IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 76-1937

JAMES A. CRAMER,

Plaintiff-Appellee

v.

VIRGINIA COMMONWEALTH UNIVERSITY, et al.

Defendants-Appellants

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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QUESTIONS PRESENTED

1. Whether the district court erred in ruling that Executive Order 11246 requires discrimination in hiring on account of sex and therefore violates Title VII of the Civil Rights Act of 1964.

2. Whether the district court erred in enjoining the use of goals and timetables of the kind required by Executive Order 11246.

INTEREST OF THE UNITED STATES

This case involves fundamental questions regarding the permissibility of affirmative action under Executive Order 11246, as amended [hereinafter "Executive Order 11246", or "the Executive Order"]. 3 CFR 169 (1974).1/ Virginia Commonwealth University (hereinafter "VCU") has been enjoined from complying with one of the basic

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1/ The Executive Order is also reprinted following 42 U.S.C. 2000e and 42 U.S.C.A. 2000e.

aspects of affirmative action, the establishment of goals and timetables (App. 13). In addition, the district court has ruled that Executive Order 11246 conflicts with Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. 2000e et seq. (App. 21-27). The Attorney General, the Secretary of Labor, the Department of Health, Education, and Welfare and the Equal Employment Opportunity Commission as well as other federal agencies, have responsibility for enforcement of Title VII and the Executive Order. The resolution of the issues presented in this case will affect those responsibilities. Further, these federal agencies have a strong interest in preventing suits such as this, which are not truly adversary in nature, from eroding the legal responsibilities of federal contractors.

STATEMENT

1. Procedural History

Dr. James A. Cramer brought this suit against VCU and certain of its officials on June 10, 1976, alleging that he had been discriminated against in employment on account of his sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., and the Fourteenth Amendment. Cramer asserted that he was qualified and applied for a permanent position in the Department of Sociology and Anthropology (Complaint at 3); that he was not granted an interview (id. at 9); that only female applicants were considered for the first vacancy in the Department, and that first consideration was given to female candidates for the second position filled by the Department (id. at 8). Cramer alleged that the Department had discriminated against him on account of his sex in deliberate pursuit of a policy of "reverse" discrimination pursuant to an

to an Affirmative Action Plan adopted by VCU to comply with Executive Order 11246 (id. at 9-12).[2/]

Cramer therefore requested that the district court: declare that VCU's acts violated Cramer's rights under Title VII, the Fourteenth Amendment, 42 U.S.C. 1981, 1983, 1985, 1986, and 1988; permanently enjoin VCU from engaging in "reverse" discrimination; order VCU to employ him and award him back pay; and grant judgment for mental distress and punitive damages (Complaint at 12-14).

VCU denied all material allegations and stated that "the denial of employment to the plaintiff was in no way based on his race or sex" (Answer). Thereafter Cramer and VCU entered into a stipulation of facts (App. 4), and both parties moved for summary judgment. The district court, without a hearing on the motions, denied VCU's motion and granted Cramer's (App. 13).

2. Facts

The following pertinent facts were stipulated by the parties:

VCU is a federal contractor, subject to Executive Order 11246 and is an employer within the meaning of Title VII (App. 5). VCU established an Affirmative Action Plan in

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2/ Cramer alleged that the plan suggested, by inference, that less qualified minority and female applicants be favored for positions over better qualified white male applicants (id. at 10).

1973 (App. 8).[3/] The recruitment committee of the Department of Sociology and Anthropology was given a copy of the Virginia Governor's Executive Order No. 29 (which provides that "[n]o employee or applicant for employment shall be subjected to descrimination [sic] because of sex, age, race, religion, national origin, political affiliation, or physical characteristics" (App. 42)),

> ... which was interpreted by some members of the Department as indicating a hiring preference for females. The Department, which had direct responsibility for hiring policies, formulated guidelines to be followed in the selection process, and expressed to the Committee a preference to consider and hire qualified females and other minority groups before white males.

(App. 9-10). However, it was also stipulated that the Chairman of the Department distributed to the recruitment committee the Higher Education Guidelines for compliance with Executive Order 11246 issued by the Department of Health, Education and Welfare, and gave the Committee the "verbal instruction that the committee was obligated only to recommend the hiring of the best qualified" (App. 10).

3/ That plan was "designed to maintain for Virginia Commonwealth University a continuing commitment to qualified faculty, staff and employees without regard to race, color, religion, sex or national origin" (App. 56). The plan provided that "[f]ully qualified minorities and women will be given equal consideration for employment as best qualified male caucasions" [sic] (id.). The plan established no hiring goals for minorities or women.

The parties stipulated that, in the academic year 1973-74 James Cramer was on a temporary appointment in VCU's Department of Sociology and Anthropology (App. 9). He applied for appointment to a permanent position in the Department (id.). Cramer's "basic academic requirements [sic] ... were equal to or exceeded those of the individuals hired for at least one" of the two positions the Department was seeking to fill (App. 10).

The parties further stipulated that neither Cramer nor any other white male was interviewed for either of the two positions (App. 10). The selection process used by the recruitment committee consisted of selecting those applicantss whose qualifications were "compatible with position requirements," and sorting their applications into three piles: "females", "minority males," and "white males". Only applicants from the "females" pile were interviewed for either position (App. 10).

The parties also stipulated that during the 1973-74 school year the composition of the Department by rank and sex for full-time faculty was as follows:

> Professors - 2 males
> Associate Professors - 4 males
> Assistant Professors -- 11 positions, all filled by males
> Instructors - 2 males, 1 female

(App. 12). The parties also stated that 151 of 460 Ph.D's in the relevant field were awarded to women in 1973-74 (App. 11).

Finally, Cramer stipulated that "[t]he defendants acted in good faith and plaintiff seeks no damages."[4/]

3. The District Court's Opinion and Order.

The district court ruled that "[a]ll facts which are material to the summary judgment motions have been stipulated by the parties" (App. 16). The court found that in filling the two positions VCU had only considered women, and concluded that such a preference violated Cramer's Fourteenth Amendment right to equal protection (App. 21):

> Plaintiff's challenge to the employment guidelines followed by VCU raises the issue of whether a policy which notoriously favors the hiring of less or equally qualified candidates for competitive positions without considering other equally or better qualified applicants solely on the basis of sex could survive Fourteenth Amendment scrutiny. The court interprets the Equal Protection Clause as requiring that where sex is the sole factor upon which differential treatment is determined, there is no constitutional justification for treating the sexes differently.

(App. 20). The court concluded that "where the only difference between two persons competing for the same job is a difference in sex, then the Equal Protection Clause requires that they may not be treated differently on account of the fact that one is male and the other is female" (App. 21).

4/ In his Rebuttal Memorandum in Opposition to Defendants' Motion for Summary Judgment and in Support of His Motion for Summary Judgment, April 9, 1976, at 5, Cramer stated that "[i]t should be noted that plaintiff is not seeking money damages, back pay or instatement into the teaching position. He seeks declaratory and injunctive relief."

The court also ruled that VCU's treatment of Cramer, as described in the stipulated facts, violated Title VII of the Civil Rights Act of 1964. First, the court ruled that Section 703(a), 42 U.S.C. 2000e-2(a) "prohibits employment practices which, inter alia, predicate hiring and promotion decisions on gender based criteria" (App. 22). In addition, the court held that Executive Order 11246 conflicts with Section 703(j) of Title VII, 42 U.S.C. 2000e-2(j). Section 703 (j) "is the clear sense of Congress that [past discrimination] not be corrected by sex preference, or quotas, or to the use the current pseudonym, 'goals'" (App. 23):

> Plaintiff interprets the various affirmative action guidelines, directives and orders as speaking "directly and emphatically" against sex discrimination, and contends that the individual defendants simply "misunderstood" their legal responsibility to consider all applicants on the basis of their own individual merit and without regard to their sex. However, the Court's reading of these documents convinces it that the defendants understood exactly what they were being required to do - hire women. In so doing, defendants, along with all of the guidelines, directives, affirmative action plans and other paraphernalia of the federal civil rights bureaucracy, pay lip service to, but do not really attempt to hide, their actual disregard for the prohibitions of Title VII as they relate to preferential employment practices.
>
> By requiring employers to engage in widespread, pervasive and invidious sex discrimination through the implementation of the prevailing affirmative action programs, the U.S. Government is merely perpetuating the very social injustices which it so enthusiastically and properly seeks to remedy.

(App. 24-25). The court concluded that "[w]hether or not affirmative action is a good policy, the Court holds it to be bad law insofar as it permits or requires sex discrimination in hiring" (App. 27).

The court therefore granted plaintiff's motion for summary judgment, and declared that VCU's affirmative action program "insofar as it requires or is interpreted or implemented so as to require hiring preferences based on sex and employment quotas based on sex" violated the Fourteenth Amendment and Title VII (App. 13). The court enjoined VCU from implementing its Affirmative Action Plan in such a way as to prefer either sex; and from "maintaining or seeking to achieve any employment quota or goal based upon sex" (id.) VCU is further required to conduct hiring and promotion practices "in such a manner that sex shall not be a factor to be considered in employment, except where sex is a bona fide occupational qualification reasonably necessary to a particular position sought to be filled" (id.).

ARGUMENT

Introduction and Summary

The court below, in ruling that Cramer's rights under the Fourteenth Amendment and Title VII had been violated, misconstrued Executive Order 11246 and its implementing regulations. That order does not require, and in fact prohibits,

discrimination against males as well as females. In any event the record below is an insufficient basis upon which to conclude that Cramer was subject to illegal discrimination, and summary judgment was therefore inappropriately granted. In addition the district court erred in enjoining the implementation of goals and timetables, because such are legal and appropriate methods for achieving affirmative action.

I. THE DISTRICT COURT ERRED IN RULING THAT EXECUTIVE ORDER 11246 REQUIRES DISCRIMINATION IN HIRING ON ACCOUNT OF SEX AND THEREFORE VIOLATES TITLE VII.

The district court found that the Department of Sociology and Anthropology considered only female applicants in filling two vacancies in the Department (App. 18),5/ and held that such limited consideration was required by all of the "guidelines, directives, affirmative action plans and other paraphernalia of the federal civil rights bureaucracy..." (App. 24):

> By requiring employers to engage in widespread, pervasive and invidious sex discrimination through the implementation of the prevailing affirmative action programs, the U.S. Government is perpetuating the very social injustices which it so enthusiastically and properly seeks to remedy.

(App. 25). The court ruled that Title VII forbids the kind of "invidious sex discrimination" which it found was required by Executive Order 11246, and concluded that:

5/ As we argue, infra, at 24-30, we believe that the stipulated facts before the court did not provide sufficient evidence upon which the court could base its conclusion that only females were considered.

> If the President had the power to overrule an Act of Congress that should be set forth in the Constitution. Until required by the Fourth Circuit, the Supreme Court, Congress, or constitutional amendment so to hold this Court will not rule that Executive Orders supercede a Congressional mandate.

(App. 26). The district court therefore enjoined VCU

> ...from implementing their affirmative action plan in such manner or mode as to prefer either sex or to discriminate against either sex in hiring or promotion practices, except where sex is a bona fide occupational qualification reasonably necessary to the particular position sought to be filled.
>
> 3. The defendants are specifically enjoined from establishing maintaining or seeking to achieve any employment quota or goal based upon sex.
>
> 4. The defendants shall henceforth conduct their hiring and promotion practices in such a manner that sex shall not be a factor to be considered in employment, except where sex is a bona fide occupational qualification reasonably necessary to the particular position sought to be filled.

(App. 13). The district court's reasoning and its order evidence a fundamental misunderstanding of the requirements of Executive Order 11246, the federal contract compliance program, and the intent of Congress. Assuming the case is not now moot, the order below should be vacated and the cause remanded.6/

6/ Cramer's abandonment of any claim for personal relief in this non-class action raises a substantial mootness issue which the parties have not thus far raised but which is jurisdictional. In his complaint Cramer requested declaratory, injunctive and monetary relief. He requested back pay, punitive damages, and damages for mental distress, as well as appointment to a position as assistant professor. However, in the course of this non-class action litigation, Cramer dropped all prayers for specific relief. Thus in the stipulation of facts it was agreed that "[t]he defendants acted in good faith and plaintiff seeks no damages" (App. 11). Later, in his memorandum in opposition
(Footnote continued on following page)

A. Executive Order 11246 Forbids Sex Discrimination

If, as the court found, the Department of Sociology and Anthro-

6/ (Footnote continued from preceding page)
to VCU's motion for summary judgment, Cramer's attorney noted that "plaintiff is not seeking money damages, back pay or instatement into the teaching position. He seeks declaratory and injunctive relief." The district court noted this change in position (App. 28) and awarded Cramer no specific relief.

Cramer's abandonment of all claims for personal, specific relief, either monetary or equitable, raises a substantial mootness question. Because the question of mootness is jurisdictional the failure of the parties to raise it does not lessen the duty of the court (or a friend of the court) to consider it. The Constitution limits the jurisdiction of the federal courts to cases or controversies. Art. III, Sec. 2. The duty of federal courts

> ... is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions or to declare principles or rules of law which cannot affect the matter in issue in the case before it.

Mills v. Green, 159 U.S. 651, 653 (1895). "[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." North Carolina v. Rice, 404 U.S. 244, 246 (1971). The question is whether when Cramer abandoned claims for relief, he also abandoned all legally cognizable interest in the outcome of the suit:

> The controversy between the parties has thus clearly ceased to be "definite and concrete" and no longer "touch[es] the legal relations of parties having adverse legal interests." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937).

Defunis v. Odegaard, 416 U.S. 312 (1974). See also Merkey v. Board of Regents of the State of Florida, 493 F.2d 790 (5th Cir. 1974).

The rationale for prohibiting non-adverse suits is clear. To the extent that Cramer has no personal stake in the outcome of the suit, he may not vigorously assert his position. Moreover, to the extent that VCU stands to suffer no concrete loss if it loses the litigation, it may not vigorously defend its position. Here, once Cramer abandoned all claims for specific relief, VCU only faced the threat of general injunctive relief.
(Footnote continued on following page)

pology only considered females to fill the vacancies in the Department, although there were qualified male applicants, such

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6/ (Footnote continued from preceding page)

The fact that Cramer sued for declaratory relief is not relevant to the jurisdictional question. The declaratory judgment act "is operative only in respect to controversies which are such in the constitutional sense." Aetna Life Ins. Co. v. Haworth, supra, 300 U.S. at 239-240. The Supreme Court has consistently maintained that "the requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit." Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945). Neither is the jurisdiction of the court affected by the fact that Cramer might at some later date apply for another job at VCU, and at that time benefit from the permanent injunction entered against VCU. Hypothetical future interests in the outcome of this case would not be sufficient to offset the fact that Cramer does not have any justiciable interest now in the outcome of this litigation. Absent any current adversity between the parties, the district court would lack jurisdiction to grant either injunctive or declaratory relief.

actions would constitute a violation of Executive Order 11246 as well as Title VII.7/

Executive Order 11246, as amended, provides that a federal contractor shall agree that it "will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin," and that it "will take affirmative action to ensure that applicants are employed and that employees are treated during employment" without regard to these factors.8/ The plain language of Executive Order 11246 thus would prohibit the limitation of consideration of applicants either to women or to men. The federal agencies charged with enforcing Executive Order 11246 and Title VII9/ have issued a policy statement articulating their position with respect to the role of affirmative action in the equal employment opportunity programs of State and local government agencies:

7/ It would also constitute a violation of Title IX of the Higher Education Amendments of 1972, 20 U.S.C. 1681 et seq., which provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance... ."

8/ Executive Order 11246 has the force and effect of law. Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 149 (3rd Cir. 1971), cert. denied, 404 U.S. 854 (1971). Regulations implementing Executive Order 11246 require Government contractors and subcontractors to analyze their workforce and to identify areas in which they are deficient in the utilization of minority group members and females. Where deficiencies are determined to exist, the contractor must seek to eliminate or modify any employment practices causing or perpetuating the underutilization and furthermore, as part of its affirmative action program, it must develop goals and timetables to remedy the deficiencies (41 CFR 60-2.10 et seq.).

The enforcement scheme of the Executive Order relies primarily upon voluntary compliance with the regulations. While sanctions, including loss of contracts debarment from future contracts and litigation to enforce contractual obligations are provided for (see Sections 209(a) (2), (5) and (6) of the Executive Order), the essence of the program is self-evaluation and voluntary correction, without the direct intervention of the government agencies charged with enforcement.

9/ The Departments of Justice, and Labor, the Equal Employment Opportunity Commission, the Civil Rights Commission, and the Civil Service Commission.

> On the one hand, vigorous enforcement of the laws against discrimination is essential. But equally and perhaps even more important are affirmative, voluntary efforts on the part of public employers to assure that positions in the public service are genuinely and equally accessible to qualified persons, without regard to their sex, racial or ethnic characteristics. Without such efforts equal employment opportunity is no more than a wish.
>
> ***
>
> The goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons. Selection under such plans should be based upon the ability of the applicant(s) to do the work. Such plans should not require the selection of the unqualified, or the unneeded, nor should they require the selection of persons on the basis of race, color, sex, religion or national origin.10/

The Higher Education Guidelines, Executive Order 11246, issued by the Department of Health, Education, and Welfare, which are applicable to VCU, emphatically state that:

> The nondiscrimination requirements of the Executive Order apply to all persons, whether or not the individual is a member of a conventionally defined "minority group." In other words, no person may be denied employment or related benefits on grounds of his or her race, color, religion, sex, or national origin.11/

The Department of Health, Education, and Welfare has since emphasized this aspect of compliance with Executive Order 11246. Thus, in a Memorandum to College and University Presidents, issued in December, 1974, Peter E. Holmes, then Director of the Office for Civil Rights, stated that:

10/ 41 Fed. Reg. 38814, September 13, 1976 (emphasis supplied).

11/ Higher Education Guidelines Executive Order 11246, U.S. Department of Health, Education, and Welfare (1972), at 3 (emphasis in original).

At the outset, certain general principles should be made clear. Colleges and universities are entitled to select the most qualified candidate, without regard to race, sex, or ethnicity, for any position. No single appointment will be objected to where those not appointed are less well-qualified than the candidate actually selected.12/

The 1974 Memorandum emphasizes this point:

> The following case represents an example of an improper interpretation of the affirmative action obligation:
>
> > "for the past four years, the Mathematics Department of X University has been operating under an affirmative action program. Although its goal for hiring women was established at 20 percent over a five-year period, during the past four years, each of four vacancies has been filled by a male. At an annual professional association conference, the department chairman informed a male applying for a fifth vacant position that he could not be given consideration regardless of his qualifications because Federal regulations require the department to fill the position with a woman."
>
> The Mathematics Department has violated its equal employment opportunity obligations by designating the vacancy as a position for a woman, or as one in which a woman would be preferred, thereby excluding all other categories of applicants from consideration. Such action is forbidden by the Executive Order, and it is improper to suggest or to act on the assumption that Federal affirmative action provisions require that any particular position be filled by a woman or minority person.13/

12/ This memorandum is appended to our brief for the convenience of the court. See pp. 36-44 infra.

13/ See pp. 38-39 infra.

It is hard to imagine a clearer message: sex discrimination against females or males is forbidden by Executive Order 11246. The district court erred in holding otherwise.

B. The Executive Order Does Not Conflict with Title VII

As Executive Order 11246 does not, as the district court held (App. 25) require "invidious sex discrimination," it follows (contrary to the ruling of the court below (App. 22)) that the Executive Order does not conflict with section 703(a) of Title VII. 42 U.S.C. 2000e-2(a), which provides that it shall be an unlawful employment practice for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, separate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The Third Circuit has addressed the objections raised by the district court. Contractors Association of Eastern Pennsylvania v. Secretary of Labor, supra. The Court of Appeals rejected the contention that the goals established pursuant to the Executive Order were in conflict with Section 703 of Title VII.

> To read §703(a) in the manner suggested by the plaintiffs we would have to attribute to Congress the intention to freeze the status quo and to foreclose remedial action under other authority designed to overcome existing evils. We discern no such intention either from the language of the statute or from its legislative history. Clearly the Philadelphia Plan is color-conscious. Indeed the only meaning which can be attributed to the "affirmative action" language which since March of 1961 has been included in successive Executive Orders is that Government contractors must be color-conscious. Since 1941 the Executive Order program has recognized that discriminatory practices exclude available minority manpower from the labor pool. In other contexts color-consciousness has been deemed to be an appropriate remedial posture. Porcelli v. Titus, 302 F. Supp. 726 (D.N.J. 1969), aff'd 431 F.2d 1254 (3d Cir. 1970); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931 (2d Cir. 1968, Offermann v. Nitkowski, 378 F.2d 22, 24 (2d Cir. 1967). It has been said respecting Title VII that "Congress did not intend to freeze an entire generation of Negro employees into discrminatory patterns that existed before the Act." Quarles v. Phillip Morris, Inc., supra, 279 Supp. at 514. The Quarles case rejected the contention that existing nondiscriminatory seniority arrangements were so sanctified by Title VII that the effects of past discrimination in job assignments could not be overcome.
>
> We reject the contention that Title VII prevents the President acting through the Executive Order program from attempting to remedy the absence from the Philadelphia construction labor force of minority tradesmen in key trades. 422 F.2d at 173.

See United States v. International Union of Elevator Constructors, Local Union No. 5, 538 F.2d 1012 (3d Cir. 1976); Southern Illinois Builders Association v. Ogilvie, 471 F.2d 680, 684-86 (7th Cir. 1972).

Neither does the Executive Order conflict with Section 703(j) of Title VII. The district court ruled that "subsection (j)14/

14/ Section 703(j) provides:

> Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by an employment agency or labor organization, admitted to membership or classified by any labor organization, or other training program, in comparison with the total number of percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section or other area.

is the clear sense of congress that [past discrimination] not be corrected by sex preference, or quotas, or to use the current pseudonym 'goals'" (App. 23). The court found that "the 4th Circuit has not yet made a definitive ruling that invidious sex discrimination, so long as it is called 'affirmative action,' complies with the Constitution or with §2000e-2(a) and (j)" (App. 26). Although the district court did not explicitly so state, it apparently held that the Executive Order, in requiring affirmative action and goals and timetables, violated Section 703 (j). The court enjoined VCU "from establishing, maintaining or seeking to achieve any employment quota or goal based upon sex" (App. 13).

The district court's ruling with regard to the impact of 703(j) upon affirmative action programs undertaken pursuant to Executive Order 11246 is erroneous. Faced with a similar claim in Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor, 442 F. 2d 159 (3d Cir. 1971), cert. denied, 404 U.S. 854 (1971), the court of appeals dismissed it with the notation that "Section 703(j) is a limitation upon Title VII not upon any other remedies, state or federal." See, Association of General Contractors of Massachusetts v. Altshuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974). The district court noted the Contractor's Ass'n decision, but rejected it as unpersuasive: "The Third Circuit in Contractor's Ass'n dealt with the conflict between Title VII and Executive Order 11246 briefly and seemed to accept the mandate of the Order by fiat more than by reason or constitutional imperative" (App. 26). In so ruling the district court ignored the plan meaning of Section 703(j). As that subsection has no applicability to activities undertaken to comply with Executive Order 11246, the district court erred in holding that 11246 conflicts with that section.

Moreover, although the district court asserts that there is a conflict between Executive Order 11246 and Title VII, the legislative history of Title VII of the Civil Rights Act of 1964 and the amendments thereto demonstrate that Congress recognized and approved of the Executive Order 11246 program. As originally enacted, Title VII made express reference to the Executive Order in a context which clearly contemplated continuance of the Executive Order program. 42 U.S.C. 2000e-8(d). Contractors Association of Eastern Pennsylvania v. Secretary of Labor, supra, 442 F.2d at 171. Indeed, the Senate expressly rejected an amendment proposed by Senator Tower which would have made Title VII the exclusive Federal remedy in the area of equal employment opportunity. 110 Cong. Rec. 13650-52. Local 12, Rubber Workers v. N.L.R.B., 368 F.2d 12, 24, n. 24 (C.A. 5, 1966); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097, 1101 (C.A. 5, 1970), cert. denied, 401 U.S. 948 (1970); Alexander v. Gardner Denver Co., 415 U.S. 36 (1974).

Similarly, in passing the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261), which extensively amended Title VII, Congress rejected an amendment which would have made Title VII the exclusive Federal remedy in the field of employment discrimination for persons who filed charges with the Equal Employment Opportunity Commission. 118 Cong. Rec. 3367-3370; 3371-3373; 3959-3965. In opposing that amendment, Senator Williams, one of the floor managers of the bill, made the following statement (118 Cong. Rec. 3372):

> Furthermore, Mr. President, this amendment can be read to bar enforcement of the Government contract compliance program, at least, in part. I cannot believe that the Senate would do that after all the votes we have taken in the past 2 to 3 years to continue that program in full force and effect.

There was also debate as to whether to transfer responsibility for enforcement of that program from the Department of Labor to the Equal Employment Opportunity Commission (EEOC). That proposal was also rejected. 118 Cong. Rec. 1387-1388.

Speaking in support of his amendment to strike that transfer provision, so as to leave the administration of the Executive Order with the Department of Labor, then Senator Saxbe stated:

> "The OFCCP's affirmative action programs have tremendous impact and require that 260,000 Government contractors in all industries adopt positive programs to seek out minorities and women for new employment opportunities. To accomplish this objective, the OFCCP has utilized the proven business techniques of establishing "goals and timetables" approach which is unique to the OFCCP's effort in equal employment, coupled with extensive reporting and monitoring procedures that has given the promise of equal employment opportunity a new credibility.
>
> "The Executive Order program should not be confused with the judicial remedies for proven discrimination which unfold on a limited and expensive case-by-case basis. Rather, affirmative action means that all Government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. Proof of overt discrimination is not required.

118 Cong. Rec. 1385. Senator Saxbe's proposed amendment was adopted. 118 Cong. Rec. 1387-1398.

The Senate, just two days after hearing the comments of Senator Saxbe quoted above, rejected an amendment offered by Senator Ervin which would have proscribed the imposition of goals by government contractors. 118 Cong. Rec. 1676. In speaking against this amendment, Senator Javits had the Third Circuit's prior approval of affirmative action goals in Contractors Association, supra, reprinted in the Congressional Record. 118 Cong. Rec. 1665. Moreover he argued that the Ervin amendment would impede:

> ...the whole concept of affirmative action as it has been developed under Executive Order 11246 and as a remedial concept under Title VII.
>
> Philadelphia-type plans are based on the Federal Government's power to require its own contractors or contractors on projects to which it contributes --for example, State projects with a Federal contribution--to take affirmative action to enlarge the labor pool to the maximum extent by promoting full utilization of minority-group employees, and by making certain requirements for those who hire to seek out minority employees as well as majority employees....

118 Cong. Rec. 1664. Senator Javits later restated his objections to the Ervin amendment:

> First, it would undercut the whole concept of affirmative action as developed under Executive Order 11246 and thus preclude Philadelphia-type plans.
>
> Second, the amendment, in addition to the dismantling the Executive Order program, would deprive the courts of the opportunity to order affirmative action under Title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination in employment and thereby further dismantle the effort to correct these injustices.

118 Cong. Rec. 1665.

Congress also explcitly ratified previous court construction of Title VII:

> In any area where the new Law does not address itself, or in any areas where a specific contrary intention is not indicated, it is assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

Conference Committee Report, reprinted in Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, at 1844 (1972). Thus it is apparent that Congress, in 1972, recognized the existence of the Executive Order contract compliance program, including its requirements of goals and timetables, and rejected attempts to curtail or eliminate it. Executive Order 11246, contrary to the conclusions of the court below, has the implied and express ratification of Congress, and does not violate Title VII.15/

15/ As Executive Order 11246 does not violate Title VII, a fortiori, it does not violate the Fourteenth Amendment. See Washington v. Davis, ____ U.S. ____, 44 U.S.L.W. 4789 (1976); Contractors Association of Eastern Pennsylvania v. Secretary of Labor, supra, 442 F.2d at 177.

C. The Record Below Provides an Inadequate Basis Upon Which to Decide That Cramer's Rights Under Title VII, and Executive Order 11246, as Properly Construed, Were Violated by VCU

The court below appears to have relied heavily on its erroneous interpretation of Executive Order 11246 in deciding to grant summary judgment on behalf of Cramer. Under the proper interpretation of the Executive Order, sex discrimination against Cramer by VCU is forbidden. It is not clear whether the district court thought there was evidence, aside from the attempt to comply with the Executive Order, which conclusively demonstrated sex discrimination against Cramer. We doubt that the evidence before the court was sufficient to allow resolution of this case on summary judgment, and we would suggest that the proper disposition of this appeal (assuming the case is not moot) is to return the case to the district court to conduct the evidentiary hearings necessary to develop fully the circumstances surrounding the rejection of Cramer's application for employment. The inappropriateness of the ruling in favor of Cramer is exacerbated by the fact that it is doubtful whether sufficient adverseness of interest between the parties to establish a case or controversary remained once Cramer withdrew his claim for individual relief. See n. 6, supra.

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56, Federal Rules of Civil Procedure. "On summary judgment the inferences to be drawn from the underlying facts contained in [the materials before the court] must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). What a jury could infer against the movant on the given facts, the court on summary judgment must infer. Adickes v. Kress & Co., 398 U.S. 144, 158 (1970). Furthermore, "[w]here the evidentary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentary matter is presented." Adickes, supra, 398 U.S. at 160. Here, neither the facts as stipulated, nor the inferences properly to be drawn from them could support summary judgment in favor of Cramer.

1. The district court found that the Department "had a clearly expressed preference that qualified females and members of other minority groups be considered and hired before white males" (App. 17).16/ However, the district court also found that the Dean of the Department instructed the recruiting committee that it "was obligated only to recommend the hiring of the best qualified applicant" (App. 17). These findings are inconsistent with each other, and, as held in Adickes, supra, the ambiguity should have been resolved against Cramer.

16/ The district court apparently refers to the policy statement in VCU's Affirmative Action Plan, which provides that "[f]ully qualified minorities and women will be given equal consideration for employment as best qualified male caucasions [sic]" (App. 56) (emphasis supplied). The district court erroneously inferred that this statement indicated that females and minorities would be accorded preferential treatment. The language does not readily lend itself to that interpretation, and the procedural posture of the case precludes that interpretation.

2. The district court ruled that Cramer was discriminatorily rejected for the position for which he applied. The parties stipulated that both female applicants hired to fill vacancies in the department were qualified for the positions, and that Cramers' basic academic requirements [sic], as evidenced by his academic vita, were equal to or exceeded those of the individuals hired for at least one of the positions" (App. 10). These stipulations do not settle the question whether Cramer was the victim of discrimination. First, on a motion for summary judgment it must be inferred from this statement that Cramer's paper qualifications at best were only equal to those of one of the females hired and were not even equal to those of the other female hired. Second, the stipulation is limited to Cramer's "academic requirements" and says nothing else about Cramer's relative fitness for any position, based upon the broad spectrum of standards used to evaluate applicants for professional positions such as those at issue here. There is nothing in the stipulations, or elsewhere in this barren record to indicate that Cramer's other qualifications, such as teaching skills, publications, demonstrated research ability, or other skills deemed essential for the positions for which he applied would have required him to be ranked equal to or above the two females hired to fill those positions. The district court could not, on the basis of this stipulation, properly have concluded, that VCU improperly passed over Cramer in favor of less or even equally qualified female applicants.

3. The parties stipulated that the recruitment committee selected applications which met the requisite "position requirements," and that applications

> ...so selected were divided into three categories: "females," "minority males," and "white males." (See Ex. 5). Only applicants from the "females" pile were interviewed for either position.

(App. 10). Nowhere in the stipulations, (or, indeed, in the record) is it stated that only females were considered for the positions. Yet the district court draws that inference, for it concludes that, "[o]nly applicants from the 'females' pile received further consideration and only they were interviewed for the two vacant positions" (App. 18). The court below evidently drew the inference from the stipulated facts that one must be interviewed in order to be considered. There is nothing in the record, however, to indicate that an interview is an essential part of VCU's selection process. The stipulations do not state that Cramer was not considered for either of the positions, and, as he was a member of the VCU faculty at the time of his application and was presumably well known to the members of the recruitment committee, it could be inferred that the committee chose to consider him without benefit of a formal interview.17/ Therefore the district court erred in inferring,

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17/ Although the stipulations of the parties clearly leave room for the inference that Cramer was considered, although he was not interviewed, counsel for VCU in his brief on appeal apparently concedes that such was not the case. Appellants state in their brief:

> The record in the case is clear as to what happened. The departmental recruiting committee considered only women for the post.

(Brief for VCU at 7). Of course it is for the court, not the parties, to decide what conclusions can properly be drawn from the facts presented. For the reasons already stated above, we do not believe that the conclusion that only females were considered is supportable, based upon the record of the case.

in the absence of stipulations to the contrary, that Cramer was not considered for the positions for which he applied. Thus the district court improperly viewed the stipulated facts in a light most favorable to Cramer, who was the movant for summary judgment and therefore was not entitled to such judicial deference. Had the court given proper consideration to the posture of the parties it would have concluded that there was insufficient evidence in the record upon which to base a ruling that Cramer's rights had been violated, and would have denied Cramer's motion for summary judgment.

Not only did the ambiguous and incomplete stipulations before the district court provide insufficient facts upon which to base a conclusion that Cramer had been discriminated against in violation of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964, it is possible that a full development of the facts would lead to the opposite conclusion. Of course this court's decision in this case must be based on the record before it, but we believe the following non-record discussion may be considered insofar as it shows that our reading of the ambiguities of the stipulated facts is not farfetched. There is evidence - not submitted to the district court - that Cramer was in fact considered for three positions in the Department of Sociology and Anthropology, and was rejected for all three because the committee did not rank him high among the applicants. That evidence is contained in a memorandum written by the recruitment committee in 1974, which outlines the methods used by the committee in evaluating candidates. That memorandum, together with an affidavit explaining how the memorandum came into the possession of attorneys for the United States, is attached to this Brief (See pp. 45-52). The information contained in the memorandum

supplements but does not contradict directly the stipulations submitted to the court. For example, the stipulations provide that Cramer was not interviewed for either of two positions open in the Department (App. 10). The memorandum does not indicate that Cramer was interviewed. However, it does state that Cramer was considered for three permanent positions (see p. 51, infra). Moreover, the memorandum states that because Cramer had a temporary appointment with the Department, "[t]he Recruitment Committee considered Professor Cramer's application before any candidates were invited to interview..." (see p. 51, infra). The stipulations provided that "[n]o white males were interviewed for either position" (App. 10). The memorandum states that females and one black male were interviewed for the first two vacancies in the Department, which is consistent with the stipulation. However, the memorandum also states that four white males were considered for the second position (although not interviewed), and that the committee agreed that should the female ultimately selected for the second position turn it down, the committee would recommend at least one of the three high-ranking white males for an interview (see p. 51, infra). Cramer was not listed as one of the three high-ranking males. Further, the memorandum indicates that, in fact, there were three vacancies in the Department at the time in question, and that the recruitment committee recommended that two white males and one female be invited to interview for the third position (see p. 51, infra). By that time, the memorandum states, Cramer had withdrawn his application. (see p. 52, infra).

We do not submit the recruitment committee's 1974 memorandum to this court for the truth of the facts contained therein. The memorandum, and the authors of it, have not been the subject of a fact-finder's scrutiny. But that, we believe, is precisely the point. Although the facts contained in the memorandum are not contrary to those contained in the stipulation submitted to the court, if those facts were found to be true, they would lead, we believe, to very different conclusions than those reached by the court below on the basis of the barren record presented to it. The 1974 memorandum supports our contention that there are genuine issues of material fact in dispute with which a fact finder should be required to grapple. Summary judgment was inappropriately granted.

II. THE DISTRICT COURT ERRED IN ENJOINING THE USE OF GOALS AND TIMETABLES

The district court's erroneous conclusion that Sections 703(a) and 703(j) of Title VII prohibit the use of hiring goals under affirmative action plans led it to enjoin VCU from "maintaining or seeking to achieve any employment quota or goal based upon sex" (App. 13)18/ VCU is thereby precluded from adopting an affirmative action plan which contains goals and timetables. It is possible that VCU may face administrative action aimed at cancellation of existing Federal contracts held by the University and its debarment from future contracts (see 41 C.F.R. 60-2.2). Moreover, if VCU were to bid on a contract for more than $1 million, the Department of Health, Education, and Welfare would be unable to provide the necessary

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18/ It is not clear from the district court's opinion why the court found it necessary to discuss the issue of goals and timetables, as VCU's affirmative action plan did not provide for goals (App. 56).

pre-award clearance required under 41 C.F.R. 60-1.20(d), if it were apparent that VCU had an underutilization of females and no goals and timetables. VCU has therefore been placed in the position of choosing between compliance with the court order, thereby foregoing Federal contracts, or compliance with Executive Order 11246 in violation of the court order. This result is unnecessary, as the portion of the court's order which bars the use of hiring goals is erroneous and unsupported by the law, and should be reversed.

The regulations implementing Executive Order 11246 require that all Federal contractors with 50 or more employees and a contract of $50,000 or more must have an affirmative action plan. 41 C.F.R. 60-2.1. An employer's duty is to make efforts to recruit, employ and promote qualified members of groups "which were formerly excluded, even if that exclusion cannot be traced to particular discriminatory actions on the part of the employer."19/ As part of its affirmative action obligation, an employer must determine whether women and minorities are "underutilized" in its work force. 41 C.F.R. 60-2.11. If so, the employer has an obligation to develop specific goals and timetables to overcome that underutilization. 41 C.F.R. 60-2.12.

19/ Higher Education Guidelines, Executive Order 11246 at 3.

In its opinion the district court equated goals with "quotas" and "sex preferences" (App. 23), and held them illegal. Goals and timetables are recognized as an integral part of an affirmative action plan designed to insure non-discrimination by government contractors. See Contractors Association of Eastern Pennsylvania, supra. The specific goal, to be implemented when a contractor's minority work force in a specific job category is less than that of the relevant job market, is based on realistic projections, made after study by the contractor of the availability of qualified minority persons in the relevant job market. The goal will reflect the probable work force which would result from hiring in a completely non-discriminatory manner. Unlike quotas, such goals are not rigid, inflexible figures which must be attained by the employer regardless of the qualifications of the specific job applicants. The contractor is specifically directed to consider qualifications for the job as a factor in determining the availability of potential minority and female employees in the job area. 41 C.F.R. 60-2.11. See also 41 C.F.R. 60-2.20(a).

In addition a contractor is required only to make a good faith effort to meet its goals. A contractor who has failed to meet his projections for a given hiring period cannot be penalized solely on that basis, but is given an opportunity to demonstrate that his actions have been consistent with, and are indicative of, a good faith commitment to comply with the provisions of the plan. 41 C.F.R. 60-2.14, 60-2.30. The unavailability of qualified minority or female applicants is a factor which may be demonstrated to the relevant compliance agency when goals are not achieved in order

to avoid sanctions for noncompliance. See Association of General Contractors of Massachusetts, Inc. v. Altshuler, supra, 490 F.2d at 19.

The federal policy regarding goals and quotas has been articulated in a memorandum of March 23, 1973, signed by the Chairmen of the Civil Service Commission and the Equal Employment Opportunity Commission, the Assistant Attorney General for Civil Rights, and the Acting Director of the Office of Federal Contract Compliance:

> A quota system, applied in the employment context, would impose a fixed number or percentage which must be attained, or which cannot be exceeded; the crucial consideration would be whether the mandatory numbers of persons have been hired or promoted. Under such a quota system, that number would be fixed to reflect the population in the area, or some other numerical base, regardless of the number of potential applicants who meet necessary qualifications. If the employer failed, he would be subject to sanction. It would be no defense that the quota may have been unrealistic to start with, that he had insufficient vacancies, or that there were not enough qualified applicants, although he tried in good faith to obtain them through appropriate recruitment methods.
>
> Any system which requires that considerations of relative abilities and qualifications be subordinated to considerations of race, religion, sex, or national origin in determining who is to be hired, promoted, etc., in order to achieve a certain numerical position has the attributes of a quota system which is deemed to be impermissible. . . .
>
> A goal, on the other hand, is a numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the relevant job market. Thus, if through no fault of the employer, he has fewer vacancies than expected, he is not subject to sanction, because he is not expected to displace existing employees or to hire unneeded employees to meet his goal. Similarly, if he has demonstrated every good faith effort to include persons from the group which was the object of discrimination into the group being considered for selection, but has been unable to do so in sufficient numbers to meet his goal, he is not subject to sanction.

> Under a system of goals, therefore, an employer is never required to hire a person who does not have qualifications needed to perform the job successfully; and an employer is never required to hire such an unqualified person in preference to another applicant who is qualified; nor is an employer required to hire a less qualified person in preference to a better qualified person provided that the qualifications used to make such relative judgments realistically measure the person's ability to do the job in question, or other jobs to which he is likely to progress. The terms "less qualified" and "better qualified" as used in this memorandum are not intended to distinguish among persons who are substantially equally well qualified in terms of being able to perform the job successfully. Unlike quotas, therefore, which may call for a preference for the unqualified over the qualified, or of the less qualified over the better qualified to meet the numerical requirement, a goal recognizes that persons are to be judged on individual ability, and therefore is consistent with the principles of merit hiring. . . .

Accordingly, goals are not, as the district court assumes, requirements for hiring and promotion which must be met regardless of the qualifications of applicants.20/

Because the requirement that federal contractors establish hiring goals does not conflict with other federal laws and does not, as the court held, constitute a "quota" system, the district court erred in enjoining VCU from maintaining hiring and promotion goals to comply with its obligations under Executive Order 11246.

20/ The district court evidently assumes that lack of qualified females is the cause of their underrepresentation in the Department (App. 20, n. 2):

> Preferential hiring, as such, merely camouflages the current symptoms of past sex discrimination, but fails to address the actual causes. The Court can perceive no rational relationship between cosmetic remedies employed by VCU which are designed to eradicate unfavorable male-female employee ratios, and the root cause of such an imbalance - a paucity of available female and minority applicants whose credentials are superior to those of the male applicants for similar employment. The ultimate - the only effective solution involves a systematic and persistent policy of recruiting, educating and selecting women who can compete for a given position on an equal basis with any other applicants, male or female without the need to be favored or afforded a competitive advantage.

Of course, the stipulations themselves demonstrate that there are a substantial number of qualified females in Cramer's field (App. 11).

CONCLUSION

If this court rules that the district court had jurisdiction over the case (see n. 6, supra), we believe that the court's order of summary judgment should be vacated and the cause remanded for hearing on the merits.21/ Should the court hold that summary judgment on behalf of Cramer was warranted, the court should nonetheless reverse those portions of the judgment below which interfere with compliance with Executive Order 11246.

Respectfully submitted,

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21/ Because of the important federal interest involved in this case, the United States will consider intervention in the court below if there is a remand.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE OF THE SECRETARY

WASHINGTON, D.C. 20201

December 1974

MEMORANDUM TO COLLEGE AND UNIVERSITY PRESIDENTS

The Office for Civil Rights (OCR) has responsibility for the enforcement of Executive Order 11246, as amended, with respect to employment at colleges and universities which hold Federal contracts. Under the Executive Order, Federal contractors, including institutions of higher education, are prohibited from discriminating against any person on the basis of race, color, religion, sex, or national origin in recruitment, selection, promotion and any other employment practices and procedures. Further, contractors are required by the Executive Order to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin." (Section 202(1)) Such affirmative action should be designed to expand employment opportunities for women and minorities and to eliminate those policies and practices which have had the effect of excluding or limiting female and minority group employment.

Further, under Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, both of which are within the compliance jurisdiction of the Office for Civil Rights, educational institutions which are recipients of Federal financial assistance must ensure non-discrimination. Under Title VI the recipients of Federal financial assistance may not discriminate on the basis of race, color, or national origin. Title VI prohibits employment discrimination only to the extent that such discrimination tends to exclude individuals or deny them the benefits of Federal financial assistance. With certain exceptions, Title IX prohibits discrimination based on sex in federally assisted education programs or activities. It extends to all employment practices of a covered institution. While the Executive Order coverage is extended only to those institutions which are Federal contractors, Title VI and Title IX reach all of the nation's higher education institutions which receive Federal financial assistance. Whereas affirmative action in employment is expressly required under the Executive Order, even in the absence of a finding of specific discrimination by the institutions, it is not required under Title VI or Title IX. However, voluntary affirmative action is permitted under both Title VI and Title IX "... to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, national origin, or sex."

It should be noted that where there has been a specific finding of discrimination under the Executive Order, Title VI or Title IX, specific remedial or corrective action is required. Remedies in these cases are

tailored to the specific wrong which has occurred. This memorandum is not intended to apply to corrective actions undertaken pursuant to a specific finding of discrimination.

This Office, in October 1972, issued Higher Education Guidelines which set forth the compliance responsibilities of colleges and universities under the Executive Order. In the time during which the Guidelines have been in effect, OCR has been faced with determining the permissibility of many common practices designed to effect compliance with the Executive Order. The purpose of this Memorandum is to encourage resort to positive affirmative action steps by setting forth concrete examples designed to distinguish such positive steps from others which might conflict with nondiscrimination requirements.

At the outset, certain general principles should be made clear. Colleges and universities are entitled to select the most qualified candidate, without regard to race, sex, or ethnicity, for any position. The college or university, not the Federal Government, is to say what constitutes qualification for any particular position. No single appointment will be objected to where those not appointed are less well-qualified than the candidate actually selected.

I. RECRUITMENT FOR EMPLOYMENT VACANCIES MUST BE UNDERTAKEN WITHOUT DESIGNATION OR IDENTIFICATION BY RACE, SEX, OR ETHNICITY.

As defined on page five of the Guidelines, "[r]ecruitment is the process by which an institution or department within an institution develops an applicant pool from which hiring decisions are made." As indicated on page six of the Guidelines, a contractor must make an explicit statement of its commitment to equal employment opportunity in all recruiting announcements and advertisements, and it may do so by specifying that it is an "equal opportunity employer." There is a caveat:

> It is a violation of the Executive Order, however, for a prospective employer to state that only members of a particular minority group or sex will be considered.

A major purpose of the affirmative action provision of the Executive Order is to broaden the pool of applicants so that women and minorities will be considered for employment along with all other applicants. The affirmative action process must not operate to restrict consideration to minorities and women only. Acceptable nonrestrictive language designed to broaden the pool of applicants would be:

> The English Department of X University is subject to the requirements of Executive

> Order 11246 and is an affirmative action employer. All interested persons are encouraged to apply.

It would, however, be unacceptable to state that "women and minorities are preferred" or "this is an affirmative action position." Status as a member of any specific group should not be mentioned in any advertisement as preferred.

The type of announcement which identifies the category of applicants who will be considered on the basis of race and/or sex would be unacceptable because it has the effect of discouraging the candidacy of other categories of persons. Therefore, it would be unacceptable for an announcement to read:

> Pursuant to our affirmative action plan establishing goals for the employment of women and minorities, the English Department of X University is seeking to fill this position with a woman.

Of course, under the Executive Order, all employment advertising must contain a statement that the institution is an equal opportunity employer.

It has been suggested that a position might be designated on the basis of race or sex in order to meet an employment goal. This would be in violation of the nondiscrimination provisions of the Executive Order.

The following case represents an example of an improper interpretation of the affirmative action obligation:

> For the past four years, the Mathematics Department of X University has been operating under an affirmative action program. Although its goal for hiring women was established at 20 percent over a five-year period, during the past four years, each of four vacancies has been filled by a male. At an annual professional association conference, the department chairman informed a male applying for a fifth vacant position that he could not be given consideration regardless of his qualifications because Federal regulations require the department to fill the position with a woman.

The Mathematics Department has violated its equal employment opportunity obligations by designating the vacancy as a position for a woman, or as one in which a woman would be preferred, thereby excluding all other categories of applicants from consideration. Such action is forbidden

by the Executive Order, and it is improper to suggest or to act on the assumption that Federal affirmative action provisions require that any particular position be filled by a woman or minority person.

The Mathematics Department has misunderstood the nature of goals. Goals are good faith estimates of the expected numerical results which will flow from specific affirmative actions taken by a college or university to eliminate and/or counteract factors in the university's employment process which have contributed to underutilization of minorities and women in specific job categories or resulted in an adverse disproportionate impact in terms of promotion, compensation and training of currently employed minorities and women. They are not rigid and inflexible quotas which must be met. Nor should a university strive to achieve goals as ends in themselves, for "[n]o contractor's compliance status shall be judged alone by whether or not he reaches his goals and meets his timetables. Rather, each contractor's compliance posture shall be reviewed and determined by reviewing the contents of his program, the extent of his adherence to this program, and his good faith efforts...." (41 Code of Federal Regulations, Sec. 60-2.14, known as "Revised Order No. 4")

The Mathematics Department must be able to demonstrate clearly that it has adhered to its affirmative action obligation by making a full and good faith effort to recruit and consider women for each of the five vacancies. If the Department is able to make this demonstration, its inability to meet its employment goal would not be deemed a violation of its affirmative action obligation. However, a failure by the Mathematics Department to make a sufficient good faith effort to recruit and consider women and minority candidates for the four earlier openings would constitute a violation of the Executive Order regulations.

As noted on page seven of the Guidelines, minorities and women are often sought to fill positions in women's and ethnic studies programs. Consider the following example, which would constitute a violation of the Executive Order:

> A job description for an instructor position for a University's Black Studies Program, included, as job requirements, the ability to bring special insights to the course material and the ability to relate well to the large number of black students attracted by the program. The Dean of Arts and Sciences decided that only a black person could meet these requirements. When questioned by a white applicant, the Dean defended the selection of a black person on the grounds that race was a necessary element for the proper performance of the job.

While the university established job requirements to answer what it deemed as its special needs for the Black Studies Program, its actions amounted to giving exclusive consideration to candidates on the basis of race. Such action results in the restriction of the applicant pool and is a violation of the Executive Order.

In this case, the job requirements themselves (ability to relate to students, special insights, etc.) do not limit the applicant pool on the basis of race and do not by their own terms prohibit non-minorities from applying or being employed. However, it is the university's assumption that only a black person can meet the job requirements and serve as an instructor in a successful Black Studies Program which brings the university into violation of the Executive Order.

II. IF AN INSTITUTION HAS FAILED TO FOLLOW ITS AFFIRMATIVE ACTION RECRUITMENT PROCEDURE OR IF ITS RECRUITMENT EFFORTS DO NOT YIELD AN EXPANDED APPLICANT POOL, THE RECRUITMENT PERIOD FOR ALL CANDIDATES MAY BE EXTENDED.

The Guidelines, on pages 5-7, set forth a specific framework to which the recruitment process should conform. An institution or institutional department must develop a nondiscriminatory applicant pool from which hiring decisions are made, and failure to do so constitutes a violation of the Executive Order. Consider the examples which follow:

A. The Psychology Department of X University was given a period of two months to fill a vacancy on its clinical teaching staff. Prior to beginning its recruitment efforts, the Department received the unsolicited application of a qualified white male applicant, and made no further efforts to recruit for the position. Shortly before the two-month period was up, the nomination was sent to the Vice Chancellor for approval as a choice candidate. On the advice of the affirmative action monitoring committee, the Vice Chancellor rejected the nomination on the ground that the Department had failed to make adequate attempts to reach female and minority applicants, and required that the recruitment search be reopened and extended for another month.

The obligation to take specific steps to recruit applies even in instances where a university has not previously made a practice of active recruiting. Hence, even though it had received an unsolicited application from a person who was qualified, the Department's failure to recruit and consider women and minorities constitutes a violation of the Executive Order. In

such case, further action is required under the Executive Order and the Vice Chancellor's decision to extend the period for recruitment does not amount to an abuse of the affirmative action process with respect to the Department's first choice, who will be subjected to greater competition for the job.

B. In seeking to fill an academic position, the English Department took the recruitment steps required under its affirmative action plan. At the end of the recruitment period, during which time it had not received the applications of any women or minorities, the Department nominated one of the white male applicants as its first choice. Although the Vice Chancellor noted that good faith efforts to recruit women and minorities had been made, he required the Department to extend the recruitment period for another month during which period additional specified efforts were to be made to reach available women and minority applicants.

In carrying out an affirmative action plan, the period for recruitment may be extended, particularly where a utilization analysis indicates that the percentage of women and minorities recruited is substantially less than the percentage of qualified women and minorities available in the work force. In such cases, additional positive recruitment efforts may be undertaken to broaden the applicant pool to include qualified women and minorities. OCR would approve (but not require) the decision to keep open competition for the position. But it must be emphasized again that nothing in an affirmative action plan requires the employment of any specific number of women or minorities.

Thus, if the Department can demonstrate that it has taken all recruitment steps required under its affirmative action plan--and even though no (or very few) applications have been received from women and minorities--there would be no requirement that the recruitment period be extended, as in the following example:

C. The Physics Department took all the affirmative recruitment steps called for by the university's affirmative action plan, and advertised the opening for several months. At the end of that time, no women and no minority candidates had applied and the recruitment procedure was concluded.

The Department was justified in ending the recruitment period, inasmuch as it had done everything possible to publicize the opening for a reasonable period of time.

III. JOB REQUIREMENTS MUST BE APPLIED UNIFORMLY TO ALL CANDIDATES WITHOUT REGARD TO RACE, COLOR, SEX, RELIGION, OR NATIONAL ORIGIN.

The Guidelines stress the need for standardized employment practices that minimize the opportunity for arbitrary and/or discriminatory hiring decisions. It is not intended that affirmative action should result in a dilution of standards in order to attain the objectives of the Executive Order. Consider the example of the following institution, which violated the Executive Order:

> Because of the small size and location of X University, its History Department had experienced considerable difficulty in recruiting women and minorities for several teaching positions in the past. Consequently, the department chairman, with the support of his faculty and administration, waived the Ph.D. requirement for those women or minorities who wished to apply for the vacant Associate Professor position but retained the requirement for males or non-minorities applying for the same position and for all other positions.

The Executive Order does not require that job requirements be waived or lowered in order to attract women and minority candidates. Indeed, it expressly forbids differential standards based on race, color, sex, religion or national origin. Further, it requires that once valid job requirements are established, they must be applied equally to all candidates. It is discriminatory for such requirements to be applied selectively on the basis of race, color, religion, sex, or national origin. Thus, the history department must either waive the Ph.D. requirement for all applicants (without regard to race or sex) or maintain it for all applicants.

IV. A JOB REQUIREMENT WHICH RESULTS IN A DISPROPORTIONATE IMPACT UPON MINORITIES AND/OR WOMEN CAN BE MAINTAINED ONLY IF IT IS JOB-RELATED.

As the Guidelines make very clear (page 4), the Executive Order does not require an institution to eliminate or dilute legitimate employment standards by which to measure prospective employees. On the other hand, no standards or criteria which have, by intent or effect, worked to exclude women and minorities as a class can be utilized, unless the institution can demonstrate the necessity of such standards to the performance of the job in question. For example:

> X Law School has established a Teaching Fellows Program which is responsible for the administration

of the law school's clinical practice program. The requirement for Teaching Fellows includes holding a graduate law degree as well as an LL.B. or J.D. Degree. In analyzing its workforce for its affirmative action program, the law school learns that this job requirement disproportionately excludes blacks from consideration for the Teaching Fellows positions.

In order to continue the requirement for a graduate law degree, the law school must demonstrate that the requirement is related to successful job performance. If the law school is able to demonstrate that the skills and knowledge acquired through the advanced law degree are necessary for effective job performance, the job requirement can be maintained. On questions relevant to the validity of the requirement, the opinion or testimony of persons experienced in the conduct of legal aid clinics will be given substantial weight by HEW.

V. A UNIVERSITY IS REQUIRED TO OBTAIN INFORMATION ON THE RACE, SEX, AND ETHNIC IDENTITY OF APPLICANTS FOR EMPLOYMENT.

The Executive Order establishes the principle that Federal contractors, including colleges and universities, are required to collect and maintain data on the race, sex and ethnic identity of all applicants for employment.

The collection and analysis of such data is recognized as an essential means of providing both the institution and the Federal Government with the information necessary to monitor the compliance posture of the institution. In the case of universities and colleges, the collection of such data is particularly essential for the workforce analysis required by Revised Order No. 4. Each institution must adopt safeguards to ensure that such information cannot be used as a basis for discrimination.

Preserving the anonymity of applicants in the collection of applicant flow data can be accomplished by gathering the requisite race, sex, and ethnic data separately from the application form. Furthermore, applicants should be instructed not to identify themselves by name or number on this form. If the institution wishes to determine applicant response for a particular position, the data form may be coded by position, as long as it does not individually identify any applicant.

This document is intended to help clarify areas of confusion which have arisen during the implementation of contractor requirements set forth in the Executive Order regulations. This Memorandum should be circulated

among all members of your administrative staffs. Experience of the recent past seems to indicate that much of the existing confusion over affirmative action requirements has resulted from an absence of clear lines of communication concerning Federal regulations. It is most important that all officials charged with recruiting and hiring responsibilities have a clear understanding of the Higher Education Guidelines and that they ensure that institutional employment conform to the provisions of those Guidelines.

Additional copies of this Memorandum may be obtained from the Regional Office for Civil Rights in your area, or from the Office for Civil Rights, Department of Health, Education and Welfare, Washington, D. C. 20201. Requests for technical assistance and inquiries relating to development and implementation of affirmative action programs should also be addressed to these Offices.

Thank you for your continuing cooperation.

Peter E. Holmes
Director
Office for Civil Rights

CITY OF WASHINGTON)
)
DISTRICT OF COLUMBIA)

AFFIDAVIT

YOSHINORI H. T. HIMEL, being first duly sworn, deposes and says:

1. I am an attorney employed by the United States Department of Justice, Civil Rights Division, at Washington D.C.

2. On Tuesday, November 2, 1976 I telephoned Mr. Walter H. Ryland, counsel for the defendants and appellants in this cause, and obtained his permission to interview defendants McGrath and Nelson and members of the Recruitment Committee of the Department of Sociology and Anthropology of Virginia Commonwealth University.

3. On Wednesday, November 3, 1976 I spoke with defendants McGrath and Nelson and Dr. Charles Jarmon, a member of the Recruitment Committee, at their offices at Virginia Commonwealth University. In the course of these conversations I was told of the availability of a Memorandum from the Recruitment Committee to Dr. Paul D. Minton, Dean of School of Arts and Sciences, dated May 31, 1974. Defendant Nelson handed me such a document and indicated that it was that Memorandum.

4. On Monday, November 8, 1976 I telephoned Mr. Ryland, who indicated that he had no objection to my having the Memorandum.

5. The Memorandum attached hereto for inclusion in the amicus brief of the United States is a true copy of the Memorandum handed me by defendant Nelson on Wednesday, November 3, 1976.

Yoshinori H. T. Himel
YOSHINORI H. T. HIMEL

WASHINGTON, D.C.

I, Ellen W. Cummins, a Notary Public, do hereby certify that on this 23 day of November, 1976, personally appeared before me Mr. Yoshinori H. T. Himel, and affirmed that the statements contained in the foregoing document are true and correct.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year before written.

Ellen W. Cummins
Notary Public in and for
Washington, D.C.

My Commission expires: 7/31/79

Virginia Commonwealth University

May 31, 1974

MEMORANDUM

TO: Dr. Paul D, Minton
Dean, School of Arts and Sciences

FROM: Recruitment Committee
Department of Sociology and Anthropology

Charles Jarmon

Melvin Mednick

J. Bernard Murphy

L. D. Nelson
Recruitment Committee Chairperson

The attached document details procedures and activities of the Recruitment Committee of the Department of Sociology and Anthropology. Part I outlines the Committee's general functions and procedures; Part II focuses on the Committee's work during the 1973-74 academic year; Part III highlights actions taken by the Committee regarding the candidacy of Professor James A. Cramer.

The Recruitment Committee's rationales for its evaluations of specific candidates are not detailed in the document; rather, candidate assessment is discussed in terms of criteria and procedures employed in the evaluation process. The Recruitment Committee concluded that to concentrate on the evaluation process rather than explicate specific assessment results would most directly confront the central issue related to the discrimination complaint of Professor Cramer: the question of whether he was considered by the Department for a position beginning in the fall, 1974.

/ls

901 West Franklin Street • Richmond, Virginia 23284

Part I: RECRUITMENT COMMITTEE FUNCTIONS AND PROCEDURES

The Recruitment Committee is charged by the Department with performing four primary functions. These functions, and the procedures employed by the Committee in the performance of the functions, are detailed below:

A. Publicizing vacancies

B. Receiving and screening applications

Most applicants for positions in the Department write either to the Chairperson of the Recruitment Committee or to the Department Chairperson.

The Recruitment Committee conducts most preliminary screening of applications. All Department members are also invited to scrutinize applicant files and recommend specific candidates to the Committee, to the Department, or both.

C. Recommending applicants for interviews by the Department

The Recruitment Committee recommends candidates for interviews by the Department according to five dimensions for candidate evaluation:

1. Rank

Rank criteria for open positions are specified by the Department.

2. Potential and/or demonstrated research and teaching competence

Several indicators are employed to assess research and teaching skills. Reference letters are considered. Research papers submitted in support of candidates' applications are read by some members of the Recruitment Committee. Teaching effectiveness indicators are utilized when available. Communication with colleagues of applicants provides information in some cases.

3. Potential and/or demonstrated contribution to non-teaching Departmental and University activity

Such factors as cooperativeness and initiative are considered.

4. Teaching and research specialties

The Department determines the teaching and research specialty criteria for each open position.

5. Ethnic and gender status

The Department has instructed the Recruitment Committee to screen and recommend candidates for consideration according to the guidelines presented by the U.S. Department of Health, Education and Welfare and by the Virginia Commonwealth University administration with two exceptions.

The first exception to the guidelines pertains to the extent to which affirmative action hiring policies are to be pursued in the Department. The Department has determined that, while vigorous efforts should be made to recruit women and ethnic minority candidates, being qualified for a position is not sufficient; to be offered a position women and minority candidates must be as well qualified as white male applicants for the same position.

The second exception to the guidelines applied during 1973-1974 only to the application of J.A. Cramer and is discussed in Part III.

D. Planning itineraries of applicants selected for interviews

Part II: GENERAL PROCEDURES EMPLOYED AND ACTIONS TAKEN BY THE RECRUITMENT COMMITTEE DURING THE 1973-1974 ACADEMIC YEAR

It became evident early in the fall, 1973, that the two faculty members in the Department who were then on leaves of absence (M.J. Miller and C.W. Thomas) might not return. Consequently, the Recruitment Committee began searching in the fall for qualified candidates to fill those two positions.

In April, 1974, Professor J.B. Murphy indicated that he would probably resign, thus creating a third opening for the fall, 1974. The Recruitment Committee immediately began the process of candidate selection for that position.

In addition to the three permanent positions mentioned above, the Department added two temporary faculty members during the Spring semester, 1974. The Recruitment Committee was charged with recommending applicants for the two temporary positions.

The procedures and actions detailed below pertain only to candidate recruitment for the three permanent positions available in the Department beginning in the fall, 1974.

A. Publicizing of vacancies

1. Interviews with applicants at national and regional sociology meetings

The Recruitment Committee Chairperson interviewed approximately 15 applicants at the annual meeting of the American Sociological Association (August 1973). Other candidates were informally interviewed by Recruitment Committee members and other Department members at various regional meetings during the year.

2. Paid advertisements

The anticipated vacancies in sociology for the fall, 1974, were advertised in the October, November and December issues of Footnotes (a professional sociology journal) during 1973.

3. Informal communication with faculty and students

Department members publicized the position openings among colleagues and acquaintances at other insitutions. Several potential candidates were invited by the Recruitment Committee to apply for the openings.

B. Screening of applicants

Applicants were screened according to the dimensions for candidate assessment detailed in Part I. Criteria established by the Department for candidate assessment during 1973-1974 were as follows:

1. Rank

Only junior level candidates were to be considered. All candidates considered were required to have completed or to be near completion of the Ph.D. degree.

2. Potential and/or demonstrated research and teaching competence

No special criteria were specified by the Department.

3. Potential and/or demonstrated contribution to non-teaching Departmental and University activity

No special criteria were specified by the Department.

4. Teaching and research specialties

The teaching specialties emphasized for the first open position involved social statistics and research methods. Research specialties were left open, although criminology, ethnic relations and formal organizations were made priority areas.

Teaching specialties set by the Department for the second open position included research methods as a second teaching area, with the primary teaching area being left unspecified. It was determined that the person filling this position should be committed to conducting community-based research.

The Department did not concretely specify teaching and research specialties for the third position, although several Department members noted that a person qualified to teach and conduct research in the areas of either demography or urban sociology was needed.

5. Ethnic and gender status

In detailing recruiting procedures for the 1973-1974 academic year, the Department determined that an exception would be made to the affirmative action policy discussed in Part I. Because Professor James A. Cramer was filling a one-year appointment in the Department during the 1973-1974 academic year, the Department specified that an application from Professor Cramer should be considered by the Recruitment Committee before the Committee recommended any other candidates for interviews by the

Department.

C. Recommendations for applicant interviews by the Department

On the recommendation of the Recruitment Committee, four female candidates were interviewed for the first open position: D.S. Rose, M. Boeckmann, N. Daley and N.V. Benokraitis. The Department offered the position to D.S. Rose.

L. Lindsey, K. Williams, B. Howe and L. Thompson (three women and one black male) were interviewed for the second position. The Recruitment Committee also considered for the second position, in a meeting on March 13, 1974, L.S. Rosen, D.S. Mileti, J.A. Cramer and L.M. Busch. The second open position was offered to N.V. Benokraitis, one of the candidates interviewed for the first position. On April 9 the Recruitment Committee agreed that, should N.V. Benokraitis not accept the offer, at least one of the three white male candidates being considered would be recommended for a Department interview. The three high-ranking white male candidates were L.M. Busch, D.S. Mileti, and L.S. Rosen.

On April 30 the Recruitment Committee recommended that D.S. Mileti, L.S. Rosen and J.A. Honnold (two white males and one female) be invited to interview for the third open position.[1]

Part III: PROCEDURES EMPLOYED BY THE RECRUITMENT COMMITTEE IN CONSIDERING THE APPLICATION OF PROFESSOR J.A. CRAMER FOR A PERMANENT POSITION IN THE DEPARTMENT

As is explained below, the Recruitment Committee's assessment of Professor J.A. Cramer's candidacy resulted in his not being recommended by the Committee for any of the three open positions in the Department. Further, no individual Department members chose to formally promote his candidacy before the Department.

In accordance with the Department's charge, the Recruitment Committee initiated actions in January 1974, designed to insure consideration of Professor Cramer for a permanent position in the Department.

Although two anticipated openings had been advertised nationally during the fall, 1973, no formal application from Professor Cramer had been submitted to the Recruitment Committee or to the Department Chairperson by January 1974. Consequently, a member of the Recruitment Committee indicated to Professor Cramer in January that, should he wish to apply for one of the positions, certain materials supporting an application would be needed by the Committee. These materials were furnished to the Committee in January.

The Recruitment Committee considered Professor Cramer's application before any candidates were invited to interview for the open position in the Department. His application was considered by the Committee for each of the three open positions in the Department. The Committee assessed Professor Cramer's application according

[1] D.S. Mileti cancelled his interview appointment.

to the dimensions for candidate evaluation outlined in Part I.C. and as modified for Professor Cramer's application (Part II. B.5.).

It was the consensus of the Recruitment Committee (all members present) that Professor Cramer should not be ranked high among the candidates being considered, and thus not to recommend that he be voted on along with other applicants interviewed by the Department for the position.

While the Recruitment Committee considered Professor Cramer for the second open position, again he did rank high among the candidates for the position.

Professor Cramer's application was also considered for the third open position.[2] He did not rank high among all the applicants. Professor Cramer withdrew his application before any candidates for the third position visited the Department.

The presence of Professor Cramer in the Department provided the opportunity for all Department members to evaluate his candidacy. Only one member of the Department formally urged the Recruitment Committee to evaluate Professor Cramer specially, and this advocacy seemed to be based primarily on a belief that the University had an unfulfilled legal obligation to Professor Cramer. The Recruitment Committee Chairperson discussed with the Department Chairperson the Department's legal obligation to Professor Cramer; the Committee and the Department Chairperson agreed that all the University's written and verbal obligations to Professor Cramer had been fulfilled (to the best of their knowledge). The Recruitment Committee also concluded that the question of unfulfilled legal obligations to Professor Cramer stemmed from inadequate information held by the faculty member raising the question. The faculty member's knowledge seemed to be inadequate regarding (a) the nature of the University's commitments to Professor Cramer, and (b) the assessment procedures being employed by the Recruitment Committee in reference to his application.

The decision of the Recruitment Committee not to recommend that Professor Cramer be voted on for a position in the Department did not preclude the presentation of his name by any Department member for consideration in a Department meeting. During the 1973-1974 academic year the names of two candidates who had not initially been recommended by the Recruitment Committee were presented to the Department, and both candidates were ultimately interviewed by the Department. No member of the Department, however, formally presented Professor Cramer's name for Departmental consideration at any Department meeting during the year.

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[2] In April one member of the Recruitment Committee - Professor J.B. Murphy - resigned, and another Department member - Professor J.S. Williams - was added to the Committee. Professor Williams participated in the selection of candidates for the third open position.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served two copies of the foregoing Brief for the United States as Amicus Curiae upon counsel for Appellants and Appellees by mailing them, first class, postage prepaid, to the offices indicated below:

Walter H. Ryland, Esquire
Assistant Attorney General
1101 East Broad Street
Richmond, Virginia 23219

W.H. Cabell Venable, Esquire
1128 Ross Building
Richmond, Virginia 23219

This 30th day of November, 1976.

CYNTHIA L. ATTWOOD
Attorney
Department of Justice
Washington, D.C. 20530