Enforcing a Congressional Mandate: LEAA and Civil Rights

Section 601 of the Civil Rights Act of 1964 prohibits recipients of federal financial assistance from engaging in racial discrimination:

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

The Act then prescribes measures to be taken by funding agencies of the federal government against recipients who disregard this prohibition.²

The principle set forth in this statute was not new. It had been given effect in many areas through individual Executive Orders,³ and it had often been the substance of proposed amendments to appropriations bills.⁴ Some agencies had acted on their own initiative to eliminate discrimination in their programs.⁵ By 1964, however, this ad hoc approach had proven unsatisfactory, and Congress endeavored "to settle the issue of discrimination once and for all, in a uniform, across-the-board manner."⁶ Since the passage of the Act, Congress has

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5. E.g., 45 C.F.R. § 160.3(b) (1962) (HEW training programs); 28 Fed. Reg. 7221 (1963) (Dept't of Labor training programs); 27 Fed. Reg. 12911 (1962) (Dept't of Agric. mortgages), 11689 (1962) (Veterans Administration housing).
6. 69 CONG. REC. 6544 (1964) (Sen. Humphrey), Accord, id. 7054-58 (1964) (Sen. Pastore); 109 CONG. REC. 14493 (1963) (Sen. Keating). There were several reasons for this new approach. First, it was hoped that a single legislative command would end the time-consuming practice of considering a specific nondiscrimination amendment with every proposed spending bill, a practice which forced the controversial issue of racial discrimination into every discussion of proposed legislation. 110 CONG. REC. 2468 (Rep. Celler), 6544 (1964) (Sen. Humphrey). Second, several agencies had been reluctant to enforce nondiscrimination by recipients of their funds on the ground that their authority
extended the principle of nondiscrimination in federally funded programs by prohibiting types of discrimination not covered by Title VI.7

Twelve years later, the congressional mandate remains unexecuted; discriminatory practices still abound among programs and activities receiving federal funds.8 Congress recently has taken notice of the failure of one funding agency, the Law Enforcement Assistance Administration (LEAA), to prevent its recipients from discriminating, and is now weighing proposals to tighten the agency’s enforcement procedures.9 This Note will analyze the record of LEAA in civil
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rights enforcement and offer a solution to the problem now before Congress. It suggests that the agency's failure can be ascribed to its having been granted excessive discretion in an area peripheral to its chief administrative concern—the same broad discretion normally given to agencies in the performance of their main functions. It argues that an agency like LEAA cannot be expected, on its own initiative, to enforce nondiscrimination vigorously, when such enforcement might require a partial compromising of its narrower day-to-day purposes. Enforcement can be effective in such a situation only when the agency is given exact rules to follow and when in addition a forceful external control is provided.

I. Existing Enforcement Schemes

A. Title VI

Section 601 and its enforcement provisions form Title VI of the Civil Rights Act of 1964. These enforcement provisions leave federal agencies broad discretion in responding to racial discrimination by recipients of their financial assistance. The agencies are first obliged to seek “voluntary compliance” with § 601. If this fails, they must attempt to enforce compliance by cutting off funds to the offender or by employing “any other means authorized by law.” Prominent among these other means of enforcement is referral of the case to the Attorney General, who may bring an action against the recipient. This choice of enforcement methods was intended to allow funding agencies flexibility in responding to instances of discrimination.


11. Section 602 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (1970), provides: Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity is directed to effectuate the provisions of Section 2000d of this title. Compliance may be effected (1) by the termination of or refusal to grant or to continue assistance or (2) by any other means authorized by law. This section requires some form of action by funding agencies to enforce nondiscrimination by their recipients. 110 Cong. Rec. 6544 (Sen. Humphrey), 7058 (1964) (Sen. Pastore). See Comment, Title VI of the Civil Rights Act of 1964—Implementation and Impact, 36 Geo. Wash. L. Rev. 824, 827 (1968).


13. Id.


15. Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before Subcomm. No. 3 of the House

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The enforcement failure was the result, to a large extent, of placing the responsibility for ensuring racial and ethnic justice upon a massive Federal bureaucracy which for years had been an integral part of a discriminatory system. Not only did the bureaucrats resist civil rights goals; they often viewed any meaningful effort to pursue them to be against their particular program’s self-interest.


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Although fund termination was envisioned as the primary means of enforcement under Title VI, and although it has proven the surest deterrent to discrimination, it has been given a low priority in the Justice Department guidelines for enforcing Title VI and is now hardly ever used. Agencies can fulfill their Title VI obligations simply by referring instances of noncompliance to the Attorney General, whose decisions whether or not to sue are generally not reviewable by the courts.

The broad grant of discretion has also undermined the right of judicial review given by Title VI to victims of discrimination. Since the plaintiff must exhaust his administrative remedies before seeking review, he generally must wait until the agency has made a final decision not to terminate funds. However, the discretion conferred by Title VI permits agencies to prolong efforts to obtain compliance almost indefinitely, thus forestalling judicial relief.

18. See, e.g., Subcommittee Hearings, supra note 15, at 1544 (Sec'y Celebreze, HEW), 1786-88 (George Meany, AFL-CIO), 1890-91 (Joseph Rauh, ADA), 2161 (Roy Wilkins, NAACP). The wording of Title VI indicates a preference for the fund cutoff remedy. Not only is fund termination mentioned first, but it is the only sanction specifically named. 42 U.S.C. § 2000d-1 (1970). The preference for fund termination under Title VI is noted in, e.g., United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 852-53 (5th Cir. 1966) ("Congress was dissatisfied with the slow progress inherent in the judicial adversary process . . . [and] therefore fashioned a new method of enforcement."); Report of the White House Conference, To Fulfill These Rights 63 (Gov't Printing Off. 1966) ("administrative proceedings prescribed by Congress as the primary device of enforcing Title VI"); VI Commission Report—1974, at 22-24, 386, 653; Comment, supra note 11, at 833; Notre Dame Conference on Federal Civil Rights Legislation and Administration: A Report, 41 Notre Dame Law 906, 922-24 (1960).

19. Early use of the sanction by HEW is instructive. Between July, 1964 and March, 1979, HEW initiated approximately 600 administrative proceedings against school districts found not to be in compliance with § 601 standards. In 400 of these cases, the agency found that the districts came into compliance following threat of termination, with no need for actual termination. Among the 200 cases in which funds were actually cut off, HEW subsequently determined that compliance had been achieved, and federal assistance was resumed in all but four districts. VI Commission Report—1974, at 384-85. See Adams v. Richardson, 480 F.2d 1159, 1163 n.4 (D.C. Cir. 1973); Tomlinson & Mashaw, supra note 17, at 631; Comment, supra note 11, at 871.

20. The Department of Justice Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964, 28 C.F.R. § 50.3 (1975), issued in 1965, suggested alternative judicial and administrative means of enforcement and authorized fund termination only where these alternatives would be ineffective or inappropriate. The Civil Rights Commission found that every agency it examined in 1974 had failed to cut off funds in cases where termination would have been the appropriate means of enforcement. VI Commission Report—1974, at 653, 762-97. See Adams v. Weinberger, 391 F. Supp. 269, 271 (D.D.C. 1975).


view is available, the plaintiff will generally prevail only if the agency action or inaction in enforcing Title VI is "arbitrary, capricious, [or] an abuse of discretion." 24 Finally, even when courts order that some action be taken, the nature of that action may be left to agency discretion. 25

Congressional supervision of Title VI enforcement efforts is limited and cannot compensate for the defects of the statute's enforcement provisions. Oversight is by committees with only peripheral interests in civil rights. 26 Congress can refuse to renew appropriations for an


25. For example, in Adams v. Richardson, 480 F.2d 1159, 1163 n.5 (D.C. Cir. 1973), the Court held that HEW's continued funding of discriminatory school districts violated Title VI, and then went on to state: "Far from dictating the final result with regard to any of these districts, the order merely requires initiation of a process which, excepting contemptuous conduct, will pass beyond the District Court's continuing control and supervision."

The reluctance of the courts to order specific relief may be overcome after protracted litigation. For example, in Robinson v. Shultz, 8 Emp. Prac. Decs. ¶ 9144 (D.D.C.), reaffirming 7 Emp. Prac. Decs. ¶ 9270 (D.D.C. 1974), the court held that continued payment of Revenue Sharing funds to Chicago violated Title VI, but ordered only that the Treasury Department choose among its alternative means of enforcement. After further litigation, the court ordered that the funds be placed in escrow. 8 Emp. Prac. Decs. ¶ 9832 (D.D.C. 1974), stay denied, 9 Emp. Prac. Decs. ¶ 9861 (D.D.C.), confirmed after transfer sub nom. United States v. City of Chicago, 385 F. Supp. 543 (N.D. Ill. 1975). Cf. Gautreaux v. Romney, 448 F.2d 731 (7th Cir.), on remand, 332 F. Supp. 366 (N.D. Ill. 1971), rev'd, 503 F.2d 124 (7th Cir. 1972), on remand, 363 F. Supp. 690 (N.D. Ill. 1973), rev'd, 503 F.2d 930 (7th Cir. 1974), aff'd, 96 S. Ct. 1538 (1976). In Gautreaux, the court of appeals concluded in 1971, after five years of litigation, that HUD's continued funding of a racially discriminatory public housing system violated Title VI. However, in remanding to the district court, the court noted, "It may well be that the District Judge, in his wise discretion, will conclude that little equitable relief above the entry of a declaratory judgment and a simple 'best efforts' clause will be necessary to remedy the wrongs which have been found to have been committed."

448 F.2d at 740-41. After much further litigation the Supreme Court recently remanded the case to the district court to formulate a plan requiring HUD to locate public housing in Chicago suburbs. 96 S. Ct. at 1550.

26. Every federal agency is overseen in each House by an Appropriations subcommittee, a Government Operations subcommittee, and one additional subcommittee. W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 114 (6th ed. 1974). These subcommittees are concerned with how the agency performs its primary functions. Even the congressional committee most concerned with civil rights—the House Judiciary Subcommittee on Civil Rights and Constitutional Rights—cannot adequately monitor the extent to which federal funding agencies are complying with Title VI. Letter from Representative Edwards, Chairman, Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, to author (May 19, 1976) (on file with Yale Law Journal).
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agency which fails to fulfill the mandate of § 601, but this response would eliminate otherwise worthwhile programs.27

Congress has never modified the Title VI enforcement scheme. However, in 1973, it enacted an explicit civil rights provision, governing only one funding agency, which departed significantly from the Title VI procedures. The agency governed by this new provision was LEAA, created in 1968 as a subagency of the Department of Justice to provide financial and technical assistance to state and local police departments, courts, correctional institutions, and other law enforcement organizations.28

Although Title VI governs LEAA's funding practices, it was apparent when the agency's initial appropriations period expired in 1973 that its performance in the area of civil rights had been inadequate.29 Regulations promulgated by LEAA had been widely criticized as ineffective.30 The agency's civil rights staff assignments were utterly insufficient.31 LEAA had failed to recognize the full reach of Title VI, maintaining that its mandate did not even apply to

28. LEAA was created by Title I of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (Title I codified in 42 U.S.C. §§ 3701-3795 (Supp. IV 1974)), “to assist state and local governments in strengthening and improving law enforcement at every level by national assistance.” Id. § 3701.


LEAA employs two methods for fund dispersal. Most funds are channelled to law enforcement agencies through “State Planning Agencies,” which develop comprehensive annual statewide law enforcement plans, and which receive and distribute “block grants” in accordance with the approved plan. 42 U.S.C. §§ 3722-23, 3733, 3736 (Supp. IV 1974). In addition to such block grants, LEAA also provides “discretionary grants” directly to state and local governments for programs of national priority not included in the state plans. Id. §§ 3736(a)(2), 3737. In fiscal year 1973 LEAA awarded, exclusive of grants to develop the statewide plans, $480.2 million in block grants and $86.9 million in discretionary grants. VI COMMISSION REPORT—1974, at 272, 272 n.720 & 722.

30. LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, supra note 29, at 35, 38 n.104.
31. Until 1971, LEAA had no civil rights office responsible for implementing its Title VI regulations, and the office, once established, was understaffed. COMMISSION REPORT—1973, supra note 8, at 97; see COMMISSION REPORT—1970, supra note 8, at 601, 634.
certain funding activities. Even where the agency had recognized its Title VI obligations, it had not fulfilled them. Although LEAA had received numerous complaints concerning discrimination by its recipients, it had never applied any sanctions and had never held a compliance hearing. In fact, procedures for such a hearing had never even been promulgated. The Justice Department regulations governing LEAA expressed a preference for enforcement through judicial proceedings rather than fund termination. Yet LEAA had never referred a single case to the Attorney General, and only after much external pressure had it intervened in a few private suits.


Congress had occasion to address the problem of LEAA's poor record in preventing discrimination by recipients when, in 1973, it reviewed the agency's initial grant of funds. In the course of considering what eventually became the Crime Control Act of 1973, Congress did not approve the President's version, which did nothing more than state that Title VI applies to LEAA. While retaining the mandate of § 601, Congress created a set of more stringent enforcement requirements addressed specifically to LEAA. Under the Crime Control Act, the agency retains control over the pace but not the mode of enforcement. LEAA must initiate proceedings to cut off funds to

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32. For example, for many years LEAA took the position that Title VI did not require it to ensure adequate minority representation in the State Planning Agencies (described in note 28 supra). LEAA Hearings, supra note 29, at 306 (Sarah Carey, Lawyers Committee for Civil Rights Under Law). In addition, at least through 1970 LEAA refused to recognize any obligation to compel its recipients not to discriminate in employment, Commission Report—1970, supra note 8, at 572-75, even though Title VI bars employment discrimination where employment is a "primary objective" of financial assistance, 42 U.S.C. § 2000d-3 (1970), and LEAA grants are designed in part for "the recruiting of law enforcement and criminal justice personnel," id. § 3731(b)(2).


34. Id. at 344 n.27.

35. 28 C.F.R. § 42.206(a) (1975) provides: "[W]here the responsible Department official determines that judicial proceedings . . . are as likely or more likely to result in compliance than administrative proceedings . . . , he shall invoke the judicial remedy rather than the administrative remedy." In 1973, the Civil Rights Commission concluded that "LEAA has administratively repealed the remedy of fund cut-off." Commission Report—1973, supra note 8, at 101 n.36.

36. 119 Cong. Rec. 20071 (Rep. Jordan) (1973). In two of the suits, Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974), cert. denied, 419 U.S. 895 (1975), and Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972), LEAA intervened 10 months after the suits were brought and only "as a result of a great amount of external pressure to take some action." Commission Report—1971, supra note 8, at 147. In the third case, intervention was by court order. Lawyers Committee for Civil Rights Under Law, supra note 29, at 36.


38. LEAA Hearings, supra note 29, at 26 (text of President's bill, S. 1234, 93d Cong., 1st Sess. (1973)).
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any recipient which fails to comply "within a reasonable time"; the agency can no longer rely solely on the Title VI option of "any other means authorized by law." LEAA has in fact never enacted regulations reflecting the changes made by Congress in 1973. Even if the agency had responded with regulations incorporating the statutory changes, the problem of lax enforcement would remain, because the 1973 provisions contain three gaps. First, they indicate no procedures that LEAA must follow in order to find out on its own if any of its recipients is engaged in discrimination. As a result, LEAA has never systematically reviewed

39. 42 U.S.C. § 3766(c) (Supp. IV 1974). These proceedings are conducted pursuant to § 3757 of that title, which provides for fund termination, after a hearing, in the event of substantial failure to comply with statutes or regulations under the Crime Control Act. Before 1973 these termination procedures did not apply to discrimination by recipients, because LEAA's civil rights mandate, Title VI, was not part of the Act.


Representative Jordan initiated the provisions reducing LEAA discretion. Her original amendment made two major changes: it imposed a 60-day time limit on voluntary compliance efforts, after which enforcement action was required, and it replaced the discretionary choice of sanctions permitted under Title VI with mandatory fund termination. After termination, the agency could use other enumerated means in its efforts to obtain compliance. 119 Cong. Rec. 20071 (1973) (Rep. Jordan). The Jordan version passed the House, id. at 20105, but was revised in the conference committee to accommodate the views of the Senate, which had approved the President's proposal. Id. at 22082. The statute which emerged provided for mandatory termination after a "reasonable time" rather than after 60 days, but retained the requirement that, in the words of the conference committee, "LEAA must initiate proceedings to cut off funds to any recipient who continues to discriminate after that period, and may, concurrently with that initiation, take other actions." Senate Conf. Rep. No. 93-349, 93d Cong., 1st Sess. 32 (1973) (emphasis added).

An earlier and more drastic amendment offered by Representative Rangel, H.R. 14239, 92d Cong., 2d Sess. (1972), would have specified even more stringent civil rights requirements, but was not adopted. Rangel's amendment would have required an explicit finding of civil rights compliance before any grant was made, prohibited discrimination in the composition of state and local planning agencies, and deleted the prohibition against the use of quotas to promote minority employment, 42 U.S.C. § 3766(b) (1970). For the latter provision, the Rangel amendment would have substituted a requirement of "affirmative action to overcome the effects of past discrimination by the grantee in employment and in the services provided." 118 Cong. Rec. 11388-90 (1972).

41. Statement of Representative Jordan, supra note 9, at 1-2. Recently, LEAA has circulated proposed regulations for comment. Notice of Proposed Rulemaking, 40 Fed. Reg. 56454 (1975). If adopted, these regulations would improve LEAA's enforcement procedures in several ways. Additional employment discrimination guidelines would be incorporated by reference. Proposed Reg. § 42.203(b), 40 Fed. Reg. 56454 (1975). Following the language of the Crime Control Act, 42 U.S.C. § 3766(c) (Supp. IV 1974), fund termination would be mandatory once voluntary compliance efforts failed. Proposed Reg. § 42.206(a), 40 Fed. Reg. 56454 (1975). Unless LEAA refers investigation to another specified agency, any complaint would have to be investigated within 180 days. Id. § 42.404, at 56455. Increased responsibility for aiding enforcement would be delegated to the State Planning Agencies funded by LEAA. Id. § 42.406. However, the proposed regulations fall short of fully satisfactory enforcement procedures, and legislative action is therefore still required. See pp. 736-37 and notes 77-82 infra.
the compliance of its recipients.\footnote{As of January, 1975, LEAA had conducted only 18 post-award compliance reviews. LEAA's explanation is that the process is too lengthy to be practical and that the agency relies instead on pre-award reviews. However, by the end of fiscal year 1974, LEAA had conducted only about 76 such reviews; it reviews no recipients of block grants and only those few recipients of discretionary grants receiving $750,000 or more. VI \textit{Commission Report}-1974, at 348, 350, 355.} Second, they fail to specify the pace at which LEAA must proceed in determining the validity of a charge of discrimination or in cutting off funds once such a determination has been made. LEAA has exploited this omission through needless delays in attending to complaints and through protracted compliance negotiations.\footnote{\textit{Id.} at 365-76.} Third, the Act provides no guidance on the meaning of "discrimination" as applied to activities in which LEAA recipients engage. LEAA's regulations have done little to remedy this deficiency,\footnote{\textit{Id.} at 383; Statement of Representative Jordan, \textit{supra note 9}, at 2.} which results in ad hoc, subjective determinations of compliance.\footnote{VI \textit{Commission Report}-1974, at 377.} These gaps in the Crime Control Act have had the cumulative effect one might have expected. The civil rights enforcement record of LEAA since 1973 is still bad.\footnote{\textit{Id.} at 281-88.} Of the few recipients whose activities have been reviewed by the agency, most were found to be discriminating in some way.\footnote{\textit{Id.} at 361 n.968.} Yet in no instance has LEAA cut off a recipient's funds,\footnote{\textit{Id.} at 383; Statement of Representative Jordan, \textit{supra note 9}, at 2.} and the lesser sanction of fund deferral has been used sparingly.\footnote{VI \textit{Commission Report}-1974, at 377.} The agency even continues to fund recipients which...
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have refused to comply with judicial orders prohibiting further discrimination.\textsuperscript{50} Despite LEAA's stated position that nondiscrimination is best enforced through judicial proceedings,\textsuperscript{51} it has referred only four cases to the Attorney General.\textsuperscript{52}

There is even some doubt whether victims of a recipient's discrimination can compel the cutoff of funds required by the Crime Control Act. The Act grants no explicit right of judicial review to persons seeking to challenge a decision by LEAA to continue funding recipients which are allegedly discriminating.\textsuperscript{53} Such review is available under Title VI, but its scope is limited to the agency's Title VI responsibilities and does not include the question whether the agency has observed the provisions of any other law—in the case of LEAA, the Crime Control Act. And under Title VI, an agency has broad discretion whether or not to cut off funds; any decision it makes can generally be set aside by a judge only upon a showing that this discretion has been abused.\textsuperscript{54} Thus, the fact that the Crime Control Act makes such termination mandatory is of no help to a person seeking review under Title VI.

But judicial review may well be available under the Administra-


\textsuperscript{51} 28 C.F.R. § 42.206(a) (1975); see note 35 supra. At a recent conference with civil rights leaders, the Administrator of LEAA stated:

\textit{I think it is a very accurate observation that we perhaps have excessively relied on judicial remedies where in fact we could have been more successful in pursuing an administrative course too.


\textsuperscript{53} Section 2 of the Act, 42 U.S.C. § 3759(a) (Supp. IV 1974), which reenacted an identical provision in the Omnibus Crime Control and Safe Streets Act of 1968, provides judicial review for "any applicant or grantee" dissatisfied with final agency action. No other possible plaintiffs are mentioned in the Act.

\textsuperscript{54} See p. 726 and note 24 supra.
tive Procedure Act (APA) to an individual seeking to enforce the Crime Control Act’s stricter requirements. The APA provides judicial review to any person “aggrieved” by any act, or failure to act, by a federal agency. If an aggrieved person demonstrates sufficient cause, the court must compel the agency to take any action “unlawfully withheld or unreasonably delayed.” It is settled that if a statute requires that action be taken against a recipient of federal aid engaged in discrimination, and an agency fails to act, then any victim of this discrimination is “aggrieved.” There is no reason not to apply this principle to the Crime Control Act.

Under the APA itself, however, judicial review is not available if another statute precludes it. This provision raises some doubt as to whether the APA can be invoked by individuals suffering discrimination at the hands of LEAA recipients. Judicial review of LEAA action under the Crime Control Act is granted to “any applicant or grantee,” but there is no mention of review for any other person.

It may be argued that by thus providing review to some plaintiffs, the Act by implication precludes review under the APA for those not mentioned. The weight of authority lies against this manner of construction. Nonetheless, it is less than certain under present

56. Id. § 706(1).
57. See Tomlinson & Mashaw, supra note 17, at 630 n.84 (citing cases). Individuals with Title VI claims are clearly entitled to APA review. See p. 724 and note 16 supra.
60. As originally proposed, the APA exception for statutes precluding review, 5 U.S.C. § 701(a)(1) (1970), was limited to explicit preclusions. S. Doc. No. 248, 79th Cong., 2d Sess. 155, 160 (1946) (text of bill). It was changed at the request of the Attorney General to the present form in order to allow preclusions by implication. Id. at 229-30. Implied preclusion of review was the basis of the Court’s decision in Switchmen’s Union v. National Mediation Bd., 320 U.S. 297 (1943), decided before the enactment of the APA. The Court denied review of the defendant’s certification of an election on the grounds that the Railway Labor Act, ch. 347, 44 Stat. 577 (1926) and ch. 691, 48 Stat. 1185 (1934) (now codified at 45 U.S.C. §§ 151-164 (1970)), did not include such certification within the class of specifically reviewable acts. 320 U.S. at 305-06. In Kirkland v. Atlantic Coast Line R.R., 167 F.2d 529 (D.C. Cir. 1948), the reasoning of Switchmen’s Union was followed in construing the provision of the APA that review is not available where precluded by another statute. 5 U.S.C. § 1009 (1964) (now 5 U.S.C. § 701 (1970)). Other cases involving implied preclusion include American Fed’n of Labor v. NLRB, 308 U.S. 401, 404, 411 (1940) (NLRB certification decision); Guardian Life Ins. Co. v. Bohlinger, 308 N.Y. 174, 181, 124 N.E. 2d 110, 113 (1954) (claim under state insurance law). Switchmen’s Union has been criticized and distinguished in several recent cases. International Longshoremen’s Ass’n v. North Carolina Ports Auth., 463 F.2d 1, 3 (4th Cir. 1972); United States v. Feaster, 410 F.2d 1534, 1561 (5th Cir. 1969).
61. The Supreme Court has stated that the judicial review provisions of the APA should be construed broadly. Barlow v. Collins, 397 U.S. 159, 166 (1970) (dicta); Brownell v. Tom We Shung, 332 U.S. 180, 185 (1946) (“[U]nless made by clear language of super- sedure, the expanded mode of review granted by [the APA] cannot be modified.”) See L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 373 (1965); note 60 supra.
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law that aggrieved individuals can enforce the cutoff of funds in the courts.62

II. An Alternative Plan of Enforcement for LEAA

LEAA's lax enforcement has undermined the congressional prohibition of racial discrimination by the agency's recipients. Congress should replace the loose provisions of Title VI and the Crime Control Act with an enforcement scheme which closely circumscribes LEAA's permissible range of action and which guarantees that individual victims of discrimination can compel the agency to take such action as the law requires.

A. Specification

Although broad administrative discretion63 often serves government agencies well, it is not necessary to effective enforcement of nondiscrimination, and may even hamper enforcement when nondiscrimination is peripheral to an agency's central purpose. If an agency is to deal with problems in a constantly changing environment, a detailed statutory scheme prescribing what it must do would quickly become

62. Only one case has discussed the right of an aggrieved individual to seek review of LEAA's civil rights obligations under the Crime Control Act. In Hardy v. Leonard, 377 F. Supp. 831 (N.D. Cal. 1974), a black woman who had been denied employment by the Oakland Police Department sued LEAA under both Title VI and the Crime Control Act, charging that the agency had taken inadequate steps to assure nondiscrimination by the police department. For purposes of deciding whether the plaintiff could obtain judicial review, the court distinguished between the provisions of Title VI and the Crime Control Act. It noted that 42 U.S.C. § 3759(a) (Supp. IV 1974) provided review of agency action taken under the Crime Control Act only for LEAA grantees and applicants, but that Title VI authorized such review "as may otherwise be provided by law." Id. at 835, n.2, citing 42 U.S.C. § 2000d-2 (1970). The court found that the APA provided review of the agency action taken under Title VI; however, it made no mention of whether the APA provided review of agency action taken under the Crime Control Act. By failing to address the latter question, the opinion may be interpreted to suggest that such review is precluded by Congress's failure to include individuals injured by recipients of LEAA funds among those permitted to obtain review under 42 U.S.C. § 3759(a) (Supp. IV 1974). But see Ely v. Velde, 321 F. Supp. 1088, 1092 (E.D. Va.), aff'd in part, rev'd in part, 451 F.2d 1130 (4th Cir. 1971) (granting APA review of LEAA action to individual plaintiffs and rejecting the argument that the grant of review for LEAA applicants and grantees under 42 U.S.C. § 3759(a) precludes review for other persons under APA). Nevertheless, Hardy represents a troublesome uncertainty as to whether review will be granted in the future.

Even if a plaintiff could not obtain review under the APA of an LEAA decision not to terminate funds, he might succeed in bringing a mandamus action under 28 U.S.C. § 1361 (Supp. IV 1974). However, § 1361 reaches only the "ministerial" duties of an official, Richardson v. United States, 405 F.2d 844, 849 (3d Cir. 1972), rev'd on other grounds, 409 U.S. 965 (1974), and LEAA's obligations under the Crime Control Act are largely discretionary.

63. For a recent discussion of the problem of discretion in administrative law, see Stewart, The Reformation of Administrative Law, 88 HARV. L. REV. 1667 (1975).
obsolete. Broad discretion is also essential when the agency's task is so specialized and complex that reasonable choices can only be made by those with a high degree of expertise. And at the outset of a new program, experimentation is often necessary before proper standards and procedures can be formulated. But discrimination is not a phenomenon whose contours change rapidly over time. Expertise is probably not required to detect or respond to instances of discrimination: Congress must have so concluded when it chose to assign the responsibility of enforcing Title VI to 25 different agencies, none primarily concerned with civil rights. Whatever the apparent virtues of experimentation were at the time Title VI was enacted, 12 years later they are belied by LEAA's record of failure.

The enforcement of nondiscrimination is not LEAA's main function. Effective enforcement requires that the agency attach importance to factors entirely foreign to those which normally determine the merits of funding requests. As a result, the agency is likely to be predisposed against vigorous enforcement and inclined to do no more than the bare minimum in this area. And since LEAA's raison d'être is to foster law enforcement programs, its administrators will hardly be quick to impose a paralyzing fund cutoff, even in the face of discrimination that they might otherwise deplore.

In addition, Congress may choose to delegate discretion to an agency because it lacks the political consensus to legislate beyond the outline of a general goal. K. Davis, supra note 21, at 39, 46; Stewart, supra at 1672 n.10, 1695, 1697.

The problems attending agency enforcement of peripheral mandates is not limited to civil rights. Similar difficulties have arisen under the National Environmental Policy Act of 1969, 42 U.S.C.A. §§ 4321-4347 (1976 Supp.) (NEPA), which requires all federal agencies to consider the environmental impact of every proposal over which the agency presides. 42 U.S.C. § 4332 (1970). Congress recognized that protection of the environment is necessarily a secondary concern to agencies with other primary functions, and NEPA was enacted to insure that this secondary status would not cause environmental considerations to be ignored entirely. 115 Cong. Rec. 40123 (1969) (Sen. Muskie); F. Anderson, NEPA in the Courts 1, 106 (1973); Leventhal, Environmental Decisionmaking and the Role of the Courts, 122 U. Pa. L. Rev. 509, 515 (1974). Nevertheless, the ill-defined NEPA directive has failed to compel agency decisionmakers to give sufficient weight to environmental factors. See F. Anderson, supra at 257-58. See also NAACP v. FPC, 520 F.2d 432, 436 (D.C. Cir. 1975), aff'd, 44 U.S.L.W. 4659 (U.S. May 19, 1976) (FPC
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LEAA's task requires continuous dealings with its recipients, the agency will probably be unwilling to dissipate accumulated goodwill in controversies regarded as peripheral by both parties. Finally, recipients are far more likely to contest LEAA's decisions than are those suffering discrimination, and the agency therefore has more to fear from angry recipients than from the victims of their discrimination.

A precise specification of procedures to be followed by LEAA would strengthen its enforcement program in several ways. First, it would counteract the predisposition of its personnel against strict enforcement by closing off the possibilities of inaction latent within the existing laws. Second, it would make LEAA's performance more susceptible to evaluation by its overseers. Third, greater specification would allow courts to impose a stricter standard of review; plaintiffs would not need to demonstrate that the agency's action was "arbitrary or capricious," but simply that it was "not in accordance with law." Fourth, it would diminish the influence of informal political pressures on enforcement decisions—pressures which are magnified by the fact that LEAA is not an independent agency, but rather part of the executive branch.

not required to issue rules prohibiting discrimination under its responsibility to regulate in the public interest).

69. See Stewart, supra note 63, at 1714.
70. See id. at 1684-86, 1713-15.
71. See Wright, supra note 64, at 581. At the present time, ten governmental authorities are involved in overseeing LEAA: six congressional subcommittees, see note 26 supra; the Federal Programs Section of the Justice Department's Civil Rights Division, see note 84 infra; the Office of Management and Budget, 31 U.S.C. §§ 16, 153 (Supp. IV 1974); the Comptroller General, 31 U.S.C. §§ 42, 1154 (Supp. IV 1974); and the United States Commission on Civil Rights, 42 U.S.C. §§ 1975-1975e (Supp. IV 1974). Of these, only the Civil Rights Commission devotes a significant amount of attention to LEAA's civil rights program. The Federal Programs Section of the Civil Rights Division has failed to fulfill adequately its responsibility to prescribe standards and procedures for Title VI enforcement. VI COMMISSION REPORT—1974, at 798-803.
72. 5 U.S.C. § 706(2)(A) (1970). See Cappadora v. Celebrezze, 356 F.2d 1, 6 (2d Cir. 1966) ("[O]nce appropriate rules have been established, the discretion conferred in day to day administration cannot have been assumed to extend to unreasonable deviation from such rules on an ad hoc basis at the whim of the Administration."); Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion," 82 HARV. L. REV. 367, 376, 380-81 (1968); Comment, supra note 65, at 41-42; Wright, supra note 64, at 581. Cf. Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971) (holding reviewable discretionary action by agency, but remanding for agency articulation of the factors it considered).
73. There is also evidence that greater specification decreases the frequency with which judicial review is sought. H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 24 (1962); see Sofaer, supra note 66, at 1302 (study of Immigration and Naturalization Service). In addition, specification might sufficiently restrict agency discretion to make it "ministerial," and thus possibly subject to a mandamus action under 28 U.S.C. § 1361 (Supp. IV 1974). See note 62 supra.
74. See J. LANDIS, THE ADMINISTRATIVE PROCESS 61-63 (1938); R. NOLL, REFORMING REGULATION 5 (1971); Sofaer, supra note 66, at 1501-02 (Immigration and Naturalization Service); Stewart, supra note 63, at 1676; notes 17 supra (frustration of civil rights enforcement by executive branch) and 87 infra (informal congressional pressures).
There is a limit, however, beyond which statutory specification may hinder an effective civil rights program. As the original proponents of Title VI noted, \(^74\) a degree of flexibility is needed to allow a response suited to the particular circumstances of each instance of discrimination. Rather than eliminate discretion altogether, therefore, specification should establish minimum standards to which LEAA must adhere.

Two means exist for specifying LEAA's responsibilities. Congress may itself enact a detailed statutory scheme, or it may place the burden on LEAA by conditioning appropriations on the promulgation of acceptable regulations.\(^75\) The delegation of rulemaking power to the agency would be justified only if it were likely that the agency were better able to address the problem of discrimination than Congress. However, nothing in LEAA's performance to date indicates that it is either vigorous or expert in the enforcement of civil rights. And even if promulgated, the regulations could be changed unilaterally by the agency.\(^76\) Hence direct statutory specification seems the only way for Congress to give effect to its own mandate.

In light of the present deficiencies in LEAA's enforcement scheme, Congress should establish deadlines for responses to complaints,\(^77\) and specify the minimum pace at which the agency must proceed from each stage of the enforcement process to the next.\(^78\) LEAA should be required to report its grounds for denying any complainant's request that an authorized sanction be imposed; such a report would permit informed judicial review and would establish precedents to

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74. See note 15 supra.

75. To avoid constitutional problems, Congress as a whole would have to approve these regulations and submit them to the President for his approval. See note 91 infra.


77. Under 29 C.F.R. § 42.107(c) (1975), LEAA is required to act "promptly," but the agency presently imposes needless delays in processing complaints. VI COMMISSION REPORT—1974, at 369-76. The proposed regulations, § 42.404, 40 Fed. Reg. 56455 (1975), would require that complaints generally be investigated within 180 days, but would provide exceptions which may frustrate the requirement. For example, LEAA would be exempted from any duty to investigate once the complaint is referred to a State Planning Agency, the Equal Employment Opportunity Commission, or any of a number of other authorities, none of which is subject to the 180-day requirement.

78. The only time limit provided in the Crime Control Act requires that LEAA give the governor of a state "a reasonable time" to achieve compliance before commencing procedures for termination of funds to a recipient within that state. 42 U.S.C. § 3766(c)(2) (Supp. IV 1974). LEAA's proposed regulations, 40 Fed. Reg. 56454 (1975), are inadequate because they do not establish time limits for all steps of the compliance process. For example, no limit is placed on the time allotted for the actual investigation. Moreover, LEAA may circumvent other time limits by delegating investigation to another authority. See note 77 supra.
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promote consistency among enforcement decisions. Congress should establish standards by which compliance is to be measured. A showing of recipients' nonadherence to these standards would establish a prima facie case of discrimination, and, after an opportunity for voluntary compliance, would automatically trigger a deferral of funding. Automatic deferral would encourage recipients to come forward with evidence to rebut the prima facie case of discrimination. The standards would establish both a measure for supervision of the agency's enforcement effort and a guide for recipients in their own efforts to eliminate discrimination. In addition, LEAA should be required to review the compliance of its recipients as a matter of course without waiting for complaints.

79. K. Davis, supra note 21, at 103-11. Courts have recognized the need for agencies to provide reasons for their actions. E.g., Environmental Defense Fund, Inc. v. EPA, 465 F.2d 528, 539 (D.C. Cir. 1972); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 612 (2d Cir. 1965). The present requirement, unchanged in the proposed regulations, is that written notice of the decision, but not its factual basis, must be given. 28 C.F.R. §§ 42.107(d)(2), 42.108(c)(1) (1975).

An alternative proposal might be to grant disappointed LEAA complainants a hearing, a right now accorded to LEAA recipients before a decision to terminate funds. 28 C.F.R. § 42.104 (1975). Cf. 29 C.F.R. § 10.6 (1975) (hearing granted to complainant following NLRB dismissal of charges).

80. The evidentiary basis for LEAA compliance actions would be similar to the "pattern or practice" criterion under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6 (Supp. IV 1974). LEAA's proposed regulations adopt the EEOC's employment discrimination guidelines, 28 C.F.R. §§ 42.201-.308 (1975), but do not provide standards for other discriminatory practices of LEAA recipients. See note 44 supra. For one attempt to develop such standards for police services, see P. Bloch, Equality of Distribution of Police Services--A Case Study of Washington, D.C. (Urban Institute 1974). Although § 518(b) of the Crime Control Act, 42 U.S.C. § 3766(b) (Supp. IV 1974), prohibits LEAA from imposing quotas to achieve racial balance among employees of its recipients, both LEAA and the Justice Department have explicitly recognized that a rebuttable presumption based on numerical compliance standards is consistent with § 518(b). Legal Opinion No. 74-54--"Goals and Timetables" Relationship to Section 518(b)—January 21, 1974 (memorandum from LEAA General Counsel to LEAA Deputy Administrator for Administration); LEAA Instruction: Goals and Timetables Under Section 518(b) of the Crime Control Act of 1973, Instruction No. I 7300.1 (undated) (instruction from LEAA Deputy Administrator for Administration to LEAA regional offices and State Planning Agencies) (both on file with Yale Law Journal).

81. Cf. Revenue Sharing Hearings, supra note 23, at 152, 165 (similar proposal concerning Revenue Sharing). Under LEAA's present and proposed regulations the agency is required to provide a hearing before suspending funds. 28 C.F.R. § 42.108(c) (1975); Proposed Reg. § 42.410, 40 Fed. Reg. 56457 (1975). Under the procedures suggested here, the hearing would occur after deferral.

82. LEAA's present and proposed regulations provide for reviews "from time to time." 28 C.F.R. § 42.107(a) (1975); Proposed Reg. § 42.410(a), 40 Fed. Reg. 56455 (1975). This vague wording has meant that very few recipients have ever been reviewed, see note 42 supra, and as a result recipients do not take the threat of review seriously. As Catherine Higgs Milton, former Director of the Police Foundation, stated:

Generally, the departments which are . . . trying hard to make improvements . . . say that LEAA does not know what they are doing. . . . One person told me that . . . he did not think that LEAA would even know that they had not filed
B. Control

A specific statutory plan which no longer accommodates LEAA's inaction would do much to strengthen the agency's civil rights enforcement. But it will not suffice by itself: a guarantee that the specified standards and procedures will be followed is also needed. Since the agency is likely to be predisposed against strict enforcement, some effective external control must be provided.

The potential for this control resides in all three branches of the federal government. Executive control over LEAA operates through the Attorney General's authority to coordinate the civil rights programs of all federal agencies. This authority has not been used effectively in the past, and it would be unwise to rely on executive leadership in the future. Congressional control over the agency is presently exercised through the oversight of subcommittees. The pressures generated by this supervision are not likely to promote non-discrimination, since the informal control exercised by committee members is entirely unstructured and often shaped by personal, local, and political motivations. These problems would only be exacerbated if Congress undertook more active supervision of LEAA's

[an Equal Employment Opportunity Plan] or even cared about whether they filed it . . . .

From the departments which are avoiding making changes, I got the impression that their view is that, again, LEAA is not even going to find out or, if they do, there will be ways to avoid making changes.


Representative Rangel's 1972 proposal, supra note 40, would have required pre-award reviews, 118 CONG. REC. 11390 (1972), as does the Office of Federal Contract Compliance. 41 C.F.R. §§ 60-1.1, 60-1.2, 60-1.3 (1975). LEAA's regulations require recipients to develop Equal Employment Opportunity Plans, which are rarely used by the agency. 28 C.F.R. §§ 42.302, 42.304 (1975); VI COMMISSION REPORT—1974, at 306. If supplemented with information on practices other than employment, these plans would be sufficient in most cases to make annual pre-award compliance determinations.

83. See pp. 734-35 supra.

84. Exec. Order No. 11764, 3 C.F.R. app. 124-25 (1974 Comp.). Title VI imposed a check upon agency discretion by requiring all regulations to be approved by the President, 42 U.S.C. § 2000d-1 (1970); 110 CONG. REC. 2497-500 (Rep. Lindsay), 12716 (1964) (Sen. Humphrey). The President delegated this power to the Attorney General, whom the Executive Order directs to "prescribe standards and procedures regarding implementation of Title VI." The Attorney General, in turn, has delegated this responsibility to the Federal Programs Section of the Civil Rights Division. VI COMMISSION REPORT—1974, at 645.

85. VI COMMISSION REPORT—1974, at 798-803; see note 17 supra.

86. For enumeration of the relevant congressional committees, see note 26 supra.


88. For example, a statute might require LEAA to provide a congressional committee with a civil rights compliance report before any grant could be approved, or to submit to the committee an explanation of any decision not to terminate funds following a

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day-to-day workings. Increased committee control could not help but further politicize the issue of civil rights, a problem Title VI was designed to avoid. It would also hamper judicial review by the resulting diffusion of responsibility: confusion as to which body is responsible for decisions would decrease LEAA's accountability. Moreover, express administrative control such as a committee veto over agency action might well violate Article II of the Constitution by vesting an essentially executive function in Congress; even if such ongoing supervision could somehow be characterized as "legislation," it would nevertheless violate Article I by allowing a part of Congress to act as a whole and by depriving the President of the power to approve congressional enactments before they become law.

Judicial review is in all likelihood the best means of ensuring that LEAA adheres to its statutory obligations, once these have been adequately specified. The courts' traditional function as an independent check on administrative abuse is even more essential when the vindication sought is not that of competing private interests, but of a minority's statutory right. As a non-majoritarian branch, the judiciary is more apt to be immune from political pressures and to hold LEAA to a standard strictly defined by law. In light of the affirmative complaint. Cf. Watershed Protection and Flood Prevention Act of 1954, 16 U.S.C. § 1002 (1970) (requiring committee approval for certain conservation projects over $250,000); J. HARRIS, supra note 27, at 136-37 (discussing relationship between the Atomic Energy Commission and the Joint Congressional Committee on Atomic Energy under 42 U.S.C. § 2252 (1970)). The recently created Senate Select Committee on Intelligence greatly expands the congressional power to oversee the CIA and other government intelligence units. The committee will receive information on intelligence activities, and, although it has no formal veto power, it can vote to make public any activity of which it disapproves. If the President objects to disclosure, the decision is left to the full Senate. S. Res. 400, 94th Cong., 2d Sess. §§ 4, 5, 8 (1976), reprinted in 122 CONG. REC. S7563-65 (daily ed. May 19, 1976).

89. See Stewart, supra note 63, at 1695 n.128.
90. See note 6 supra.
91. See Comment, Congress Steps Out: A Look at Congressional Control of the Executive, 63 CAL. L. REV. 983, 1053-69 (1975); Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 HARV. L. REV. 569, 571, 605-09 (1953). The Constitution vests the executive power of the United States in the President and the legislative power in the Congress as a whole. U.S. CONST. art. II, § 1; id. art. I, § 1. It also requires Congress to submit its actions to the President for his approval (or veto) before they become law. Id. art. I, § 7.

Title VI contains a "report and wait" provision of the type criticized in Comment, supra at 1060-63:

In the case of any action terminating assistance the agency shall file with the committees of the House and Senate having legislative jurisdiction a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

42 U.S.C. § 2000d-1 (1970). It appears that Congress has never attempted to override an agency fund termination reported under this provision.

92. See, e.g., Fiss, The Jurisprudence of Busing, 39 LAW & CONTEMP. PROB. 194, 209-10 (1975); Wright, Professor Bickel, The Scholarly Tradition, and the Supreme
virtues of judicial review and the practical and constitutional infirmities of the other means of control considered here, there is no reason for Congress to consider seriously other means.

Congress should make clear that judicial review is available for any individual aggrieved by LEAA's failure to respond to the discriminatory practices of a recipient of federal financial assistance. It would be unwise to rely on the courts to find that such a right is not impliedly precluded by the existing provisions for review in the Crime Control Act. Clear statutory recognition of the right of review, together with increased specification of LEAA's obligations, will give fuller effect to Congress's mandate against discrimination.


93. See pp. 731-33 *supra.*