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NOMINATION OF J. STANLEY POTTINGER TO BE
ASSISTANT ATTORNEY GENERAL IN CHARGE OF
THE CIVIL RIGHTS DIVISION

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HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-THIRD CONGRESS

FIRST SESSION

ON

J. STANLEY POTTINGER, OF CALIFORNIA, TO BE ASSISTANT
ATTORNEY GENERAL IN CHARGE OF THE
CIVIL RIGHTS DIVISION

TUESDAY, JANUARY 30, 1973

Printed for the use of the Committee on the Judiciary



U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1973

AUTHENTICATED
U.S. GOVERNMENT
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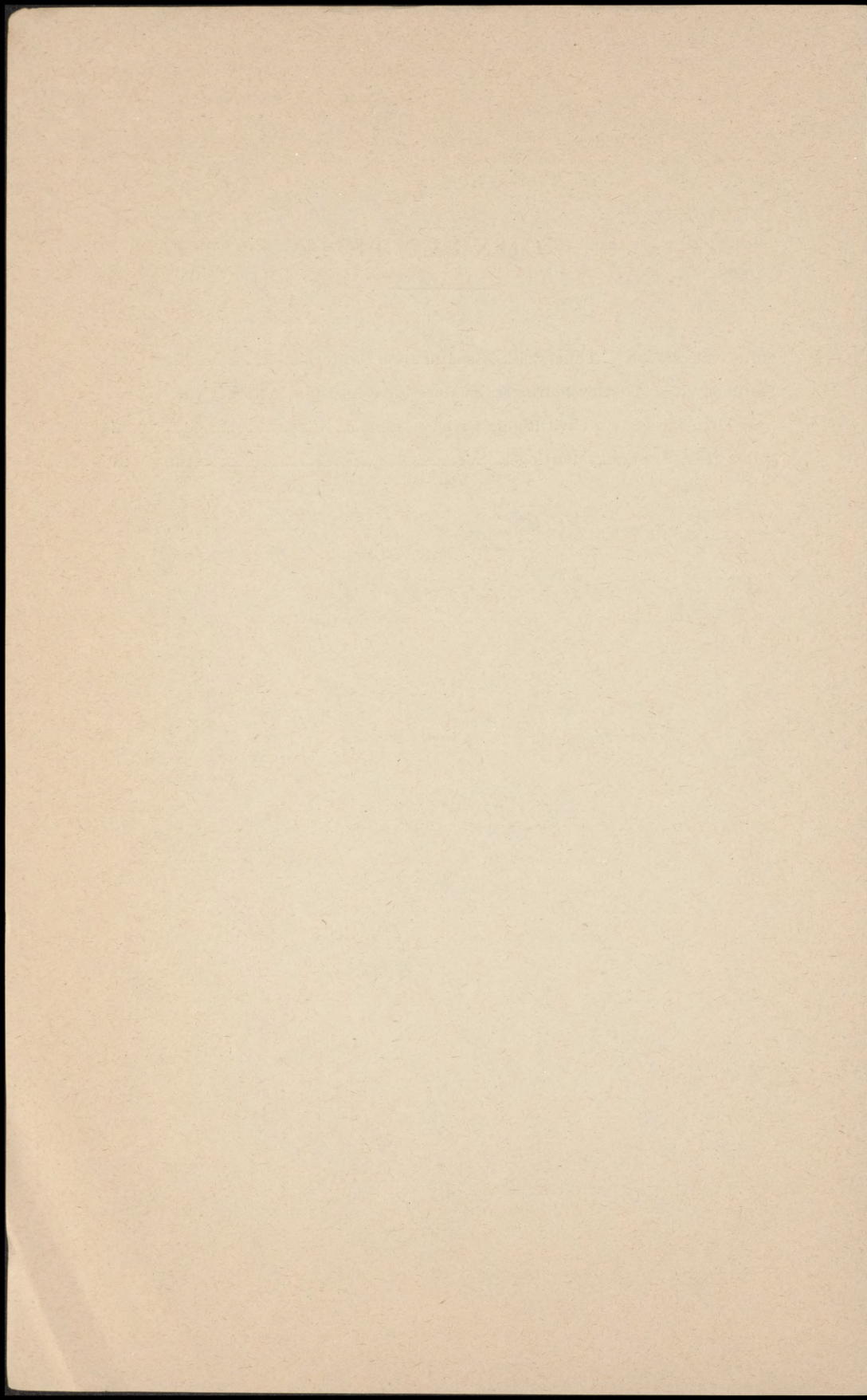
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NOMINATION OF J. STANLEY POTTINGER TO BE ASSISTANT ATTORNEY GENERAL

TUESDAY, JANUARY, 30, 1973

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 11 a.m., in room 2228, Dirksen Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, Erwin, Hart, Kennedy, Bayh, Tunney, Hruska, Scott, Thurmond, and Gurney.

Also present: John H. Holloman, Francis C. Rosenberger, and Thomas D. Hart, of the committee staff.

The CHAIRMAN. Senator Tunney.

[A biographical sketch of the nominee prepared by the Department of Justice is as follows:]

J. STANLEY POTTINGER

Born: February 13, 1940, Dayton, Ohio.

Marital status: Married (wife, Gloria).

Legal residence: California.

Education: 1958-62, Harvard University, A.B. degree, cum laude. 1962-65, Harvard University Law School, LL.B., degree.

Bar: 1966, California.

Employment: 1965-69, Broad, Busterud and Khourie, San Francisco, Calif. 1969-70, Health, Education and Welfare, Attorney, 1970-present, Director, Office for Civil Rights.

Office: Health, Education, and Welfare, 330 Independence Avenue, SW., Washington, D.C.

Home: 7112 Laverock Lane, Bethesda, Md.

STATEMENT OF JOHN V. TUNNEY, U.S. SENATOR FROM CALIFORNIA

Senator TUNNEY. Mr. Chairman, I am pleased to introduce Stanley Pottinger to the committee. Mr. Pottinger is from the State of California, and in a very short time has compiled an impressive background. Although Mr. Pottinger is only 32 years old, he has already served as Director of the Office of Civil Rights in the Department of Health, Education, and Welfare.

Mr. Pottinger graduated from Harvard College in 1962, and the Harvard Law School in 1965, where he had an impressive record. Between 1965 and 1969, he was engaged in the practice of law in San Francisco, and during those years he was involved in the representation of indigent minority clients in his law practice. He served as president of the Richmond District Community Council and was a member of the board of directors of the San Francisco Lighthouse for the Blind.

In 1969 he argued a case successfully before the Supreme Court on behalf of an indigent prisoner in a habeas corpus case, and he spent a good deal of time, his own personal time outside of his law firm, representing habeas corpus cases while he was in the practice of law in San Francisco.

He received an award for contribution to the advancement of civil rights in the Mexican-American community in California in May of 1972, an award given by the Association of Mexican Educators. He has been with the Department of Health, Education, and Welfare since 1969, serving as a consultant and as a regional attorney in his first year, and as a Director of the Office for Civil Rights, subsequently.

The CHAIRMAN. Senator Hart.

Senator HART. Mr. Pottinger, congratulations on your nomination.

Mr. POTTINGER. Thank you, Senator.

Senator HART. It is my fault, and not yours, that I did not have a chance to visit personally with you before the hearing here, but I believe that you were aware that I would ask you several questions in a general area that deal with your experience in your present post in the Department of Health, Education, and Welfare and with your understanding of the duties which would be yours in the post to which you have been named.

The first has to do with school desegregation and HEW. You are the principal defendant in a law suit, Adams against Richardson, which was brought alleging failure of HEW to enforce title VI of the 1964 Civil Rights Act. There is a provision for terminating Federal assistance to a State or local agency if the Federal funds are used in a program operated in a discriminatory manner. The principal area of the application of title VI so far has been in regard to desegregating school systems, and the Office of Civil Rights of HEW, which you now head, has primary responsibility for administering title VI in this area. Am I correct so far?

TESTIMONY OF J. STANLEY POTTINGER, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL IN CHARGE OF THE CIVIL RIGHTS DIVISION

Mr. POTTINGER. Yes, sir.

Senator HART. All of us understand that this has been the most controversial area in the administration of civil rights so far. The administration's policy has made it central, and you have my understanding sympathy that you have been in a very hot seat. Several major civil rights organizations and the Civil Rights Commission have criticized your office, and you, I think it is fair to say. The criticism has been that the office has not enforced title VI emphatically, that you have presided over a substantial rollback of its enforcement in several aspects of school desegregation.

Let me get to the specific allegations in a minute, but first let me give you the dilemma that some of us find ourselves in and on which we would like your help. Last November, the district court in the Adams suit granted what I think it is fair to say is a rather unusual summary judgment for the plaintiffs. Its opinion fairly can be summarized as finding that the Office of Civil Rights in HEW, under your direction had failed to enforce title VI.

Now, I do appreciate the difficulties that operate in my questioning a nominee about matters in litigation which may well be viewed as a party under obvious restraints, but it does present for some of us on the committee a real problem. It is very unusual for a Federal court to find that a high Federal official has failed to enforce the civil rights laws, and here we have a summary judgment. In fact, if my memory of pleadings is at all fresh, I think that means that the court took your version of the facts and still found that as a matter of law you had failed to enforce title VI: You did not follow the intent of Congress that at some point the efforts of negotiation ceased and the enforcement teeth of the act would be used. So we have that unusual decision, and within a matter of a few weeks or a couple of months of that decision, we are asked to approve your performance, so to speak, in the field of civil rights, and confirm your nomination to an even higher post of civil rights enforcement. Suppose a member of one of our racial minorities says to me; "Look, this nominee did not even do his job at HEW, the Court said so, and now you are going to promote him to a post of higher responsibility in this very area." What do I tell him?

Let me add for the record, I have a pretty clear position in the past of saying that the President should have those executive officials that he wants, absent some gross incompetence or moral impropriety.

Senator GURNEY. Would the Senator yield for a point of information?

Senator HART. Yes.

Senator GURNEY. Would the Senator explain the status of this case? I am not familiar with it, in what court it is in? Is it on appeal, what is the status?

Senator HART. It is in the District Court for the District of Columbia. Am I correct on that?

Mr. POTTINGER. Yes, that is correct.

Senator HART. The opinion has been written, but they are in the process of drafting an order; so, as I have indicated in my preliminary comment, it rather inhibits us in the discussion. But there is the opinion of the district court that there was failure to enforce.

Senator GURNEY. I thank the Senator.

Mr. POTTINGER. Senator, I recognize as you do that there are certain constraints with regard to the pendency of the litigation and, indeed, it has been the litigation strategy of the Department not to comment on the merits of the opinion, at least until a final order is entered, because there are aspects of the opinion that are still in contention even before the final order has been entered.

However, I personally and quite frankly welcome the opportunity to comment, without in any way jeopardizing, I hope the very strongly felt opinion by HEW, which has not yet been voiced publicly, that is, jeopardizing the litigation in which that position will be taken in due course. And certainly without in any way commenting adversely with regard to the court's having done its duty as it sees it best to do it, I can tell you that with regard to the merits of the conclusions that you have just stated, that to the extent that the implication of press reports or, indeed, perhaps of your own question, is that we have—well, if you will, actually defaulted on enforcement of title VI, I categorically, and without any equivocation, completely reject that conclusion.

Now, let me explain why that is the case, and why we have not made that case publicly to this date. It is true that the court found in four areas that there was what the court believed to be an excessive period of time under the regulations for negotiation of solutions. That is a matter which is not specified in any period of time by either law or regulations, but is a matter of opinion between the judicial branch on the one hand, and the executive branch on the other. It seems to me that that is a position that fair and reasonable people can disagree on. But I do not agree that this constitutes in any case a willful failure to enforce a case where two conditions appear to exist: Number one, where the law is clear; and number two, where the facts are known.

To back that up, let me point out in response to the first part of your question, that, indeed, the administration's record, and the record of my office and, if you will, my own record as Director of the office over a 3-year period, I think gives the lie to any indication that there has been a willful default. The most extensive amount and degree and quality of school desegregation in the Nation's history, I am proud to say, not apologetically, but proud to say, took place in the last 3 years and during my tenure. Not that I was the sole cause of it by any means, but during my tenure. Indeed, it seems to me that we all fail to recognize too frequently that the real plaudits, if any are to be given, belong to none of us here, but to the children and the parents and citizens in those States that undertook this arduous task so successfully. But to the extent that the Federal Government and my office were involved, it has been involved on the record with the most extensive fulfillment of title VI, rather than a default, in the history of the country.

Specifically, when the administration came in in 1968, 68 percent of all minority children in the South were in 100 percent black schools. Today that is less than 9 percent. The number of children who are in majority white—minority children in majority white schools—was less than 18 percent. Today—that is, in 1971 (we do not know today)—but in 1971, it was 44 percent. The figures could go on, and I do not intend to bore you with them at this point, except to say that they are a matter of record, and that this background, plus the work that has been done in the higher educational field, I believe must be given, too, as an explanation, a full explanation of this suit.

Now, it is true that the court in this case has found that out of 4,400 school districts in the southern and border States, 42, according to the findings, based on testimony in 1971, remain out of compliance. Let me, in addition to pointing out that that is less than 1 percent of all school districts of the South, point out that they were, in our opinion, close cases. They are still in some cases close calls. No case, given the breadth and ambiguities inherent in any Supreme Court case like the *Swann* decision, can be judged by a formula. It does take judgment, and in some cases that judgment will lead reasonable people, whose civil rights interests are clearly not in dispute, to different conclusions. In every one of these 42 cases, that the judge is talking about, not one of them has a dual system today. None of them do, and I want to give you that direct assurance. All of those districts have one or more schools which are made up mostly of minority children, either 50 percent minority children, and in some cases the school may be a long distance from a pairable school. In some cases it may not be in an 80 percent or 90 percent or 100 percent range, but it is in a 52 or 60 percent range in

the district, a district that may have an overall population of 40 percent black. In some cases it is clear that action will have to be taken at the conclusion of the deliberations in the Department. But, in no case do I believe that the conclusion was clearly reached that this was a willful default not to pursue normal enforcement.

Finally, let me comment to this extent. It was clear in the fall of last year that some of these districts where there was consensus that further action, or if you will "clean-up" action ought to be taken, there was also a basic policy decision by the Secretary of the Department to suspend briefly enforcement action that required new transportation beyond those limits specified in the President's proposed moratorium and Equal Education Opportunity Act. The purpose of that was, as the Secretary then testified, to have a brief moratorium in order to allow the U.S. Congress to deliberate as free from immediate constraints and political upheavals as possible. That period was openly and quite candidly spoken to by the Department, and was, I think, one of the reasons for the continuation of negotiations that otherwise might not have existed.

Senator HART. As you indicated, we can take these figures and perhaps quarrel as to what they mean and, indeed, we would first have to establish some definitions of what is a desegregated district.

Mr. POTTINGER. May I simply say that we have, in addition to providing one set of figures, provided every breakdown of the progress that has been made as it was calculated since 1964, plus additional measurements. So, by any measurement one takes, the record I have spoken to is still the superior record.

Senator HART. With that explanation, and the admitted difficulty of talking about an order not yet drawn, let us see if you can help evaluate the major findings of the district court. I think your comments serve as a useful reminder of the procedures that title VI enforcement brings into play. Let me see if I have it right. Title VI of the 1964 act states that when you determine that a district has not desegregated its school-system, you notify the system that they must submit an adequate plan or face fund termination. If it refuses to submit a plan, or will agree to a plan that you find inadequate, you either commence enforcement procedures which are administrative, or refer the matter to the Justice Department for court action. Once a school district enters an acceptable plan, you consider further enforcement action if you find that they are violating or cheating on the plan, or that the plan is no longer adequate because of an additional requirement that subsequent court decisions establish. That a fair summary?

Mr. POTTINGER. Yes it is.

Senator HART. Judge Pratt made several specific findings. First that you stopped using the enforcement teeth of the statute for commencement of the enforcement proceedings for almost 1 year after your assumption of office, and then thereafter used it only sporadically, although the record was rather clear that commencement of enforcement proceedings has proved an effective way to needle people into submitting adequate plans. The court recognized that there was some discretion to seek voluntary compliance in issuing, but found that your refusal to start enforcement proceedings went well beyond that discretionary point, and that your obligation in certain of these cases, in his judgment, was to commence enforcement proceedings. You have

commented in part on that in your earlier comments. Would you want to make any further comment?

Mr. POTTINGER. Yes, I would. Since you have raised the additional procedural point, Senator, I think the question does go to the extent of the court's findings as we understand it. There is a basic ingredient in the process that has to be added to your description, and that is that under the Civil Rights Act of 1964, and the regulations which implement it, the Department of Health, Education, and Welfare, and, therefore, my office, does not have the authority or the power to enjoin a district to desegregate. We have no authority to say to a district, you must desegregate now. What we do say, what we have authority to say or enforce, I should say, is that if you do not desegregate now, you must go to a formal enforcement hearing to determine whether you are in compliance or not. And if the determination is made after a hearing examiner has given you your day in court, your constitutional due process, and after a reviewing authority has reviewed that, and after the Secretary of the Department has reviewed that, and after it has been transmitted to the U.S. Congress for 30 days notice, then you may lose your Federal financial assistance. Now, that process, as a matter of constitutional and statutory law, ordinarily takes anywhere from 9 to 18 months. Conversely, the Justice Department, which has the authority and power to go to the Federal court, present the facts to the trier of them, and if there is a need upon noncompliance, obtain injunctive relief, and can secure relief much more quickly for obvious reasons.

In 1970, Senator, the President of the United States set forth a message in March of that year in which he said that the dismantling of the dual school system as mandated by the Supreme Court must be a mandate that would be fulfilled. At that point, as the judge points out, a decision, a basic policy decision had to be made by the administration. Would it continue to rely on the administrative process which ordinarily, in the event that any school district wished to contest our findings, would take another year? Or would the administration rely on the Justice Department procedures which would allow the courts to act by the summer of 1970, and thereby obtain actual desegregation, actual dismantling of the dual systems, in the fall of 1970?

Senator, I have no doubt whatsoever that the answer was as clear then as it should be today; that if we had taken the policy decision that we would allow any school district which wished it to have another year before desegregation, we would today be facing questions from you not about whether we had abandoned title VI, but why in the world did we give those school districts, through no fault of anything except constitutional law, another year. We believed that the citizens of the South who were involved in this court process also agreed that it was important that the job be done at once, and evenhandedly across the board, and for that reason we had no alternative but to defer cases where there was a disagreement about dual systems to the Justice Department rather than go through a year's delay of administrative proceedings.

The CHAIRMAN. Now, what would you do? You would make recommendations from HEW to the Justice Department, is that correct?

Mr. POTTINGER. Yes, sir.

The CHAIRMAN. How many recommendations did you make to the State of California?

Mr. POTTINGER. I am sorry, sir; in what?

The CHAIRMAN. In desegregation.

Mr. POTTINGER. We in the——

The CHAIRMAN. In busing.

Mr. POTTINGER. Well, without regard to the question of whether there was less or more busing, there were 200 cases that we had during my tenure at HEW referred to the Justice Department.

The CHAIRMAN. From where?

Mr. POTTINGER. From various States.

The CHAIRMAN. Well, all right. What about the State of California?

Mr. POTTINGER. Senator, I am sorry that I do not know the answer off hand, although I may have information in this pile of documents here. I think——

The CHAIRMAN. I want you to look it up.

Now, what about the State of Michigan?

Mr. POTTINGER. Well, the case that comes to mind in the State of Michigan is Ferndale, Mich., where, indeed, we did terminate Federal financial assistance.

The CHAIRMAN. One?

Mr. POTTINGER. Yes, sir.

The CHAIRMAN. Just one case?

Mr. POTTINGER. That is the only case we had, yes, sir. That is correct.

The CHAIRMAN. What about the State of Massachusetts?

Mr. POTTINGER. Well, we presently are engaged in one of the largest hearings the office has ever been engaged in in the city of Boston. It has not been concluded yet, but we expect it to be in March.

The CHAIRMAN. Just one?

Mr. POTTINGER. To my knowledge, that is correct.

The CHAIRMAN. But you have forgotten about California, your home State?

Mr. POTTINGER. Well, let me give you my recollection. No, I have not forgotten. Let me give you my best recollection. The Sequoia Union School District, which in part of the Palo Alto area, has been subject to our enforcement. We were briefly involved until court litigation assumed all jurisdiction in San Francisco. I believe we initially were involved in Pasadena. Again that was assumed by court litigation, and the same, I believe, is true for Oxnard and perhaps Inglewood, although I honestly do not recall the later two and the status of them.

The CHAIRMAN. Well, I want the correct figures put in the record.

Mr. POTTINGER. Yes, sir.

The CHAIRMAN. It is obvious that you have not tried to enforce the law north of the Mason-Dixon line.

Mr. POTTINGER. Senator, what we have done is to apply our resources even greater in number to the Northern States than to the South.

The CHAIRMAN. What about the State of Pennsylvania?

Mr. POTTINGER. Well, we have been involved in cases.

Senator SCOTT. What have I got, Mr. Chairman?

The CHAIRMAN. No, he is doing a lot of talking. I want to see what he knows.

Mr. POTTINGER. But, Senator, I appreciate the apparent discrepancy in effort, but I would like to say, if I may say——

The CHAIRMAN. I want you to put in the record a racial breakdown of every school in the country.

Mr. POTTINGER. Yes, sir. May I also ask to supplement the record with the information indicating the extent of our resources North compared to South? It is true that we have not made the dramatic—

The CHAIRMAN. The resources that you have, North compared to South, do not mean anything. That is resources. What have you done? That is the question.

Mr. POTTINGER. I will certainly supplement the record with that information.

Senator HART. Would you, if the chairman did not ask for it, and he may well have, would you tell us how many cases you have referred to the Department of Justice, during the year, school year 1970-1971, and how many suits were commenced in the same schools?

Mr. POTTINGER. Yes, I will. I know the total figure is 200, but I do not have the breakdown as you just requested. We will furnish that.

Senator HART. When you entered upon your duties, had the Supreme Court or, indeed, any court, found that there was a 14th amendment pattern of violation in any area other than those areas of the country where it had the hardnosed dual system? I am pretty familiar with the cases in Michigan.

Mr. POTTINGER. I was trying to recall the time sequence. You said when I entered the office. It seems to me most of the cases in the North are more recent cases. As, indeed, the Southern States have surpassed the North in the extent of desegregation, the courts have turned their attention more to the North, and I think that you will find that that has been a recent occurrence, perhaps in the last 2 years. I am thinking of Denver and Detroit as examples.

Senator HART. And in the case of Ferndale, you cut off money?

Mr. POTTINGER. Yes, sir. I believe that they are presently in terminated status.

Senator HART. What I would like to get, in reaction to Judge Pratt's decision, is sort of a basic issue, a problem of legislative and executive relations. Let us assume that a statute, or just commonsense, would call for some initial effort at voluntary compliance, in this case school desegregation, and, indeed, have an immediate, tough enforcement mechanism which would involve acting now and talking about it later. Most of us would agree that there is that timelag permitted, but at some point does not failure to use the enforcement process as provided by the Congress have the effect of administrative repeal of legislation that we have passed to meet a problem? In a sense, that seemed to be the issue as drawn by Judge Pratt's order.

Mr. POTTINGER. It seems to be the issue, but in my opinion, Senator, and with complete due respect to the court, it misses the point. In the cases I mentioned a moment ago where the law and the facts are clear, and a reasonable period of time for obtaining relief has gone by, then I would not disagree one iota with your statement. Yes, to take a greater period of time in those circumstances would constitute a default. In a case where either the law is unclear, or, indeed, the facts are unclear, where the law applies to them, where you have those close cases, if you will, then it seems to me that the Department is not in a position to draw a conclusion of noncompliance based on a suspicion of noncompliance or based upon an investigation. It must then, in other words, begin the process of administrative enforcement, includ-

ing negotiations, only when it is satisfied that the facts and the law involved indicate that noncompliance exists.

Now, the court in some cases has assumed, because the plaintiffs have quite effectively argued this case, I guess, that in its opinion, a number of cases which are in a grey area, where noncompliance may not have been determined, nevertheless ought to be found in noncompliance, and since they have been in the office for a period of time, that that period of time constitutes more than a reasonable period of time for negotiation. I disagree in some of those cases. In some cases I believe that is correct, but I disagree that that characterizes either those numbers of cases we have pending now, or in any sense a large number of cases being specified in the order.

Senator HART. Admittedly it is a complex thing and I wanted you to have a chance to comment on that decision. I wanted to get your reaction to it, and I know the Senator from California has some questions in this area. If I have just a few more minutes, I will move to an area where, on this question of negotiation, discretion and timelag, it should be conspicuous by its absence and that is the Voting Rights Act of 1965.

Your understanding of your duties with respect to that will be of interest to this committee, because its enforcement will depend enormously upon your view of it. Section 5 of that act requires a coverage jurisdiction to clear any proposed change in law affecting voting rights. A change must be submitted for prior approval, either to a court or to the Attorney General. I think almost without exception they have always gone to the Attorney General, and your responsibility, among others, will be to advise the Attorney General when to object to the submitted change.

There are two distinct stages in this title VI enforcement. Our experience shows the first one comes when the covered jurisdiction simply does not submit a change for clearance and proceeds to implement it without compliance. Now, unfortunately the Civil Rights Division often has failed to enforce the act by failing to enjoin the implementation of the change until it has been cleared. Last year the House Judiciary Subcommittee on Civil Rights Oversight held hearings on enforcement of section 5. The subcommittee's report concluded that too many changes were put into effect, voting rights changes, before their submission to the Attorney General, and the Department systematically has failed to seek injunctive relief. The report considered the Department's explanations and still reached this conclusion, that the present enforcement policies have placed the burden on the people that Congress sought to protect, that given the present enforcement policies, the only prudent course that a citizen might pursue is to act as if the Voting Rights Act of 1965 had never been enacted.

That is at page 5 of their report. That sure sounds like a suggestion of administrative repeal of congressional intent, and that was a unanimous committee report, signed by the Republican members as well as the Democrats. Now, in light of that history, I want to find out your views on the Department's duty to prevent implementation of any voting law change covered by the act until it has been both submitted and approved, or technically not objected to by the Attorney General. Do you agree that while a minimal amount of effort to seek voluntary

compliance may be built into this Voting Rights Act, the basic thrust of the act is to enjoin any change until cleared, and certainly to prevent any election under a changed law until it has been cleared? Is that not the whole concept of this preclearance business?

Mr. POTTINGER. Senator, that is my understanding of the act as I read it.

Senator HART. That is your understanding?

Mr. POTTINGER. It is, yes. I hasten to add that having spent more of the time since my nomination was announced working on continuing HEW business than Justice business, I may be in error in part, but as I read the act, and as I read the correspondence which has taken place between this committee and the Division, I believe that your summary is a fair one.

Senator HART. All right, now. That is our understanding, yours at the moment and mine are the same. That is the way it happens when the law has been changed, and clearance not yet obtained. Once a proposed change is submitted to the Attorney General, he has to decide, with your advice, whether to object to it or not. The burden is on the submitting jurisdiction to establish that the change has neither a discriminatory purpose nor a discriminatory effect. If it has either, the Attorney General must object. That is what Congress, and subsequently the Supreme Court, suggested that section 5 of the 1965 act is all about.

The present administration has made plain its displeasure with this operation of section 5 and tried to eliminate it when it sent up its proposed extension of the Voting Rights Act in 1970. A bipartisan majority in Congress indicated our desire to retain section 5 undiluted. The administration then sought to change the burden of proof, which is critical, through administrative action during 1971, and a number of meetings between the Department and a bipartisan group in the Senate, and communications from civil rights advocates across the country, prevented this administrative change. Yet that still may not be the end of the matter. The same report of the House Subcommittee on Civil Rights Oversight unanimously concluded that Department's failure to object to various voting law changes, particularly certain regulation requirements, ignored the statutory standard as Congress intended it, and as the Supreme Court interpreted it. Now, without asking you about specific situations, which I certainly would not, can you tell us first whether it is your understanding that the Attorney General's role here permits no discretion, that rather it is a quasi-judicial function of evaluating the facts in the law, and unless he can find adequate evidence, with the burden of proof, that the change does not have a discriminatory purpose or a discriminatory effect he must object?

Mr. POTTINGER. Yes, I think that is correct. On the issue of discretion, my understanding is that there is no discretion as to whether the Attorney General or a court to which such a proposal has been submitted has the duty, statutory duty, to make that ruling. I would say that in the course of the making of the ruling there is undoubtedly some inherent area of discretion as to whether the facts proposed constitute apparent discrimination or not.

Senator HART. He has to make a judgment on it?

Mr. POTTINGER. The judgment would have to be made, yes. No discretion in making a judgment.

Senator HART. Without an affirmative finding that it has not the effect, he must object?

Mr. POTTINGER. That is my understanding of the act.

Senator HART. Second, do you agree that a practice has developed where a submission is made, and it is rather complicated and additional materials are needed, and while the act says that 60 days is the period during which he must make a finding, that the Department has, in effect, continued the running of the 60 days in certain cases? And do you agree that if the Department continues the 60-day period for the entry of objection, to get more information, that the Department must make sure that the change is not implemented in the meantime?

Mr. POTTINGER. Well, I am honestly not familiar with that provision.

Senate HART. Just commonsense would suggest, I think you would agree, that if the law requires that a finding within 60 days of non-discriminatory effect or purpose is required before the law change becomes effective, and if in negotiations they extend the 60-day period, and delay a finding, clearly if an election should occur in that extended interval, it should not be permitted that the new and yet undecided law become effective?

Mr. POTTINGER. Well, given the background as you have explained it, it does sound as though it is a logical conclusion.

Senator HART. Mr. Chairman, I have one other series of questions, but, let me yield to Senator Tunney.

Senator TUNNEY. Thank you, Mr. Chairman.

I am one who believes that very often, Mr. Pottinger, the public perception of one is commitment to any field of endeavor may vary and be different from what his own personal attitude is. I would like to say that I was impressed in the few minutes that I had with you listening to your comment on the role that you had played as an attorney in San Francisco in attempting to bring about equal opportunities for minorities. Perhaps other members of the committee would be interested in things that you have done. There may be a public perception that perhaps you do not have the enthusiasm for the civil rights laws that you should have in assuming this position of responsibility that you will assume if the Senate confirms you. Would you care to relate to the committee the things that you did in San Francisco as a practicing attorney?

Mr. POTTINGER. Yes. In your generous introduction you touched on most of the salient parts of the record. I did have occasion to represent indigent prisoners, minority prisoners, who had filed habeas corpus petitions with the Federal district court alleging a serious defect in the record with regard to the reasons for their incarceration. As you mentioned, on one occasion a collateral question to this activity I managed to carry to the U.S. Supreme Court and squeezed out a 5 to 4 victory on behalf of the chief judge in the State of California and the real party in the interest, the indigent prisoner. I advised the court with regard to other habeas corpus petitions and also represented additional clients along that same line.

There were other community activities of that kind.

The CHAIRMAN. We will recess at 12 o'clock. The Chair must leave. We will reconvene at 2:15. Now, I want this record to show every recommendation that you made to the Justice Department in the area of desegregation.

Senator TUNNEY. Shall I continue?

The CHAIRMAN. Until 12 o'clock.

Senator TUNNEY. Mr. Pottinger, I have received in the past several days correspondence from three minority groups urging that the Senate reject your nomination as Assistant Attorney General. One of these groups is the League of Academic Women at the University of California who stated in their letter, and I quote:

The League of Academic Women urges that you, as a member of the Senate Judiciary Committee, which must approve his nomination, make a thorough and critical examination of Mr. Pottinger's qualifications to direct the Civil Rights Division. We believe that such an investigation will reveal to you, and to the Committee, Mr. Pottinger's total lack of commitment to civil rights, and to those groups most in need of the protection of the Department of Justice.

The second group is the Asociacion Mixta Progresista, which describes itself as a nonprofit corporation composed of persons of Mexican descent residing in Sonoma County whose basic objective is to improve the living conditions of Spanish-speaking persons in Sonoma County who are underemployed, poor, and otherwise economically disadvantaged.

This group states that:

We have learned that he has been nominated to the position of Assistant Attorney General in charge of the Civil Rights Division of the Department of Justice. That nomination startles us in view of Mr. Pottinger's indifference to our problems.

A third letter came from the United Native Americans Inc. in San Francisco, an organization which identifies itself as representing American Indians. They have written the following letter:

Dear Senator Tunney, our organization is writing to oppose the confirmation of Stanley Pottinger as the head of this Nation's civil rights struggle.

On February 1, 1972, three native American organizations filed a formal title VI complaint charging civil rights violations by HEW in funding State and county welfare organizations. This complaint was filed on behalf of this Nation's third largest native American population—140,000 California native Americans.

It goes on to say that you took no action on the matter except for an immediate perfunctory and extremely polite letter acknowledging receipt of the complaint and indicating that the matter would be looked into in due course:

It goes on to say that you took no action on the matter except for an immediate perfunctory and extremely polite letter acknowledging receipt of the complaint and indicating that the matter would be looked into in due course:

Although native Americans in California do not think that Mr. Pottinger is antagonistic to our cause, we do not have confidence in him and do not believe that he will either be our advocate or that he will carry out his statutory mandate to protect our interests.

It goes on. It says:

In our civil rights complaint of February 1, 1972, we charged that HEW was acting with a "forked tongue;" we now believe that Mr. Pottinger is also acting in such a manner.

We are prepared to document our charges and can assure you that even an HEW survey of native Americans in California would show that there is no confidence in the Civil Rights Division of HEW.

It is signed by Lehman Brightman, president, United Native Americans, Inc.

Would you care to comment on these communications to my office?
Mr. PORTINGER. I would be pleased to.

Let me say generally that I think this is an example of one of the burdens one bears in attempting to deal with problems, raising expectations in the course of doing so, and not being able, not because of a lack of will, but because of law and other constitutional constraints, to deliver immediately on all of them. I say that because in each of the cases the irony is that our office has been deeply involved and earnestly involved in delivering the rights guaranteed by the act to the people who have been writing.

For instance, the League of Academic Women—and this is the first I have heard, incidentally, of any of these letters—I assume that was signed by Isabel Welsh. Isabel Welsh and I have known each other and dealt with each other on the issue of sex discrimination at the University of California at Berkeley for some months. Our office has undertaken a complete review of that matter. We have presented the university with findings which do, in our opinion, show discrimination. And as late as yesterday afternoon, we had our first negotiation session with regard to their response. The League of Academic Women simply does not agree with the procedures by which we are conducting a review. We do not in our office ordinarily, to my knowledge ever in the prior administration or this administration, especially where a court is overseeing a process, as it is here, involve third parties in negotiations between the Federal Government and the institution involved. Miss Welsh wants to be in on the negotiations. We have said no, so we have a disagreement on that.

I can say before I leave the point that I have no doubt that our office will deliver on the report that we have made, and which will also be made to the Federal court in San Francisco, and that there will be a fulfillment of the Executive order as it applies to that university campus. Indeed, I would even go so far as to add that this is the most extensive sex discrimination review that has been undertaken in the Federal Government, and to the best of my knowledge, by State or local governments as well. It has been done well by the regional office, and I have no reason to apologize for it, although I respect Miss Welsh and her views.

On the Asociacion Mixta Progresista, I do not know, but I am only perplexed to say that we have in Sonoma County notified the county that they are out of compliance with title VI based on what appears to us to be a discriminatory pattern of exclusion of Spanish-speaking personnel in the county welfare office. This is also groundbreaking. There has never been a case brought in private litigation or Federal litigation on behalf of the Spanish-speaking community in this regard. And all I can say is that we are very happy about the extent to which a careful review has taken place, and that we are making progress in this area. But by the same token, I have no doubt, and I believe I deeply understand that when the Government attempts to make new law of this kind, and attempts to fulfill rights of this kind, it raises expectations in the community, and if it does not happen immediately, there are disappointments. And I assume that that is what is involved here.

Lee Brightman of the United Native Americans has been providing our regional office with complaints, many of which, if not most of which, we do not have jurisdiction over. There are others of which we have asked for additional information, such as "please give us the names of individuals who are involved in the alleged discrimination so that we can contact him," and his answer to that has simply been "I am not going to do it. That is not my job. I am alleging there is a discrimination at a given place; now it is your job to go find out." Our position is that every complaint we receive will be investigated. We have a tremendous backlog, Senator, but everyone will be investigated, including those that Mr. Brightman has provided us. But, we will not be raising a complaint to a priority level when we cannot obtain names and addresses of individuals against whom discrimination is involved, or where we cannot get the cooperation of the individuals, as we do in virtually all other cases.

Again, we simply disagree. Mr. Brightman calls frequent press conferences, and if people show up, he says the same thing that he says in the letter. I happen to disagree with him. I do not have a disagreement, however, with the conclusion that there are many native Americans in the State of California and elsewhere who are the subject of various kinds of problems and deficiencies which our office has continuing responsibility for. And we have for the first time ever in HEW, last February, constituted a National American Indian Task Force to assist us in that task.

Senator TUNNEY. How many complaints have you received regarding violations of civil rights of native Americans? I do not think that you would have to indicate at this time the exact number, but could you give us some indication generally of the number? Hundreds?

Mr. POTTINGER. I do not know. No, I would not say there are hundreds. I would have to canvas the regional offices.

As you know, Senator, there is a tendency to believe that American Indians exist only in the West. In fact there are many American Indians in all regions in the country, including the 10 regional offices which we have, and we have been dealing with the problem around this country.

Senator TUNNEY. Since 1970, have you cut off any funds to any organizations that have discriminated against American Indians?

Mr. POTTINGER. We have brought for the first time in the office, the first case on behalf of American Indians on a possible cutoff in Shwano, Wis., on behalf of the Menominee Indians, and that case is in progress.

Senator TUNNEY. Any in California?

Mr. POTTINGER. I do not believe so. I do not recall at this moment that there are.

Senator TUNNEY. Have you considered this to be a high priority in your own personal understanding of your role?

Mr. POTTINGER. I certainly do. In fact, I would go further than that and point out that traditionally, and until very recently, I think that the perception has been in the public, and perhaps in the Congress as well, that the Office for Civil Rights exists solely on behalf of school desegregation, or busing, or on behalf of the black community. In fact, in addition to the problems of school desegregation, we have a mandate in many other areas and on behalf of many other minority communi-

ties against whom discrimination has been shown. We have undertaken in the last 18 months not only to recognize that fact, but to put in motion programs and onsite reviews on behalf of the American Indian community, on behalf of the Spanish-speaking community, the Puerto Rican community, the Mexican-American community of the Southwest, and the Rocky Mountain States in the Far West, so I would say a definite yes.

Senator TUNNEY. Is your task force looking into any of the complaints made by Mr. Brightman?

Mr. POTTINGER. I do not know the answer to that. They ordinarily do not look into the complaints. They are advising us on where problems exist that we can pursue with the highest priority.

Senator TUNNEY. Have any of the complaints made by Mr. Brightman contained specifics as to who the individual is allegedly who is doing the discrimination?

Mr. POTTINGER. It may. I gave you my answer based on the report from the San Francisco regional office. I did indeed inquire as to why Mr. Brightman was alleging that there was default and received a heated response that we have been attempting on more than one occasion to obtain information from him, and he refuses to provide it to us. I don't think that is the end of the matter. I believe we have to do our utmost to be sure we follow up on complaints, as I said before, even if we do not have the level of information that we ordinarily get. But I do not know. I am not prepared to say that our regional office in San Francisco has defaulted on its fair obligations to Mr. Brightman. I do not believe that.

Senator TUNNEY. You have indicated to your regional office that you want them to extend not only every courtesy to Mr. Brightman, but thoroughly to investigate every allegation charged?

Mr. POTTINGER. Yes, and I intend to see that that is done.

Senator TUNNEY. Do you view the language of title VI in the Federal Civil Rights Act that Federal funds may not be used to assist programs or activities which are discriminating on the basis of race, color, national origin, as merely a suggestion, or do you believe that Congress meant what it said in enacting that part of the Civil Rights Act, that Federal assistance must be terminated?

Mr. POTTINGER. I believe it either must be terminated, or injunctive relief sought through the Justice Department as set forth in the regulations. That must be secured, yes, and I do not believe that this is a matter of discretion.

Senator TUNNEY. One of your major responsibilities, as I understand it, was the coordination of title VI activities through the Federal Government. Enforcement now appears to be very uneven with the equal opportunities in some agencies being better than others. What steps do you plan to take as civil rights coordinator to make the Federal civil rights enforcement more effective?

Mr. POTTINGER. I think that is an excellent question. As I understand it, there is in the regulatory scheme, a responsibility in the Justice Department to coordinate all title VI activities. Very recently, I guess in just the past few months, the Division has elevated this coordinating function to the level of a section, which is the basic level of responsibility in the Civil Rights Division. I have had occasion to work with that section in my capacity at HEW. In that section I found

that the people who were working there, and the work they are doing, is excellent, and needed, and I would very much like to see that function, as appropriately defined, expanded and used so that there is a coordinated function, so there is better coordination.

Senator TUNNEY. Do you feel a sense of commitment sufficiently strong that you would be prepared to take on agency heads, privately initially, but even with your boss, the Attorney General, if you feel that various agencies are not responding in the way that you feel that they should?

Mr. POTTINGER. I would make a distinction between taking on the Attorney General in the same sense that I would take on another agency.

Senator TUNNEY. I understand. You going to him——

Mr. POTTINGER. And advising and recommending——

Senator TUNNEY. And be prepared to risk perhaps the security of your own position in being prepared to take on other Federal agency heads if you feel that they are not showing a proper responsiveness?

Mr. POTTINGER. Well, I do; yes. Of course, I like to think, I would say in preface to that, that there would not be a major disagreement between the Attorney General and myself on an issue of coordination, but I say as a general matter in this area or elsewhere that if there is, if I am confronted with the default on the responsibilities that I have under the Constitution, and to which my oath attaches, and cannot resolve it, then I think I would be obliged to make a change of position. Having said that, I do not wish in any sense to suggest that I expect that would happen. In fact, I do not believe it will happen.

Senator TUNNEY. Will you share with us your opinion of the effectiveness of the Federal efforts to insure equal opportunity in areas other than education, areas such as employment, housing, and voting rights?

Mr. POTTINGER. Well, I believe that there are great opportunities in areas other than education, not to diminish those opportunities in education, but to make clear that the national attention, the attention of much of the press and the Congress has been focused on the emotional, difficult, and complex issues of busing, and I think so much so that perhaps there has been an oversight on the part of all of us with concern, with regard to delivery of guaranteed civil rights in these other areas. I have been involved in the area of employment opportunities at HEW and believe that there are many important steps that have been made. At first I thought that it was a shame that the steps that were being taken did not generate a great deal of attention and and enthusiasm. I later came to change my mind about that and believe that, indeed, perhaps the quiet with which we have been able to proceed has permitted us to do more effective work. In other words, perhaps the controversy that settles on one or two issues provides a kind of vehicle for other work to be done in other areas quietly, and I think that the same is true in the additional responsibilities that I would have at the Justice Department.

Senator TUNNEY. How about housing?

Mr. POTTINGER. There are some important steps that can be taken and ought to be taken in that area. I think that the position of the Justice Department with regard to securing on a citywide or district-wide basis fair housing codes, with local enforcement as a mechanism,

sounds to me to be a good one. I am familiar with it only to that extent, and with the statute to that extent, but it has been effective. It has stimulated local action of a kind that cannot be done strictly through a Federal presence. With the Federal presence measuring the effectiveness of local monitoring agents, it seems to me that that kind of voluntary action, and the catalytic effect that the Justice Department can have there, keeping in reserve the enforcement where that fair housing enforcement breaks down, is a wise policy.

Senator TUNNEY. We could, of course, spend a good bit of time in each one of these areas, employment, housing, and voting rights. The committee obviously does not have time to go into great detail, but I would like to ask you this: Do you feel that in the Civil Rights Division that there is an adequate plan now to bring about equal opportunities in all three areas, employment, housing and voting rights, and if not, what do you intend to do about it?

Mr. POTTINGER. Senator, I honestly do not know. I can say that I have nothing but the highest regard for my predecessor, Dave Norman, and his predecessor, Jerris Leonard. I believe that given the tremendous strains and demands that were made on them as individuals, and on their office, they performed in ways for which they will never receive public credit. But, to the extent that we must all recognize that the problems we face are still greater than our resources and our ability to deal with them immediately, I believe there is always room, I hope there is room for more effective enforcement. If it is possible to have more effective enforcement, I would attempt to secure it.

Senator TUNNEY. Do you feel that it is perhaps advisable with some of the actions that are being taken, and some of the policies that are stamped in the Division, that there be more public attention, as opposed to just doing it quietly, on the assumption that people tend generally to have greater confidence in the responsiveness of government if they know what is going on, rather than working quietly, if you will, behind an opaque wall in a way that may deny hope to minorities?

Mr. POTTINGER. I think that is a step that one must keep carefully in balance, and the balance in my opinion is this: On the one hand, one must always make sure that the public which you are serving understands what you are doing, not only to correct deficiencies but, as you say, to sustain hope, and the drive that stems from it. On the other hand, I also believe that by generating an excess of rhetoric, we have seen in our recent past a tremendous kind of backlash from the minority community which is that expectations have outstripped our ability and the ability of any reasonable person to fulfill them. I think that is a terrible blow. So, maintaining the balance between those two positions is very important, I think, and I hope that I will be able to do that at the Justice Department.

Senator TUNNEY. In light of your view of title VI, is it the case that there are many school districts which have not complied with title VI and yet have received and continue to receive Federal assistance from HEW? Is that true?

Mr. POTTINGER. No, I do not believe that it is true. Let me say that there is at least in one part of the opinion an error of fact based on my own testimony, which itself is based on incorrect information that, through no one's fault, came to my attention during my deposition. Today an affidavit will be filed with the court correcting the record

with regard to the court's findings. This is probably an inappropriate place to say it, but the question has been raised twice, and I feel compelled to answer it. Specifically, I am talking about the court's finding that there are 74 districts that had reneged on agreed plans, and where we knew of them, yet supposedly took no action. I found that, and still find that difficult to believe, and I just did not believe it. Certainly there is no policy in the Office of Civil Rights not to act on reneges. Our policy is just the opposite, and our education division did check into those districts, which I testified to on the basis of information that came to my attention, and it now turns out that, in fact, those districts did not exist. It was a mistake. I have a memorandum here in front of me which you are entitled to if you would like to see it. It will be filed with the court, I believe, today.

Now, there are other areas of the suit, and I think there are other answers to the other areas. But that, to me, was the most damaging conclusion, if it were true; that is, that we knew. It is not a question of unclear law and unclear facts, but a district supposedly had filed a plan, and the plan had been agreed upon, and then failed to carry it out. If that were true, and the office had not taken action on those districts, I think that that would be insupportable action or nonaction by me in the office, and all I can say is that it has caused us embarrassment to have that mistake in the record. But it is a mistake. That is not our policy. Those districts have not gone unattended for 2 years, and I intend to make sure that none do so long as I am there or at the Justice Department.

Senator TUNNEY. The chairman indicated that we should recess at 12 o'clock.

Senator HART. We will recess until 2:15.

[Whereupon, at 12:05 p.m., the hearing was recessed to reconvene at 2:15 p.m. this same day.]

AFTERNOON SESSION

Senator HART (presiding). The committee will be in order.

Senator Tunney had not, as I understand it, had an opportunity to conclude his questions when we took the recess. Some of his questions were directed to several of the specific findings in the *Adams* case. I am not suggesting that he would have asked this question, but the likelihood is that he would. The court, I believe, concluded in regard to about 42 school districts that the plans under which they had been operating did not meet the standards that the *Swann* case required as to the necessary degree of desegregation and the court found that you did not take adequate enforcement steps to update those 42 order plans. Could you comment on that?

Mr. POTTINGER. Yes. As I mentioned briefly, in none of the 42 cases are we talking about a dual system existing. They are all update cases, if they are that. In each of the cases, the question that remains to be answered is one of this kind: Since the Supreme Court found, handed down its finding in the *Swann* case in April of 1971, we attempted, I think with some diligence, to ascertain what school districts throughout the country would be subject to updating. Unfortunately, there is no clear formula for doing so nor is the information one has about school districts uniform or complete that you could determine it without making certain estimations, Senator.

So what we did, on the basis of a computer printout, was to determine which school districts had one or more schools that were mostly black if the school districts were mostly white, and vice versa, if it were mostly a black school district did it have one or more schools that were mostly white.

Now, that standard in itself, which gave us a basic cut at what school districts might be subject to compliance, does not, obviously, mean the districts are in noncompliance. To give you an example, a school district might be 45 percent black as a whole and clearly desegregated but one school which is, say, 52 percent black. That school would be 7 percentage points off a perfect balance. Clearly one would not say that is a disproportionate school or a black school, and yet that school would appear on our computer list because it had a majority black school.

What we attempted to do then was to weed out from those school systems that appeared on the list those that appeared to be, that had, an all-black school or which appeared on the basis of additional information we had had a substantial disproportionate school. The 42 cases that you are talking about were in most cases, with few exceptions, the toughest cases to call because they involved figures in a gray area. Perhaps the school involved—at lunch today we were talking about one such district where there was one school that is majority black, about a half hour's distance away from the closest pairable school, and all other schools in the system are either majority white or were balanced.

What kind of burdens under the *Swann* decision that imposes on a district were the kind of questions we were asking and, as I said, in some cases, I think, there are clearly some additional steps that have to be taken and in the course of our continuing enforcement they will be taken. There are others that we found or believed are not in non-compliance because of lack of either clear standards or agreement on it.

What the court found was not, though, that the school districts should be subject to further steps. Let's be clear about that. What the judge found was that based on HEW's own conclusions, if HEW found that a district had further steps to take, in the court's opinion the time for further voluntary negotiations had expired as of November 16 and, therefore, the court said, "Take the action either by referral to Justice or by administrative action."

My own opinion is that that is exactly what we ought to do and what we are in the process of doing by updating the files and taking that kind of action.

Senator HART. As of the moment, however, none of those districts has been referred either for a suit to update or notice toward an administrative hearing?

Mr. POTTINGER. Most of them have not but I can't tell you that none has not been subject to one or the other. I just offhand don't know.

Senator HART. Finally, on a manpower question: When a Member of Congress inquires of the civil right division with respect to enforcement performance, sometimes we are told that it is a problem of inadequate manpower, lack of resources. I am not aware of the administration seeking to obtain an increase in the manpower for the division or any congressional resistance. There have been reports of a decline in the number of lawsuits filed by the Civil Rights Division in the last year and a half.

If you are confirmed, would you be in position to furnish the committee a tabulation of the number of lawsuits commenced by the Division in each of its major areas of responsibility, housing, employment, voting rights, in each of the last 4 years.

Mr. POTTINGER. Four years?

Senator HART. Yes, 1969, 1970, 1971, 1972.

Mr. POTTINGER. Assuming that those statistics are available, and I am quite sure they are, I would indeed do so, yes.

Senator HART. Would you furnish us at that time or as soon as you could, after you have had a chance to review the problem, if any, of the manpower division, an estimate of what additional manpower or resources would be required to make fully operational the enforcements and supervision of section 5 of the Voting Rights Act, for example, and other key elements in the enforcement responsibility?

Mr. POTTINGER. I would give you my best opinion on that, yes, sir.

Senator HART. Finally, we are in the process of giving substantial additional sums of money to State and local governments for general purposes but with some minimal restriction on the way those local governments can buy services or otherwise use the money. One of those restrictions, of course, will be compliance by that local unit of government with the civil rights laws under the 14th amendment. I think it would be useful also if you could indicate what additional manpower would be needed if you are going to be able to fulfill the oversight responsibility for civil rights compliance, which I would assume would be your responsibility along with the Treasury Department as those revenue-sharing funds begin to bite in, out in the country.

Mr. POTTINGER. Yes, sir; I would be pleased to give you that opinion.

Senator HART. Thank you very much. That is all I have.

Senator ERVIN (presiding). Senator Hruska, do you have any questions?

Senator HRUSKA. I have no questions.

Senator ERVIN. That is all.

Mr. POTTINGER. May I, in response to questions raised this morning about supplementing the record, may I briefly offer for the record now the material that was requested this morning? We did have occasion at the lunch hour to gather it.

Senator ERVIN. Yes.

Mr. POTTINGER. Is that agreeable?

Senator HRUSKA. It was to be submitted for the record?

Mr. POTTINGER. Yes, sir.

Senator HRUSKA. Can it be done in that fashion?

Mr. POTTINGER. Fine. Would you like a brief description of what it is or shall we just submit it?

Senator HRUSKA. If you have it in writing wouldn't that be sufficient, Mr. Chairman?

Senator ERVIN. I would think so. Of course, if he wants to explain the writing I see no reason to object to it.

Mr. POTTINGER. It is all in writing.

Senator ERVIN. That is the best evidence according to an old rule of evidence.

[Laughter.]

Senator ERVIN. That is all.

Mr. POTTINGER. Thank you.

[Whereupon, at 2:40 p.m., the hearing was concluded.]
 [Mr. Pottinger subsequently submitted the following material.]

DEPARTMENT OF JUSTICE,
 Washington, D.C.

HON. JAMES O. EASTLAND,

Chairman, Senate Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR EASTLAND: I am submitting this letter to completed the testimony I gave to your committee on January 30, 1973. Please excuse the delay.

Senator Hart inquired (T. 18) about the number of school districts referred by HEW to the Department of Justice in connection with the districts' plans for the 1970-71 school year and the number sued as a result of these referrals. To fully explain the situation about which Senator Hart was inquiring, I should put it in its historical context.

Prior to the 1968-69 school year, compliance with the existing legal standards for desegregation could be achieved by local school boards through the adoption and implementation of a freedom-of-choice student assignment plan. See, *United States and Stout v. Jefferson County Board of Education*, 372 F. 2d 836, *aff'd en banc*, 380 F. 2d 385 (5th Cir, 1968), *cert. denied sub nom. Caddo Parish School Board v. United States*, 389 U.S. 840 (1967). The Supreme Court decision in *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), in May of 1968 and subsequent lower court decisions regarding the implementation of the legal principles announced in the *Green* case, had the effect of requiring the complete reorganization of formerly dual school systems. As a result, many school districts which had been in compliance with HEW regulations were no longer in compliance with the Fourteenth Amendment standards being enforced by the courts.

During 1969, HEW and Justice were engaged in the process of bringing school districts into compliance with the new standards. Over 250 school districts which had not previously complied with *Green* put into effect either voluntary or court ordered plans to reorganize on a unitary basis by the beginning of the 1969-70 school year. That Fall, in *Alexander v. Holmes County Board of Education*, 390 U.S. 19 (1969), the Supreme Court held that further delays in dismantling dual systems were constitutionally impermissible. It was within this framework that I took office as the Director of the Office for Civil Rights at HEW, and we set out in coordination with the Department of Justice to obtain compliance with the *Green* standard in as many school districts as possible by the commencement of the 1970-71 school year.

I would like to explain that we decided to forego the formal referral process which is ordinarily used in situations where a school board promises HEW to follow a specific plan and then reneges on its promise. Here we were dealing with boards who were following the plans they had promised to implement, but the plans were no longer in keeping with legal requirements. What was required in the Spring of 1970 was the development of entirely new plans calling for reorganization of the school districts.

As a first step, we reviewed the status of every school district in the states which had previously required racial segregation in public schools. Based on this study, I sent to the Department of Justice during the Spring of 1970 lists to the identifying 225 school districts whose plans were not in compliance with *Green* and who were not already in litigation. These districts were in Arkansas, Florida, Mississippi, North Carolina, South Carolina and Texas. The Department of Justice then sent letters notifying the state departments of education in these states that the districts were out of compliance and asked the state departments to set up meetings between Justice and HEW representatives and officials of the individual school districts. As a result of these meetings, 128 of the districts submitted plans which the Office for Civil Rights at HEW was able to accept as in compliance with the *Green* standards. Ninety one of those which failed to submit acceptable plans were sued by the Justice Department during the summer of 1970. The few who did not submit new plans and who escaped suit that summer included such districts as Conway County, Arkansas, where the problem was too complex for easy resolution and which has since been sued by Justice.

In addition, we identified thirty four districts in Georgia, Louisiana, Tennessee and Virginia which were out of compliance and not in litigation. Because there were so few in each state our contacts with state officials were handled in a less formal manner. We obtained voluntary compliance settlements with twenty of these school districts and Justice initiated law suits against five.

Of the fifteen districts which failed to submit satisfactory plans and which were not sued during the summer of 1970, two were sued by private plaintiffs and the remainder have been the subject of subsequent enforcement activity.

Senator Hart also inquired (T. 48) about the number of lawsuits commenced by the Civil Rights Division in recent years by subject matter area. I am enclosing a table setting forth that information.

Finally, Senator Hart asked (T. 48-49) about the Civil Rights Division's need for additional manpower, particularly with respect to the Division's new responsibilities under the Local Fiscal Assistance Act of 1972 (Revenue Sharing). It is still too early in my tenure here for me to assess the resource requirements of the Civil Rights Division. As for the revenue sharing, we are working with the Treasury Department on the development of an enforcement program. I will not be in a position to consider manpower needs in that area until that developmental work is completed.

Thank you for the courtesies extended to me by the Committee. Please call upon me if you desire any further information. I am enclosing a copy of the transcript with my corrections.

Sincerely,

J. STANLEY POTTINGER,
Assistant Attorney General, Civil Rights Division.

CASES INITIATED BY CRD

	Fiscal year—				
	1968	1969	1970	1971	1972
Criminal.....	11	29	51	50	38
Education.....	14	24	29	21	1
Employment.....	24	19	6	12	21
Housing.....	0	9	38	40	14
Public acc.....	23	45	22	32	34
Public fac.....	0	1	2	3	0
Voting.....	4	2	2	5	7
Other.....	0	0	0	5	0
Total.....	76	129	150	168	115



