitutional rights of individuals are affected by the denial of admission, and not by a clause in a Federal aid statute which expressly permits segregated colleges to receive Federal funds, as well as other colleges."

On the basis of this memorandum, and upon the personal urging of the Secretary of Health, Education, and Welfare, Attorney General Brownell agreed to withdraw his letter of January 26, 1956, and the accompanying memorandum, pending study of the HEW memorandum. This Office then undertook such a study. Thereafter, a draft opinion for the Attorney General was submitted to Mr. Rankin reaffirming the original position taken. This draft opinion expressed the view that, although the Second Morrill Act did not directly require or permit racial discrimination, a serious constitutional issue arose if it should be presently viewed as a continuing exercise of governmental power sanctioning, through the device of

federal aid, public school admission policies in violation of the Constitution. It was found unnecessary, however, to reach the question of constitutionality. This was on the theory that it was possible to construe the statute as expressing an intention on the part of Congress to permit funds for separate colleges for white and Negro students only so long as it was constitutional for a State to maintain such colleges. Cf. Steele v. Louisville & Nashville R. Co., 323 U.S. 192 (1944), supra. The draft expressly stated that the opinion was directed and limited to the particular Morrill Act question and was not to be taken as deciding any other question or as reflecting the views of the Attorney General on any matters not presented by the particular language of the Morrill Act. Mr. Rankin took office as Solicitor General prior to completion of his review of the draft opinion. A copy is attached.

Under date of April 16, 1957, Assistant Attorney General W. Wilson White, Mr. Rankin's successor, submitted to Attorney General Brownell a recommended opinion concluding, that until Congress directed otherwise, HEW might continue to certify the grants authorized by the act on the same terms as in the past. This opinion took the position that, while no college

supported by public funds could lawfully exclude students on the basis of their race or color, Congress did not intend that HEW as part of its certifying functions should determine whether in fact a particular state, despite the absence of any legal basis therefor, was attempting to enforce racially discriminatory admission policies in its colleges. This, it was said, was a judicial matter to be determined at the suit of aggrieved students. The opinion did not deal with the constitutional issues as such. Mr. White, in transmitting this recommended opinion to the Attorney General, stated that in his view the position was consistent with that of the President on the problem of amendments to the Administration school aid bill--"in a nutshell, he [the President] said that the problem of financial grants to schools should not be complicated by the desegregation question, which is handled elsewhere." Attorney General Brownell took no action on the opinion submitted by Mr. White. There are attached copies of Mr. White's memorandum to the Attorney General and of the recommended opinion.

When Attorney General Rogers took office, he requested Assistant Attorney General Wilkey, Mr. White's successor, to examine the question of the Morrill Act as well as the

similar nondiscrimination provisions of the Hill-Burton Act and related statutes establishing programs for federal assistance to the States in the construction of hospital and medical facilities. In response to this request, Mr. Wilkey transmitted to the Attorney General a staff memorandum of this Office dated February 2, 1959, a copy of which is also attached. The memorandum pointed out that, despite the invalidation of the separate but equal doctrine in the field of public education, Congress had nevertheless incorporated provisions of that tenor in subsequent hospital construction legislation. It was stated that this would seem to weaken "the congressional intention" argument of the draft opinion that had been submitted to Mr. Rankin. It was believed that "delicate considerations" of a fundamental character were involved in determining the unconstitutionality of such provisions. It was stated that the resolution of the question from a constitutional standpoint was difficult and the answer uncertain. In this posture it was said that probably "the safest course" was for the Attorney General to avoid an expression of opinion if possible. The Attorney General has never issued any ruling, and, so far as we know, HEW has continued its past practices with respect to the Second Morrill Act and the hospital construction statutes.

The failure of the Executive branch to direct the discontinuing of Federal aid to land-grant colleges and to hospital and medical facilities following racially-discriminatory practices cannot be properly advanced as representing an Executive determination of lack of power in the field of housing. In the first place, no determination was made as to whether the power existed in the former areas; the most that can be said is that no definite conclusions were reached on the matter. Secondly, there is a plain and material distinction between the two situations. In the case of the land-grant colleges and in the case of hospitals and medical facilities, Congress had specifically provided for the payment of funds even if there existed racial discrimination on the part of the beneficiaries. Moreover, as to hospitals and medical facilities it had gone so far as to incorporate such provisions even after the "separate but equal" doctrine had been repudiated by the Supreme Court in the field of public education, and other courts, following the lead of the Supreme Court, had extended the repudiation to a wide variety of public facilities. Finally, the housing statutes, unlike the statutes involved in the land-grant college and the hospital situation, do not

specifically cover the problem of racial discrimination. Accordingly, it cannot be said that the question in both areas is to be governed by the same considerations and that a determination in the one case must control the other.

13 VI.

FORM AND CONTENT OF PROPOSED PRESIDENTIAL ACTION

Presidential action may take the form of an Executive order, a proclamation, or a directive, depending on the circumstances. In this instance it is believed that an Executive order would be best suited to accomplish the objectives sought. Because of our lack of familiarity with the practical problems involved in the administration of the housing programs, we do not feel qualified to do more than to offer tentative suggestions as to the details of any Executive order that may be issued on the subject.

The Civil Rights Commission in its Report (p. 537) states that the President should take direct action "in the form of an Executive order on equality of opportunity in housing * * *. The order should apply to all federally assisted housing, including housing constructed with the assistance of Federal mortgage insurance or loan guaranty as well as federally aided public housing and urban renewal projects." The Civil Rights Division in its memorandum (pp. 30-32) spells out the provisions of a proposed

order.[31] These provisions may be summarized as follows; our comments follow each item:

(1) The President should first announce that "in accordance with the Constitution and the declared policy of Congress,"[32] the housing statutes are to be administered so as to insure equal opportunity for all persons to enjoy their benefits "without discrimination based on race, color, religion, or national origin."

While we are in general agreement with the substance of the above, it seems to us that in the initial recitations of the order no reference should be made to the President's authority. This should be inserted immediately preceding the directory provisions of the order. Note should be taken in

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[31] It states that the proposed order "is substantially modeled after a proposal by the American Jewish Congress," and that the AJC order "in turn, is based upon a combination of the provisions of the Executive orders dealing with discrimination in employment on Government contracts and with equality of treatment and opportunity in the Armed Forces. See Executive order 10479, August 13, 1953; Executive Order 10308, December 5, 1951; Executive Order 10557, September 3, 1954; Executive Order 9981, July 26, 1948."

[32] Reference is made to 42 U.S.C. § 1982, supra, and 42 U.S.C. § 1441. In the latter, Congress declared that "the general welfare and security of the nation require * * * the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family * * *."

this connection of Executive Order No. 10479 of August 13, 1953 (3 C.F.R. (1953 Supp.) 97), establishing the Government Contract Committee. Moreover, it is not believed desirable in the order itself to refer to any specific statutory authority. It should be sufficient in the circumstances to use substantially the following language:

> "NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, it is ordered as follows: * * *."

We also recommend that the policy statement preceding the directory provisions should use more general language along the following lines:

> "WHEREAS it is in the national interest that discriminations on account of race, color, creed, or national origin should be terminated as rapidly as possible; and
>
> "WHEREAS it is the policy of the United States Government to promote by all appropriate means the termination of such discrimination; and
>
> "WHEREAS there now exists in some areas a policy of discrimination on account of race, color, creed, or national origin with respect to housing programs assisted by the United States Government; and

10 "WHEREAS in R. S. § 1978, 42 U.S.C. § 1982, Congress has declared that all citizens of the United States shall have the same right as is enjoyed by white citizens to purchase, lease, sell, hold, and convey real property:

10 "NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, it is ordered as follows:

10 "* * * *."

4 (2) The President should direct that measures should be taken to prevent discrimination by agencies of the Federal Government, agencies of State and local governments operating housing assisted by the Federal Government, and private persons, corporations, and other agencies in the housing industry receiving assistance from the Federal Government directly or indirectly, whether in the form of subsidy, loan, grant, mortgage insurance, or otherwise.

(3) The President shall direct each housing agency to adopt appropriate regulations to carry out the non-discrimination policy.

It is believed that the substance of these might be better expressed in section 1 of the order in the following language:

"Section 1. The head of each agency of the Government administering a housing program shall issue appropriate rules, regulations, and directives the effect of which shall be to deny thereafter Government assistance directly or indirectly, and whether in the form of subsidy, loan, grant, mortgage insurance, guaranty, or otherwise, to any public agency, person, firm, or corporation which will utilize such assistance in a manner that will discriminate against any person on account of his race, color, creed, or national origin. Such rules, regulations, and directives shall require every agency, person, firm, or corporation to agree in writing, prior to obtaining assistance or benefits, that it will not discriminate against any person in the sale or rental of any housing which is the subject of the application for assistance or benefits."

(4) The President shall establish a Committee on Discrimination in Housing, to be composed of housing and racial

experts, and to include at least one representative from HHFA, from VA and from Justice.

(5) The Committee shall study the rules, procedures, and practices of all housing agencies, prepare an educational program, and make periodic reports to the President.

(6) The Committee shall direct all Federal agencies to cooperate with the Committee and to furnish it with information and assistance it may need.

There is some question as to the desirability or need for a supervisory committee in this limited field. The housing agencies can probably perform the tasks assigned to the committee. It may be desirable, however, to require the housing agencies to submit their proposed regulations to the Attorney General for review and approval and to require them to report annually to the President on administration of the Executive order.