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4 MEMORANDUM FOR THE ATTORNEY GENERAL

4 Re: Use of executive authority to deny federal funds to institutions of higher learning which discriminate among applicants for admission.

This memorandum is in response to your request for a brief discussion of the legal basis for presidential authority to deny federal funds to institutions of higher learning which discriminate among applicants for admission and the extent of the actual impact of such a program. We have concluded that it is probably within presidential authority to require that federal funds to both public and private institutions be denied under existing programs if the recipients of such funds discriminate in their admissions policy. In addition, it would appear that since the amount of such federal funds presently expended in the 17 southern states is well in excess of $100,000,000 the potential impact of the program is large. However, the great bulk of the recipients of such funds are either public institutions which constitutionally are forbidden to discriminate or private institutions which do not in fact discriminate among students applying for admission. At the same time considerable sums of money undoubtedly are being expended at schools which, while they may deny that they discriminate, do not in fact have any Negro students.

(1) Legal Basis--Federal funds to educational institutions are expended under a variety of statutes, each using

somewhat different statutory language to guide the administration of the program. The most important programs in terms of dollars are (a) several programs administered by the Department of Health, Education, and Welfare, especially (i) funds for support of land grant colleges, (ii) funds in support of scientific research and education activities, (iii) a number of special training programs particularly in the public health field, (iv) programs for training in language and mathematics, especially for training qualified teachers; (b) funds administered by the Department of Agriculture for agricultural research and agricultural extension work; (c) the college housing program administered by HHFA in which loans are made for construction of housing and other educational facilities; (d) Atomic Energy Commission programs for research and training; (e) research programs administered by the National Science Foundation; and (f) research grants administered by the Department of Defense.

With the exception of the provisions of the Morrill Act with respect to the land grant college support, there is no explicit reference in any of the statutes to the problem of discrimination. The Morrill Act, which became law in 1890, requires distribution within states on an "equitable" basis, and explicitly approves the "separate but equal" doctrine which was not rejected by the United States Supreme Court until 1954. Today, of course, distribution of funds in accordance with this principle would be in violation of the Constitution.

Public institutions of higher learning are not permitted by the Constitution to discriminate among applicants for admission; in colleges and universities "all deliberate speed" means immediate integration. This does not, however, require the Federal Government in the administration of federal programs to police the compliance of public institutions run by the states and municipalities, nor would it make federal grants to such institutions which in fact continue to discriminate necessarily unconstitutional. It would be possible for the Federal Government to assume without investigation that all public institutions were in compliance with constitutional requirements.

At the same time it would appear to us to be within the executive authority, unless explicitly forbidden by Congress, to require that those administering grants in contracts assure themselves that public institutions were in fact complying with the Fourteenth Amendment, and to withhold federal funds if there was reasonable evidence that this was not the case. Indeed, once the Federal Government has embarked upon a program which investigates such compliance, it is arguable that it must withhold funds if it finds in fact that discrimination exists within such institutions, provided only that the funds involved are in support of the institution. Since most federal programs are for special training perhaps it could be argued that the Federal Government was not in fact supporting such institutions in those cases, but it should be noted that once such a program is commenced the argument that the Federal Government is constitutionally required to withhold funds is dure to be made. For this reason it may be hard to make exceptions to a policy of nondiscrimination in the case of public institutions. Furthermore, while there are obvious legal and factual distinctions between higher and lower education, it would not be possible to avoid all the implications of such a program for analogous programs with regard to public schools.

There is no constitutional requirement that private institutions refrain from discrimination in their admissions policy. Therefore, in this case, the basis for the exercise of presidential authority would rest upon the proposition that the general purpose of federal programs in support of education is related to the federal interest in insuring a trained and skilled population, particularly for purposes of national defense, and that this objective is not being promoted if the funds are used in support of institutions which exclude important parts of the population from the benefits of higher education. In addition, the Federal Government should not expend monies contributed by all taxpayers for programs in which the benefits are available only to the white population.

The legal basis for the President adding conditions not specified by Congress rests with the contention that, in the absence of explicit congressional denial of discretion, the President may impose additional requirements consistent with the purposes and objectives of the Acts and which serve to promote them. Arguably those Acts which are most explicit in their criteria--for example the National Defense Education Act--implicitly limit such presidential authority, and a number of people have questioned its existence where the criteria laid down by Congress are well defined. But it is so difficult to make distinctions among the existing laws on the basis of such implications, that it is probably preferable to take the view that the President has such authority in the absence of an express congressional provision with regard to discrimination.

The only provision of this latter type is that contained in the Morrill Act. We believe that even in this case the President could instruct the Secretary to ignore the provision with respect to separate but equal facilities. If the Secretary should find that such institutions are operating in what is an unconstitutional manner, he should deny funds and report the discrimination, as required by the legislation, to the Congress forthwith.

13 II.

10 The Factual Impact

We are attaching tables which give a somewhat more detailed breakdown of the potential impact of federal programs within the south.

As nearly as we can estimate, something between 20% to 25% of federal funds expended are expended in the seventeen southern states. Selected programs of the Department of Health, Education and Welfare indicate approximately an even division of such funds between public and private institutions in those states. On the other hand, AEC grants are almost exclusively to state institutions, and the same is true of agricultural programs. We have not been able to break down programs of the National Science Foundation and the Department of Defense in this respect, but it is suspected that the breakdown here is predominately to public institutions.

While the evidence is by no means complete, it would appear that there are a number of universities, predominately state, to which large amounts of federal funds are available. The most important of these are the agricultural colleges and such state universities as the University of Texas, the University of Florida, Georgia Institute for Technology, Louisiana State University, the University of Virginia, and the University of Tennessee. In other instances, where the amounts expended are less in terms of dollars, the importance may be of equal magnitude. This is particularly true with regard to medical schools where federal programs have contributed considerably to strengthening such schools in the south.

The great majority of the most important recipients cannot constitutionally discriminate, and have stated that they do not discriminate, and in a number of instances have admitted a token number of Negro students.

In assessing the factual impact it should be kept in mind that one effect of the presidential directive undoubtedly would be to focus the activities of Negro organizations upon those administering the programs rather than by resorting, as at the present, to legal process to secure admission for qualified students. One could predict that

administrators would be faced with a large number of complaints from rejected students which would require investigation under appropriate presidential directive to determine whether the school involved was in fact discriminating. If the finding is made that the school did discriminate the Department of Justice would probably be faced with the problem of suit to enforce compliance with the terms of the grant, or, possibly a suit to recover funds spent under false assurances.

13 III.

10 Recommendations

1. It would be possible for the President to distinguish between public and private institutions. If only public institutions were to be included at this stage the impact, legally or politically, would be considerably less, although the benefits of the program might be substantial.

2. Should the President elect to require that those administering federal programs withhold grants from institutions which discriminate, we would recommend the following general principles:

(a) The only programs covered should be those which make grants or contract directly with the university;

(b) Scholarship funds awarded to students should be omitted;

(c) Those administering the program should be instructed to satisfy themselves by reasonable means that institutions do not in fact reject eligible applicants on account of race, and should require, as a condition of a grant or contract, a statement from the university that it does not discriminate. This statement should be made an explicit condition of the contract or grant, and it should be made explicit that the grant or contract be terminated in the event that the administrator has evidence satisfactory to him that the statement does not accurately reflect the admission policy of the institution. Further provisions permitting the United States to sue for the return of funds, or for compliance with the assurances, should also be inserted.

The program should be perspective only. It should not be required in existing contracts or grants except when new commitments are made under their terms.

There should be a general discretion in the administrator to exempt any grant or contract from the requirements of the executive directive, If he finds that the statutory policies of the relevant act would not be in fact promoted by the withholding of federal funds from a particular institution. This should be a rare exception, but I think such an exception should be included because the theory of the presidential directive is that the statutory policies would best be served by the provision and, therefore, an exception phrased in this way would be consistent with the legal basis for executive action. For example, some of the statutes require equitable geographical distribution of funds should an administrator find it impossible to comply with this statutory mandate he might be justified in making an exception. Furthermore, it is possible (although highly unlikely) that a special contract for scientific research could only be performed at a university unwilling to make the undertaking discribed above.

The Executive order should also contain a provision similar to that now in the National Defense Education Act which instructs those administering programs not to interfere with the educational policies of the institution or its internal administration.

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