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Judicial Review and Discrimination in Federally Assisted Housing: The Enforcement of Title VI

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JUDICIAL REVIEW AND DISCRIMINATION
IN FEDERALLY ASSISTED HOUSING:
THE ENFORCEMENT OF TITLE VI

Section 601 of Title VI of the Civil Rights Act of 1964 requires that:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.\(^1\)

Section 602 of the Act\(^2\) was enacted to enable federal agencies to enforce this policy, and it authorizes them to issue rules and regulations which, while consistent with the objectives of the program authorizing the assistance, effectuate the provisions of Section 601.\(^3\) To enforce these regulations, an agency may terminate assistance to noncomplying programs, or use any other means authorized by law.\(^4\)

Although fund terminations under Title VI have been used frequently by the Department of Health, Education, and Welfare (HEW) in attempts to enforce school desegregation orders\(^5\) and by the Department of Housing and Urban Development (HUD) to prevent local public housing authorities (LHAs) from discriminating on the basis of race in administering programs receiv-

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\(^3\) Id. The applicable portion of the Act states:
Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.
\(^4\) Id. The applicable portion of the Act states:
Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity . . . or (2) by any other means authorized by law. Provided, however, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.
under the Nixon administration, fund terminations have been only rarely used as an administrative enforcement mechanism under Title VI. As a result, judges have been forced to decide whether they should order a termination of funds to a program that continues to receive federal financial assistance even though it is being administered in a manner that violates Title VI.

This question has been raised recently in the school desegregation field. In Adams v. Richardson, the court found that HEW had not properly fulfilled its obligations under Title VI. To remedy this situation, the court ordered HEW to begin termination of financial assistance to the 116 noncompliant school districts. HEW was also directed to ask eighty-five school systems to explain statistics that indicated racial discrimination.

However, in the housing field, the courts have not yet determined whether termination of federal assistance should be ordered in cases involving programs violating Title VI standards. To provide an answer to this question the following issues must be addressed: First, if a program is not in compliance with the Title VI nondiscrimination requirements, is the federal agency in charge of funding that program required to terminate financial assistance? If so, the courts should not hesitate to order a termination of federal funding. Second, if the agencies are not obligated to terminate financial assistance to a discriminating project, should the courts ever interfere with agency discretion and order a fund termination? Finally, if federal agencies are not required to end the funding of discriminatory projects, and it is determined that the courts should, in some cases, order fund terminations, at what point should a court order a fund termination to remedy the discrimination found in the project? In other

9 Id. at 638-39. HEW admitted that seventy-four elementary and secondary school districts were out of compliance with Section 601, but HEW had commenced administrative enforcement actions against only seven of them; another forty-two districts were presumptively in violation of Supreme Court desegregation standards and HEW had done nothing but review them. Eighty-five districts had one or more schools with substantially disproportionate racial composition, but HEW had not required them to justify the disproportion.
11 See notes 15-44 and accompanying text infra.
12 See notes 45-49 and accompanying text infra.
13 See notes 50-129 and accompanying text infra.
words, what is the extent of agency discretion in determining the appropriate remedy for a federally funded project that is being administered in a discriminatory manner? Answers to these questions should permit the development of guidelines for judges faced with agency refusal to terminate assistance, and thus forced to decide whether the court should order terminations.\(^\text{14}\)

### I. IS HUD REQUIRED TO TERMINATE FUNDS TO A DISCRIMINATORY PROJECT?

An examination of the provisions of Title VI and their legislative history indicates that Congress intended fund termination to be used as a remedy against discrimination in federally funded projects only after all other means of obtaining compliance with Title VI failed.\(^\text{15}\) Section 602 clearly demonstrates a congressional preference for voluntary compliance over the more drastic remedy of fund terminations.\(^\text{16}\) This emphasis on voluntary compliance shows that Congress wanted fund terminations to be used as a remedy for discrimination only as a last resort. Fund terminations are disfavored because such cut-offs directly oppose another congressional policy—carrying out the programs for which the funds were granted originally.\(^\text{17}\) Section 602 reflects this conflict since it requires that regulations devised to effectuate Section 601 "be consistent with achievement of the objectives of the statute authorizing the financial assistance,"\(^\text{18}\) and imposes further proce-

\(^{14}\) See notes 130-31 and accompanying text infra.

\(^{15}\) Contra, Board of Pub. Instruction v. Cohen, 413 F.2d 1201, 1203 (5th Cir. 1969). See notes 16-42 and accompanying text infra.

\(^{16}\) Civil Rights Act of 1964. 42 U.S.C. § 2000d-1 (1970). See text of statute. supra note 4. The legislative history of Title VI reveals the emphasis on voluntary compliance. Generally, we believe that compliance with the provisions of Title VI can be accomplished through the application of persuasion and common sense. In 1962, for example, 11 colleges and universities in the South, rather than face the loss of assistance, agreed to admit qualified Negroes to summer courses which were financed under the National Defense Education Act.

\(^{17}\) In the debate of Title VI, Senator Pastore outlined the reasons for disfavoring the fund terminations:

[The] purpose of Title VI is not to cut off funds, but to end racial discrimination. ... As a general rule, cutoff of funds would not be consistent with the objective of the Federal assistance statutes if other effective means of ending discrimination are available. ... Section 602, by authorizing the agency to achieve compliance "by other means authorized by law," encourages agencies to find ways to end discrimination without refusing or terminating assistance.

dural requirements that must be met before funds may be ter-

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19 Id. For example, there must be an opportunity for a hearing. Also, any termination must be
limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

42 U.S.C. § 2000d-1 (1970). Furthermore, in the event that funds are actually cut off by the agency, the head of the federal department or agency which terminates the funding must file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action.


21 Id. The court stated:
Where a substantial period of time has elapsed, during which periodic at-
tems toward voluntary compliance have been either not attempted or have been unsuccessful or have been rejected, defendants' limited discretion is ended and they have a duty to effectuate the provisions of [§ 601] by either administrative determination... that funds should be terminated, or by any other means authorized by law, such as reference to the Department of Justice.

351 F. Supp. at 641.


23 See notes 27-35 and accompanying text infra.

was intended to encourage agencies to devise their own methods of enforcing the standards of Title VI, and thereby to avoid fund terminations if possible.\textsuperscript{25}

A final argument supporting the interpretation that Congress envisioned fund terminations as only one of several remedies for discriminatory administration of federally funded projects is that the congressional enumeration of remedies includes the phrase "by any other means authorized by law."\textsuperscript{26} "Other means" are presently well defined as a result of past utilization of this approach. One alternative means is to seek an injunction which compels compliance subject to a contempt citation.\textsuperscript{27} Once an injunction is obtained, it should, in many instances, more effectively carry out the intent of Congress than would a fund termination. The injunctive remedy is more consistent with the achievement of the goals of the statute authorizing the financial assistance. While a contempt citation for refusing to obey an injunction penalizes the public officials involved, fund terminations penalize the beneficiaries of assistance programs. For instance, in July, 1969, when HEW ceased using Title VI terminations as its chief weapon to bring about school desegregation, 3 percent of the school districts under HEW jurisdiction had been declared ineligible for federal aid.\textsuperscript{28} By using an anti-segregation injunction, courts can often avoid such hardship\textsuperscript{29} to beneficiaries

\textsuperscript{25} For instance, according to Senator Gore: "As I have previously indicated in the Senate, it seemed clear to me that the use of the word 'may' would have the effect of authorizing alternate methods of implementing the provisions of Section 601."\textsuperscript{110 CONG. REC. 13126 (1964).}


\textsuperscript{27} This alternative was suggested by Senator Pastore at \textsuperscript{110 CONG. REC. 7061 (1964)}:

[I] suppose that once Title VI was enacted, in that particular case [in which there was discrimination in one particular part of a state but not elsewhere] it would still be proper for the Attorney General under other titles of this bill, if he were asked to do so, to step in. He might go before the court and obtain some kind of injunctive relief or some kind of mandatory relief which would compel compliance subject to a citation for contempt of court.

\textsuperscript{28} This is in spite of the facts that until 1968 "free choice" plans were all that HEW required, and that HEW had been negotiating for compliance with such plans since 1965. However, it should be noted that the districts which had been declared ineligible were generally districts receiving only token amounts of federal assistance.\textsuperscript{SENATE SELECT COMM. ON EQUAL EDUCATIONAL OPPORTUNITY (WALTER MONDALE, CHMN.), TOWARD EQUAL EDUCATIONAL OPPORTUNITY, REP. NO. 92-000, 92d Cong., 2d Sess. 194-98 (1972) [hereinafter cited as MONDALE]}

Beneficiaries of federal housing aid have also suffered from fund terminations. In Philadelphia, where the court in Shannon v. United States Dep't of Housing and Urban Development, 436 F.2d 809 (3d Cir. 1970), enjoined federal financial assistance to a housing project, the white community's and the city government's resistance to federally subsidized low- and moderate-income housing outside areas of minority concentration in Philadelphia began to cause federally subsidized housing programs in the city to close down. Maxwell.\textsuperscript{HUD'S PROJECT SELECTION CRITERIA—A CURE FOR "IMPERMISSIBLE COLOR BLINDNESS?" 48 NOTRE DAME LAWYER 102, 102-03 (1972).}

\textsuperscript{29} Even if injunctions are used, beneficiaries may suffer. In Chicago, the LHA has built no new public housing since 1969 when construction of such housing in black areas of the city was enjoined, Maxwell.\textsuperscript{supra} note 28 at 102. The situation became so desperate that
by accompanying the injunction with a court order requiring the relevant federal agency to re-institute the financial assistance that had been terminated.30

Injunctions also appear to be a particularly effective mechanism for enforcing Title VI. For example, on July 3, 1969, the Attorney General and the Secretary of HEW announced that the primary responsibility for ultimate enforcement of school desegregation would be shifted from the Title VI HEW compliance mechanism to judicial action by the Department of Justice.31 Subsequently, the Justice Department instituted an aggressive enforcement program.32 As a result of these efforts, plus those of private plaintiffs, the percentage of black children attending majority white schools in eleven Southern states33 rose from 18.4 percent in 1968 to 39.1 percent in September of 1970.34 Even greater gains in faculty desegregation were achieved.35

A second alternative to the use of Title VI fund terminations in the housing field is the use of Project Selection Criteria,36 a set of standards used by HUD to evaluate proposed housing projects in order to determine which projects are eligible to receive federal assistance.37 Criterion (2) is entitled “ Minority Housing Opportunities.”38 A “poor” rating on this, or any other criterion, vetoes a housing proposal.39 If a proposal receives no “poor” ratings, it is approvable, and may be funded if it meets other processing standards.40

Chicago leaders who had earlier sought the 1969 order, in 1972 sought the reversal of that order. Chicago Tribune. Mar. 6. 1972. § 1 at 10, col. 3. (The head of the Chicago Southern Christian Leadership Conference asked that the order be reversed.); Chicago Tribune. Apr. 5. 1972. § 1 at 1, col. 1. (The A.C.L.U. attorney who had filed the suit leading to the 1969 order said he would agree to its elimination.).


In instituting the enforcement program, “[t]he Justice Department filed statewide desegregation suits in Georgia and Texas, initiated individual suits against roughly 50 school districts, and requested updated orders in numerous cases that had already been filed.” MONDALE, supra note 28 at 200.

MONDALE, supra note 28 at 200.


MONDALE, supra note 28 at 200.

Id. at 198. 372.


Maxwell, supra note 28 at 92.

A project is rated “superior” in this category if it will provide “opportunities for minorities for housing outside existing areas of minority concentrations.” or if the project is located in “an area of minority concentration, but the area is part of an official State or local agency development plan, and sufficient comparable opportunities exist for housing for minority families...outside areas of minority concentration.” 37 Fed. Reg. 206 (1972). A project is rated “poor” if it will “cause a significant increase in proportion of minority residents in an area which is not one of minority concentration, but which is racially mixed...” or a similar adverse result. Id.


UNITED STATES DEP’T OF HOUSING AND URBAN DEVELOPMENT, IMPLEMENTATION
discriminatory projects may be screened out before federal funding is approved.

When Congress enacted the Civil Rights Act of 1964, it seems to have intended that the federal agencies required to enforce the mandate of Section 601 not be obliged to terminate immediately funds of projects found to be discriminatory. Rather, the agency should seek voluntary compliance; employ other remedies, such as injunctions, against intransigent project administrators; and encourage LHAs to refrain from discriminatory acts by using Project Selection Criteria to give more aid to LHAs having policies that best promote equal housing opportunities. These alternative remedies more fully satisfy the dual congressional aims of providing federal aid to locally administered housing projects for the poor, while assuring that such projects do not reinforce the segregation lines already dividing major American municipalities.

II. JUDICIAL REVIEW OF ADMINISTRATIVELY DETERMINED REMEDIES

Since fund terminations are not the statutorily favored form of relief for discriminatory practices in federally assisted projects and since federal agencies are given broad discretion to determine appropriate remedies, the issue arises as to whether a court should ever order an immediate termination of funds because of discrimination. Under the fourteenth amendment no government program may be administered in a racially discriminatory man-

of HUD Project Selection Criteria for Subsidized Housing: An Evaluation, at 4 (1972). [Hereinafter cited as P.S.C. Evaluation.] This evaluation covered 3,273 proposals for 226,530 housing units processed by HUD's seventy-seven Area and Insuring Offices between February 7, and June 30, 1972. Id. at 1. Only 313 housing proposals were found to be in areas of minority concentration, and 17 percent of the proposals in such areas were rejected due to one or more "poor" ratings. Of the proposals not in such areas, 12 percent were rejected. Id. at 58–60. However, the likelihood of an "approvable" proposal being funded was slightly greater if the proposal was in an area of minority concentration than if not, for 73 percent of the "approvable" projects in areas of minority concentration were funded; 70 percent of the "approvable" projects outside such areas were funded. Id. at 59.

42 See notes 16–23 and accompanying text supra.
43 See notes 27–35 and accompanying text supra.
44 See notes 36–40 and accompanying text supra.
45 Judicial review of agency-devised remedies is explicitly authorized by statute. If there is a fund termination, any person aggrieved thereby:

[M]ay obtain judicial review of such action . . . and such action shall not be deemed committed to unreviewable agency discretion . . . .


[Shall be subject to such judicial review as may be otherwise provided by law for similar action taken by such department or agency on other grounds.

Id. However, there are no specific provisions governing judicial review of an agency refusal to terminate funds.
If the Constitution guarantees a right, such as the right to nondiscriminatory administration of federally funded programs, it also guarantees that courts will have the power to fashion an effective remedy to protect that right. Therefore, if a federal agency fails to protect diligently the constitutional rights of citizens affected by a federally assisted project, courts may intervene and fashion an appropriate remedy.

However, the fact that the Constitution guarantees a remedy for a constitutional wrong does not mean that a particular remedy is guaranteed. This follows from two sources. First, the school desegregation cases clearly imply that there may be more than one remedy sufficiently effective to satisfy constitutional requirements. Second, cases indicate that when Congress has not defaulted on its obligation to assure protection of constitutional rights, courts have been willing to accept the congressionally devised remedy, rather than make one of their own.

From this it follows that if a program is discriminatory, an aggrieved party has the constitutional right to have the condition remedied, but he has no constitutional right to a fund termination. Nevertheless, the guarantee of some remedy for constitutional wrongs constitutes a limitation on federal agency discretion in determining appropriate remedies for discriminatory actions. The agency must devise an effective remedy designed to alleviate the discrimination which presently exists or the courts will interfere with the normal agency discretion and order an appropriate remedy.

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46 See Heyward v. Public Housing Administration, 238 F.2d 689 (5th Cir. 1956); Detroit Housing Comm'n v. Lewis, 226 F.2d 180 (6th Cir. 1955); Gautreaux v. Chicago Housing Authority, 304 F. Supp. 736 (N.D. Ill. 1969); Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969); Gautreaux v. Chicago Housing Authority, 265 F. Supp. 582 (N.D. Ill. 1967).


48 Green v. School Bd., 391 U.S. 430 (1968), held that the "freedom-of-choice" plan of the local school board did not adequately meet its duty to develop a plan to eliminate promptly and effectively the dual system of education. Nevertheless, the Court indicated that such a plan would have been acceptable if it had proven effective. 391 U.S. at 440. Though the Court indicated that a "freedom of choice" would not be acceptable if other more effective means of bringing about desegregation were reasonably available, 391 U.S. at 441, it did indicate that: "There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case." 391 U.S. at 441. See also Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), where the Court indicated that judicial authority was invoked to provide a desegregation remedy only because the local school authorities had failed to devise their own satisfactory policies. 402 U.S. at 415–16.

49 The first indication of this occurred in Katzenbach v. Morgan, 383 U.S. 641 (1966), in which the Supreme Court reviewed the constitutionality of the Voting Rights Act of 1964, 42 U.S.C. §§ 1971–74(e) (1970), insofar as it overruled parts of a New York election law. By enfranchising certain Puerto Ricans in New York City, the Act was found to have involved Congress in what was traditionally a court task—defining and remedying fourteenth amendment equal protection rights. The Court acquiesced to this Act instead of making a de novo determination of what the fourteenth amendment required. The reason for this acquiescence can be traced to Section 5 of the fourteenth amendment. This Section
Thus there appears to be a conflict between the role of courts and that of federal agencies in determining proper remedies for discrimination in federally assisted housing projects. On the one hand, the provisions of Title VI grant wide discretion to federal agencies in this endeavor. On the other hand, there is a constitutionally guaranteed remedy for discriminatory administration of federally assisted projects, which must be enforced by the courts. The problem is to determine the scope of the discretion granted federal agencies by Title VI of the Civil Rights Act of 1964.

III. GUIDELINES FOR JUDICIAL REVIEW

When a court hears a suit alleging discrimination, it has broad equitable power to devise an appropriate remedy. However, federal agencies also have the responsibility to cure discrimination in the programs they fund. Difficulties arise since courts and agencies share the responsibility to combat discrimination. This conflict is best discussed in terms of the scope of judicial review of HUD actions. The broader the scope of review, the greater the responsibility assumed by the court as compared to the agency.

A. Is There Discrimination?

The first question confronting a court reviewing HUD actions is the validity of HUD's determination as to whether federal funds are being used in a discriminatory manner. A court nor-
mally freely reviews questions of law, but limits itself in reviewing findings of facts. Applying a reasonableness test, a court accepts administrative determinations of factual issues, if they are supported by substantial evidence, rather than making independent determinations of their validity.

From this it follows that if a program is discriminatory, an aggrieved party has the constitutional right to have the condition remedied, but he has no constitutional right to a fund termination. Nevertheless, the guarantee of some remedy for constitutional wrongs constitutes a limitation on federal agency discretion in determining appropriate remedies for discriminatory actions. The agency must devise an effective remedy designed to alleviate the discrimination which presently exists or the courts will interfere.

Whether a certain act constitutes discrimination is a "mixed" question of law and fact. For that reason, it would be fruitless to try to determine the scope of judicial review of an agency determination of whether there is discrimination by deciding whether the question is more nearly legal or factual. Rather, the courts, in determining the scope of review they will follow when reviewing agency determinations, have tended to use what one commentator has called the "practical approach." Courts first look at the competing policy considerations behind the various degrees of review available. Then, deciding as a matter of policy whether the review should be broad or narrow, they apply the label of "fact" or "law" to the issue at hand. Thus, in order to determine the scope of judicial review of a HUD determination concerning whether discrimination exists, the various policies or factors considered by courts must be examined.

One factor which is relevant in deciding the proper degree of judicial review is the nature of the question raised. Generally, courts will broadly review agency decisions when propositions or methods of approach are at issue, but will narrow the scope of review if an agency is merely applying such propositions or methods to unique facts. Thus, a reviewing court makes an independent judgment on the general principles determining what constitutes discrimination, while, in applying these principles to a particular situation, it defers more to the relevant agency.

This principle is illustrated in cases involving Title VI. For instance, in *Shannon v. United States Department of Housing*

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52 4 K. Davis, Administrative Law § 29.01 (1958).
54 4 K. Davis, supra note 52, at § 30.02.
55 Id.
56 Id. at § 30.11.
and Urban Development,\textsuperscript{57} the court outlined the general criteria by which HUD should judge whether an LHA had conformed to the requirements of Title VI.\textsuperscript{58} The court then remanded the case to HUD to make a determination of whether the particular project in question was in conformity.\textsuperscript{59} Similarly, in Adams v. Richardson,\textsuperscript{60} when HEW was found to have failed to enforce adequately the school desegregation requirements of the Constitution, the reviewing court enunciated the general principle that HEW, by its total reliance on voluntary compliance, could not fulfill its statutory obligation to prevent the use of federal funds by segregated school systems.\textsuperscript{61} However, the court itself did not apply this principle to any particular school system. Rather, it ordered HEW to begin compliance hearings for 116 elementary and secondary school districts.\textsuperscript{62} At compliance hearings, HEW has the power to devise any remedy it believes appropriate to the situation.\textsuperscript{63}

Other factors may dictate a broad scope of judicial review of agency determinations concerning the existence of discrimination, even when such a determination focuses only on a particular situation. A court must consider the nature of the problem confronting the administrative agency.\textsuperscript{64} In more important controversies, judicial review should be broader.\textsuperscript{65} Where constitutional rights are at stake, as they are in Title VI fund termination disputes, the scope of review should be quite broad.\textsuperscript{66}

The fact that constitutional rights are at stake does not necessarily mean that the scope of judicial review is so broad that the

\textsuperscript{57} 436 F.2d 809 (3d Cir. 1970).
\textsuperscript{58} 436 F.2d at 821.
\textsuperscript{59} Id. at 822–23. However, the court of appeals did undertake some remedial action of its own; it terminated federal financial assistance to the project under consideration until HUD made its determination. Furthermore, it reserved to the district court the right to review HUD's determination.
\textsuperscript{60} 351 F. Supp. 636 (D.D.C. 1972).
\textsuperscript{61} Id. at 641.
\textsuperscript{63} See 45 C.F.R. §702 (1972).
\textsuperscript{64} REPORT OF THE ATT'Y GEN. COMM. ON ADMIN. PROCEDURE 91 (1941).
\textsuperscript{65} L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 585 (1965).
\textsuperscript{66} In Pickering v. Board of Educ., 391 U.S. 563 (1968). the Supreme Court indicated that:

This Court has regularly held that where constitutional rights are an issue an independent examination of the record will be made in order that the controlling legal principles may be applied to the actual facts of the case.
391 U.S. at 578. n.2. Similarly in Jacobellis v. Ohio. 378 U.S. 184 (1964). Mr. Justice Brennan said that in obscenity cases, as in all cases involving first amendment rights, the Court "cannot avoid making an independent constitutional judgment on the facts." Id. at 190. To this he added a footnote: "Even in judicial review of administrative agency determinations, questions of 'constitutional fact' have been held to require de novo review." 378 U.S. at 190. n.6.
reviewing court must make an independent judgment. This conclusion follows because an entire series of factors must be taken into account before a definitive solution is revealed. For instance, there have been cases involving constitutional rights in which courts have not felt compelled to review fully agency determinations. Nevertheless, other factors do not indicate that the judicial review of HUD’s findings as to the existence of discrimination should be narrowed. One important consideration not yet mentioned is the comparative qualifications of the agency and a court to decide this particular issue. In the field of race relations the courts generally hold that they, not the agencies, possess greater expertise.

Thus an analysis of the various factors commonly considered by courts in determining the appropriate scope of judicial review in a given case reveals that when reviewing an agency determination of whether discrimination exists in a particular federally funded project, the court should thoroughly review the administrative finding. On a scale from “complete unreviewability to complete substitution of judicial judgment,” the review of an agency finding regarding discrimination should be nearer the latter.

B. Review of HUD Remedial Actions

If a court finds discrimination in the administration of federally funded projects, it must review the remedial action, if any, taken by HUD. The test applied to remedies is whether they are sufficiently effective to cure the constitutional wrong. A review-
ing court must independently determine the degree of remedial effectiveness required to meet constitutional standards, since the judiciary is peculiarly suited to decide issues of general legal principles and constitutionality. Nevertheless, the scope of review of a determination that a particular remedy satisfies this general standard need not be so broad. To determine the proper scope of review, it is necessary to examine the competing policies calling for various degrees of review. These policy considerations are analyzed below.

1. Congressional Intent—Courts narrow the scope of their review if Congress committed remedy formulation to the agency. As previously noted, in Title VI cases administrative discretion is intentionally substantial. Because of this legislative intent, courts should give substantial deference to administrative remedies.

Section 603 of Title VI defines the scope of judicial review for agency actions taken under Section 602. If there is a fund termination, any person aggrieved thereby: "[M]ay obtain judicial review of such action... and such action will not be deemed committed to unreviewable agency discretion..." Other actions taken pursuant to Section 602: "[S]hall be subject to such judicial review as may be otherwise provided by law for similar action taken by such department or agency on other grounds." Thus, Title VI contains no express provisions defining the scope of review if the agency fails to terminate funds. However, Section 602 does contain hints about the proper scope of review. First, the language of Title VI—that funds "may" be terminated—indicates that Congress intended to give agencies some discretion in deciding whether to use a fund termination to effectuate the policies of Section 601. Second, the emphasis on voluntary compliance also indicates the congressional preference for agency, rather than judicial, handling of the enforcement of Title VI. Clearly, "voluntary compliance" would more likely refer to negotiations between federal and local officials regarding how the local community can best go about conducting a satisfactory

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73 See note 56 and accompanying text supra.
74 Id.
75 See notes 54–55 and accompanying text supra.
76 4 K. Davis, supra note 52, at § 30.10.
77 See notes 16–44 and accompanying text supra.
79 Id.
80 Id.
81 See note 25 and accompanying text supra.
program, than to a court-ordered fund termination. Nonetheless, as mentioned earlier, the emphasis on voluntary compliance does not leave HUD with unlimited discretion. Third, at least one case seems to indicate that the enactment of Title VI limited judicial flexibility in devising housing discrimination remedies. That is, the limits on Title VI administrative enforcement activity also apply to courts. In Gautreaux v. Romney, a federal district court enjoined HUD from making Model Cities money available to the City of Chicago because Chicago had failed to comply with a condition under which it had received earlier Model Cities money. The condition was an agreement to build public housing in non-ghetto areas. The Model Cities program itself had not been shown to be discriminatory, and Section 602 had been interpreted as limiting administrative agencies to terminating funds only to programs which had been found discriminatory. When the case reached the court of appeals, determination of the fund cut-off issue depended in large measure on whether the limits Congress had put on agency action under Title VI also limited court action. The court of appeals held that such limits should apply to equitable remedies devised by courts, and reversed the district court decision. Thus, the limits on permissible remedies for enforcing the policy of Title VI apply equally to administrative and judicial remedies.

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82 See note 16 and accompanying text supra.
83 See notes 20–23 and accompanying text supra.
85 Gautreaux v. Romney, 457 F.2d 124, 126 (7th Cir. 1972).
86 Board of Pub. Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969). In this case, an HEW order ending funding grants for three programs under three different statutes was vacated for not being limited to a particular program. The fact that all three programs gave financial assistance to the Taylor County, Florida, school system which, according to HEW, was making inadequate progress toward desegregation, was not sufficient to justify a fund termination en masse. Each program had to be considered separately to determine if it were discriminatory, even though a program need not be “considered in isolation from its context.” 414 F.2d 1068, 1078–79. This limitation was derived from the admonition in Section 602 of Title VI that the termination of assistance “shall be limited to the ... recipient as to whom such a finding [of non-compliance with Section 601] has been made and. shall be limited in its effect to the particular program, or part thereof, in which non-compliance has been so found. ...” Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (1970).
87 457 F.2d at 127. The court stated: “We think it was improper for the District Court to threaten the termination of a program which was not tainted with discriminatory action in order to bring about a cure of a separate program which was found to be so tainted.” Id.
88 Judge Sprecher, in his dissenting opinion, argued persuasively that Section 602 does not limit the equitable remedies of a court. First, he said that the Supreme Court in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17 (1971), had analyzed restrictive language similar to that in Section 602 and had found no suggestion of an intention to restrict the existing powers of the federal courts to enforce the equal protection clause or withdraw from courts their historic equitable remedial powers. 457 F.2d at 135 (dissenting opinion). Second, the equitable powers of the courts exist independently of the Civil Rights Act of 1964. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 880 (5th Cir. 1966). These powers are based not only on the Constitution, but on the Civil
While the result in *Gautreaux* does not speak directly to the scope of judicial review, it indicates that Title VI was intended to limit judicial discretion in enforcement. If Congress intended to limit court discretion, the language of Title VI and its emphasis on voluntary compliance are strong evidence that Congress intended agency discretion to be broad.

2. The Importance of the Rights at Stake—The fact that constitutional rights are at stake when HUD attempts to remedy violations of Title VI urges a broader scope of judicial review. However, even when constitutional rights are involved, federal courts have been willing to give "great weight" to remedies proposed by administrative agencies. For example, in *United States v. Jefferson County Board of Education*, the Fifth Circuit Court of Appeals decided that, in determining whether to approve a school desegregation plan, it would give "great weight" to the guidelines for school desegregation promulgated by HEW. Similarly, in ruling on the constitutionality of a school desegregation plan, Justice Blackmun, then a judge of the Eighth Circuit Court of Appeals, ruled that HEW guidelines, although not binding on the courts, were entitled to "serious judicial deference."

Unfortunately, neither court defined what was meant by "great weight," or "serious judicial deference." Furthermore, neither term has a familiar legal meaning. Nevertheless, these cases indicate that even if fourteenth amendment rights are at stake, the scope of judicial review may be somewhat limited.


Nevertheless, it would seem unlikely that Congress would want courts to take actions that the courts specifically forbid agencies to take. Even if the courts are not specifically bound to the limits set by Title VI, it would seem that their equitable discretion should be exercised in a manner consistent with congressional policy. As the majority in *Gautreaux* indicated, the limits set by Congress on fund terminations were necessary to protect the innocent beneficiaries of the programs that were the targets of fund cut-offs. 457 F.2d at 128. This is hardly a policy the courts should ignore.

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89 See note 46 and accompanying text supra.
90 See notes 64-69 and accompanying text supra.
93 Smith v. Board of Educ., 365 F.2d 770, 780 (8th Cir. 1966).
94 The "great weight" given to agency determinations may be used regardless of the ultimate standard of review. If a court is willing to accept all "reasonable agency determinations," the court will give "great weight" to an agency remedy. Jacob Siegel Co. v. Federal Trade Comm’n, 327 U.S. 608, 613-14 (1946). Even if the court completely reviews an agency decision and unhesitatingly substitutes its own judgment, it may give "great weight" to the agency determination. 4 K. Davis, *supra* note 52, at § 30.13.
This result is supported by a variety of factors. As mentioned above, the fact that constitutional rights are at stake does not necessarily mean that the scope of judicial review must be so broad that the reviewing court makes an independent judgment.\(^9\) This is especially true since the intent of Congress is that scope of review be limited,\(^6\) and since courts are often willing to defer to Congress' judgment on how best to remedy a constitutional violation.\(^9\)

If HUD refuses to terminate funds to a discriminatory LHA, and a reviewing court, deferring to agency discretion, also refrains, this leads to the appearance of an unconstitutional result. Such a conclusion would be erroneous, however, because there are alternative methods for remedying the discriminatory actions of LHAs.\(^8\) HUD may, in fact, be vigorously implementing such alternative remedies. Thus, even though both HUD and the courts refuse to terminate funds to a discriminatorily administered program, this need not mean that a violation of a constitutional right is being tolerated.\(^9\)

3. **HUD's Expertise**—The most important factor affecting the scope of review is the comparative qualifications of the agency and those of the court to decide the particular issue.\(^10\) As mentioned before, courts are considered the experts in the field of race relations.\(^10\) Yet, courts have recognized agency expertise in certain specific areas. For instance, the Fifth Circuit Court of Appeals, in *United States v. Jefferson County Board of Education*,\(^10\) explained the rationale for giving serious deference to the HEW guidelines for school desegregation by observing that the courts acting alone have failed to bring about desegregation, and the guidelines, prepared in detail by experts in education and school administration, present the best aid to the courts in evaluating the validity of a school desegregation plan.\(^10\)

In the field of housing discrimination, courts have tended to criticize HUD not for its lack of expertise, but for not using its expertise in planning projects so as to avoid increased racial concentration. This attitude is illustrated in *Shannon v. United

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\(^9\) See notes 67–69 and accompanying text *supra*.
\(^9\) See notes 76–88 and accompanying text *supra*.
\(^9\) See note 49 and accompanying text *supra*.
\(^8\) See notes 27–40 and accompanying text *supra*.
\(^9\) See notes 15–40 and accompanying text *supra*.
\(^10\) 4 K. DAVIS, *supra* note 52, at §30.09.
\(^10\) See note 70 and accompanying text *supra*.
\(^10\) 372 F.2d 836 (5th Cir. 1966); *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).
\(^10\) 372 F.2d at 847.
Enforcement of Title VI

In that case, federal financial assistance to a rent supplement project in Philadelphia was enjoined on the grounds that HUD had given insufficient attention to the effect the project would have on racial concentration in Philadelphia. HUD is obligated, according to the court, to exercise its expertise to determine the socio-economic desirability of a housing project, and one of the measures of the project's desirability is the impact of the project on racial segregation.

When HUD has used its expertise, courts have been willing to approve its decisions, even when it has decided to locate a housing project in an area of minority concentration, thus increasing such concentration. For instance, in *Croskey Street Concerned Citizens v. Romney*, a district court refused to enjoin the construction of a low-income housing project for the elderly in an area of racial concentration in Philadelphia because HUD had analyzed the impact of the building on racial concentration and had acted to alleviate any harmful effects. Similarly, in *Coffey v. Romney*, residents in the neighborhood of the proposed project sought to prevent its approval by HUD primarily on the ground that HUD did not use 'adequate institutionalized means' for finding the facts necessary to a determination of whether the [project site] could be selected for federally financed housing in compliance with the Department's duties under the Constitution and Civil Rights Acts of 1964 and 1968.

However, there will be times when needs are so pressing that, projects that would increase racial concentration should be approved, but HUD can do so only after taking into account the socio-economic implications. See Maxwell. *HUD's Project Selection Criteria—A Cure for "Impermissible Color Blindness?"* 48 Notre Dame Lawyer 92, 95–97 (1972).

The project was planned as part of a "package." The package included building low-income housing outside of the areas of racial concentration. Further, HUD decided that the only public housing it would approve at the site would be for the elderly because there was evidence that in areas with a high concentration of racial minorities, projects for the aged are more integrated than the surrounding community. Finally, HUD provided that the housing units in black areas were to be scattered among four sites to avoid large scale concentration of public housing in black areas. 335 F. Supp. at 1256.


Id. at 2.
The court, assuming that proper consideration of relevant factors by HUD would entitle its determination to significant deference, decided that HUD had properly weighed socio-economic factors, particularly race, in approving the site and therefore the court approved the location.

In devising desegregation guidelines HUD must follow two directives. First, it must strive to maintain a comprehensive national housing assistance program. This goal requires a precise analysis of the housing needs of the particular localities being considered as possible sites for federal projects. This determination is peculiarly within the expertise of HUD. Additionally, in carrying out the policy of the Act, HUD must strive to make each particular project successful. Any reluctance to terminate funds will significantly aid the achievement of this goal. Surely HUD, given its intimate knowledge of the details of the various programs under its control, is better able than the courts to balance the competing goals of desegregation and of maintenance of federally assisted programs.

Second, HUD must exercise its expertise to prevent discrimination. The use of Project Selection Criteria represents an attempt to satisfy this requirement. HUD’s processors of financial assistance applications have been instructed to utilize the experts available to them to evaluate each proposal properly. In twenty of the twenty-five HUD field offices, ratings on criterion (2), minority housing opportunities, have been preceded by recommendations from equal opportunity officers, the HUD specialists in preventing discrimination. The seeming success of these criteria in placing projects outside areas of minority concentration appears to indicate that future judicial deference to

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114 See note 46 and accompanying text supra.
115 See notes 36-40 and accompanying text supra.
117 P.S.C. Evaluation, supra note 40, at 81. It has been recommended that courts rely on the Equal Opportunity Office (EO) to formulate remedies for discrimination by LHAs. First, the EO is not deeply involved in the original site selection process and thus can view the project with more objectivity. Second, the EO is knowledgeable enough about acceptable site requirements to qualify as a reliable expert. Note, Racial Discrimination in Public Housing Site Selection, 23 Stan. L. Rev. 63 (1970).
118 In the first half of 1972, only about 10 percent of the reportedly rated proposals for housing projects were found to be in areas of minority concentration. Proposals for housing in areas of minority concentration were more likely (17 percent) to be rejected than proposals not in such areas (12 percent). P.S.C. Evaluation, supra note 40, at
actions taken by HUD will be significant; the confidence won by an agency’s past performance affects the standard of review courts use in judging the agency’s actions.119

The desirability of deferring to agency expertise was illustrated in the case of *Gautreaux v. Chicago Housing Authority*.120 The court ordered the Housing Authority to refrain from concentrating large numbers of dwelling units at one location.121 While such an order might aid in the dispersal of public housing to many locations, it also would likely result in fewer units being built,122 since the cost per unit rises with decreasing individual project size.123 Furthermore, the *Gautreaux* court had some difficulty determining what would be the impact of low-income projects placed in certain areas, and the court has been criticized for relying on the plaintiff’s brief for an answer.124 It is, of course, not surprising that a court would find itself faced with such problems when it deals in an area in which it lacks expertise.

In any event, courts have recognized the need for the use of administrative expertise in devising remedies to cure discriminatory practices of LHAs.125 It is apparent that HUD, the agency responsible for the projects in question, has both the most intimate knowledge of the projects and the most extensive experience in devising remedies for racial discrimination in its particular area. This lends further support to the principle that the courts should grant considerable deference to agency-devised remedial decisions.

4. *Nature of Proceedings Before the Administrative Agency*—The scope of judicial review of agency action is also a function of the nature of the proceedings before the agency.126 If an agency decision is made after hearings conducted in conformity with the Administrative Procedure Act,127 a reviewing court is likely to

58-59. In past years the percentage of public housing sites found in minority areas has been higher. A recent study found that in Chicago, San Francisco, and Oakland, over 70 percent of the total occupied units in each city were located in areas of 50 to 100 percent black population. *Note, supra* note 117, at 85, 99, 113.


121 304 F. Supp. at 739.

122 *Note, Discriminatory Site Selection in Public Housing and Federal Judicial Response, 64 Nw. U.L. Rev. 720, 733 (1970).*

123 Smaller projects require the acquisition of more sites, resulting in an increased total expenditure. Ledbetter, *Public Housing—A Social Experiment Seeks Acceptance, 32 Law & Contemp. Prob. 490, 502 (1967).*

124 *Note, 85 Harv. L. Rev. 870, 878 n.45 (1972).*

125 *Shannon v. United States Dep't of Housing and Urban Development, 436 F.2d 809 (3d Cir. 1970); Garrett v. City of Hamtramck, 335 F. Supp. 16 (E.D. Mich. 1971).*


127 5 U.S.C. §§ 500-76 (1970). This act gives all interested parties the right to present
grant more deference to the resulting agency decision than if the agency had proceeded otherwise. Thus, if HUD acts to eliminate discrimination after conducting a compliance hearing, a reviewing court will be more inclined to defer to the anti-discrimination remedy HUD chooses. However, if HUD limits its analysis and remedial actions to the use of Project Selection Criteria, the scope of review will be greater, even though these criteria appear to satisfy the Shannon mandate that HUD adopt institutionalized means for achieving compliance with Title VI.

IV. DEFINING A STANDARD OF REVIEW

The above survey of the factors affecting the standard of review of HUD's remedial actions under Title VI makes possible a more precise statement of the proper scope of judicial review of such actions. The reasonableness test, which requires a court to uphold an agency decision if it can be said to be "reasonable," provides the clearest and most workable standard of review. The factors analyzed above tend to support this theory of narrow review.

Of course, the scope of judicial review within the reasonableness standard will fluctuate, for many of the factors which affect the scope of judicial review will vary from case to case. For instance, in some cases HUD may make full use of its expertise to devise remedies, while in others it may rely too heavily on voluntary compliance. In some cases HUD may devise a remedy after holding formal hearings, or, in other cases, its procedure may be cursory.

It appears that courts, in the absence of special circumstances, should give considerable deference to HUD in developing workable and effective remedies against housing discrimination. Through adherence to such a policy, the courts can assure that a comprehensive national housing finance program will continue to flourish and that discrimination in the administration of housing programs will be reduced to a minimum. It is beyond doubt that the achievement of these dual goals was intended by Congress when it enacted Section 602 of the Civil Rights Act of 1964.

—Barry M. Block

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128 The procedure for a compliance hearing is governed by 24 C.F.R. § 1.9 (1972), which indicates that the hearing will be conducted in conformity with the Administrative Procedure Act.

129 See note 75 and accompanying text supra.

130 See note 52 and accompanying text supra.

131 See notes 72-129 and accompanying text supra.