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# JUDICIAL ACTIVISM AND THE ADMINISTRATION OF CIVIL RIGHTS POLICY

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## I. INTRODUCTION

The utility of judicial intervention to reform and perfect the administration of social policy is widely acknowledged:

> Because they are sometimes more accessible than legislatures and bureaucracies, courts can encourage the adaptation of cumbersome administrative institutions to emergent public values. Decisions such as . . . *Adams v. Richardson*, which require old-line administrative agencies to give new weight . . . to the elimination of racial discrimination, exemplify this sometimes controversial process of judicial renovation of statutory norms."[1]

Subjection to a court order may even facilitate the exercise of bureaucratic power by providing a timid agency with the clout and legitimacy it needs to triumph over its political opposition.[2] An agency constrained by the judiciary is well-positioned to pacify the opposition without actually curtailing its enforcement activities by disavowing responsibility for its actions. The judiciary is not only a magnificent scapegoat, but the solutions it proposes to bureaucratic problems can "be tailored to the needs of the particular situation and flexibly administered or modified as experience develops."[3] According to Cavanagh and Sarat, scholars who doubt the judiciary's capacity to superintend the administration of social policy have "underestimate[d] the

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1. Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1282 (1982).

2. *See, e.g.*, T. Yarbrough, *The Political World of Federal Judges as Managers*, 45 PUB. ADMIN. REV. 660, 665-66 (1985); S. Wasby, *Communication of Decisions, in* COURTS, LAW, AND JUDICIAL PROCESSES 479, 482 (1981);; D. Brown & R. Stover, Compliance with Court Directives: A Utility Approach, in, AMERICAN COURT SYSTEMS 555-56 (1989).

3. Abraham Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1308 (1976).

demonstrated ability of courts to evolve new mechanisms and procedures in response to implicit or explicit societal demands. They are too often content to evolve theories about judicial competence from a handful of 'worst' case studies."[4]

But how are we to decide when a case study is typical, and therefore relevant to the determination of judicial competence, and when it is not? Is every example of judicial incapacity an aberration? Cavanagh and Sarat seem to think so.[5] Otherwise, why would they try to establish the capacity of the judiciary to manage extended impact cases successfully on the basis of purely abstract considerations? Not one case study is cited to demonstrate the inadequacy of Horowitz's case selection process. But a theory, unsubstantiated by practice, is hardly proof of the capacity of the judiciary to comprehend and superintend the administration of complex social policies.

*Adams v. Richardson*[6] is relevant to the study of judicial competence, not only because of the importance of its subject matter—the administration of civil rights policy by the Office for Civil Rights (OCR)—but also because it is frequently cited to illustrate the desirability of judicial intervention. *Adams*, however, is a reminder that what seems obvious in the beginning may not be so obvious in the end. Difficulties arose not because the judiciary was too political, but because it was not political enough. It was too insulated from the political and administrative process to anticipate the consequences of its decisions.

In *Adams*, the District Court for the District of Columbia not only intervened repeatedly to improve the enforcement of civil rights, but adopted a strategy which to everyone's surprise made it increasingly difficult for OCR to combat racial

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4. R. Cavanagh & A. Sarat, *Thinking about Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371, 373 (1980) (citing D. Horowitz, *The Courts as Guardians of the Public Interest*, 37 PUB. ADMIN. REV. 1294 (1977)).

5. *Id.* at 403-11.

6. Adams v. Richardson, 351 F. Supp. 636 (D.C. Cir. 1972). *Adams* has gone through many name changes in its history as evidenced by the following list: Women's Equity Action League v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990); Adams v. Bennett, 675 F. Supp. 668 (D.C. Cir. 1987) *rev'd sub nom.*, Women's Equity Action League v. Cavazos, 879 F.2d 880 (D.C. Cir. 1989); Women's Equity Action League v. Bell, 743 F.2d 42 (D.C. Cir. 1984); Adams v. Bell, 711 F.2d 161 (D.C. Cir. 1983) (en banc), *cert. denied*, 465 U.S. 1021 (1984); Adams v. Mathews, 536 F.2d 417 (D.C. Cir. 1976); Adams v. Califano, 430 F. Supp. 118 (D.C. Cir. 1977); Adams v. Weinberger, 391 F.Supp. 269 (D.C. Cir. 1975); Adams v. Richardson, 656 F. Supp. 92 (D.C. Cir.) *aff'd en banc*, 480 F.2d 1159 (D.C. Cir. 1973).

discrimination, thereby delaying attainment of the very goals the court's authority had been originally invoked to secure. As the history of *Adams* amply demonstrates, judicial intervention can not only reduce an agency's effectiveness, but may even facilitate the imposition of a more conservative political agenda. The most ardent champions of *Adams*, although loath to assume responsibility for what has happened, now grudgingly acknowledge the insufficiency of judicial intervention: "[T]he sad story is that despite fifteen years of litigation, the nonenforcement continues."[7] While "OCR's failure to aggressively enforce the civil rights laws extends backwards to its inception in the Department of Health, Education and Welfare [HEW], it appears that the Reagan Administration severely worsened this agency's enforcement record, despite close monitoring by the Federal courts and the Congress."[8] How the plaintiffs' legal victories strengthened the hand of their political and ideological opponents within OCR and its implications for the study of judicial competence are the subjects of this discourse.

## II. THE INELUCTABLE MARCH OF JUDICIAL ACTIVISM

Title VI of the 1964 Civil Rights Act forbids racially discriminatory behavior in any program or activity receiving federal funds.[9] The Department of Education (formerly HEW) has primary responsibility for its enforcement with respect to educational institutions. If voluntary compliance with the provisions of Title VI cannot be secured, enforcement may be accomplished either by terminating further assistance and/or prosecution by the Department of Justice (DOJ) or any other means authorized by law. Infuriated by Attorney General Mitchell and HEW Secretary Finch's July 3, 1969 decision to "minimize the number of cases in which it becomes necessary to employ the particular remedy of a cutoff of federal funds,"

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7. *Investigation of Civil Rights Enforcement by the Department of Education, Hearings before the House Committee on Government Operations*, 99th Cong., 1st Sess. 84 (1985) (statement of Elliot C. Lichtman, counsel for the NAACP Legal Defense and Educational Fund (LDF) in *Adams*). [hereinafter 1985 *Civil Rights Hearing*].

8. *Investigation of the Civil Rights Enforcement Activities of the Office for Civil Rights U.S. Department of Education, Majority Staff Report of the House Committee on Education and Labor*, 100th Cong., 2d Sess. 6 (1989) [hereinafter *Majority Staff Report*].

9. Section 602 codified at 42 U.S.C. § 2000d-1 (1976).

the NAACP Legal Defense Fund (LDF) filed suit.[10] In the eyes of most observers, the Nixon administration's new enforcement strategy (prosecution by DOJ) was merely a ploy to mask its abandonment of civil rights:

> The Nixon administration has been the most guilty of vacillation, inconsistency and weakness .... [T]he [new] desegregation procedures ... amounted to a blueprint for failure. The [Mitchell/Finch] statement deemphasized the technique that had proven best at achieving school desegregation in recalcitrant school districts (HEW fund cutoffs), and adopted a technique that had proven bankrupt before (individual negotiations with school boards backed by litigation brought by [DOJ].[11]

In its complaint, the LDF alleged that OCR had done nothing to halt the flow of federal funds to school districts and systems of higher education which the agency itself found continued to segregate and discriminate on the basis of race.[12] The LDF's real objective, however, was not to terminate federal funding, but to alter the dynamics of OCR's compliance negotiations with state and local officials. Convinced that the "threat of losing federal money is a greater stimulus to corrective action than prosecution by DOJ," the LDF advocated a judicially mandated timetable for the initiation of fund termination proceedings to make "the carrot—voluntary compliance—effective."[13]

The termination of federal funding would have injured those students (blacks) and universities (predominantly black institutions) most dependent upon federal aid. To terminate federal funding to every public institution of higher education in Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Pennsylvania and Virginia (the ten *Adams* states whose entire systems of higher education OCR had previously concluded were in violation of Title VI) or the 525 or more school districts cited in the LDF's complaint was politically impossible.[14] No President would

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10. Brief for Appellant at 5, Adams v. Richardson, 351 F. Supp. 636 (D.C. Cir. 1972) (No. 3095-70) (reprinted in *Majority Staff Report* at 200) *supra* note 8.

11. C. BULLOCK & H. RODGERS, JR., LAW AND SOCIAL CHANGE 99 (1972).

12. Brief for Appellant, Adams v. Richardson, 351 F. Supp. 636 (D.C. Cir. 1972) (No. 3095-70) (reprinted in *Majority Staff Report supra* note 8, at 192-224).

13. *1985 Civil Rights Hearings, supra* note 7, at 11.

14. In 1980, Judge Pratt ordered OCR to negotiate higher education desegregation plans with Alabama, Delaware, Kentucky, Missouri, Ohio, South Carolina, Texas and West Virginia.

ever have permitted OCR to deny so many state universities and school districts access to federal funds; had the Secretary of HEW or the Director of OCR attempted to do so, he would have been fired.[15] But once OCR's hands were tied by the judiciary (or so the LDF assumed), the capacity of the White House to impede the enforcement of Title VI would be diminished, and OCR's negotiating posture would be so strengthened that state and local educational officials would have no choice but to capitulate.

Title VI required OCR to thoroughly explore the possibility of voluntary compliance prior to the initiation of any enforcement proceedings. Although no timetable for the completion of this process of consultation and negotiation was outlined in the statute itself, the judiciary need only conclude that OCR had abused its discretion and correct the legislature's oversight by fashioning one of its own. Judicial supervision would then be limited to monitoring OCR's compliance with the time frames. At the time, it was difficult to imagine a more prudent example of judicial intervention, or an approach to the administration of civil rights policy more respectful of the integrity of the bureaucratic process. "The timeframes came into being as the demonstrably necessary and least intrusive means of bringing HEW . . . into compliance with Title VI . . . [T]his Court's timeframe order has . . . represented an exercise of judicial restraint."[16]

No jurist sympathetic to civil rights would decline to strike a blow against racial discrimination when the improprieties were so obvious and the remedy (a timetable for securing voluntary compliance) was so simple. Judge Pratt, who has been the presiding judge in *Adams*, need not even "dictate the substantive result of any agency proceedings."[17] By creating a timetable for the initiation of enforcement proceedings, one might even argue that the court was merely doing its best to make sense of a poorly drafted statute. Ordering OCR to withhold further funding from those whom OCR itself had already concluded were in violation of federal law was no abuse of judicial power; the right of a court to require an agency to abide by its own rules and regulations is among the canons of

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15. L. PANETTA & P. GALL, BRING US TOGETHER: THE NIXON TEAM AND THE CIVIL RIGHTS RETREAT (1971); J. CALIFANO, GOVERNING AMERICA 254-57 (1981).

16. Brief for Appellant at 3, Adams v. Bennett, 675 F. Supp. 668 (D.C. Cir. 1987).

17. *Id.* at 39.

administrative law.[18] As Mary Levy, co-counsel for the LDF, observed, "*Adams* is really just a simple matter of administrative law."[19]

Was the omission of a timetable for the completion of voluntary negotiations an oversight? Would the desegregation of public education have been accomplished more quickly if OCR had adopted the enforcement strategy advocated by the LDF, i.e. swift and simultaneous initiation of fund termination proceedings? In a follow-up to their original study, Bullock and Rodgers[20] discovered to their surprise that "the poorest districts were the most willing to forego federal aid."[21] "[A]ctual denial of federal funds proved to be largely ineffective in Georgia. While some, and perhaps many, districts desegregated rather than lose federal revenue, forty-two districts (twenty-two percent of the state's total) preferred loss of federal funds to desegregation. Of these, all but one refused to file a desegregation plan *even after* the fund cutoff." In Region IV, which includes Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee, fund cutoffs were effective only twenty-five percent of the time.[22] Critics of the Mitchell/Finch statement have accused the Nixon administration of orchestrating a civil rights retreat.[23] But the record is more complicated; Bullock and Rodgers, for example, criticize OCR's civil service personnel, and by implication, the civil rights community as well, for its "steadfast refusal . . . to acknowledge the success of the statewide suits years after they had been used."[24] In 1969 (the same year the Mitchell/Finch statement was issued), DOJ filed suit against recalcitrant school districts in Georgia, even waiving the usual ten day notice given to defendants in such cases, to block their access to state educational funds.[25]

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18. Bowen, Secretary of Health and Human Services v. Georgetown Univ. Hosp. et al., 488 U.S. 204 (1988).

19. Author's interview (May 29, 1988).

20. Harrell R. Rogers and Charles S. Bullock III are professors of political science specializing in policy implementation. They are the authors of several studies assessing HEW's efforts to promote school desegregation.

21. C. Bullock & H. Rodgers, Jr., *Coercion to Compliance: Southern School Districts and School Desegregation Guidelines*, 38 J. POL. 987, 1004 (1976).

22. C. BULLOCK & H. RODGERS, JR., COERCION TO COMPLIANCE 50, 90 (1976).

23. *See, e.g.*, L. PANETTA & P. GALL, BRING US TOGETHER: THE NIXON TEAM AND THE CIVIL RIGHTS RETREAT (1971); G. ORFIELD, MUST WE BUS? 242-58, 285-97 (1978); *but cf.* R. NIXON, THE MEMOIRS OF RICHARD NIXON 435-45 (1978).

24. BULLOCK & RODGERS, JR., *supra* note 22, at 93.

25. BULLOCK & RODGERS, JR., *supra* note 21, at 992.

Thereafter, every one of them "submitted desegregation plans acceptable to the courts."[26]

*Adams* was never a simple matter of administrative law. Under the guise of administrative law, OCR eventually became a ward of the court, and for nearly twenty years was denied the right to determine its own enforcement priorities, or to modify them to incorporate the lessons of experience. In the name of civil rights, and at the behest of the LDF, the federal judiciary adopted an interpretation of Title VI contrary to Congress' intent.[27] The enforcement procedures outlined in Title VI are extraordinary. If voluntary negotiations fail to produce an agreement, OCR may either transfer the case to DOJ for civil prosecution, initiate fund termination proceedings before an Administrative Law Judge (ALJ), or pursue any other means authorized by law. If an ALJ rules in OCR's favor, the order announcing the fund cutoff must be signed by the President himself, and full reports must be submitted to all relevant House and Senate committees. Even then, funds cannot be terminated until thirty days after submission of these reports, presumably to give Congress time to take whatever action it deems appropriate. If funds are terminated, the defendant is entitled to a formal hearing before the Washington, D.C. Circuit Court. It is difficult to imagine a more cumbersome procedure, or one less likely to inspire terror in those accused of discriminatory behavior.

No administration wants to terminate federal assistance, and every administration has tried to delay the actual termination of funds as long as possible.[28] But if "[t]here has been bipartisan anathema to employing even the threat of fund termination by initiating the administrative enforcement process when voluntary negotiations fail,"[29] it is not because Presidents Nixon, Ford, Carter, Reagan, Bush and their appointees have no regard for civil rights, but because political pressure or the anticipation of political pressure (much of it emanating from Congress) to postpone the interruption of funds is enormous.[30] Nor is every delay in the initiation of

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26. BULLOCK & ROGERS, JR., *supra* note 22, at 51-52.

27. J. RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY 147, 149-51, 163 (1989).

28. Interview with Frank K. Krueger, Director, Enforcement Division, Policy and Enforcement Service, Office for Civil Rights, Department of Education (August 29, 1990).

29. *1985 Civil Rights Hearings*,*supra* note 7, at 11 (statement of Julius L. Chambers, LDF).

30. F. Farmer, *Selling the Adams Criteria: The Response of OCR to Political*

fund termination proceedings a pretext for nonenforcement.

> Finally our findings also provide some insight into the enforcement approach that was most efficacious in bringing about Southern desegregation. OCR's strategy of leaving until last most of those districts in which greatest opposition was anticipated seems to have been correct. By using their limited resources to negotiate desegregation plans in less resistant districts, OCR made important inroads against white obstinacy. Even small first steps away from complete segregation in a district were psychologically significant. Also for districts which had not yet begun desegregation, the compliance of neighboring systems probably showed other superintendents that the process was feasible and made it more acceptable to the public. In addition, OCR's later strategy of bringing severe coercion against selected recalcitrant districts to set examples for other foot-dragging communities was seemingly effective. Seeing the implications of continued non-compliance, many districts decided to capitulate.[31]

Had Congress required OCR to initiate fund termination proceedings in accordance with a specific timetable, "the enforcement approach that was most efficacious in bringing about Southern desegregation"[32] would have been illegal. The simultaneous denial of federal funds to so many states and districts would have solidified local opposition, strengthened the influence of those members of Congress who opposed OCR's efforts to promote school busing, complicated the task of desegregating the nation's schools, and (if Congress had responded by amending Title VI) diminished OCR's statutory authority to combat discrimination in the future.[33]

In 1974, not long after Judge Pratt's 1973 order establishing time frames for the initiation of Title VI enforcement proceedings was unanimously upheld by the D.C. Circuit sitting *en banc*, eight states submitted plans to eliminate the vestiges of racial discrimination in their systems of higher education. The LDF was ecstatic, its faith in the power of the judiciary to effect social reform confirmed.[34] But its victory was hollow, and its celebration premature. The LDF was forced to return to court again, and again, and again to request additional relief. Further relief was necessary because

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*Intervention in Adams v. Califano*, 22 HOW. L. J. 419-25 (1979).

31. BULLOCK & RODGERS, JR., *supra* note 22, at 67.

32. *Id.*

33. RABKIN, *supra* note 27, at 154, 158.

34. SOUTHERN EDUCATION FOUNDATION, ENDING DISCRIMINATION IN HIGHER EDUCATION: A REPORT FROM TEN STATES (1974) [statement of Jean Fairfax, LDF].

"soon after these 1973 rulings [the LDF] learned that [OCR] was continuing its practice of extensive delays."[35] To make matters worse, the higher education desegregation plans accepted by OCR were unsatisfactory. Contrary to the LDF's expectations, Judge Pratt's order intensified the political pressure upon OCR to produce an agreement within the time allotted by the court, thereby strengthening the hand of the states and prompting OCR to accept desegregation plans it would otherwise have rejected.[36] Wary of the political consequences of initiating enforcement proceedings, OCR backed down, accepting plans which the LDF itself later characterized as totally deficient, and inconsistent with OCR's own desegregation criteria.[37]

When the Ford administration finally initiated fund termination proceedings against Maryland, the state successfully filed suit to enjoin the proceedings. OCR gave Maryland sixty days to appropriate additional funds for the desegregation of its system of higher education, a time frame the Federal district court in Maryland deemed "outrageous" since the legislature "was not in session during any part of the sixty day period."[38] When Maryland officials wrote OCR to inquire where to find the black students required to satisfy OCR's statistical desegregation criteria, they were advised to "recruit" ("raid?") black students from other states, a proposal thoroughly at odds with the premise underlying OCR's original determination of liability, that the state was obligated to increase the number of its own black high school graduates enrolling in its own system of higher education.

One of the reasons it took OCR so long to take action

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35. Brief for Appellant at 30, Adams v. Bennett, 675 F. Supp. 668 (D.C. Cir. 1987).

36. RABKIN, *supra* note 27, at 174.

37. Brief for Appellant, Adams v. Weinberger, 391 F. Supp. 269 (D.C. Cir. 1975). "In response to the court order, all but 2 of the 10 states submitted plans in 1974 which OCR promptly rubber stamped" (*1985 Civil Rights Hearings, supra* note 7, at 25) (statement of Elliot C. Lichtman). David Tatel (Director of OCR during the Carter administration) still believes that the time frames were helpful. "But I do think that in the civil rights area, that the court-ordered timeframes are quite helpful primarily because these are difficult issues. They are politically sensitive issues and it's very easy for an administrative agency to duck them and the court-ordered timeframes, I believe, significantly motivated the agency and I also believe they helped the agency gain compliance from recipients of federal funds" (quoted in Brief for Appellant at 37, Adams v. Bennett, 675 F. Supp. 668 (D.C. Cir. 1987).

38. *See* Mandel v. United States Dep't of Health, Educ., and Welfare, 411 F. Supp. 542 (D. Md. 1976).

against state systems of higher education accused of discriminatory behavior was that OCR had no idea how to desegregate higher education. OCR's proceedings to terminate federal funding to Maryland were enjoined, in part, because "the defendants have never specified and, in fact, consistently refused to specify actions which plaintiffs could take in order to facilitate compliance with Title VI."[39] OCR learned its lesson; when negotiations failed to produce a settlement in Louisiana, OCR referred the matter to DOJ for civil prosecution instead.

To justify promulgation of the timeframes, the LDF argued and Judge Pratt agreed that Title VI requires OCR to investigate and resolve every complaint received alleging racial discrimination emanating from an *Adams* state unless it is "patently frivolous," a standard so strict that virtually no complaint may be summarily dismissed.[40] Possible violations of Title VI are typically identified in one of two ways: by investigating the complaints filed by individuals alleging discriminatory behavior; or alternatively, by conducting a compliance review, a comprehensive, on-site investigation initiated by OCR itself, and designed to ferret out evidence of systemic discrimination. Prior to the intervention of the court, the bulk of OCR's resources were assigned to its compliance reviews, and as a consequence, many of the complaints filed with OCR were never investigated.

Less than a year after the time frames were established, OCR filed a motion for relief, arguing that it did not have sufficient personnel to investigate every Title VI complaint of racial discrimination emanating from the *Adams* states, and still fulfill its statutory obligation to investigate and rectify discriminatory behavior on the basis of sex, national origin and handicap in educational institutions receiving federal funds. OCR's request to modify Pratt's First Supplemental Order was denied. The LDF argued, and again the court agreed, that Title VI's prohibition against the discriminatory use of Federal funds was categorical, that insufficient personnel was no excuse for selective enforcement.[41] The denial of investigatory

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39. Mandel v. U.S. Department of HEW, 411 F. Supp. 542, 547-56 (D. Md. 1976).

40. Interview with Frank K. Krueger, Director, Enforcement Division, Policy and Enforcement Service, Office for Civil Rights, Department of Education (Aug. 29, 1990).

41. Adams v. Weinberger, 391 F. Supp. 269 (D.C. Cir. 1975). OCR's inability to obtain additional staff was due to a government wide hiring freeze (NARRATIVE HISTORY OF THE *ADAMS* LITIGATION FROM OCTOBER 19, 1970 TO DECEMBER 29,

and prosecutorial discretion was the linchpin to the litigation. If OCR had the right to decide which complaints to investigate and which violations to prosecute, there would be no basis for judicial intervention. Had the court chosen to intervene anyway, the fiction that *Adams* was merely a matter of administrative law would have come to an end, and the court would have been obliged to announce criteria for determining the Agency's enforcement priorities. Judge Pratt, however, could hardly be expected to keep abreast of OCR's ongoing caseload to determine which complaints were sufficiently serious to warrant further action.

Seizing upon OCR's admission that it was unable to fulfill its statutory responsibility, and determined to retain, and if possible expand, their share of administrative resources, the Women's Equity Action League (WEAL), the first of several women's groups to intervene in *Adams,* and the Mexican American Legal Defense Fund (MALDEF), requested permission to join the suit as plaintiff-interveners in 1976. In the following year, a similar request was filed by the National Federation of the Blind. Judge Pratt denied WEAL's request to intervene, which was overturned on appeal, noting that a suit challenging the adequacy of OCR's enforcement of Title IX of the Education Amendments of 1972 prohibiting discrimination on the basis of sex in all educational programs receiving federal assistance was already pending in Federal court.[42] Judge Pratt, although he never said so, may well have wondered about the wisdom of imposing additional burdens upon an agency whose resources were already being taxed to the limit. But how could WEAL be excluded from the suit? The statutory language prohibiting racial discrimination was virtually identical to the language prohibiting discrimination on the basis of gender. To make matters worse, *Brown v. Weinberger*,[43] a suit challenging OCR's enforcement activities in non-*Adams* states was consolidated with *Adams* in 1977 swelling OCR's mandatory caseload even further.

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1977 at 9. Anonymous manuscript obtained from the D.C. office of the NAACP Legal Defense and Educational Fund) [hereinafter *Narrative History*].

42. *Investigation of Civil Rights Enforcement by the Office for Civil Rights at the Department of Education, 24th Report of the House Committee on Government Operations*, 99th Cong., 1st Sess. 5 (1985) [hereinafter *1985 Civil Rights Report*]. "[S]ome regions had even notified complainants by letter than their complaints could not be processed because of the diversion of resources to meet the *Adams* requirements." *Narrative History*, *supra* note 355, at 15 n.38.

43. 417 F. Supp. 1215 (D.C. Cir. 1976).

In 1977 the plaintiffs returned to court, complaining that OCR "had permitted the accumulation of a backlog of hundreds of unresolved complaints, and . . . wide-ranging violations of the time frame requirements."[44] OCR, the plaintiffs argued, although no longer guilty of deliberate nonenforcement, had not tried hard enough to secure authorization from Congress for the additional personnel necessary to comply with Judge Pratt's time frame order. To ensure that OCR had sufficient staff to process all complaints within the time frames mandated by his decree, the plaintiffs asked Judge Pratt to order HEW to request additional funding, and if Congress declined to act, exhorted him to order the Congress to appropriate the funds required. Although Judge Pratt agreed that OCR had "not taken every feasible step to obtain resources which would facilitate coming into compliance with [his] order of June 14, 1976," he declined the plaintiff's invitation to order Congress to increase OCR's budget; instead, he ordered OCR to request additional personnel, and called upon the parties to negotiate a settlement. In his Consent Order of December 29, 1977, the parties readopted "without major changes" the time frames already in place (twenty-five procedural steps, each with its own time frames), and stipulated that henceforth additional data (to verify OCR's compliance with the time frames) would be collected and transmitted to the plaintiffs semiannually. OCR made some progress, but by 1980 it again found itself unable to meet the 1977 time frames (eighty-eight percent of its 225 compliance reviews and sixty percent of its Letters of Finding were behind schedule, not to mention a backlog of 170 complaints, some as old as nine years) prompting the plaintiffs to come before Judge Pratt yet again to request further relief. The court, siding with the plaintiffs, strengthened rather than vacated, as the government had requested, its 1977 order.[45]

The court and the plaintiffs were now committed to two propositions: the denial of investigatory and prosecutorial discretion, and the necessity of judicially mandated time frames.

> The *Adams* and *WEAL* orders require [OCR] to handle every complaint that they get. Because the groups and individuals that we

44. *1985 Civil Rights Hearings*, *supra* note 7, at 16.

45. *1985 Civil Rights Report*, *supra* note 42, at 5-6; *Narrative History*, *supra* note 41, at 13.

> represent place a major emphasis and importance on investigating those complaints, it takes an enormous amount of courage . . . to step forward and file a complaint, and to have that 'deep six'd' is a very cruel injustice.[46]

"I agree with my colleagues here. You have to handle every individual complaint . . . "[47] And similarly, "the time frames are indispensable to vindicate the central purpose of Title VI."[48] "From the first, court-ordered time frames have been critical tools to secure enforcement of . . . basic civil rights laws . . . ."[49]

## III. A PYRRHIC VICTORY

To their dismay, the plaintiffs in *Adams* have found it necessary "to go back to court continuously . . . to try to get [OCR] to comply with its responsibilities . . . "[50] As Congressman Weiss, a New York Democrat, observed: "The testimony we have heard portrayed policies of lax enforcement in every administration, Democrat and Republican."[51] OCR, according to its critics, cannot be trusted to carry out its mandate to prevent the discriminatory use of Federal funds. But why not?

OCR's ineffectiveness during the Nixon, Ford and Reagan administrations is usually attributed to the presence of individuals unsympathetic, if not hostile, to the civil rights laws they were supposed to enforce.[52] No one, however, would

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46. *1985 Civil Rights Hearings, supra* note 7, at 77 (testimony of Marcia Greenberger, WEAL).

47. *Id.* at 80 (testimony of Michael Landweher, Disability Rights Education and Defense Fund, Inc.).

48. Brief for Appellant at 36, Adams v. Bennett, 675 F. Supp. 668 (D.C. Cir. 1987).

49. *Investigation of Civil Rights Enforcement by the Department of Education, 1987: Hearings before the Human Resources and Intergovernmental Operations Subcommittee of the House Committee on Government Operations*, 100th Cong., 1st Sess. 53 (1987) [hereinafter *1987 Civil rights Hearings*] (statement of Marcia Greenberger).

50. *1985 Civil Rights Hearings, supra* note 7, at 91.

51. *Id.* at 149.

52. C. WILLIAMS, THE BLACK/WHITE COLLEGES: DISMANTLING THE DUAL SYSTEM OF HIGHER EDUCATION 20-21 [U.S. Commission on Civil Rights Report] (1981); U.S. COMMISSION ON CIVIL RIGHTS, 3 THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974 213 (1975). Most of OCR's personnel were decidedly pro-civil rights. For example, officials at OCR leaked information to the LDF to assist them in their lawsuit. Title VI required that aid be terminated to the discriminatory program only. OCR interpreted this provision broadly to permit termination of

accuse the Carter administration's appointees, Joseph Califano (Secretary of HEW), David Tatel (Director of OCR), and Cynthia Brown (Deputy Director of OCR) of indifference to civil rights. Secretary Califano was not only a long-time friend of Joseph Rauh (counsel for the LDF in *Adams*), but "[d]uring his first week in office . . . announced . . . [that] there had been 'too much data collection and too little enforcement.'"[53] Director Tatel was a prominent civil rights attorney both prior and subsequent to his service at OCR. Deputy Director Brown was a civil rights attorney specializing in higher education, and prior to her appointment, active in the Leadership Conference on Civil Rights and the Lawyers Committee for Civil Rights under Law. When Judge Pratt invalidated the higher education desegregation plans accepted by OCR in 1974 and ordered the agency to prepare "criteria specifying the ingredients of an acceptable higher education desegregation plan," it was Tatel who labored to create an atmosphere conducive to the formal adoption of the bulk of the LDF's proposed desegregation criteria.[54] Califano advocated the targeted deferral of funds in North Carolina should the state fail to propose an acceptable plan for desegregation of its higher educational system (a remedy originally proposed by the LDF). Tatel's trip to North Carolina in the company of the press to compare conditions at the predominantly black institutions (PBIs) and predominantly white institutions (PWIs) prompted Governor Hunt to declare how "his heart aches when [he] sees some of the buildings those children have to go to school in,"[55] and eventually, to agree to a $40 million capital program for the PBIs, the expansion of their course offerings, and the suspension of any new programs at the PWIs which might hinder the state's desegregation effort—an agreement subsequently rejected by the Board of the University of North Carolina. None of this, of course, deterred the LDF from moving to cite Califano for contempt for his agency's failure to meet the time frames. "Rauh moved so often to have me cited for contempt that

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funds to the entire school district. These, and other examples of OCR's commitment to civil rights and the agency's activistic disposition are discussed in J. Rabkin, *Office for Civil Rights, in* THE POLITICS OF REGULATION 318-19, 329, 333, 338 (1980); RABKIN, *supra* note 27, at 151-53, 179; G. ORFIELD, *supra* note 21, at 236-38.

53. ORFIELD, *supra* note 23, at 317.

54. Interview with Mary Levy, attorney with Lichtman, Trister and Levy, counsel of record for the *Adams* litigation, (May 29, 1988).

55. CALIFANO, *supra* note 15, at 255.

Griffin Bell sent me a hacksaw 'in the event of incarceration.'"[56]

OCR "was under so many court-imposed deadlines for so many contradictory enforcement tasks that virtually no staff was available for any fresh policy initiative. One of the ironies of the situation was that some of the new enforcement officials were the very civil rights lawyers who had worked so hard to wrap their Nixon and Ford administration predecessors in a straitjacket of judicial decrees. Now they found themselves unable to move . . . "[57] When Tatel asked the court for more time to comply with the time frames, the court denied his request.

During his tenure in office, Secretary Califano never terminated anyone's funds, and in five instances took no action despite ALJ rulings in OCR's favor.[58] To the plaintiffs, Califano's reluctance to proceed was proof of his abandonment of civil rights. But such a characterization is ludicrous; if neither judicial intervention nor the election of an administration favorably disposed to civil rights is sufficient to overcome the obstacles to fund termination, then the explanation for OCR's behavior probably lies elsewhere. Both President Carter and Vice-President Mondale (certainly no enemy of civil rights) pressured Califano to delay the initiation of enforcement proceedings against North Carolina's system of higher education.[59] Fund termination is simply too drastic a remedy, especially when the "violations" are equivocal (e.g., the underrepresentation of minorities in higher education) or the remedy (e.g., busing) exceedingly unpopular, to be politically feasible.

Too much was expected of OCR. OCR was asked to expand the scope of its Title VI higher education investigations by collecting data on the names and dates of all minority students contacted, the number of minority applications received, the cultural diversity of university course offerings, and minority utilization rates for campus housing, counseling and tutorial assistance. OCR was asked to investigate the adequacy of remediation and retention programs nationwide; to become a

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56. CALIFANO, *supra* note 15, at 254.

57. ORFIELD, *supra* note 23, at 317.

58. Interview with Frank K. Krueger, Director, Enforcement Division, Policy and Enforcement Service, Office for Civil Rights, Department of Education (August 29, 1990).

59. CALIFANO, *supra* note 15, at 255-56.

repository of specific, technical advice on how to increase minority enrollment, retention and employment; to mandate the establishment of faculty affirmative action goals; to review the adequacy of the criteria employed by universities to determine the job availability of minority employees; to require validation of all employment selection criteria, and to monitor the development of specific performance criteria; to increase the number and scope of its compliance reviews; to review the compliance record of one-fourth of all federal contractors per year; to authorize no aid beyond its capacity to monitor compliance; to deny access to federal funds until all complaints currently pending against a university have been investigated and resolved, etc. "Pressed by so many claims for relief, from so many different groups, in such varied forms, the Office became almost paralyzed."[60]

In the beginning, OCR was reluctant to initiate Title VI enforcement proceedings against state systems of higher education accused of discriminatory behavior. Lethargy, however, is sometimes the better part of valor. OCR had no idea how to compare the quality of the physical plant at the PBIs and PWIs, and consequently it needed the cooperation of state officials to devise and execute a building utilization analysis.[61] Leon Panetta, while Director of OCR, was flabbergasted when the President of Arkansas AM & N (PBI) rejected his agency's proposal to exchange AM & N's four-year educational program for a series of two-year technical programs offered at a nearby PWI. "Why [should we] emasculate our college in favor of another?"[62] AM & N's president asked. Unfamiliar with higher education, it never occurred to OCR to consider the prestige of the programs to be exchanged. The program exchanges it initiated between the PBIs and PWIs in the name of racial desegregation often failed to produce the results promised, usually to the detriment of the PBIs. In Georgia, for example, Savannah State University (PBI)

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60. U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 52, at 216-18, 228-33, 235-39, 242-43, 247-51, 261, 288, 298, 367-71, 390-93; A. Block, *Enforcement of Title VI Compliance Agreements by Third Party Beneficiaries*, 18 HARV. C.R.-C.L. L. REV. 14 (1983); *1985 Civil Rights Hearings, supra* note 7, at 29; *1985 Civil Rights Report, supra* note 42, at 6; Interview with Phyllis McClure, Division of Legal Information and Community Service, NAACP Legal Defense and Educational Fund, D.C. Office (May 31 and June 1 of 1988); J. CALIFANO, *supra* note 15, at 226.

61. Interview with Terrence Pell, Deputy Assistant Secretary for Policy, Office for Civil Rights, Department of Education (June 1, 1988).

62. PANETTA & GALL, *supra* note 15, at 320.

exchanged its education program for Armstrong State's (PWI) business program. Total enrollment at Savannah State fell from 2,500 in 1978 to 1,500 students in 1979, although by 1989 it had climbed back to about 2,000 while the gain in black enrollment at Armstrong State proved temporary, disappearing as soon as those blacks previously enrolled at Savannah at the time of the exchange completed their degrees.[63] Since enrollment is a crucial variable in most state funding formulas, the PBIs suffered financially from the desegregation remedies imposed by OCR.

Doubtful of its competence and mindful of its political vulnerability, OCR was unusually slow to take action. To the LDF, however, its tardiness in terminating funds was evidence of a conspiracy to sabotage enforcement of Title VI. OCR's reply, that more time was required, that voluntary compliance was being sought in a complex and unfamiliar arena, fell on deaf ears. Blinded by their passion for justice, neither the LDF nor Judge Pratt paid any attention to the complexity of the agency's mission, or to the political and administrative obstacles to its attainment. Instead, civil rights enforcement was portrayed as a battle between the forces of light (the civil rights lobby) and the forces of darkness (Nixon, Ford, Carter, Reagan, and their political appointees) with nary a shade of gray.

In fact, the principal obstacle to compliance with the time frames was OCR's *devotion* to the cause of civil rights. This was particularly true during the Carter administration when officials at OCR were enamored with the prospect of establishing new civil rights precedents. Complaint investigations were less exciting than compliance reviews—a threat to the agency's activist agenda, consuming valuable staff time which in the absence of the court order might have been assigned more profitably to the investigation of other matters. Despite the *Adams* order, the Carter administration increased the annual number of compliance reviews required of each investigative officer. "OCR's compliance reviews result in twice as many remedies and benefit six times as many victims of discrimination as its complaint investigations."[64]

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63. Data on Savannah State and Armstrong State's enrollment was obtained from Georgia State officials; the results in Florida were similar, *see* I. Tribble, *Desegregation of Higher Education: A Public/Private Cooperative Alternative in*, DESEGREGATING AMERICA'S COLLEGES AND UNIVERSITIES 94 (1988).

64. U.S. COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS

To clear house, Harry M. Singleton, Assistant Secretary for Civil Rights during the Reagan administration, transferred OCR's oldest and most intractable cases to DOJ for civil prosecution where they languished for some time, due in part to bad relations between himself and Bradford Reynolds, Assistant Attorney General for Civil Rights. Singleton reorganized OCR, and instituted new management techniques designed to enhance the agency's capability to process complaints in accordance with the time frames.[65] Since fifty-four percent of the complaints received by OCR involve allegations of discrimination against the handicapped (e.g., a parent who disagrees with the school's placement of their child),[66] and since these complaints tend to address a relatively narrow band of issues requiring analogous remedies, OCR was able to streamline its procedures so that the resolution of subsequent complaints raising the same issue became less time-consuming.[67] The additional staff time required to comply with the court order was secured by deemphasizing compliance reviews, and by adopting new administrative procedures designed to narrow the scope of the compliance reviews undertaken by the agency. Pressure was then applied to OCR's ten regional offices to impress upon them the importance of meeting the time frames: "[A]ll you need to do is talk to some of my senior officers and my regional directors and they'll tell you the gray hairs they've gotten over the pressure that I [Singleton] put on them to comply [with the *Adams* order]."[68] And indeed, the pressure to comply was so intense that:

> the union which represents OCR employees [went] on record requesting that OCR management lessen the strict deadlines all OCR employees have to adhere to in their performance plans . . . [arguing that the] timeframes are too strict and impossible to meet . . . . [OCR has] responded to the union indicating that the timeframes are dictated by the court and are not within OCR's prerogative to adjust.

Managers at OCR's regional offices were reportedly told that

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ENFORCEMENT BUDGET 1983 16 (June 1982).

65. *1985 Civil Rights Hearings, supra* note 7, at 115-17.

66. *Majority Staff Report, supra* note 8, at 84.

67. Interview with Terrence Pell, Deputy Assistant Secretary for Policy, Office for Civil Rights, Department of Education (June 1, 1988).

68. *1985 Civils Rights Hearings, supra* note 7, at 118.

"anyone causing them to miss an *Adams* timeframe was going to get it."[69]

As a result of these efforts, the average age of pending complaints was reduced from 1,297 days at the end of fiscal 1982 to 174 days at the end of fiscal 1986—a decline of eighty-seven percent.[70] By 1987, only seven percent of the complaints filed with OCR were missing at least one *Adams* time frame despite a significant reduction in staff (from 1,099 in 1981 to 807 in 1987) and the annual return of substantial unspent funds (from a low of $832,000 in 1982 to a high of $2,694,000 in 1984) to the Treasury.[71] Officials at OCR were jubilant: "The Education Department has a fantastic record as far as enforcement actions are concerned. All you have to do is look at the statistics . . . . We've eliminated a backlog of cases. We've reduced the average age of complaints . . . and I'm not hearing any praise."[72] And indeed, as OCR's record improved the praise became increasingly faint.[73]

OCR's efforts to comply with the time frames were greeted with derision. Marcia Greenberger of WEAL accused OCR of "trying to get out of the court order, beefing up its record before the court, to make it appear that they are complying with the court order . . . ."[74] Staff for the House Committee on Education and Labor complained that OCR was now interpreting the time frames too strictly, thereby putting too much pressure on its regional "staff to close cases without in-depth investigations and with possibly inadequate settlements." Several regional staff members even admitted to "encourag[ing] complainants to withdraw their complaints or 'clarify' their allegations in order to narrow the scope of their complaints."[75] Substantive monitoring of closed cases to verify implementation of the remedial action agreed upon by the parties was sporadic.

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69. *1985 Civil Rights Hearings, supra* note 7, at 118; *1985 Civil Rights Report, supra* note 42, at 28-30; *1987 Civil Rights Hearings, supra* note 49, at 265, 270, 339, 345.

70. *1985 Civil Rights Hearings, supra* note 7, at 2, 98-99; *Majority Staff Report, supra* note 8, at 35.

71. *1985 Civil Rights Report, supra* note 42, at 101-2, 114.

72. *1985 Civil Rights Hearings, supra* note 7, at 113.

73. Note, e.g., the omission of any allusion to OCR's compliance with the time frames in *1985 Civil Rights Report, supra* note 7, at 35.

74. *Civil Rights Enforcement by the Department of Education, Hearing Before a Subcommittee of the Committee on Government Operations*, House of Representatives, 100th Cong., 1st Sess. 248 (1987).

75. *Majority Staff Report, supra* note 8, at 4, 27.

> [T]here are investigators who indicate that they fail to monitor because the process is too lengthy, or because the *Adams* time frames, which apply to cases in the investigative stages, militate against expending valuable time monitoring closed cases, as case monitoring is not subject to the time frames. Thus monitoring cases, when there are others in the investigative pipeline which are governed by *Adams* and are therefore conferred higher priority status, may be viewed as compromising an investigator's record for adhering to deadlines.[76]

The time frames have hampered efforts to deploy OCR personnel in a way calculated to serve national civil rights priorities efficiently by giving too much weight to narrowly based grievances. More importantly, they have given officials at OCR a mechanism for reining in the activities of the agency's permanent civil service. "To the extent that any enforcement has occurred, it has occurred in spite of OCR's leadership, by a regional staff that remained loyal to the objectives implicit in the civil rights statutes which the staff were mandated to protect."[77]

Harry Singleton was understandably proud of the Reagan administration's civil rights record:

> We terminated Federal financial assistance to a school district. We did that in 1982. You know the last time that was done was 1972. The great saviors of civil rights during that period from 1977 to 1980-81, they never brought an enforcement action that went to fruition. They never terminated anyone's Federal financial assistance. But, yet, they talk about our lack of nerve and fortitude in going forward with enforcement action.[78]

According to its critics, however, OCR has consistently failed to investigate civil rights violations thoroughly; and yet, according to these same critics, OCR's investigative reports are too

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76. *1985 Civil Rights Hearings, supra* note 7, at 248; *Majority Staff Report, supra* note 8, at 4, 41; Interview with Phyllis McClure, Division of Legal Information and Community Service, NAACP Legal Defense and Educational Fund, D.C. Office (May 31 and June 1 of 1988).

77. *Majority Staff Report, supra* note 8, at 6. This is the same regional staff who were previously denounced for illegally backdating Letters of Finding in order to meet the *Adams* time frames. For publicity purposes, the plaintiffs deliberately exaggerated the significance of the practice. In most instances, the deadlines were missed by no more than 1-6 days. It is difficult to understand why one should be so indignant about this matter if the Reagan administration were indeed guilty of interpreting the time frames too strictly (*1987 Civil Rights Hearings, supra* note 49, at 33-37, 247-92).

78. *1985 Civil Rights Hearings, supra* note 7, at 113.

long.[79] Lengthy reports are necessary to protect OCR in the event of subsequent litigation. Regional staff have complained that they were forced to investigate frivolous cases (only patently frivolous cases may be dismissed without a formal investigation).[80] For example, a staff member allegedly spent one week on-site investigating a complaint filed by a parent of a handicapped child against his school's mascot, a pirate wearing an eye patch; the school was accused of discrimination against the handicapped—the eye patch, sexual discrimination—pirates often took advantage of their female captives, and racial discrimination—pirates participated in the slave trade.[81]

The plaintiffs' frustration with the civil rights record of the Reagan administration is understandable. Having repeatedly denied that *Adams* is an attempt to dictate the actual terms of settlement, the civil rights community can hardly contest the adequacy of OCR's prescription for resolving a specific complaint.[82] Having insisted that every complaint is entitled to a thorough investigation, it is difficult to object when OCR, in deference to the court's time frame order, allocates its limited resources accordingly in spite of its deleterious effect upon OCR's capacity to discover and remedy civil rights violations of more significance to more people. It is somewhat ironic that the only administration to make satisfaction of the time frames its number one priority was so vehemently denounced for its failure to take seriously the enforcement of civil rights. Even more ironic that officials of the Reagan administration by virtue of their success in meeting the time frames were less vulnerable than the Carter administration (ostensibly more sympathetic to civil rights) to the threat of a contempt citation. The discerning reader will not be surprised to discover that the day after Judge Pratt vacated his *Adams* orders (overturned on appeal in 1989, and then dismissed once again for want of cause of action in 1990), LeGree S. Daniels, Assistant Secretary for Civil Rights, sent a memorandum to OCR's regional staff indicating that all procedures and time frames previously mandated by the court were to remain in

79. *1987 Civil Rights Hearings, supra* note 49, at 60.
80. *Majority Staff Report, supra* note 8, at 34.
81. *Id.*
82. *1985 Civil Rights Hearings, supra* note 7, at 18-23, 29-49, 126-27; Brief for Appellant at 39-40, Adams v. Bennett, 675 F. Supp. 668 (D.C. Cir. 1987).

effect.[83] Despite the dismissal of the *Adams* suit, the Bush administration is still following the time frames, and still investigating every complaint received although an agency task force was recently established to consider modifying the time frames and restoring the agency's investigatory and prosecutorial discretion.

## IV. REFLECTIONS ON THE PERILS OF JUDICIAL ACTIVISM

Convinced it had nothing to lose and exasperated by OCR's timidity and inertia, the LDF filed suit. Title VI was misinterpreted, and the effectiveness of fund terminations exaggerated in order to convince the court of the legitimacy and efficacy of its intervention. The court was told what it wanted to hear, despite the availability of evidence to the contrary, that the executive branch was the principal, if not the only, obstacle to the timely and vigorous enforcement of Title VI. Yet, on more than one occasion Congress enacted legislation to express its displeasure with OCR's behavior, restricting OCR's capacity to mandate school busing for purposes of racial desegregation (the Byrd Amendment), forbidding deferral of federal funding for new programs to school districts suspected of racial discrimination, reassigning half of OCR's enforcement personnel to the investigation of Northern discrimination, and closing a loophole in the Byrd Amendment exploited by Secretary Califano. "In 1966 the most liberal House since the depression voted against the HEW school desegregation program," and by 1975, the Congress, at least according to Senator Humphrey, was "ready to destroy the only existing machinery for systematic enforcement of . . . the constitutional rights" of school children attending segregated schools.[84] In numerous instances, the threat of Congressional opposition was sufficient to prompt OCR to back down. Given the scope and depth of congressional opposition to OCR's efforts to promote school busing, OCR's enforcement of Title VI was surprisingly energetic.[85]

Had the court been more political, it might have realized

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83. *Majority Staff Report, supra* note 8, at 11.

84. ORFIELD, *supra* note 23, at 238-39, 273.

85. *Id.* Orfield chastises the Nixon administration for its failure to enforce Title VI. And yet, the evidence he amasses concerning the scope and depth of Congressional opposition suggests that even a President who wanted to enforce Title VI more vigorously would have been thwarted by Congress.

that the promulgation of its time frame decree would only weaken OCR's negotiating position. Title VI's fund cutoff provisions are a powerful weapon, but like the atomic bomb, their impact is too great and opposition to their use too formidable to constitute a credible threat, at least in the absence of extraordinary provocation.[86] It was naive to believe that threatening the *Adams* states with the loss of all federal funding for public higher education would be sufficient to bring about parity in black/white undergraduate, graduate and professional school attendance and retention rates within five years, and yet this is precisely what the LDF maintained. OCR was caught bluffing, sometimes even threatening to terminate funds despite its inability to gather sufficient evidence to demonstrate in a court of law the existence of the civil rights violations complained of.[87] By promulgating a timetable of its own, the court exposed OCR's bluff.

Had Judge Pratt endeavored to dictate OCR's enforcement priorities and manage the allocation of its institutional resources, the novelty of *Adams*, its affront to the separation of powers, would have been obvious. And yet, this is precisely what happened, albeit by default and under the cover of administrative law. By denying OCR investigatory and prosecutorial discretion, OCR lost the ability to determine its enforcement priorities and manage the allocation of its institutional resources. In order to investigate every complaint received within the allotted time frame, OCR was forced to reduce the number and scope of its compliance reviews. Today, roughly eighty percent of OCR's resources are devoted to complaint investigations, resulting in a finding of "no violation" more than 57% of the time, an utterly inefficient allocation of agency resources. At the behest of the judiciary, OCR became a small claims court for civil rights, an agency whose primary activity (complaint investigations) is of no consequence more than half the time; and even when it is, the scope of most complaints is so limited that fewer Americans now benefit from the violations it corrects. Although created under the Civil Rights Act of 1964, OCR spends most of its time addressing the rights of the handicapped. The court's denial of prosecutorial

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86. CALIFANO, *supra* note 15, at 252-57; *See* Interview with Frank Krueger, *supra* note 58 (stating political appointees are under extraordinary pressure not to cutoff funds in the absence of overwhelming provocation).

87. J. RABKIN, Office for Civil Rights, in, THE POLITICS OF REGULATION 341, 344 (1980).

discretion diminished OCR's capacity to combat racial and national origin discrimination.[88] Thereafter, OCR's enforcement priorities were determined by chance, or rather, by the civil rights community's most sophisticated and vocal members—the parents of handicapped children. No agency has unlimited resources, and consequently discretion is an essential component of administrative efficiency. District attorneys sometimes decline to prosecute; plea bargaining is used to reduce the strain upon the legal system. And yet in *Adams*, the court was unable to recognize the desirability of conceding investigatory and prosecutorial discretion to an agency subject to similar constraints.

TABLE 1[89]
PERCENTAGE OF COMPLIANCE REVIEWS AND COMPLAINT INVESTIGATIONS

RESULTING IN A FINDING OF NO VIOLATION BY TYPE AND BASIS
FY 1983 - FY 1988 (THROUGH 5/6/88 ONLY)

| BASIS OF INVESTIGATION | COMPLIANCE REVIEW | COMPLAINT INVESTIGATION |
|---|---|---|
| Race | 44.9 | 84.9 |
| National Origin | 46.0 | 74.8 |
| Sex | 23.4 | 48.2 |
| Handicap | 18.3 | 49.5 |
| Multiple Bases | 29.9 | 70.4 |
| Total | 27.3 | 57.8 |

The reasonableness of the time frames was never verified empirically. The LDF argued in testimony before Congress that the time frames were reasonable, otherwise the Ford, Carter and Reagan administrations would never have agreed to them.[90] "These negotiations were protracted and intensive . . . The result was a carefully crafted agreement . . . which encompassed compromise on each side and reflected OCR's two and one-half years of experience under the time frames."[91] According to Cavanagh and Sarat, the "threat of a remedy fashioned by a judge" encourages the parties to the litigation to

88. J. RABKIN, *supra* note 27, at 169.
89. *Majority Staff Report*, *supra* note 8, at 81, 97.
90. *1985 Civil Rights Hearings*, *supra* note 7, at 83.
91. Brief for Appellant at 32, Adams v. Bennett, 675 F. Supp. 668 (D.C. Cir. 1987).

negotiate with one another, resulting in "a mutually agreeable course of remedial action" and thereby, reducing the need for judges with "the training and expertise to devise appropriate solutions."[92] But in *Adams* the threat of a judicial remedy did not lead to a reasonable compromise. A negotiated settlement need not alleviate the need for judges with "the training and expertise to devise appropriate solutions" if one of the parties has greater cause to doubt the court's competence. Judge Pratt had already denied OCR's request to modify the time frames. According to one of OCR's negotiators, it was a victory merely to maintain "the previously existing internal time frames."[93]

To justify judicial activism, the plaintiff needs a simplified theory of causation, lest he cast doubt upon the capacity of the court to devise a suitable remedy. The critics of Horowitz's critique of judicial competence presume that we can count on either the defendant, the judge, or other interested parties to bring to the attention of the court any information relevant to the litigation, but omitted by the plaintiff. But OCR could hardly be expected to acknowledge the political pressures to which it was subject, or their effect upon the agency's ability to terminate access to federal funds. What would have happened if the LDF had instituted legal proceedings, requiring the Johnson administration to explain why its enforcement efforts were largely confined to non-urban school districts with small minority populations? Would OCR have been able to explain why it had yet to do anything to combat segregation in urban school districts with substantial minority populations? Would the judiciary have understood why OCR needed to make psychological inroads against white obstinacy by negotiating desegregation agreements with less resistant districts first? Would the court have dismissed such arguments as self-serving pretexts for nonenforcement? With respect to higher education, OCR argued in its brief that more time was required, that voluntary compliance was being sought in a complex and unfamiliar arena.[94] Should OCR have tried to explain that it had no idea how to desegregate higher education? That its negotiations with Louisiana, for example, were complicated by the state's apparent readiness, if pressed too far, to merge its PWIs and PBIs, to the detriment of the latter?

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92. Cavanagh & Sarat, *supra* note 4, at 406.

93. *Narrative History, supra* note 41, at 14, 17.

94. Brief for Appellee at 19-24, Adams v. Richardson, 351 F. Supp. 636 (D.C. Cir. 1972).

Critics of judicial activism usually chastise the court for being too political; but perhaps the problem is that courts are not political enough. Their approach to social policymaking may be too abstract to do justice to the politics of policymaking, to the political, social, administrative and psychological constraints which govern its formulation and constrain its execution.[95] The discretion necessary for successful policymaking may be abused; but the denial of sufficient investigatory and prosecutorial discretion is no less fraught with difficulties. The LDF went to court, because individual lawsuits are inefficient, and "often do not address systemic patterns of discrimination or promote institutionwide remedies."[96] But surely the same could be said of the complaints such individuals now file with OCR instead.[97]

95. M. Walzer, *Philosophy and Democracy*, 9 POL. THEORY 379, 387 (1981).

96. *1985 Civil Rights Hearings, supra* note 7, at 3.

97. In 1990 the D.C. Circuit sitting *en banc* dismissed *Adams* for want of cause of action. Weal v. Cavazos, 906 F.2d 742 (1990). According to the court, Title VI may no longer be enforced by suing OCR itself. If an individual believes OCR's enforcement of Title VI is inadequate, his only option is to sue the offending institution itself.