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Administrative Coordination in Civil Rights Enforcement: A Regional Approach†

Charles M. Lamb*

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I. INTRODUCTION

The Supreme Court's 1954 desegregation decision¹ marked a renewed pursuit of the antidiscrimination principle.² Since that decision, sorely needed legal steps have been taken toward resolving an American dilemma—the discrepancy between egalitarian ideals and the realities of inequality.³ Foremost among legislative develop-

† Materials published by the Federal Regional Councils and the Office of Management and Budget that are referred to in this Article are on file with *Vanderbilt Law Review* and are cited using the following abbreviations:

Federal Regional Council: FRC

Office of Management and Budget: OMB

Fiscal Year: FY

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1. *Brown v. Board of Education*, 347 U.S. 483 (1954). Prior to *Brown*, implementation of antidiscrimination principles was ineffective, limited to such remedies as the separate but equal doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896).

2. Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).

3. G. MYRDAL, *AN AMERICAN DILEMMA* (1944). For distinctions between the civil rights

ments are the Civil Rights Acts of 1960⁴ and 1964,⁵ the Voting Rights Act of 1965,⁶ and the Fair Housing Act of 1968.⁷ Presidents have supplemented these statutes with executive orders that prohibit discrimination against minorities and women.⁸ In addition, since 1954 the Supreme Court occasionally has returned to the cutting edge in upholding civil rights.⁹

Despite this progress the Nation still has far to go before the rights of minorities and women are strictly enforced.¹⁰ Law enforcement of rights to employment, housing, and education remains.¹¹ Compared with the 1960's, when the greatest need was for new laws to protect civil rights, full implementation of these laws must be the highest civil rights priority for the 1970's and beyond.¹² This Article

movements of the first and second decades after *Brown*, see Fiss, *The Fate of An Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade after Brown v. Board of Education*, 41 U. CHI. L. REV. 742 (1974).

4. Pub. L. No. 86-449, 74 Stat. 86 (codified at 18 U.S.C. §§ 1074, 1509 (1976); 20 U.S.C. §§ 241, 640 (1970); 42 U.S.C. §§ 1971, 1974 to 1974e, 1975d (1970)).

5. Pub. L. No. 88-352, 78 Stat. 241 (codified at 28 U.S.C. § 1447 (1970); 42 U.S.C. §§ 1971(a), (c), (f)-(h), 1975a to 1975d, 2000a to 2000h-6 (1970)).

6. Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971, 1973 to 1973bb-4 (1970)).

7. Pub. L. No. 90-284, 82 Stat. 81 (codified at 42 U.S.C. §§ 3601-3631 (1970)).

8. *E.g.*, Exec. Order No. 11,063, 3 C.F.R. 652 (1959-1963 Compilation); Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 Compilation); Exec. Order No. 11,478, 3 C.F.R. 803 (1968-1970 Compilation); Exec. Order No. 11,764, 3A C.F.R. 124 (1974 Compilation).

9. *E.g.*, *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Bolling v. Sharpe*, 347 U.S. 497 (1954). Commentators have argued persuasively, however, that the Burger Court is less committed than the Warren Court to advancing civil rights. See Barker, *Black Americans and the Burger Court: Implications for the Political System*, 1973 WASH. U.L.Q. 747; Reid, *Cast Aside the Burger Court: Blacks in Quest of Justice and Education*, 49 NOTRE DAME LAW. 105 (1973). For more recent cases, see *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Washington v. Davis*, 426 U.S. 229 (1976).

10. See, *e.g.*, C. BULLOCK & H. RODGERS, *RACIAL EQUALITY IN AMERICA: IN SEARCH OF AN UNFULFILLED GOAL* (1975); J. SIGLER, *AMERICAN RIGHTS POLICY* ch. 17 (1975); Edwards & Zaretsky, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1 (1975); Lamb, *Presidential Fair Housing Policies: Political and Legal Trends*, 8 CUM. L. REV. 619 (1978); Mitchell, *Moods and Changes: The Civil Rights Record of the Nixon Administration*, 49 NOTRE DAME LAW. 63 (1973); Note, *Enforcing a Congressional Mandate: LEAA and Civil Rights*, 85 YALE L.J. 721 (1976).

11. See 5 U.S. COMMISSION ON CIVIL RIGHTS, *THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974: TO ELIMINATE EMPLOYMENT DISCRIMINATION* (1975) [hereinafter cited as *TO ELIMINATE EMPLOYMENT DISCRIMINATION*]; 3 U.S. COMMISSION ON CIVIL RIGHTS, *THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974: TO ENSURE EQUAL EDUCATIONAL OPPORTUNITY* (1975); 2 U.S. COMMISSION ON CIVIL RIGHTS, *THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974: TO PROVIDE . . . FOR FAIR HOUSING* (1974) [hereinafter cited as *TO PROVIDE . . . FOR FAIR HOUSING*].

12. See A. GOLDBERG, *EQUAL JUSTICE* 8 (1971); Blumrosen, *The Crossroads for Equal Employment Opportunity: Incisive Administration or Indecisive Bureaucracy?*, 49 NOTRE DAME LAW. 46 (1973).

discusses a common and significant obstacle to effective enforcement, the failure of federal agencies with civil rights responsibilities to coordinate their enforcement activities. Specifically, this Article proposes the use of a largely ignored regional approach for upgrading enforcement coordination. The purpose is to introduce ideas for solving a recurrent problem in the federal bureaucracy, a target that President Carter has singled out for special attention in the federal government's current reorganization effort.¹³

II. THE PROBLEM AND A PROPOSAL

Weak or nonexistent coordination is not the only cause of lax civil rights enforcement, but it plays a prominent role and contributes heavily to that result. Reports by the United States Commission on Civil Rights,¹⁴ as well as studies outside government,¹⁵ repeatedly have concluded that inadequate coordination is a primary reason for poor enforcement and lingering noncompliance. In 1971 the Civil Rights Commission found that "[n]o substantial attempt has yet been made to coordinate the various civil rights laws and policies into a total, coordinated Federal civil rights effort."¹⁶ Inadequate coordination remains today, continuing to provide an obstacle to meeting the Nation's stated civil rights goals. When asked in the summer of 1977 to define his highest priority, President Carter's Assistant Attorney General for Civil Rights replied that it was "to

13. President's Remarks and a Question-and-Answer Session with Department [of Commerce] Employees, 13 WEEKLY COMP. OF PRES. DOC. 170 (Feb. 14, 1977); Nelson, *Various Civil Rights Agencies May Be Consolidated Into One*, Wash. Post, April 14, 1977, at 1, col. 5. See also Lamb, *The Carter Reorganization and the Future of Civil Rights Compliance* (paper presented at the Annual Meeting of the American Political Science Ass'n, Washington D.C., Sept. 1, 1977) (copy on file with *Vanderbilt Law Review*).

14. See, e.g., 6 U.S. COMMISSION ON CIVIL RIGHTS, *THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974: TO EXTEND FEDERAL FINANCIAL ASSISTANCE* 114-29 (1975) [hereinafter cited as *TO EXTEND FEDERAL FINANCIAL ASSISTANCE*]; *TO ELIMINATE EMPLOYMENT DISCRIMINATION*, *supra* note 11, ch. 6; *TO PROVIDE . . . FOR FAIR HOUSING*, *supra* note 11, at 120-30; U.S. COMMISSION ON CIVIL RIGHTS, *FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT* 239-50 (1971) [hereinafter cited as *FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT*]; U.S. COMMISSION ON CIVIL RIGHTS, *TOWARD A MORE COOPERATIVE AND PRODUCTIVE RELATIONSHIP AMONG CIVIL RIGHTS AGENCIES AND OFFICIALS* (1974).

15. See, e.g., J. HOPE, *MINORITY ACCESS TO FEDERAL GRANTS-IN-AID: THE GAP BETWEEN POLICY AND PERFORMANCE* 16-28 (1976); Taylor, *Federal Civil Rights Laws: Can They Be Made to Work?*, 39 GEO. WASH. L. REV. 971, 984-90 (1971); *Notre Dame Conference on Federal Civil Rights Legislation and Administration: A Report*, 41 NOTRE DAME LAW. 906, 921-22 (1966) [hereinafter cited as *Notre Dame Conference*]; *Comment: Title VI of the Civil Rights Act of 1964—Implementation and Impact*, 36 GEO. WASH. L. REV. 824, 843-77 [hereinafter cited as *Comment*]. For an explanation of how civil rights activities of federal agencies can be better coordinated, see Blumrosen, *The Newport News Agreement—One Brief Shining Moment in the Enforcement of Equal Employment Opportunity*, 1968 U. ILL. L.F. 269.

16. *FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT*, *supra* note 14, at 363.

have a coordinated and vigorous civil rights enforcement program"¹⁷

Coordination problems stem from overlapping jurisdiction among enforcement agencies, which leads to redundancy of effort, inconsistent standards for compliance, and selective enforcement.¹⁸ Although bureaucratic inertia is widespread, the basic problem can be traced to the statutes themselves. Leading civil rights statutes were "the result of a political compromise, a product more of the desire for passage than the desire for a rational scheme for uprooting discrimination."¹⁹ When the same type of discrimination is addressed by different statutes, this piecemeal legislative approach creates a situation in which coverage may vary significantly²⁰ and overlapping remedies become apparent.²¹ Alternatively, one statute might create specific administrative mechanisms for achieving enforcement within an agency's hearing and adjudicatory authority, while another statute places responsibility for enforcement with the judiciary, requiring action by either the Justice Department or private litigants. Such a statutory framework is not conducive to coordination, but instead has the opposite effect.

Civil rights enforcement needs coordination for a variety of reasons. First, coordination would avoid duplication of enforcement activities. Second, it would promote consistency in federal guidelines and in principles of equal opportunity, thereby facilitating uniformity in compliance standards. Third, coordination would improve the quality and quantity of agency data on minorities and

17. 2 TITLE VI FORUM 1 (Summer 1977) (statement by Drew Days) (copy on file with *Vanderbilt Law Review*).

18. For details and examples, see notes 14-15 *supra*. On selective enforcement generally, see K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 162-87 (1969); Blumrosen, *Toward Effective Administration of New Regulatory Statutes*, 29 *AD. L. REV.* 87 (1977).

19. Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968*, 82 *HARV. L. REV.* 834, 835 (1969).

20. In the fair housing area, for example, several laws prohibit discrimination on grounds of race, color, and national origin, including Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3604-3606 (1970); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970); The Housing and Community Development Act of 1974, 42 U.S.C. § 5309 (Supp. V 1975); and Exec. Order No. 11,063, 3 C.F.R. 652 (1959-1963 Compilation). By contrast, only the Equal Credit Opportunity Act of 1974, 15 U.S.C. § 1691 (1976), and Title VIII *as amended* by the Housing and Community Development Act of 1974, 42 U.S.C. § 3604 (Supp. V 1975) prohibits sex discrimination in housing. Similarly, only Title VIII and Executive Order 11,063 prohibit religious discrimination in housing.

21. See Herbet & Reischel, *Title VII and the Multiple Approaches to Eliminating Employment Discrimination*, 46 *N.Y.U.L. REV.* 449 (1971); Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies, the Better?*, 42 *U. CHI. L. REV.* 1 (1974); Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 *U. CHI. L. REV.* 30 (1971); Sullivan, *The Enforcement of Title VII: Meshing Public and Private Efforts*, 71 *Nw. U.L. REV.* 480 (1976).

women. Fourth, it would upgrade and centralize civil rights training. Finally, and perhaps most important, coordination would eliminate the confusion of those regulated and the general public concerning rights and obligations—what the law requires and who is responsible for meeting those standards. The promise of equal opportunity inherent in the Constitution, federal statutes, executive orders, and judicial decisions neither will be achieved nor publicly accepted without coordinated enforcement.

Until acceptable coordinative approaches are forthcoming, federal agencies must seek to enforce civil rights laws through existing governmental mechanisms. This Article contends that one way of improving coordination is through the Federal Regional Councils (FRCs). The FRCs potentially can bring a degree of order to the confusion that now prevails. These regional governmental forums are specifically designed and mandated to promote interagency coordination.²² Although objections have been raised to the Councils' addressing "profound social or systemic issues,"²³ the central theme of this Article is to the contrary. By necessity, the Councils increasingly should become involved in regional civil rights questions.

Admittedly, the Councils were not created to function primarily as civil rights coordinating bodies, and they often have failed to bring about adequate governmental coordination in other areas. Yet other governmental machinery has not accomplished this urgently needed civil rights coordination. Moreover, civil rights enforcement falls within the authority of the Councils. The proposal, therefore, is not that the Councils can solve the entire problem, but that they should be considered thoroughly by the Carter administration as a prominent option for coordinating regional antidiscrimination enforcement.²⁴ Simply put, the FRCs are now in a position

22. The need for regional coordination of federal programs is examined in J. SUNDQUIST, *MAKING FEDERALISM WORK: A STUDY OF PROGRAM COORDINATION AT THE COMMUNITY LEVEL* chs. 1, 7 (1969). See also ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *IMPROVING FEDERAL GRANTS MANAGEMENT* ch. 2 (1977) [hereinafter cited as *IMPROVING FEDERAL GRANTS MANAGEMENT*]. The advent of the Federal Regional Councils represents organization based on area instead of function. See generally Gulick, *Notes on the Theory of Organization* 1, 29-30 in *PAPERS ON THE SCIENCE OF ADMINISTRATION* (L. Gulick & L. Urwick eds. 1937); Kaufman, *Administrative Decentralization and Political Power*, 29 *PUB. AD. REV.* 8 (1968).

23. OMB memorandum, quoted in M. DERTHICK, *BETWEEN STATE AND NATION* 169 (1974).

24. In early 1977 President Carter directed Jack Watson, his Assistant for Intergovernmental Relations, to assess the FRCs and their proper role in the ongoing governmental reorganization plans. While Watson believes that Carter will change the role of the Councils to some extent, he has heard from a number of state and local officials "that some sort of federal regional coordinating mechanism is badly needed." Cannon, *Regional Councils' Role Being Reassessed*, *Wash. Post*, May 15, 1977, at 10, col. 1. Based upon Watson's assessment, the Carter administration announced in September of 1977 that the FRCs will continue to

to improve upon the past record—provided they are given proper encouragement and direction from the national and regional levels.²⁵

The Councils were established on an experimental basis in the late 1960's to identify conflicting federal activities and thereby to enhance the effectiveness of federal services at the regional level.²⁶ In 1972, through Executive Order 11,647,²⁷ President Nixon issued "a strong Presidential mandate"²⁸ to the FRCs by formalizing and expanding their power as coordinative mechanisms in each of the ten standard federal regions.²⁹ At that time the Councils were composed of seven major grant-making federal agencies.³⁰ Other federal agencies were added through Executive Orders in 1973 and 1976,³¹

function in upcoming years. Press Release, Executive Office of the President, Sept. 2, 1977 (copy on file with *Vanderbilt Law Review*).

Moreover, the Carter administration has at least partially identified the problem of civil rights coordination and has provided FRC action in the 1978 guidelines issued to the Councils. The guidelines state:

In pursuit of *national goals* such as environmental protection, citizen participation, and civil rights, many Federal agencies have promulgated rules and regulations independently which duplicate or contradict the rules of others. FRCs should assist the Administration in identifying redundancy and gaps in coverage so we can develop similar, uniform requirements, both through input of the members themselves and through consultation with State and local governments. As new, comprehensive and simplified regulations are promulgated which span the programmatic jurisdiction of several Federal agencies, FRCs should assist in explaining and implementing the new procedures.

OMB, FY 1978 ROLES/OBJECTIVES FOR FEDERAL REGIONAL COUNCILS 6 (1977).

25. Poor coordination of civil rights enforcement certainly is symptomatic of the broader coordinative problems in a federal system. See Stanfield, *Federal Regional Councils—Can Carter Make Them Work?*, 9 NAT'L J. 949 (1977).

26. The origin and development of the Councils is described in IMPROVING FEDERAL GRANTS MANAGEMENT, *supra* note 22, at 181-85; M. DERTHICK, *supra* note 23, at 157-65; General Accounting Office, *Assessment of the Federal Regional Councils 3-5* (1974); *Hearings on New Federalism Before a Subcomm. of the House Comm. on Governmental Operations*, 93d Cong., 2d Sess. 3-5 (1974); Kolberg, *The New Federalism: Federal Regional Councils and Program Coordination Efforts*, in THE ADMINISTRATION OF THE NEW FEDERALISM: OBJECTIVES AND ISSUES 51 (L. Grosenick ed. 1973); Mogulof, *The Federal Regional Councils: A Potential Instrument for Planning and Joint Action*, 44 SOC. SERV. REV. 132, 133-34 (1970). See also M. MOGULOF, FEDERAL REGIONAL COUNCILS: THEIR CURRENT EXPERIENCE AND RECOMMENDATIONS FOR FURTHER DEVELOPMENT (1970).

27. Exec. Order No. 11,647, 3A C.F.R. 146 (1972 Compilation).

28. OMB, FACT SHEET ON REGIONAL COUNCILS, *quoted in* M. DERTHICK, *supra* note 23, at 171.

29. The ten standard federal regions are headquartered in Boston, New York, Philadelphia, Atlanta, Chicago, Dallas, Kansas City, Denver, San Francisco, and Seattle. 41 Fed. Reg. 33,454 (1976).

30. The agencies were the Departments of Health, Education and Welfare; Housing and Urban Development; Labor; and Transportation; the Environmental Protection Agency; the Law Enforcement Assistance Administration; and the Office of Economic Opportunity. Exec. Order No. 11,647, *supra* note 27, at 147.

31. Exec. Order No. 11,731, 3A C.F.R. 199 (1973 Compilation) added the Departments of Agriculture and Interior; Exec. Order No. 11,892, 41 Fed. Reg. 751 (1976) added the Department of Commerce and the Federal Energy Administration. In addition, the Office of

bringing the current membership to eleven of the most powerful federal agencies: the Departments of Agriculture; Commerce; Health, Education, and Welfare; Housing and Urban Development; Interior; Labor; and Transportation; the Community Services Administration; the Environmental Protection Agency; the Federal Energy Administration; and the Law Enforcement Assistance Administration.³²

Advocating a stronger role for the FRCs in coordinating the enforcement of federal civil rights laws within the major regions of the country, this Article will interpret the legal authority of the Councils and examine their coordinative function in equal employment law.³³ The discussion then will shift to what the Councils should do to coordinate civil rights enforcement through the federal grant-making process. The concluding section suggests that the Councils have not yet met their potential for upgrading enforcement and that President Carter should specifically direct the FRCs to assist in implementing national civil rights policy at the regional level.

III. AUTHORITY OF THE FEDERAL REGIONAL COUNCILS

President Nixon's Executive Order 11,731 assigned broad authority to the Federal Regional Councils.³⁴ The FRCs were instructed to develop "better ways to deliver the benefits of Federal programs over the short term," to formulate "integrated program and funding plans with Governors and local chief executives," to encourage "joint and complementary Federal grant applications by local and State governments," and to resolve "conflicts and problems which may arise between Federal agencies."³⁵ They were further directed to evaluate "programs in which two or more member

Economic Opportunity was replaced by the Community Services Administration for purposes of FRC coordination.

32. The highest ranking regional officials of member agencies serve as Council members. Other federal officials, including the regional directors of nonmember federal grant-making agencies, may attend Council meetings as ad hoc members when Council business relates to their agencies. Exec. Order No. 11,731, *supra* note 31. FRC guidelines for 1977 also state that the Councils are to "[e]stablish the necessary ad hoc arrangements for the Civil Service Commission, General Services Administration, Corps of Engineers, and other Federal agency participation in Council deliberations on particular regional problems." OMB, FY 1977 FRC GUIDELINES: ROLE, GUIDANCE, AND MANAGEMENT 2 (1976).

33. As early as 1971, the Commission on Civil Rights suggested that the FRCs should play a role in coordinating civil rights enforcement. See FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT, *supra* note 14, at 9.

34. The mandate and authority of the Councils prior to 1973 is discussed in Mogulof, *supra* note 26, at 136-39.

35. Exec. Order No. 11,731, 3A C.F.R. 199, 200 (1973 Compilation).

agencies participate," to develop "more effective ways of allocating Federal resources to meet the long-range needs of State and local communities," to supervise "regional interagency program coordination mechanisms," and to develop "administrative procedures to improve day-to-day cooperation on an interagency and intergovernmental basis."³⁶ These responsibilities indicate both the potential power that the Councils possess and the far-reaching areas in which they may exercise it.

Executive Order 11,731 explained that FRC programs would be overseen by the Washington-based Under Secretaries Group for Regional Operations (USG). Consisting of political appointees with access to the highest levels of government, the USG was directed to "establish policy with respect to Federal Regional Council matters, provide guidance to the Councils, respond to their initiatives, and seek to resolve policy issues referred to it by the Councils."³⁷ In carrying out these functions, USG has issued annual guidelines to be considered by the Councils in selecting priority programs.³⁸ Because these guidelines translate and clarify relevant executive orders and presidential priorities, they exert a strong influence on Council activities. The Councils apparently are not required to develop all projects suggested by USG guidelines,³⁹ although a review of FRC documents demonstrates that they usually follow USG's suggestions.

36. *Id.*

37. *Id.* at 201. In recent years the USG has been composed of the Under Secretaries of the Departments of Agriculture; Commerce; Health, Education and Welfare; Housing and Urban Development; the Interior; and Labor; the Deputy Secretary of Transportation, the Deputy Director of the Community Services Administration, the Deputy Administrator of the Environmental Protection Agency, the Deputy Administrator of the Federal Energy Administration, the Administrator of the Law Enforcement Assistance Administration, an Associate Director of the Domestic Council, and the Deputy Director of the Office of Management and Budget, who chairs the USG. Exec. Order No. 11,892, 41 Fed. Reg. 751, 751-52 (1976).

38. In providing leadership to the Councils, USG relies upon the OMB for administrative support and assistance in issuing guidelines. For the guidelines, see OMB, FY 1977 FRC GUIDELINES: ROLE, GUIDANCE, AND MANAGEMENT (1976); OMB, FY 1976 FRC GUIDELINES: ROLE, GUIDANCE, AND MANAGEMENT (1975); OMB, FY 1974 FRC SYSTEM GUIDELINES (1973). FRC priority programs are diverse. During 1977, for example, the guidelines encouraged the Councils to maintain working relationships with state and local governments, to provide federal budget briefings to state and local officials upon request, to implement OMB Circular No. A-95, to coordinate and simplify federal planning activities, and to enhance the ability of state and local governments to plan, implement, and manage governmental programs. OMB, FY 1977 FRC GUIDELINES: ROLE, GUIDANCE, AND MANAGEMENT 5-6 (1976). USG's guidelines are issued for fiscal years; thus references in this Article are to fiscal years.

39. The 1976 guidelines state, for example, that the Councils "should give particular emphasis" to assisting the General Services Administration in implementing the Joint Funding Simplification Act, 42 U.S.C. §§ 4251-4261 (Supp. V 1975). OMB, FY 1976 FRC GUIDELINES: ROLE, GUIDANCE, AND MANAGEMENT 8 (1975). In other areas, such as implementation of OMB Circular No. A-95 and federal planning activities, however, the Councils are instructed that they "will" execute various functions. *Id.* at 5.

Under the presidential mandate the Councils have authority to carry out a number of functions relating to federal civil rights laws, including coordination of civil rights enforcement and provision of general leadership in resolving pressing problems of minorities and women.⁴⁰ Specifically, the Councils were instructed by executive order to coordinate the activities of member agencies, and President Nixon intended the Councils to have the "capacity to influence agency decisions."⁴¹ One area of agency decision that badly needs coordination is implementation of federal civil rights laws, a clear and concurrent responsibility of all federal agencies. Enforcement coordination and programs developed specifically for minorities and women also fall within the three principal missions of the FRCs announced in their 1978 guidelines: "(a) intergovernmental relations; (b) federal interagency coordination; and (c) the delivery of unique services."⁴²

All member agencies of the FRCs have civil rights enforcement responsibilities under several statutes and executive orders. For instance, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in federally assisted programs.⁴³ Title VII of the 1964 Civil Rights Act⁴⁴ and Executive Order 11,478⁴⁵ assign to federal agencies responsibility for ensuring nondiscrimination on grounds of race, color, religion, sex, or national origin in their own employment practices. Title VIII of the Civil Rights Act of 1968 directs all federal agencies to administer their housing and urban development programs affirmatively to further fair housing.⁴⁶ In addition, Executive Order 11,246 prohibits employment discrimination by federal contractors on the basis of race, color, religion, sex, or national origin.⁴⁷

To varying degrees the Councils—reflecting the duties of their member agencies—have recognized their civil rights role.⁴⁸ In at

40. The Bureau of the Budget (OMB's predecessor) and the Civil Service Commission have acknowledged that "with their regionwide influence and special staff, the Regional Councils . . . should provide leadership in the field for the Federal Government's attack on urban problems." Mogulof, *supra* note 26, at 138.

41. OMB, Fact Sheet on Regional Councils, *quoted in* M. DERTHICK, *supra* note 23, at 170.

42. OMB, FY 1978 ROLES/OBJECTIVES FOR FEDERAL REGIONAL COUNCILS 1 (1977).

43. 42 U.S.C. § 2000d (1970).

44. 42 U.S.C. § 2000e (Supp. V 1975).

45. Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970 Compilation).

46. 42 U.S.C. § 3608(c) (1970).

47. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 Compilation).

48. For several years the work plans and annual reports of the Councils have acknowledged that Executive Orders 11,647 and 11,731 impose upon them responsibility for civil rights activities. As early as 1972 the New England Council listed four of the eight FRC functions, outlined in text accompanying notes 35-36 *supra*, as impetus for its equal employ-

least three instances, for example, Councils have negotiated equal employment and fair housing commitments from cities receiving special FRC attention.⁴⁹ On balance, however, the Councils have a capacity for far greater accomplishments in the quest for equal opportunity.

Although poor coordination has led to inadequate civil rights implementation, interagency coordination through the Councils could improve the effectiveness of the enforcement effort. Likewise, the directive that the Councils develop "better ways to deliver the benefits of Federal programs over the short term"⁵⁰ should mean first and foremost that the Councils significantly improve governmental assistance to those minorities and women who have not received an equitable share of benefits in the past.⁵¹ If they refuse to address the problems of minorities and women, the FRCs will fail to meet their obligation to improve the delivery of benefits to the public.⁵²

IV. THE COUNCILS' ROLE IN EQUAL EMPLOYMENT OPPORTUNITY

Employers historically have discriminated against minorities and women in hiring and promotion decisions.⁵³ Steps have been taken in recent years, however, to correct this situation. Progress toward equal employment opportunity has been forthcoming despite the Nation's economic slump of the mid-1970's and widespread use of the last-hired-first-fired standard.⁵⁴ Nevertheless, en-

ment opportunity program. NEW ENGLAND FRC, FY 1973 ACTIVITY PLAN (1972). In 1973 the Chicago FRC's annual report acknowledged that its Spanish-speaking task force was operating under the authority of three FRC functions spelled out in the executive orders, and Council functions similarly were cited as mandating two Native American Programs initiated by the Southwest Council. CHICAGO FRC, FY 1973 ANNUAL REPORT 21 (1973); SOUTHWEST FRC, FY 1974 ACTIVITY PLAN 58 (1973).

49. IMPROVING FEDERAL GRANTS MANAGEMENT, *supra* note 22, at 184-85. See also Clark, *New Federalism Report/Tulsa Agreement Demonstrates Attempts to Coordinate Grant Programs*, 5 NAT'L J. 1435, 1436 (1973).

50. Exec. Order No. 11,731, 3A C.F.R. 199, 200 (1973 Compilation). See text accompanying note 35 *supra*.

51. See generally TO EXTEND FEDERAL FINANCIAL ASSISTANCE, *supra* note 14. Social and economic problems facing women are discussed in detail in U.S. COMMISSION ON CIVIL RIGHTS, WOMEN AND POVERTY (1974). For related problems of Blacks and Spanish-speaking Americans, see, e.g., U.S. COMMISSION ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN (1977); U.S. COMMISSION ON CIVIL RIGHTS, THE MEXICAN AMERICAN (1968).

52. See Section IV *infra*.

53. See J. GREENBERG, RACE RELATIONS AND AMERICAN LAW ch. 6 (1959); M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT ch. 1 (1966); Countryman, *Discrimination in Employment*, in DISCRIMINATION AND THE LAW ch. 2 (V. Countryman ed. 1965); Edwards, *Race Discrimination in Employment: What Price Equality?*, 1976 U. ILL. L.F. 572, 573-88.

54. See Blumrosen & Blumrosen, *The Duty to Plan for Fair Employment Revisited*:

forcement of federal equal employment laws remains far from ideal. In 1975 the Commission on Civil Rights concluded that poor coordination has been a major impediment to effective enforcement. "The Federal effort to end [employment] discrimination . . . has been seriously hampered by lack of overall leadership and direction, deficiencies in existing laws, and the assignment of authority to a number of agencies which have issued inconsistent policies, and developed independent and uncoordinated compliance programs."⁵⁵ The Commission further stated:

The diffusion of authority for enforcing Federal equal employment mandates among diverse agencies is one of the paramount reasons for the overall failure of the Government to mount a coherent attack on employment discrimination. Agencies have different policies and standards for compliance. They disagree, for example, on such key issues as the definition of employment discrimination, testing, the use of goals and timetables, fringe benefits, and back pay. Moreover, there is inadequate sharing of information, almost no joint setting of investigative or enforcement priorities, and little cross-fertilization of ideas and strategies at the regional level. This fragmented administrative picture has resulted in duplication of effort, inconsistent findings, and a loss of public faith in the objectivity and efficiency of the program. This last deficiency is best exemplified by contrasting the opinion of many employers that they are being harrassed [*sic*] by Federal bureaucrats with the belief of many minorities and women that the Government's equal employment program is totally unreliable.⁵⁶

The Councils have an important role to play in resolving these problems. Like other federal agencies, all members of the Councils are assigned legal responsibilities for ensuring equal opportunity in their own employment practices, in those of federal and federally assisted contractors, and in those of their grantees.⁵⁷ Member agencies should act to ease problems caused by duplicative jurisdictions and conflicting Equal Employment Opportunity (EEO) require-

Work Sharing in Hard Times, 28 RUTGERS L. REV. 1082 (1975); Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem*, 23 U.C.L.A. L. REV. 177 (1975); Sheeran, *Title VII and Layoffs Under the 'Last Hired, First Fired' Seniority Rule: The Preservation of Equal Employment*, 26 CASE W. RES. L. REV. 409 (1976); Note, *Last Hired, First Fired Layoffs and Title VII*, 88 HARV. L. REV. 1544 (1975).

55. To ELIMINATE EMPLOYMENT DISCRIMINATION, *supra* note 11, at 617.

56. *Id.* at 618.

57. Under Title VII of the Civil Rights Act of 1964 and Executive Order 11,478, all federal agencies must provide to all persons an equal opportunity to be hired and promoted in all job classifications. To assure equal opportunity, each agency is required to develop and implement an affirmative action plan. 42 U.S.C. § 2000e-16 (Supp. V 1975); Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970 Compilation). Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 Compilation), prohibits employment discrimination by federal contractors and federally assisted contractors on the basis of race, creed, color, or national origin, and contractors must take affirmative action in order to promote equal opportunity. Title VI of the 1964 Civil Rights Act requires federal agencies to assure nondiscrimination by their grantees. 42 U.S.C. § 2000d (1970).

ments, for employers are literally "living under an overlapping and asymmetrical, if not irrational, patchwork of laws and enforcement responsibilities."⁵⁸ A genuine need for federal agencies to coordinate their regional enforcement activities remains, and it can be fulfilled through the FRCs.

Executive Orders 11,647 and 11,731 authorize equal employment coordination by the FRCs. More significantly, the President through these orders has instructed the Councils to assist state and local governments in expeditiously resolving interagency conflicts and problems in interagency coordination.⁵⁹ Coordination also would assist the Councils in meeting other responsibilities, including improving the delivery of federal benefits, evaluating federal programs that involve two or more Council agencies, and developing administrative procedures for facilitating intergovernmental cooperation.⁶⁰

The Councils are devoting increasing amounts of time to equal employment issues, but problems inhere in their approach. One notable problem flows from the 1977 guidelines of the Under Secretaries Group, which for the first time officially designated the Civil Service Commission as the "lead agency" for each Council in affirmative action matters.⁶¹ This decision was a mistake, for the CSC has tended to take a conservative and ineffective approach to combatting discrimination.⁶² The Equal Employment Opportunity Commission (EEOC), not the CSC, is the agency responsible for enforcing Title VII, which applies to private employers as well as to federal, state, and local governments.⁶³ Title VII standards therefore should be used to resolve internal federal EEO questions. Moreover, federal courts have deferred to the EEOC's interpretation of Title VII requirements.⁶⁴ Because of its established role in overseeing

58. Lopatka, *A 1977 Primer on the Federal Regulation of Employment Discrimination*, 1977 U. ILL. L.F. 69, 166-67. Problems of contradiction and inconsistency are evident, for example, in *Local 189, United Papermakers v. United States*, 416 F.2d 980 (5th Cir. 1969). In that case the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance of the Department of Labor came to very different conclusions on the acceptability of a job seniority system that had been challenged under the Civil Rights Act of 1964. *Id.* at 984-85. Judge Wisdom expressed "bewilderment at the twists and turns indulged in by government agencies." *Id.* at 997.

59. Exec. Order No. 11,647, 3A C.F.R. 146, 148 (1972 Compilation); Exec. Order No. 11,731, 3A C.F.R. 199, 200 (1973 Compilation).

60. *Id.*

61. OMB, FY 1977 FRC GUIDELINES: ROLE, GUIDANCE, AND MANAGEMENT 7 (1976).

62. See TO ELIMINATE EMPLOYMENT DISCRIMINATION, *supra* note 11, at chs. 1-2.

63. 42 U.S.C. § 2000e (Supp. V 1975). The EEOC's jurisdiction also extends to employment practices of labor unions, joint apprenticeship committees, and employment agencies. *Id.*

64. See, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power*

equal employment, the EEOC obviously should have been chosen over the Civil Service Commission to take the lead in FRC employment programs.

Notwithstanding this problem, coordination of equal employment activities has been attempted regionally. During the 1970's some Councils sought to coordinate EEO guidelines for state and local governments,⁶⁵ employment practices by federal contractors,⁶⁶ and the EEO programs of FRC member agencies.⁶⁷ Careful scrutiny of each area reveals that the Councils have demonstrated a promise for valuable EEO coordination.

A. *State and Local Employment: A Major Coordination Potential*

State and local governments are responsible for meeting the equal employment opportunity standards of several federal agencies. Under Title VII they are required to adhere to the basic nondiscrimination guidelines of the EEOC⁶⁸ and can be sued in federal district court by private plaintiffs or the Department of Justice for noncompliance.⁶⁹ The Equal Pay Act, which requires that employees, including all state and local government employees, receive equal wages for equal work regardless of sex,⁷⁰ is enforced by the Department of Labor.⁷¹ Federal Merit System standards, administered by the Civil Service Commission, forbid discrimination on the basis of race, national origin, sex, or physical handicap in the selection, promotion, and compensation of state and local employees in several programs funded by three federal agencies.⁷² Title VI of the 1964 Civil Rights Act⁷³ and other laws establishing assistance pro-

Co., 401 U.S. 424 (1971); *Douglas v. Hampton*, 512 F.2d 976 (D.C. Cir. 1975); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239 (3d Cir. 1975); *Rogers v. International Paper Co.*, 510 F.2d 1340 (8th Cir. 1975); *Boston Chapter, NAACP v. Beecher*, 504 F.2d 1017 (1st Cir. 1974).

65. See text accompanying notes 76-98 *infra*.

66. See text accompanying notes 103-16 *infra*. See also the discussion of the Kansas City Council's effort to develop equal employment opportunity guidelines in M. DERTHICK, *supra* note 23, at 168; Bombardier, *The Managerial Function of OMB: Intergovernmental Relations as a Test Case*, 23 PUB. POL'Y 317, 342 (1975).

67. See text accompanying notes 122-29 *infra*.

68. 42 U.S.C. § 2000e (Supp. V 1975).

69. 42 U.S.C. § 2000e-6 (Supp. V 1975).

70. 29 U.S.C. § 206(d)(1) (1970).

71. 29 U.S.C. § 216 (Supp. V 1975). In *National League of Cities v. Usery*, 426 U.S. 833 (1976), the United States Supreme Court ruled that Congress has no authority "to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." *Id.* at 852. The decision, however, did not mention the requirement of equal pay regardless of sex.

72. The agencies are the Departments of Health, Education and Welfare; Labor; and Defense. 45 C.F.R. § 70 (1976).

73. 42 U.S.C. § 2000d (1970). Employment practices are covered by Title VI when the primary purpose of the assistance is providing employment or when discrimination in employment will affect the services provided.

grams also contain requirements for equality in employment opportunities. Many of the latter provisions are administered by the Department of the Treasury and the Law Enforcement Assistance Administration.⁷⁴

Despite the increased number of discrimination suits in recent years, state and local governments only recently have begun to approach the ideal of equal job opportunity.⁷⁵ Largely on their own initiative, some Councils have assisted state and local governments in meeting legal requirements and resolving associated problems in minority and female employment.⁷⁶ These activities frequently have been limited to developing guidelines for affirmative action. A number of other coordinative activities, however, could reduce inconsistency and duplication in compliance programs at the regional level. Establishing mechanisms to facilitate data sharing, joint compliance reviews, and complaint investigations are plausible options.⁷⁷

At least three Councils—those in Atlanta, Dallas, and Kansas City—have developed affirmative action guidelines for their regions.⁷⁸ An analysis of the Dallas region's program, the most sophisticated and widely circulated of the three, provides an illustration of how far the FRCs have advanced and what they still must do to meet fully the requirements of equal employment law. In 1975 the Southwest Council adopted EEO standards to assist state and local agencies in complying with various federal laws.⁷⁹ Attempting to

74. *E.g.*, The State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §§ 1221-1264 (Supp. V 1975) (creating the general revenue sharing program and prohibiting discrimination in the expenditure of general revenue sharing funds); The Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §§ 3701-3796 (1970) (providing funds to state and local governments for law enforcement and prohibiting discrimination on the basis of race, color, national origin, and sex in Law Enforcement Assistance Administration-funded programs).

75. See Larson, *Remedies for Racial Discrimination in State and Local Government Employment: A Survey and Analysis*, 5 COLUM. HUMAN RIGHTS L. REV. 335 (1973). For further discussion of discrimination in state and local employment, see TO ELIMINATE EMPLOYMENT DISCRIMINATION, *supra* note 11, at 141-45.

76. Prior to 1977 the equal employment opportunity activities of the FRCs were not mentioned in formal USG guidelines, *supra* note 38. In 1977, however, they were included, and the Civil Service Commission was designated to act as "lead agency" in affirmative action matters. See text accompanying notes 61-64 *supra*.

77. For the importance of pertinent and timely data in civil rights enforcement, see Bogen & Falcon, *The Use of Racial Statistics in Fair Housing Cases*, 34 MD. L. REV. 59 (1974); Fiss, *supra* note 3, at 761-64. See also U.S. COMMISSION ON CIVIL RIGHTS, TO KNOW OR NOT TO KNOW: COLLECTION AND USE OF RACIAL AND ETHNIC DATA IN FEDERAL ASSISTANCE PROGRAMS (1973).

78. SOUTHEASTERN FRC, EEO AFFIRMATIVE ACTION PLANNING GUIDE (1975); SOUTHWEST FRC, UNIFORM INTERAGENCY GUIDELINES FOR EEO AFFIRMATIVE ACTION PLANS (1975) [hereinafter cited as SOUTHWEST GUIDELINES]; KANSAS CITY FRC, GUIDELINES FOR A MODEL AFFIRMATIVE ACTION PLAN (1974). Other Councils currently are developing such guidelines. See, *e.g.*, MID-ATLANTIC FRC, FY 1977 WORK PLAN 60 (1976).

79. SOUTHWEST GUIDELINES, *supra* note 78.

respond to the lack of federal coordination, the FRC concisely outlined the problem:

Numerous Federal agencies making grants to state and local governments require EEO Affirmative Action Plans (AAPs) but there is surprisingly little standardization in the various requirements by individual agencies, even though the requirements all stem from the same Civil Rights Act. Grantee officials object to the plethora of disparate criteria and interpretations imposed by various Federal agencies. There has been a need to refine, clarify, and standardize the EEO/AAP requirements levied on state and local jurisdictions and agencies administering federally-funded grant programs.⁸⁰

The Dallas Council subsequently publicized these guidelines and within two years had distributed 1,350 copies.⁸¹ The guidelines apparently were received gratefully by many state and local officials.⁸² The Dallas Council acted commendably in attacking EEO duplication, and it seems quite pleased with the guidelines, which have not been revised since issued in 1975.⁸³ In its 1977 work plan the Council proudly announced that its committee on equal employment opportunity was "the only mechanism of its kind to aid in developing consistent and non-conflicting guidelines and procedures, resolving agency conflicts, and improving relations between the Federal government and State and local agencies."⁸⁴ The Council further stated its belief that the guidelines had "enabled State and local levels to become more proficient in achieving compliance with Federal EEO requirements."⁸⁵

In spite of these claims, the guidelines have weaknesses that should be corrected in the future and avoided by other regions. Although the Dallas guidelines were adopted to reduce the burden upon state and local officials created by inadequate federal coordination, they do not meet the requirements of Title VII or Executive Order 11,246. The guidelines specifically state that compliance with the substance of the guidelines does not guarantee compliance with

80. SOUTHWEST FRC, FY 1976 WORK PLAN 102 (1975). A year earlier the FRC had noted that "[t]he diversity of purposes of the individual Federal agencies is equaled only by the diversity of approaches and interests of those agencies in the area of affirmative action and equal employment opportunity." SOUTHWEST FRC, FY 1975 WORK PLAN 66 (1974). The Boston and Kansas City Councils similarly identified the problem in their 1977 work plans. See NEW ENGLAND FRC, FY 1977 WORK PROGRAM 44 (1976); MID-CONTINENT FRC, FY 1977 WORK PLAN (1976).

81. SOUTHWEST FRC, FINAL PROGRESS REPORT: 1976 WORK PLAN 59 (1976). Additional copies of the guidelines were made available through the United States Government Printing Office. *Id.*

82. SOUTHWEST FRC, FY 1976 WORK PLAN 102 (1975).

83. See SOUTHWEST FRC, FY 1977 WORK PLAN 117 (1976).

84. *Id.* at 115.

85. *Id.* at 116.

Executive Order 11,246.⁸⁶ In addition, they fail to explain that the guidelines do not extend to Title VII, and they neglect to inform state and local officials of remedial actions provided by Title VII.⁸⁷ Although FRC agencies agreed that state and local compliance with the guidelines would be accepted by each of them as meeting "basic Federal EEO affirmative action requirements,"⁸⁸ and although the Council made clear that Executive Order 11,246 was an exception to this pledge, the Council failed to note that compliance with the guidelines would not satisfy Title VII.⁸⁹ To the contrary, the Council implied that compliance with the guidelines would be sufficient for Title VII compliance since excerpts from Title VII were included in an appendix. Unless state and local governments on their own initiative discover that the phrase "basic Federal EEO affirmative action requirements" does not include Title VII, they will have little protection from discrimination suits.

In addition, the affirmative action plan suggested in the Dallas guidelines fails to follow the standards of the Department of Labor and the EEOC.⁹⁰ As the Commission on Civil Rights has explained:

An affirmative action plan should contain a work force analysis to determine if there are fewer women or minorities employed in each job category than would be expected by their availability for the job. If this analysis shows that women and minorities are underutilized in the employer's work force, then the employer should be required to develop numerical goals and timetables, or measurable targets, which must be directed to obtaining prompt and full utilization of minorities and women. Goals and objectives must be developed by job classification and organizational unit. Additional required elements of an affirmative action plan include the development and implementation of internal auditing systems to measure the effectiveness of the plan, the development or reaffirmation of an equal employment opportunity policy and dissemination of the policy, the development and implementation of "action oriented" programs (such as validation of tests and other selection techniques to assure

86. The guidelines state:

NOW, THEREFORE, with one exception, we hereby resolve that any EEO affirmative action plan written, and actively implemented, so as to equal or exceed the substance of the *Guidelines*, will meet basic Federal EEO affirmative action requirements. The exception applies to public agencies acting as Federal contractors under Executive Order 11246/11375, who are required to develop a plan in accordance with Chapter 60 of Title 41 CFR.

SOUTHWEST GUIDELINES, *supra* note 78, inside cover.

87. The guidelines do not discuss remedial actions under Title VII, although Title VII is mentioned in the introduction as one statutory provision with which state and local governments must comply. *Id.* Introduction.

88. See note 86 *supra*.

89. Moreover, the guidelines do not apply to equal employment opportunity requirements of nonmember agencies. State and local governments complying with the guidelines, therefore, still may be required to adhere to the equal employment opportunity requirements of other federal agencies.

90. See 41 C.F.R. § 60-2.1 to -2.32 (1977); EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AFFIRMATIVE ACTION AND EQUAL EMPLOYMENT: A GUIDEBOOK FOR EMPLOYERS (1974).

their job-relatedness and elimination of barriers to minority and female recruitment), and support of outside programs designed to improve employment opportunities for minorities and women.⁹¹

Many of these features are either ignored or treated ineffectively in the Dallas guidelines. Although they do present some acceptable procedures for recruiting minorities and women, the guidelines neglect to emphasize that state and local governments should develop goals or annual objectives for eliminating disparities in employment profiles.⁹² The guidelines further recommend the use of "major job groupings"⁹³ for statistical evaluation of equal employment programs, even though this technique falls short of revealing whether minorities and women are employed only in lower-level jobs within each primary grouping.⁹⁴ Moreover, state and local governments are not directed to cross-tabulate all employment statistics according to race, sex, and ethnicity, despite the importance of cross-tabulated data in developing employment goals.⁹⁵

Although the regional approach in the Southwest is open to criticism, it surpasses the accomplishments of the other Councils. For 1977 the San Francisco Council supported its first task force on state and local employment practices.⁹⁶ Similarly, the New England Council recently has addressed the need for uniform affirmative action guidelines by establishing a study group to explore this problem,⁹⁷ and during 1977 the Chicago Council also ventured into the early stages of developing equal employment guidelines.⁹⁸ Nevertheless, each FRC is capable of taking additional action to help state and local agencies in the critical but frustrating endeavor of complying with federal EEO standards.

91. TO EXTEND FEDERAL FINANCIAL ASSISTANCE, *supra* note 14, at 68-70 (footnotes omitted).

92. The guidelines refer only to the need for "specific, realistic and achievable time-tables and target dates." SOUTHWEST GUIDELINES, *supra* note 78, Introduction. They do not suggest what the goals should be, specifically explain how state and local governments should develop short-term and long-range goals, or describe in detail how to develop a program to implement goals. Nor do the SOUTHWEST GUIDELINES speak in detail of the testing issue. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (announcing that employment selection standards resulting in adverse, disproportionate impacts on minorities are prohibited by Title VII unless the standards are directly job-related). See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

93. SOUTHWEST GUIDELINES, *supra* note 78, at § 1.

94. TO ELIMINATE EMPLOYMENT DISCRIMINATION, *supra* note 11, at 93.

95. *Id.* at 94. Some of these weaknesses probably resulted from the Dallas FRC's heavy reliance upon the Civil Service Commission, rather than the EEOC, in developing the guidelines. See SOUTHWEST FRC, FY 1976 WORK PLAN 102-03 (1975).

96. WESTERN FRC, FY 1977 WORK PLAN 47 (1976).

97. NEW ENGLAND FRC, FY 1977 WORK PROGRAM 44-45 (1976).

98. CHICAGO FRC, FY 1977 WORK PLAN 21 (1976).

B. Federal Contractors and EEO

Executive Order 11,246 gives the Secretary of Labor responsibility for administering a program to eliminate employment discrimination by federal contractors and subcontractors on grounds of color, race, sex, creed, or national origin.⁹⁹ This responsibility is assigned to the Department of Labor's Office of Federal Contract Compliance Programs,¹⁰⁰ which in turn has delegated authority to seventeen federal contracting agencies whose compliance programs it oversees.¹⁰¹ As in other enforcement areas, this approach has generated coordination problems. For example, "[s]everal different agencies may have responsibility for different facilities of the same corporation. Confusion arises when agencies take different positions with regard to the same corporate-wide employment policy or practice."¹⁰² Coordination between federal agencies with contract compliance responsibilities and those with responsibilities for enforcing other equal employment opportunity requirements provides one avenue for eliminating duplication and inconsistency.

Unfortunately, most of the FRCs have neglected to play a strong coordinative role, and the intensity of their efforts has fluctuated over time. A few Councils examined the employment practices of federal contractors as early as 1970.¹⁰³ In recent years, however, federal contract compliance rarely has been considered a high-priority FRC program,¹⁰⁴ and some regions explicitly have excluded contract compliance from their attempts to develop EEO guidelines.¹⁰⁵ Some Councils have given independent attention to employment practices of federal contractors, but these activities often have been phased out. A typical example is the New England Council, which in 1976 maintained no program concerning contract compliance.¹⁰⁶ This development contradicts that Council's activities in the early 1970's when its Civil Rights Team assisted the Department of Labor in monitoring hometown plans in selected New England

99. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 Compilation), as amended by Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970 Compilation); see Lopatka, *supra* note 58, at 121-25. For an examination of attempts to enforce nondiscrimination in government contracts prior to Executive Order 11,246, see Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 VA. L. REV. 27, 49-52 (1955).

100. See TO ELIMINATE EMPLOYMENT DISCRIMINATION, *supra* note 11, at ch. 3.

101. TO EXTEND FEDERAL FINANCIAL ASSISTANCE, *supra* note 14, at 664.

102. TO ELIMINATE EMPLOYMENT DISCRIMINATION, *supra* note 11, at 274.

103. Mogulof, *supra* note 26, at 146. See also M. DERTHICK, *supra* note 23, at 168.

104. The New England and New York FRCs were among those devoting some attention to contract compliance during 1977. See NEW ENGLAND FRC, FY 1977 WORK PROGRAM 54 (1976); NEW YORK FRC, FY 1977 WORK PLAN 74 (1976).

105. See, e.g., text accompanying note 86 *supra*.

106. See NEW ENGLAND FRC, FY 1976 WORK PROGRAM (1975).

cities.¹⁰⁷ The Boston contract compliance program was revived in 1977,¹⁰⁸ an indication, perhaps, that the Council has regained the spirit of earlier years.

The approach in the Chicago region also follows this fluctuating pattern. In 1976 the Chicago Council operated one of the stronger FRC contract compliance programs—at least on paper—and its goals appeared quite forward-looking. A principal objective of the Council's External Affirmative Action Task Force was to offer leadership to federal agencies, grantees, and contractors in seriously pursuing affirmative action.¹⁰⁹ This broad objective contained a number of specific goals: to review member agency affirmative action regulations; to examine agency pre-award and contract compliance procedures; to suggest means for improving affirmative action requirements of member agencies; and to hold conferences on designing and implementing affirmative action plans.¹¹⁰ The Chicago task force appeared to make progress in a few of these areas, but the program was excluded from its 1977 work plan.¹¹¹ This exclusion could be due to a number of factors, including a lack of experience in contract compliance, apathy of member agencies toward equal employment opportunity, or inadequate staff and budget allocations. In any event, such problems must be anticipated and avoided if the Councils are to provide effective coordination of contract compliance programs.

The New York Council provides possibly the most promising exception to this trend, for this FRC consistently has addressed contract compliance. Since at least 1974, the Council's Equal Employment Opportunity Committee, composed of several federal agencies, has worked consistently with the Department of Labor to support the use of joint compliance reviews and the auditing of hometown plans.¹¹² According to the Council's 1974 work plan, "joint compliance reviews have encouraged Federal contractors to take affirmative action to insure equal employment opportunity and have become sufficiently institutionalized to continue without di-

107. See, e.g., NEW ENGLAND FRC, FY 1973 ACTIVITY PLAN, work item 16 (1972). Hometown plans are voluntary agreements, negotiated by contractors, unions, and minority communities, for increasing and upgrading minority employment in an area's construction industry. The Department of Labor deems contractors who are signatories to the plans to be in compliance with Executive Order 11,246. See TO ELIMINATE EMPLOYMENT DISCRIMINATION, *supra* note 11, at 344-99.

108. NEW ENGLAND FRC, FY 1977 WORK PROGRAMS 54 (1976).

109. CHICAGO FRC, FY 1976 WORK PLAN 28 (1975).

110. *Id.*

111. The 1977 work plan contains an EEO section, but does not mention contract compliance. CHICAGO FRC, FY 1977 WORK PLAN 20-24 (1976).

112. NEW YORK FRC, FY 1975 WORK PLAN 38 (1974).

rect supervision by the FRC."¹¹³ Nevertheless, the Council to its credit has continued to maintain a coordinative role. In 1974 it participated in five joint compliance reviews;¹¹⁴ it monitored seven joint compliance reviews in 1975,¹¹⁵ and it continued similar activities in 1976 and 1977.¹¹⁶

C. *Placing the Federal Government's Own House in Order*

Civil rights law contains one obvious double standard—the federal government's own equal opportunity requirements are often less stringent than those it imposes on other employers.¹¹⁷ While the EEOC attempts to enforce Title VII strictly, the United States Civil Service Commission has assumed a more conservative position concerning federal employment matters, a position far less likely to reduce discrimination in the future.¹¹⁸ According to the Commission on Civil Rights,¹¹⁹ the CSC's policy violates both Title VII and the United States Supreme Court's decision in *Griggs v. Duke Power Company*.¹²⁰

While the Civil Service Commission is charged with the responsibility of overseeing and establishing standards for equal employment opportunity within the federal government, the FRCs also have conducted periodic activities to upgrade internal employment practices of member agencies. The nature and extent of these FRC programs have varied greatly from region to region, but the trend has been to give them less emphasis. In recent years the Councils increasingly have denied responsibility for monitoring internal federal employment practices. They have looked instead to individual federal agencies, to regional CSC offices, or to Federal Executive Boards within their regions to carry out these civil rights efforts.¹²¹ Thus, while the FRCs could be used to improve the federal government's own equal employment record, they generally have not fulfilled this potential.

113. *Id.*

114. *Id.*

115. NEW YORK FRC, FY 1975 ANNUAL REPORT 14 (1975).

116. NEW YORK FRC, FY 1977 WORK PLAN 74 (1976).

117. For examples, see TO ELIMINATE EMPLOYMENT DISCRIMINATION, *supra* note 11, at 36-43, 87-95, 619.

118. The Civil Service Commission's procedures are criticized in Ralston, *The Federal Government as Employer: Problems and Issues in Enforcing the Anti-Discrimination Laws*, 10 GA. L. REV. 717 (1976).

119. TO ELIMINATE EMPLOYMENT DISCRIMINATION, *supra* note 11, at 36-37.

120. 401 U.S. 424 (1971).

121. The Federal Executive Boards function as voluntary associations of top federal regional officials in cities throughout the nation. Their civil rights responsibilities and activities are discussed in FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT, *supra* note 14, at 307-10.

The FRCs' past achievements illustrate the kinds of regional approaches that could be pursued productively. For example, the Chicago Council's internal equal employment opportunity program has focused primarily upon federal agency affirmative action plans, and in 1974 the Council maintained an employment task force to examine employment opportunities for women, minorities, and veterans.¹²² The task force's objectives were to analyze existing plans in the region, to recommend federal employment goals for women, minorities, and veterans, and to increase the hiring and promotion of persons in these groups.¹²³ These activities were continued in 1975 and four accomplishments resulted: (1) compilation of quarterly reports on employment rates of women and minorities by Council member agencies; (2) review of the ongoing federal employment activities of FRC agencies and the Chicago Federal Executive Board; (3) development of an information system to notify federal employees of job opportunities in member agencies; and (4) support for a program that promoted upward mobility of lower paid federal employees—including minorities and women—by providing them with training opportunities through a cooperative agreement with Chicago's colleges and universities.¹²⁴ Despite these accomplishments, the task force was reorganized in 1976 to focus only on affirmative action programs for federal contractors and grantees.¹²⁵

San Francisco's Equal Employment Opportunity Committee of 1973 and 1974 furnishes another illustration of the Councils' potential for improving equal job opportunities within the federal government.¹²⁶ The Council developed a Federal Talent Bank, in conjunction with the Federal Executive Board, designed to be the primary source by which federal agencies in the San Francisco Bay area would recruit minority employees.¹²⁷ The Committee also recommended goals and timetables for the hiring and promotion of minorities and women in each federal agency.¹²⁸ Unfortunately, the San Francisco Council discontinued these EEO activities after 1974.¹²⁹ Discontinuation is not unusual, however. Although several Councils have supported internal EEO programs in the past, a review of all 1976 and 1977 FRC work plans reveals that none of these programs

122. CHICAGO FRC, FY 1974 WORK PLAN § 0 (1973).

123. *Id.*

124. *See, e.g.,* CHICAGO FRC, FY 1975 ANNUAL REPORT 31 (1975).

125. *See* text accompanying notes 109-10 *supra*.

126. The committee and its activities are explained generally in WESTERN FRC, FY 1974 WORK PLAN 27 (1973); WESTERN FRC, FY 1973 WORK PLAN 37-40 (1972).

127. WESTERN FRC, FY 1974 WORK PLAN 27 (1973).

128. *Id.*

129. *See* WESTERN FRC, FY 1975 WORK PLAN (1974).

was still in operation. This is another area in which the Councils could coordinate the activities of several federal agencies to meet the requirements of national equal employment opportunity law.

To reduce duplication and inconsistency, one government mechanism should have responsibility for coordinating and monitoring equal employment opportunity activities by state and local governments, federal contractors, and federal agencies. Unless these problems are handled by one governmental mechanism, haphazard and ineffective enforcement of the civil rights laws will continue. Although the Federal Regional Councils have focused attention on some EEO issues, stronger steps toward coordination are needed to improve the enforcement of dispersed legal authority. A coordinated approach would promote the sharing of employment information among federal agencies, would enhance the agencies' ability to cooperate in equal employment investigations, and would make agency EEO standards more uniform. As part of its reorganization attempt the Carter Administration should weigh seriously the possibility of the FRCs performing this coordination function, or at least substantially assisting in its performance. The arguments for using the FRCs should now be obvious: the Councils have developed programs within each standard federal region, which when taken together cover the entire nation; they have demonstrated an ability to complete various EEO projects successfully; and while all federal agencies are not members of the FRC system, they could easily serve as ad hoc members to the Councils on specific EEO problems. Solutions to coordinative problems should be forthcoming from President Carter, and the FRCs provide one option.

V. THE FEDERAL GRANT SYSTEM

Another regional approach, which the Councils should pursue, but have not pursued, would remove obstructions to the equitable delivery of benefits to minorities and women when federal funds are expended.¹³⁰ These inequities can be readily documented for state employment services that receive federal funds on a regular basis.¹³¹ Even during the 1970's state employment security agencies have denied minorities and women full benefits. In assigning occupational classifications, these agencies have failed to give equal credit

130. See generally L. PANETTA & P. GALL, *BRING US TOGETHER: THE NIXON TEAM AND THE CIVIL RIGHTS RETREAT* (1971); *To EXTEND FEDERAL FINANCIAL ASSISTANCE*, *supra* note 14; *Comment*, *supra* note 15.

131. State employment agencies receive federal financial assistance from the Department of Labor under the Wagner-Peyser National Employment System Act of 1933, 29 U.S.C. §§ 49 to 49k, 557 (1970).

for education, skills, and experience. They have entered subjective comments on application forms concerning applicants' family histories and appearances, which tended to decrease employment opportunities. In addition, they have discriminated against minorities and women in employment referrals by directing them to the lower paying jobs customarily reserved for these groups.¹³²

Similarly, minorities and women have not received full benefits from federally funded housing, transportation, and law enforcement programs. A 1976 report released by the United States Commission on Civil Rights concludes that, since the passage of the Housing and Community Development Act of 1974,¹³³ the amount of federal funds used to assist minorities and low-income families has declined significantly.¹³⁴ Comparing programs under the 1974 Act with those of the past, the report concludes that there was "less funding for programs in areas of concentrated slums and blight" and that "[t]he racial and economic makeup of those receiving program benefits indicates that minorities and low-income individuals are receiving fewer benefits under the community development act than they received prior to its enactment"¹³⁵ Traditionally, women also have encountered numerous obstacles in their attempts to participate in federally supported housing activities.¹³⁶ With regard to public transportation, predominantly minority inner-cities have received less adequate urban transportation services than white suburbs, with inner-city services more irregular than and inferior to those for suburban communities.¹³⁷ In law enforcement, minorities more frequently encounter harassment from the police.¹³⁸ Grand and

132. The forms of discrimination are discussed in *To EXTEND FEDERAL FINANCIAL ASSISTANCE*, *supra* note 14, at 443-46.

133. Pub. L. No. 93-383, 88 Stat. 633 (codified at 42 U.S.C. § 5301 (Supp. V 1975)). Major objectives of the Act relate directly to the housing needs of the poor and minorities, e.g., "the conservation and expansion of the Nation's housing stock in order to provide a decent home and a suitable living environment for all persons, but principally those of low and moderate income." 42 U.S.C. § 5301(c)(3) (Supp. V 1975).

134. MICHIGAN STATE ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS AND THE HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974, VOL. II: A COMPARISON WITH MODEL CITIES 127 (1976).

135. *Id.* See also *Hearings on Equal Opportunity in Housing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary Pt. 1*, 94th Cong., 2d Sess. 2-36 (1976) (testimony of Robert C. Weaver).

136. See U.S. COMMISSION ON CIVIL RIGHTS, *MORTGAGE MONEY: WHO GETS IT?* ch. 4 (1974). Certain practices subsequently have been forbidden under the Equal Credit Opportunity Act of 1974, 15 U.S.C. § 1691 (1976), as amended by Act of Mar. 23, 1976, Pub. L. No. 94-239, 90 Stat. 251.

137. *To EXTEND FEDERAL FINANCIAL ASSISTANCE*, *supra* note 14, at 522-23.

138. *Id.* at 281-82. See also G. COLE, *POLITICS AND THE ADMINISTRATION OF JUSTICE* 94-95 (1973).

petit juries often contain few minority members,¹³⁹ and imprisoned minorities obtain disproportionately few benefits from a variety of prison programs.¹⁴⁰

In view of the responsibilities described in Executive Orders 11,647 and 11,731,¹⁴¹ the FRCs can provide forums for remedying some of these problems. Perhaps most important, these executive orders direct the Councils to develop better ways of delivering benefits under federal programs. Since minorities and women face numerous impediments to obtaining an equitable share of federal benefits, increasing the benefits to these groups must be a significant component of any successful effort to improve delivery. The executive orders further direct the Councils to improve the distribution of federal funds to meet state and local needs. Based on recent trends, states and communities will continue to confront special needs of minorities and women in employment, housing, transportation, and law enforcement.

This Article emphasizes two prominent avenues through which the Councils can meet their responsibilities for upgrading the delivery of federal assistance to legally protected groups, while helping to correct past injustices. First, the Councils can foster interagency coordination of civil rights compliance in federally assisted programs.¹⁴² Second, the Councils can ensure that the rights of these groups are seriously considered in state and local review of proposed federally funded projects.¹⁴³

A. Title VI of the Civil Rights Act of 1964

Interagency coordination of compliance standards is essential because of the number of civil rights laws and regulations that prohibit discrimination in federally assisted programs. Foremost among these is Title VI of the 1964 Civil Rights Act, which prohibits discrimination on the basis of race, color, or national origin.¹⁴⁴ Dis-

139. See, e.g., U.S. COMMISSION ON CIVIL RIGHTS, MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST 36-46 (1970); Alker, Hosticka & Mitchell, *Jury Selection as a Biased Social Process*, 11 L. & Soc'y REV. 9 (1976); Van Dyke, *The Grand Jury: Representative or Elite?*, 28 HASTINGS L.J. 37 (1976).

140. See, e.g., GEORGIA ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, GEORGIA PRISONS (1976); KANSAS ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, INMATE RIGHTS AND THE KANSAS STATE PRISON SYSTEM (1974); NEW YORK ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, WAREHOUSING HUMAN BEINGS (1974). For various discriminatory advantages that male inmates have received over their female counterparts, see Note, *The Sexual Segregation of American Prisons*, 82 YALE L.J. 1229, 1231-44 (1973).

141. See notes 27 & 31 *supra*, text accompanying notes 35-36 *supra*.

142. See text accompanying notes 144-64 *infra*.

143. See text accompanying notes 165-86 *infra*.

144. 42 U.S.C. § 2000d (1970).

crimination is prohibited in additional legislation that establishes federally assisted programs.¹⁴⁵ Approximately 400 federally assisted programs account yearly for billions of dollars in expenditures.¹⁴⁶ Several agencies administer these programs, and each is responsible for enforcing the nondiscrimination laws in its own programs.¹⁴⁷ The more powerful of these agencies are members of the Federal Regional Councils.

General revenue sharing has caused fundamental changes in the manner in which federal monies are dispersed to state and local governments, but the Councils have an even greater role to play in the monetary aspects of what President Nixon called "New Federalism."¹⁴⁸ Most federal funds given to state and local governments are provided, not by general revenue sharing, but by the federal agencies that comprise the Federal Regional Councils.¹⁴⁹ Coordination among these agencies therefore is essential to adequate enforcement of the civil rights laws. As the Commission on Civil Rights noted in 1975:

Implementation of Title VI poses significant problems requiring coordination and direction. The need for coordination and direction exists because more than 25 agencies have Title VI enforcement responsibilities. Coordination and direction may be necessary to ensure joint enforcement by several agencies funding the same recipient. More importantly, absent effective coordination and direction, Title VI agencies may make inconsistent interpretations of law or develop conflicting standards for implementation of Title VI, such as data collection requirements. Since some recipients are assisted by a number of Federal agencies, it is important that these recipients not be subjected to varying and possibly conflicting information reporting requirements and compliance standards. Similarly, even where there is uniformity among

145. Thus, for example, discrimination on the basis of race, color, national origin, and sex is prohibited in programs receiving general revenue sharing funds, 31 U.S.C. § 1243(a)(7) (Supp. V 1975), and in programs receiving Law Enforcement Assistance Administration funds under the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §§ 3701-3795 (Supp. V 1975).

146. *Hearings on the Departments of State, Justice, and Commerce, the Judiciary and Related Agencies, Appropriations for 1973, Before the Subcomm. of the House Comm. on Appropriations Pt. 1*, 92d Cong., 2d Sess. 656 (1972).

147. If a federal agency uncovers discrimination in a program that it funds, and the recipient does not voluntarily correct the discrimination, the agency can either terminate the assistance or refer the matter to the Department of Justice for civil action. 42 U.S.C. § 2000d-1 (1970). For examples of problems arising in the enforcement of Title VI, see Note, *Enforcing a Congressional Mandate: LEAA and Civil Rights*, 85 YALE L.J. 721 (1976).

148. See, e.g., PUB. PAPERS: RICHARD NIXON, 1974, at 92, 176-79 (1975). See also Amyx, *New Federalism: How is it Working?*, 15 WASHBURN L.J. 229 (1976).

149. Between 1972 and 1976 general revenue sharing provided \$30 billion to state and local governments. ECONOMIC REPORT OF THE PRESIDENT 30 (1976). FRC agencies, however, provided \$42 billion in 1975 alone. See DEPARTMENT OF THE TREASURY, FEDERAL AID TO STATES: FY 1975, at 2-17 (1976). For a discussion of the negative impact of revenue sharing on civil rights, see Sklar, *The Impact of Revenue Sharing on Minorities and the Poor*, 10 HARV. C.R.-C.L.L. Rev. 93 (1975).

the agencies, it is important that such recipients not be subjected to duplicative compliance reviews, audits, and other investigations by the different agencies.¹⁵⁰

Civil rights coordination among agencies administering assistance programs has been weak despite such warnings. Responsibility for coordinating Title VI enforcement rests with the Civil Rights Division of the Department of Justice.¹⁵¹ The Commission on Civil Rights has found that the Justice Department's coordination of Title VI has been inadequate,¹⁵² and there remains no government-wide coordination mechanism for other civil rights requirements in federally assisted programs.¹⁵³ With minimum coordination, federal agencies have gone their own ways, often duplicating each others' efforts without exchanging information about overlapping compliance programs and occasionally presenting inconsistent views to federal recipients. The overlapping financial assistance provided by different federal agencies has been a chief contributor to the coordination dilemma, and the problem is compounded when compliance reviews by different agencies result in conflicting findings on employment discrimination.

Coordination of Title VI enforcement activities clearly seems to fall within the scope of the Councils' duties to develop procedures for improving interagency and intergovernmental cooperation and to resolve interagency problems and conflicts expeditiously.¹⁵⁴ In fact, in areas other than civil rights the Councils have promoted related governmental coordinative activities in a number of ways. For example, they have acted as forums for information sharing,¹⁵⁵ have published newsletters,¹⁵⁶ and have sponsored various forms of training.¹⁵⁷ Parallel activities could reduce duplication and conflict in the Title VI compliance review process.

As in contract compliance,¹⁵⁸ the New York Council has been

150. TO EXTEND FEDERAL FINANCIAL ASSISTANCE, *supra* note 14, at 647-48 (footnotes omitted), *See also Comment*, *supra* note 15, at 844-45.

151. Exec. Order No. 11,764, 39 Fed. Reg. 2575 (1974).

152. TO EXTEND FEDERAL FINANCIAL ASSISTANCE, *supra* note 14, at 798-803 & ch. 9. For a general criticism of Justice's guidelines, see *Notre Dame Conference*, *supra* note 15, at 922-24.

153. The Department of Justice published regulations in late 1976 to improve its coordinative record. *See* 41 Fed. Reg. 52,669 (1976).

154. *See* text accompanying notes 35-56 *supra*.

155. *See, e.g.*, the environmental data sharing system discussed in WESTERN FRC, FY 1976 WORK PLAN 27 (1975). *See also* M. DERTHICK, *supra* note 23, at 169.

156. *See, e.g.*, CHICAGO FRC, FY 1974 ANNUAL REPORT 30 (1974). During 1977 the Chicago FRC considered the possibility of initiating a health newsletter concerning migrants in the region. CHICAGO FRC, FY 1977 WORK PLAN 47 (1976).

157. *See, e.g.*, text accompanying note 184 *infra*.

158. *See* text accompanying notes 112-16 *supra*.

more active in Title VI coordination than most of its regional counterparts. In 1974 the Council's Equal Employment Committee "selected Title VI . . . as a potentially fruitful area [for FRC coordination] since Title VI extends to all Federal departments and agencies empowered to extend financial assistance by way of grant, loan, or contract."¹⁵⁹ After exploring the concept with the Department of Justice and equal-employment-opportunity specialists in member agencies, the Council discovered "a need for training of agency personnel to upgrade the quality of Title VI compliance reviews, and a need to establish a mechanism to review the findings of individual agency Title VI compliance reviews to determine if interagency action is required"¹⁶⁰ The Council subsequently sponsored a Title VI training meeting at which Justice Department officials provided briefings on coordination of enforcement for thirty regional agency representatives.¹⁶¹

The limited experience in New York suggests that every Council could improve Title VI enforcement through coordination of training, development of compliance tools, and execution of compliance activities, and also through the resolution of policy disagreements. The Councils could provide forums for ensuring identification of overlapping compliance responsibilities, for cooperating in the timing of compliance reviews, and for scheduling joint compliance reviews and complaint investigations when appropriate. In harmonizing compliance tools, the Councils could use committees or task forces to promote the sharing of data and maps depicting concentrations of minorities within metropolitan areas, to maintain information on previous compliance reviews, to publish periodic newsletters on member agency compliance activities, and to sponsor training sessions at which Council members could share information and explore the use of different compliance techniques.¹⁶²

Further, the Councils could act as mechanisms for identifying inconsistencies among member agencies' programs, for resolving disagreements among member agencies at the regional level, and for seeking resolution of policy disagreements by forwarding them to the Under Secretaries Group and to the headquarters of member

159. NEW YORK FRC, FY 1975 WORK PLAN 38 (1974).

160. *Id.*

161. NEW YORK FRC, FY 1975 ANNUAL REPORT 14 (1975).

162. The Department of Housing and Urban Development, along with other agencies, is developing "community profiles" to identify particular communities that are likely to be violating Title VI. See *Hearings on Equal Opportunity in Housing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary Pt. 1*, 94th Cong., 2d Sess. 123 (1976).

agencies.¹⁶³ A single mechanism for identifying and handling conflict also could serve as an important tool for policy makers in Washington by making them more aware of issues that could be resolved by regulations or guidelines.¹⁶⁴ Nevertheless, while the Councils clearly could assist in providing such coordination for Title VI compliance, FRC documents reveal that FRCs actually have undertaken few coordinative activities.

B. OMB Circular A-95

A second regional approach for improving federal assistance to minorities and women should incorporate Circular A-95 issued by the Office of Management and Budget. This circular was designed to promote intergovernmental cooperation by allowing state and local officials to review and comment on the consistency of proposed federal programs with ongoing or planned state and local programs.¹⁶⁵ The review process requires applicants for federal funds to notify clearinghouses within the states so that state and local agencies may comment on the proposals.¹⁶⁶ If the clearinghouse within thirty days chooses to review the application, it then has an additional thirty days to collect and analyze the comments of concerned state and local agencies.¹⁶⁷

Circular A-95 is important from a civil rights perspective because one of its purposes is to further the objectives of the 1964 Civil Rights Act.¹⁶⁸ Information gained through the A-95 process could be

163. The USG is discussed in text accompanying notes 37-38 *supra*.

164. Similar activities also would be appropriate under other civil rights authorities. For instance, Title VIII of the Civil Rights Act of 1968 directs executive departments and agencies to cooperate with the Secretary of the Department of Housing and Urban Development (HUD) in assuring fair housing. 42 U.S.C. § 3608(d) (1970). The FRCs could provide a forum for HUD coordination and guidance.

165. 41 Fed. Reg. 2052 (1976). The A-95 process is explained in detail in IMPROVING FEDERAL GRANTS MANAGEMENT, *supra* note 22, at 216-34; COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO THE CONGRESS: IMPROVED COOPERATION AND COORDINATION NEEDED AMONG ALL LEVELS OF GOVERNMENT—OFFICE OF MANAGEMENT AND BUDGET CIRCULAR A-95 (1975). Statutory authority for the circular is found, for example, in the Intergovernmental Cooperation Act of 1968, 42 U.S.C. § 4231 (1970) and in the Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. § 3334 (1970).

166. 41 Fed. Reg. 2052, at pt. I.

167. *Id.*

168. *Id.* For discussions of the civil rights potential of the circular, see U.S. COMMISSION ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN SUBURBIA (1974); Sikorsky, *A-95: A Deterrent to Discriminatory Zoning*, 5 CIV. RIGHTS DIG. 16 (1972); Comment, *Local Control over Federally Funded Projects*, 19 N.Y.L.F. 113 (1973). In the past, civil rights agencies and groups have evaluated proposed projects critically through the A-95 process, but federal agencies have funded the projects nevertheless. See, e.g., the discussion of *City of Hartford v. Hills*, 408 F. Supp. 889 (D. Conn. 1976), in *Hearings on Equal Opportunity in Housing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary Pt. 1*, 94th Cong., 2d Sess. 371 (1976).

of great value to federal agencies in ensuring that programs they fund will have no discriminatory impact. The circular notes that clearinghouses should provide state and local civil rights agencies an opportunity to review and comment on proposed projects¹⁶⁹ and that such comments may relate to whether the proposed projects promote "more balanced patterns of settlement and delivery of services to all sectors of the area population, including minority groups."¹⁷⁰ If the conclusions of the clearinghouse differ from those submitted by state and local civil rights agencies, applicants are directed to forward the evaluations to the federal agencies that would provide the financial assistance.¹⁷¹

Assigned the key responsibility for coordinating the A-95 process within their respective regions,¹⁷² the FRCs may carry out a number of related activities, including disseminating information on A-95, handling complaints of noncompliance with the circular, and communicating with the Office of Management and Budget on the status of A-95 implementation within the region. During 1976 and 1977 each of the Councils maintained a program for executing these responsibilities.¹⁷³ The A-95 activities of FRCs have included sponsoring workshops or training sessions for federal, state, and local officials, monitoring federal agency compliance with the circular, issuing a directory of clearinghouses, and publishing a newsletter.¹⁷⁴ Regional Councils have named an A-95 coordinator as the person primarily responsible for monitoring A-95 implementation in the region, and federal regional office heads have designated persons to work with the coordinator and state officials as members of task forces to improve intergovernmental coordination in the A-95 process.¹⁷⁵

Regrettably, however, "the A-95 regional review process has been only as strong or as weak as the regional councils,"¹⁷⁶ and the

169. 41 Fed. Reg. 2052 at pt. I(3)(e).

170. *Id.* at pt. I(5)(h).

171. *Id.* at pt. I(4)(f).

172. *Id.*

173. For fiscal year 1976, for example, see NEW ENGLAND FRC, FY 1976 WORK PROGRAM 17-20 (1975); NEW YORK FRC, FY 1976 WORK PLAN 47-52 (1975); MID-ATLANTIC FRC, FY 1976 WORK PLAN 16-18 (1975); SOUTHEASTERN FRC, FY 1976 WORK PLAN 11-12 (1975); CHICAGO FRC, FY 1976 WORK PLAN 1-3 (1975); SOUTHWEST FRC, FY 1976 WORK PLAN 21-25 (1975); KANSAS CITY FRC, FY 1976 WORK PLAN (1975); MOUNTAIN PLAINS FRC, FY 1976 WORK PLAN 18-19 (1975); WESTERN FRC, FY 1976 WORK PLAN 21-22 (1975); NORTHWEST FRC, FY 1976 WORK PROGRAM 23-24 (1975).

174. See material cited in note 173 *supra*.

175. See, e.g., SOUTHWEST FRC, FY 1976 WORK PLAN 22 (1975).

176. Bach, *The New Federalism in Community Development*, 7 Soc. Pol'y 32, 35 (1977).

Councils have not used the process to its greatest civil rights potential. For example, the New England FRC's efforts to coordinate Circular A-95 extend from the early 1970's¹⁷⁷ through 1977.¹⁷⁸ The Council has pledged "to fully implement all parts of OMB Circular A-95 in Region I, to ensure the evaluation, review and coordination of all affected Federal and Federally assisted programs in the Region."¹⁷⁹ Nevertheless, the Council has not fulfilled this objective in terms of impact on minorities and females.¹⁸⁰ When civil rights issues emerge from the A-95 process the Council presumably considers them, but there is no evidence that civil rights is an area receiving regular monitoring by the FRC. Nor is there evidence in FRC documents of the A-95 coordinator encouraging the regional clearinghouses to evaluate the impact of proposed projects on minority groups or women.¹⁸¹ The Councils should have responsibility for emphasizing to the clearinghouses specific problems, particularly those affecting minorities and women. Otherwise, the Councils will ignore two major instructions in Circular A-95: (1) that the impact of proposed projects upon all groups are among the topics for clearinghouse review; and (2) that civil rights agencies should be provided with a meaningful opportunity to review proposed projects.¹⁸²

In contrast to New England, the Southwest Council's 1976 work plan called for emphasis on A-95 implementation.¹⁸³ This emphasis included assessing member agency compliance with Circular A-95, evaluating the capabilities of the region's ten A-95 clearinghouses, and holding A-95 training sessions for federal, state, and local officials.¹⁸⁴ The Southwest Council also anticipated both the adoption of "an aggressive monitoring policy by initiating periodic direct contact with regional offices, clearinghouses, and applicants,"¹⁸⁵ and

177. *E.g.*, NEW ENGLAND FRC, FY 1973 ACTIVITY PLAN Work Item 17(a) (1972).

178. NEW ENGLAND FRC, FY 1977 WORK PROGRAM 25-28 (1976).

179. NEW ENGLAND FRC, FY 1975 WORK PLAN 39 (1974).

180. Although women are not mentioned in Circular A-95, there is no reason for this omission given the laws that prohibit sex discrimination in federally assisted programs.

181. *See, e.g.*, NEW ENGLAND FRC, FY 1977 WORK PROGRAM 25-28 (1976); NEW ENGLAND FRC, FY 1976 WORK PROGRAM 17-19 (1975); NEW ENGLAND FRC, FY 1975 WORK PLAN 39-42 (1974). A similar approach apparently is used in other regions. For example, the Chicago Council has supported an A-95 program since the early 1970's, designating the program a "high level priority" from the outset. CHICAGO FRC, FY 1974 WORK PLAN 16 (1973). Work plans and annual reports contain no evidence that the task force pays any attention to the impact of prospective federally assisted programs on minorities and females. *See, e.g.*, CHICAGO FRC, FY 1977 WORK PLAN 2 (1976); CHICAGO FRC, FY 1976 WORK PLAN 4 (1975); CHICAGO FRC, FY 1975 ANNUAL REPORT 16-17 (1975); CHICAGO FRC, FY 1975 WORK PLAN 10-12 (1974); CHICAGO FRC, FY 1974 ANNUAL REPORT 21 (1974).

182. 41 Fed. Reg. 2052 (1976).

183. SOUTHWEST FRC, FY 1976 WORK PLAN 21 (1975).

184. *Id.* at 21-25.

185. *Id.* at 23.

evaluation of the capability of the clearinghouses to receive A-95 applications and to distribute notifications.¹⁸⁶ By focusing on civil rights issues within these objectives, the Council could begin to alleviate the civil rights shortcomings of the A-95 process. As an illustration, the Council could modify its A-95 procedures to require that notifications be sent to state and local civil rights agencies for review and comment. The proposed "aggressive monitoring policy" then could be used to increase the likelihood of timely notifications to civil rights agencies and of careful attention to their comments during A-95 review. It is too early, however, to determine the success of the Dallas monitoring effort.

VI. CONCLUSION

In 1971 the United States Commission on Civil Rights found inadequate the coordination among federal agencies with civil rights enforcement responsibilities. As the Commission stated:

There has been a failure to coordinate and focus the Federal civil rights enforcement effort adequately. Agencies having civil rights responsibilities in the same area have tended to operate independently—with different goals, different orientations, and different levels of compliance activity—even where specific coordination mechanisms have been provided. There also has been a failure to provide overall coordination of and direction to the Federal civil rights enforcement efforts.¹⁸⁷

The disturbing fact is that this is still the case; the last seven years have brought little change.

Inadequate coordination in civil rights enforcement is caused by bureaucratic inertia, combined with statutes that diffuse authority for enforcing civil rights laws among a plethora of diversified federal agencies. These agencies frequently maintain conflicting standards for compliance, and they too often disagree on what constitutes discrimination. Coordination also is lacking because of insufficient sharing of information, the absence of jointly developed investigative or enforcement priorities, and minimal cross-fertilization of enforcement ideas. This fragmented administrative pattern causes duplication of effort, inconsistent findings of discrimination, and the diminution of public confidence in the objectivity and efficiency of enforcement. Even when enforcing the same laws, agencies may proceed blindly along very different paths, issuing inconsistent civil rights regulations and independently developing conflicting compliance standards. Those regulated are left with the frustrating task of understanding and complying with an ex-

186. *Id.* at 24-25.

187. FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT, *supra* note 14, at 344.

ceedingly complicated and fragmented administrative structure, with its myriad rules, regulations, and guidelines.

The failure of traditional coordinative efforts among federal agencies suggests that new and different approaches are imperative. This Article has emphasized a regional approach for solving these problems. Experience has shown that even well-intentioned and capable administrators in Washington cannot alone ensure compliance with the federal civil rights laws. They must have the full support of key regional officials of the federal government, and they must have a certain degree of cooperation from state and local officials. One means of gaining this support and assistance is through the Councils, which bring together in one forum high-level federal, state, and local policymakers. While the past performance of the FRCs in coordinating civil rights programs has been mediocre in some areas, this record can be improved substantially through forceful presidential leadership and through the regular application by Council member agencies of legal sanctions for noncompliance with the civil rights laws. The two areas suggested in this Article for priority FRC coordination are equal employment opportunity and the federal grant-making process.

In order for the Councils to operate as civil rights coordinating bodies, President Carter must provide them with specific instructions and strong leadership. Admittedly, effective civil rights enforcement may be impossible under present institutional arrangements, including the FRC system, and a partial or total reorganization of agencies and responsibilities may be essential. Until a complete reorganization emerges from the political process, and even after reorganization, however, the Councils can and should provide an important intergovernmental forum through which federal agencies can work with state and local officials to better coordinate national civil rights enforcement programs. In addition to any federal coordinating mechanism that might be created, the regional approach presented in this Article can assist in resolving the American dilemma that Gunnar Myrdal recognized years ago.¹⁸⁸

188. See MYRDAL, *supra* note 3.