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The Federal Agricultural Stabilization Program and the Negro

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THE FEDERAL AGRICULTURAL STABILIZATION PROGRAM AND THE NEGRO

I. INTRODUCTION

It is not now, if it ever was, possible to believe that racial discrimination is an evil confined to the southern United States. Events of recent years have made it depressingly clear that some of the ugliest and most intractable forms of bigotry can appear in any part of this country. Still, it cannot be overlooked that certain manifestations of racial ill-will are largely if not entirely southern phenomena. One of these is the wholesale exclusion of Negroes from the processes of government. The most obvious aspects of this problem have been widely publicized, and have resulted in federal legislation—most importantly, in the Voting Rights Act of 1965.[1] But it has been little noticed that a program created by the federal government, and administered by the United States Department of Agriculture, remains, in the South, under virtually all-white control—even where the people it affects are mostly Negro. This is the program of the Agricultural Stabilization and Conservation Service, which determines the number of acres of certain basic commodities that every farmer may plant or market. The exclusion of Negroes from the ASCS program means that decisions which can cause economic disaster for small Negro farmers are committed to rural southern whites.

Under the ASCS program, national, state, county and individual farm quotas are determined annually for affected products.[2] Ultimately, the individual farmer is given an acreage allotment which he must respect; if he does not, he may be penalized.[3] Committees elected, indirectly, by local farmers determine and enforce these individual farm allotments.[4] The committees have broad discretion which may be subject to virtually unreviewable abuse.[5] It is submitted that while Negroes remain unrepresented on these committees, such abuse is inevitable; and that its effect must be to perpetuate the continuing emigration of Negroes from the rural South, and the hard-core

1. 42 U.S.C.A. §§ 1971-73 (Supp. 1966).

2. Commodities over which extensive controls are exercised include: tobacco, 7 U.S.C. §§ 1312-13 (1964); corn, 7 U.S.C. §§ 1328-29 (1964); wheat, 7 U.S.C. §§ 1332-34 (1964); cotton, 7 U.S.C. §§ 1342-44 (1964); rice, 7 U.S.C. §§ 1352-54 (1964); peanuts, 7 U.S.C. § 1350 (1964).

For an adequate description of the program see Brooks & Campbell, *Marketing Quotas Under the Agricultural Adjustment Act of 1938*, 26 GEO. WASH. L. REV. 255 (1958).

3. *See, e.g.*, 7 U.S.C.A. §§ 1314 (tobacco), 1339 (wheat), 1346 (cotton), 1356 (rice), 1359 (peanuts), 1379i (wheat marketing restrictions), 1380n (rice processing and importing restrictions) (1964 & Supp. 1966).

4. Statutory provisions for the election of local committeemen are provided in 16 U.S.C.A. § 590h(b) (Supp. 1966). The specific statutory provisions for the various commodities provide for the use of these committees in apportioning allotments. *See, e.g.*, 7 U.S.C. § 1313(b) (1964) (tobacco); 7 U.S.C. § 1344(f)(3) (1964) (cotton).

5. *See* 7 U.S.C. § 1344(f)(3) (1964) which gives the county committee discretionary authority to reserve a percentage of the county allotment for "making adjustments."

poverty of those who remain.[6] When a federal program is infected with racial discrimination, federal law is violated. If neither Congress nor the Department of Agriculture will take the initiative against this lawlessness, relief must be sought in the federal courts.

II. The Operation of the ASCS System

A. *The Committees*

"To direct the administration"[7] of the various federal farm programs, Congress has created a hierarchical system of state, county and community committees.[8]

1. *The State Committees.* Each state committee consists of three to five farmers, legal residents of the state, appointed by the Secretary of Agriculture.[9] The committee's most important task is to supervise the elections of county and community committees. In performing this task, the committee has considerable discretion.

The state committee first determines whether an election shall be by ballot, meeting or mail.[10] More important, the committee may determine that an election was not "substantially in accordance with instructions,"[11] or that the number of eligible persons voting was so small that the result does not represent the views of "a substantial number of eligible voters."[12] In such cases the committee may declare the election void and call a new election. This power could be an effective weapon against discrimination in local elections. The state committees could enforce the Department of Agriculture regulations against discrimination[13] by issuing explicit instructions that the regulations be obeyed and by voiding elections whenever there is substantial evidence of exclusion of Negroes. Alternatively, the committee could lay down a rule that whenever evidence of exclusion on a racial basis appears, it will be concluded that the election did not represent the views of a substantial number of voters.

But state committees have yet to take such firm action against racial exclusion. A likely reason for their inaction is not hard to find. The 1965 Civil Rights Commission Report, *Equal Opportunity in Farm Programs*, indicates

6. *See* M. Harrington, The Other America 43-51 (1963).
7. 7 C.F.R. § 7.3 (1966).
8. *See id.*
9. *See* 16 U.S.C.A. § 590h(b) (Supp. 1966).
10. United States Department of Agriculture, Agricultural Stabilization and Conservation Service, ASCS Handbook: County and Community Elections ¶ 14(A) (5-17-1966) [hereinafter cited as Handbook].
11. 7 C.F.R. § 7.8 (1966).
12. [I]f the number of eligible voters voting in any election of community committeemen is so small that the State committee determines that the result of the election does not represent the views of a substantial number of eligible voters, it shall declare the election void and call a new election.
7 C.F.R. § 7.8 (1966).
13. 7 C.F.R. § 15.51 (1966).

that as of 1964 not one of the 266,000 Negro farmers in the South had been appointed to a state committee by the Secretary of Agriculture.[14] According to a tentative draft report of the National Sharecroppers' Fund, the situation has scarcely improved since publication of the Commission's report. Only two southern Negroes have been appointed as state committeemen since 1964.[15] As long as membership on state committees remains largely restricted to whites, it is improbable that these committees will show any concern for the interests of Negro farmers.

2. *The County Committees.* The county committee is the heart of the ASCS allotment system; it is responsible for acreage allotments to individual farmers. These allotments are to a degree controlled by a statutory formula based upon past acreage devoted to the crop,[16] but the county committee has broad discretion to apportion a given percentage of the county allotment on the basis of "trends" or to new farms entering the production of the crop.[17] Furthermore, when a major release of acreage for production takes place, the county committee apportions the additional acreage among producers who apply for shares of it.[18] The committee also reviews the application of any farmer who files a complaint concerning the size of his allotment.[19] Finally, the county committee is charged with supervising contracts between landowners and their tenants and sharecroppers as to the division of annual payments "on a fair and equitable basis."[20] Regulations explicitly provide some safeguards: they require proportional benefits and prohibit termination or modification of the landowner-tenant relationship for the purpose of exacting an unfair share for the landowner.[21] Enforcement of these safeguards is primarily the duty of the county committee.[22]

The county committees consist of three regular members and two alternates, all of whom must be farmers resident in the county.[23] The members are elected for three-year terms by the community committeemen[24] who in turn are elected by all eligible farmers of the respective communities.[25] The Civil Rights Commission found that in 1964 there were no Negroes among the 5,000 county committeemen in eleven southern states.[26] Whatever efforts

14. UNITED STATES COMMISSION ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN FARM PROGRAMS 90 (1965) [hereinafter cited as EQUAL OPPORTUNITY].
15. NATIONAL SHARECROPPER'S FUND, DRAFT REPORT ON DISCRIMINATION IN DEPARTMENT OF AGRICULTURE PROGRAMS 22 (1966) [hereinafter cited as DRAFT REPORT].
16. *See, e.g.*, 7 U.S.C. §§ 1313(b) (tobacco), 1344(b) (cotton) (1964); EQUAL OPPORTUNITY at 90.
17. *See, e.g.*, 7 U.S.C. §§ 1313(b)-(c) (tobacco), 1344(b)(3) (cotton) (1964).
18. *See* EQUAL OPPORTUNITY at 93-94.
19. *See* 7 C.F.R. § 711.14 (1966).
20. *Id.* § 750.167(b).
21. *See id.* § 750.525; 31 Fed. Reg. 3487 (1966).
22. 7 C.F.R. § 750.167(b) (1966); 31 Fed. Reg. 3483 (1966).
23. 16 U.S.C.A. § 590h(b) (Supp. 1966). Provision for the election of alternates is contained in 7 C.F.R. § 7.12(a) (1966).
24. 16 U.S.C.A. § 590h(b) (Supp. 1966).
25. See notes 30-35 *infra* and accompanying text.
26. EQUAL OPPORTUNITY at 107.

may have been made since 1964 to end the exclusion appear to have achieved little. The 1965 elections produced the election of only five Negroes—all second alternates.[27] By 1966 the crest had passed and only two Negro committeemen were elected, again as second alternates.[28] Yet in many southern counties there are more Negro than white farmers.[29]

3. *The Community Committees.* Participating farmers[30] in each community elect a community committee of three resident farmers.[31] The size of each community is determined by the Secretary, who is required to designate local areas as units for the administration of various programs.[32] In one-community counties the community and county committees are identical.[33] In multi-community counties the community committees assist the county committee in informing farmers of ASCS programs and in carrying out other assigned duties.[34] But the most important duties of community committeemen are to supervise elections and to select county committeemen at an annual convention.[35] Obviously exclusion of Negroes from the community committees is a convenient means of effective exclusion from county committees.

In 1964, of 37,000 community committeemen in the South, 75 were Negro.[36] Some progress has been made since that time. In 1966, 113 Negroes were elected regular committeemen, an additional 430 Negroes became alternates.[37] Ordinarily, alternate community committeemen do not participate in selecting the county committee. Thus, it is not surprising that only two Negroes were chosen as alternate county committeemen in the county conventions of 1966.

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27. DRAFT REPORT at 17.

28. Letter from National Sharecropper's Fund to Columbia Law Review, March 13, 1967, on file in Columbia Law Library.

29. *Cf.* EQUAL OPPORTUNITY, Appendix F, at 129-30.

30. *Who May Vote For Committeemen and Delegates*

> Any person who is of legal voting age and who has an interest in a farm as owner, tenant, or sharecropper and any person not of legal voting age who is in charge of the supervision and conduct of the farming operations on an entire farm shall be eligible to vote for committeemen and delegates in the community in which he has such an interest. . . .

7 C.F.R. § 7.5 (1966).

Restrictions on Voting

> Each eligible voter shall be entitled to only one vote on any one ballot in any election held in any one community or in the county convention.

Id. § 7.6.

The presence of the one man-one vote standard and the insistence that even sharecroppers have a vote answer arguments that the committees were intended to consist of the expert, i.e., most successful, farmers in the county. With every farmer accorded a vote the expectation must have been that the bodies elected would be representative and not highly "expert."

31. 16 U.S.C.A. § 590h(b) (Supp. 1966).

32. *See id.*

33. *Id.*

34. HANDBOOK at 21.

35. *See* 16 U.S.C.A. § 590h(b) (Supp. 1966).

36. EQUAL OPPORTUNITY at 92.

37. Letter from National Sharecropper's Fund to Columbia Law Review, March 13, 1967, on file in Columbia Law Library.

B. *The Causes of Racial Exclusion*

It should be evident from the foregoing summary that the key to white domination of the ASCS system is the elections at which community committeemen are chosen by local farmers. At these elections, nearly all-white community committees are elected; these in turn elect nearly all-white county committees, which play the central role in the program. It remains to inquire why more Negroes are not chosen in local elections.

Part of the explanation is that the elections are supervised by the incumbent community committees. The whites who have always dominated these committees thus have some opportunity to perpetuate their power. It has been said that Negro farmers often receive inadequate notice of pending elections, and that the ballots sent to Negroes are sometimes defective.[38] It is quite possible that some of the abuse is unintentional; white committeemen not consciously trying to bar Negroes from the program may still be inattentive to the needs of Negro farmers. In any event, petty flaws in the election procedures cannot completely account for the almost total white control of the ASCS system.

Overt intimidation of those who attempt to vote or to run in community committee elections poses a more potent threat to Negro participation. Examples of intimidation have been documented[39]—but not nearly enough examples to explain the pervasive exclusion that exists. It seems the explanation is subtler, and in a way more troubling: Negroes in the rural South are simply not in a position to challenge white control of local institutions unless a systematic effort is made to organize them for that purpose. The economic dependence of Negro sharecroppers on white landowners and the history of violent reprisal by southern whites against southern Negroes keep the Negro "in his place" far more effectively than individual threats or actions.

In the few cases where Negroes have been organized to vote in ASCS elections, local whites have responded with coercion and with subterfuge.[40] Subterfuge was used with remarkable effect in Lowndes County, Alabama, where officials were ordered to place the names of Negro candidates on the ballot. The officials complied to the point of excess; some sixty-nine Negro farmers were listed as candidates. Negro voters, including many who had never voted before, were confused; and the Negro vote was split. The election of white candidates thus was assured.[41]

But in most southern counties no organized resistance to Negro participation has been necessary—because no systematic effort to involve Negroes has occurred. The ASCS and the Department of Agriculture generally are in

38. DRAFT REPORT at 20.
39. *See id.*; EQUAL OPPORTUNITY at 92.
40. *Id.*
41. DRAFT REPORT at 19-20.

part responsible. Not until 1965 did ASCS print literature designed primarily to encourage Negro farmers to participate.[42] More important, other programs of the Department have failed in their duty to Negro farmers. In particular, the Extension Service, which is supposed to educate farmers and inform them of their rights under Department programs, was organized on a formally segregated basis in the South through 1964,[43] and is still segregated de facto.[44] No extension workers serve Negro farms in some counties; in many others, service is inadequate.[45] The failings of the Extension Service inevitably contribute to the ignorance of southern Negroes about the ASCS program—and thus to the selection of committees which do not adequately represent the interests of Negro farmers. The Department of Agriculture has the authority to take over all the functions of the local committees where the fair operation of the program so requires;[46] but the Department has yet to use this authority to protect the rights of the southern Negro.

In sum, the United States Department of Agriculture permits to exist, and by its neglect of its duties encourages, a system which gives white southern farmers vast power over the economic well-being of their Negro neighbors. Such a system can be neither trusted nor tolerated. The idea that the southern Negro is or should be the contented ward of the white man is incompatible with modern American experience. Southern Negroes need protection from the ASCS system as it is presently set up; it remains to consider what protection the courts can give them.

III. Review of Individual ASCS Actions

Congress did not expect the committee system to be foolproof. It provided for certain internal checks upon abuses and for a limited judicial review. However, these controls were intended to combat only isolated instances of unlawful determinations or abuse. The wholesale corruption of the system was not foreseen.

A. *The Review Committees*

Any farmer who is dissatisfied with his acreage allotment has 15 days to file a complaint.[47] If the county committee does not modify its initial determination, the State Executive Director must appoint a review committee of three from a panel of six or more farmers of the state appointed annually by the Secretary of Agriculture.[48] The review panel must hold a formal, public

42. *Id.*
43. Equal Opportunity at 105-06.
44. Draft Report 27-36.
45. Equal Opportunity at 40.
46. *See* 7 C.F.R. § 7.37 (1966).
47. 7 C.F.R. § 711.13 (1966).
48. *See* 7 C.F.R. §§ 711.6-.8 (1966).
But since the standards to be followed are invariably general, and many are so

hearing to decide whether the determination of the county committee may stand.[49] Issues of fact may be litigated de novo, though the aggrieved farmer is charged with the burden of proof.[50] The review committee, "[a]s soon as practicable after hearing on an application,"[51] must either deny relief or modify the quota.[52] Findings of fact and conclusions must be made in writing.[53] No provision is made for remand to the county committee.

The review committees seem to be an exception to the general rule of racial exclusion in the ASCS program. In 1966, 73 Negroes were named to review committees in southern states.[54] But the review system is inadequate protection for Negro farmers' interests. Many Negroes are unaware of their right of review. More important, a review proceeding requires sufficient literacy and sophistication to present one's case. It also requires an open challenge to locally powerful people. If abuse is widespread, few of those aggrieved will have the courage to seek individual relief. In 1965 the percentage of Negroes filing petitions for review was less than half that of white farmers.[55] Yet exhaustion of the administrative remedy provided by the review committee is a prerequisite under the present system to judicial review.[56]

B. *Judicial Review of Individual Grievances*

The statute provides for judicial review of review committee determinations in federal district courts or in state courts of record having general jurisdiction.[57] Prompt application for review is necessary, and bond to secure the cost of the action must be given.[58] Findings of fact by the review committee are conclusive "if supported by the evidence."[59]

A strict exhaustion rule is enforced in the federal courts in all cases for which the review committees have jurisdiction[60]—that is, in all cases except where the action challenged is not that of the county committee, but that of

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flexible that they would open up avenues for discrimination whether intentional, inadvertent, corrupt, or accidental, there was need for another agency, the County Review Committee, having local roots and hence local responsibility for the review of such actions. The system assures not only initial determination, but a complete review anew of the whole matter by neighbors who must live with their decision.

Fulford v. Forman, 245 F.2d 145, 151 (5th Cir. 1957).

49. *See* 7 C.F.R. § 711.21 (1966).
50. *Id.* § 711.21(e).
51. *Id.* § 711.23.
52. *Id.*
53. *Id.*
54. DRAFT REPORT at 23.
55. *Id.* at 24.
56. 7 U.S.C. § 1365 (1964); Rigby v. Rasmussen, 275 F.2d 861 (10th Cir. 1960).
57. *See* 7 U.S.C. § 1365 (1964).
58. *Id.*
59. 7 U.S.C. § 1366 (1964).
60. *See* Rigby v. Rasmussen, 275 F.2d 861 (10th Cir. 1960); Corpstein v. United States, 262 F.2d 200 (10th Cir. 1958); Weir v. United States, 310 F.2d 149 (8th Cir. 1962).

the state committee[61] or of the Secretary of Agriculture.[62] Still, any farmer determined to challenge his allotment can ultimately secure judicial review. But some abuses are not reflected in allotment sizes. If a landowner fails to meet his contractual obligations to a tenant or sharecropper the approval of the landowner's benefits may not be reviewable.[63] Thus, the statutory commands that the interests of tenants and sharecropper be protected[64] may be executed or not at the whim of local committees.

Judicial review of ASCS decisions, even more than the review committee, is wholly inadequate to remedy the fundamental flaws in the system. To the illiterate, cautious, poor farmer the prospect of facing successive committees, filling out many forms, and then undergoing the expense and time of a court proceeding is so formidable that it is unlikely he will even begin the process. But the courts may be able to fashion realistic remedies if they are presented with an attack upon the system's underlying defects rather than on specific mistakes.

IV. Review of ASCS Elections

To a degree, the racism that infects the ASCS committee system can be ameliorated by the courts without the aid of any very original or subtle techniques. Thus, it may do the Negro farmer some good to seek injunctions against those governmental officials who have been guilty of identifiable acts of discrimination—whether acts of outright intimidation or only failure to send Negroes proper notice of elections. But the injunctive remedy has serious limitations. An injunction may be evaded by discrimination which is sufficiently creative—which is outside the scope of the court's decree. An injunction can prevent only that misconduct which can be traced to particular individuals at a particular time; it is a retail remedy, while the corruption of the ASCS system is a wholesale wrong. The ineffectiveness of injunctions against racial exclusion from voting was an important reason for the passage of the Voting Rights Act of 1965. But most important in the present context is the fact that the evil to be remedied stems much less from specific acts of discrim-

61. *See* Morrow v. Clayton, 326 F.2d 36 (10th Cir. 1963).

62. *See* Freeman v. Brown, 342 F.2d 205 (5th Cir. 1965). The review committees are not empowered to review the state committee's or the Secretary's decisions. Fulford v. Forman, 245 F.2d 145 (5th Cir. 1957). Courts have differed in their response to the problem of finding jurisdiction for judicial review of state or national determinations. Thus, in Freeman v. Brown, *supra*, the Administrative Procedure Act was said to be the source of jurisdiction. In Morrow v. Clayton, 326 F.2d 36 (10th Cir. 1963), however, it is at least implicitly held that 7 U.S.C. § 1365 confers jurisdiction not only for review of review committee determinations, but also for review of state committee action. 326 F.2d at 42-43. The most obvious source of jurisdiction is 28 U.S.C. § 1337 (1964) which confers original jurisdiction (regardless of amount in controversy, Mulford v. Smith, 307 U.S. 38 (1939)) for actions arising under Acts of Congress which regulate commerce. Section 1365 of title 7 should be viewed as merely setting forth an exclusive procedure for appealing from a review committee adjudication.

63. *See* Caulfield v. United States Dep't of Agriculture, 293 F.2d 217 (5th Cir. 1961).

64. *See* 7 U.S.C.A. § 1838(n) (Supp. 1966).

ination than from a social system in which the Negro farmer is unable, without aid and encouragement, to challenge the white. It may be doubtful whether, and to what extent, the effects of this pre-existing racial inequality can be avoided by the courts; but it is certain that the rural southern social system cannot be enjoined.

A more promising approach to the task of bettering the lot of the Negro farmer through the courts is to seek review of the elections which are presently producing overwhelmingly white committees. It might be appropriate to sue a community or state committee—depending on the scope of the relief sought—for a declaration that certain elections improperly failed to reflect the interests of Negro farmers and are therefore void. It might be still more effective to sue the Secretary of Agriculture and his subordinates to require them to remedy the unfairness in the election system—perhaps by taking affirmative steps to involve Negroes in it, or perhaps by superseding the local committees altogether, as the regulations permit.[65] If relief along these lines is to be achieved, it must be established first, that the elections are reviewable administrative actions; second, that as presently administered they violate federal law; and third, that the plaintiffs in the action may assert this unlawfulness. All of these obstacles can be overcome, though none of them easily.

A. *Reviewability*

Section 10 of the Administrative Procedure Act, as recodified, provides:

> This chapter applies, according to provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.[66]

The action of federal agencies in ordering, conducting, and validating the results of ASCS elections is reviewable unless one of the exceptions mentioned in section 10 applies.

It probably could not be successfully argued that "statutes preclude judicial review" of the elections of ASCS committeemen. No statute explicitly either provides for or precludes such review,[67] though judicial review has been provided, as described above, for determinations of crop allotments and for certain other committee actions.[68] It is possible to argue that where a statute explicitly provides review for some actions and does not mention review for others, a congressional intent to preclude judicial review of the latter

65. *See* 7 C.F.R. § 7.37 (1966).

66. 5 U.S.C. § 701(a) (formerly 5 U.S.C. § 1009, recodified by Pub. L. No. 89-554, 80 Stat. 378, Sept. 6, 1966, appearing in 1966 U.S. CODE CONG. & AD. NEWS 448.)

67. 16 U.S.C.A. § 590h(b) (Supp. 1966), which is the provision authorizing review committees, makes no mention of review of the Secretary's power to promulgate regulations, nor do any of the various sections of the Agricultural Adjustment Act of 1938, as amended, and as cited in notes 2-5 *supra*.

68. See text accompanying notes 57-64 *supra*.

should be inferred. Some courts have accepted this *expressio unius* argument in cases involving section 10 of the APA;[69] others have declined to adopt such an approach.[70] Such prestigious commentators as Davis, Jaffe and Hart and Wechsler have vigorously attacked the preclusion-by-implication doctrine.[71] Surely it is inappropriate to extend so dubious a theory to the situation now being considered; an intent to insulate racially discriminatory elections from judicial review should not be inferred from congressional silence.

Nor should courts accept the contention that the administration of ASCS elections is a matter "by law committed to agency discretion" within the meaning of section 10. Of course, virtually every administrative action involves some measure of discretion; the statute does not mean that all such actions are immune from review.[72] Courts have suggested that the second exception in section 10 makes agency action unreviewable when the language of the statute conferring the authority on the agency is "permissive" rather than "mandatory."[73] Under this test, ASCS elections might be deemed immune from the scrutiny of courts. The Secretary of Agriculture is granted by statute the broad authority to "make such regulations as are necessary relating to the selection . . . of the respective committees . . . ."[74] No doubt most facets of the election procedure would be unreviewable. But it would be neither rational nor just to hold that Congress meant to give the Secretary discretion to deprive the Negro race of equal treatment in the ASCS program. Surely the authors of the "permissive" language just quoted had no thought of permitting such rank injustice.

At the heart of the arguments in favor of reviewability is the simple point that, because the rights sought to be asserted are so important, courts should not view themselves as powerless to decide the issues raised. To the extent that these issues are of constitutional scope, the case for reviewability is stronger still. A court of appeals has recently declared that "[a]ction challenged as a denial of due process . . . could be immune from judicial review, if ever, only by the plainest manifestation of Congressional intent to that effect."[75] Any manifestation of congressional intent to bar judicial review of ASCS elections is certainly not the plainest.

69. *See, e.g.*, Paducah Junior College v. Secretary of Health, Educ. & Welfare, 255 F. Supp. 147, 149-50 (W.D. Ky. 1966). The doctrine has its roots in pre-APA law. *See* Switchmen's Union v. National Mediation Bd., 320 U.S. 297, 306 (1943).

70. *See, e.g.*, Freeman v. Brown, 342 F.2d 205 (5th Cir. 1965).

71. *See* J. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 357 (1965); 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.09 at 42-44 (1958); H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 327 (1953).

72. Homovich v. Chapman, 191 F.2d 761, 764 (D.C. Cir. 1951). For general discussion *compare* Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965), *with* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE 15-30 (Supp. 1965).

73. *See* Freeman v. Brown, 342 F.2d 205, 217 (5th Cir. 1965); United States v. Wiley's Cove Ranch, 295 F.2d 436, 443 (8th Cir. 1961).

74. 16 U.S.C.A. § 590h(b) (Supp. 1966).

75. Gonzalez v. Freeman, 334 F.2d 570, 575 (D.C. Cir. 1964).

B. *The Unlawfulness of the System*

1. *The Constitution.* Cases involving alleged racial discrimination call to mind almost automatically the equal protection clause of the fourteenth amendment. That clause does not apply to the federal government; but this should be no serious obstacle to a suit challenging the ASCS election procedure. The United States Supreme Court held in *Bolling v. Sharpe* that some discrimination is "so unjustifiable as to be violative of due process" and therefore forbidden to the federal government by the fifth amendment.[76] As the Court noted in *Bolling*, it is "unthinkable" that the federal constitution could forbid racial discrimination by the states yet leave the federal government at large. It is probably safe to assume that, where there is a claim of unjust treatment on racial grounds, constitutional limitations on state action will be applied to the federal government also. It remains to consider whether the operation of the ASCS election system runs afoul of any such limitation.

If Congress were to legislate, or the Department of Agriculture's regulations prescribe, that only whites could participate in the ASCS system, there would be a violation of the Constitution too plain for argument. But racial discrimination cannot be made constitutional by the subtlety of the means used to accomplish it.[77] For example, the Supreme Court struck down an attempt to avoid integration by resort to a "private" school system,[78] and where a school board perpetuated segregation by its adherence to traditional school-district boundaries, a Court of Appeals held that equal protection was denied.[79] Thus, where it can be shown that Negroes were not notified of ASCS elections, or that the ballots sent them were defective,[80] a court should hold that the Constitution has been infringed. But to eliminate these identifiable abuses will not, for the reasons explained above,[81] fully protect the Negro's rights.

The critical question then is whether the Constitution prohibits the Department of Agriculture from leaving the ASCS in the hands of locally elected committees in the rural South without taking affirmative steps to involve Negroes in the system; whether, in other words, the Constitution requires the federal government to counteract the pre-existing inequalities which, if not counteracted, corrupt the federal agriculture program. Obviously, the Constitution does not require the government to stamp out all the "unreasonable classifications" that exist without governmental intervention; government cannot be held responsible whenever life is unfair. But where life's unfairness to the southern Negro produces a racially lopsided federal program, and where

76. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).
77. *See* Gomillion v. Lightfoot, 364 U.S. 339 (1960).
78. *See* Griffin v. School Bd., 377 U.S. 218 (1964).
79. *See* Taylor v. Board of Educ., 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961).
80. *See* Complaint in William v. Freeman, Civil Action No. 1991-66 (D.D.C. 1967).
81. See text accompanying notes 39-40 *supra*.

the means of making that program less lopsided are ready to hand, perhaps the Constitution requires that those means be used. To hold otherwise would be to hold that the Constitution will tolerate a federal program, which, however pure the minds of its creators and its managers, is racist as a matter of fact.

A holding that affirmative governmental action against inequality is constitutionally required would not be entirely without precedent. It is established that state governments may not permit the pre-existing inequality between rich and poor to corrupt their systems of criminal appeals. A state which chooses to grant criminal defendants a right of appeal may not condition that right on the payment of a fee when the defendant cannot afford to pay;[82] indeed, the state may not even deny to an indigent whose case seems hopeless to the appellate court his right to counsel on appeal.[83] In these special circumstances, a state is obliged to raise the poor man nearer to the level of the rich. A court could justly and wisely hold that, in the special circumstances detailed in this Note, the federal government must raise the southern Negro nearer to the level of the southern white.[84]

2. *The Civil Rights Act of 1964.* If the Constitution does not reach so far as has been suggested—or if, as is quite likely, a court is reluctant to confront this difficult constitutional question—an attack on the ASCS election system might be upheld on non-constitutional grounds. Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance."[85] It can be persuasively argued that Negroes are "on the ground of race . . . excluded from" the ASCS program. If it is claimed that the exclusion is by virtue of the rural southern social system and not by virtue of any governmental misconduct, the response must resemble somewhat the constitutional argument made above. It can quite persuasively be maintained that the statute applies to at least some instances of *de facto* exclusion; the language of the statute readily bears that interpretation.

The chief obstacle to an attack on the ASCS system under Title VI is that the ASCS program is probably not "a program or activity receiving federal assistance" within the meaning of the Act. The quoted language is most easily read to refer to state, local or private programs subsidized with federal funds—not to programs administered by the federal government in their en-

82. Griffin v. Illinois, 351 U.S. 12 (1956).
83. Douglas v. California, 372 U.S. 353 (1963).
84. A recent, widely publicized decision of the District Court for the District of Columbia apparently requires affirmative governmental action to remedy *de facto* school segregation—even though government did not create the segregation involved. *See* Hobson v. Hansen, 35 U.S.L.W. 2761 (D.D.C. June 19, 1967).
85. 42 U.S.C. § 2000d (1964).

tirety. This is the way the Department of Agriculture itself reads the statute: its regulations include a list of Department programs thought to be covered by Title VI—and the ASCS program is not among them.[86]

It is possible to argue that the Department's reading of Title VI is too narrow. It can be said that the purpose of the title is to eliminate discrimination in any program in which the federal government is involved—that it is not reasonable to think that the draftsmen wished to leave purely federal programs free to exclude Negroes. It may also be pointed out that Title VII of the same act, which provides for equal employment opportunities, specifically excludes the federal government from its definition of "employer,"[87] while Title VI contains no such specific exclusion. But both arguments are essentially flimsy. Title VI seems clearly directed at a narrow evil—discrimination in non-federal programs receiving federal funds. The remedial provisions of the statute, which set out in detail administrative procedures for terminating federal assistance, confirm this conclusion.[88]

3. *Executive Order and Departmental Regulations.* Stronger grounds for a non-constitutional attack on the ASCS elections may be found in sources less exalted than statutes. Executive Order 11246 forbids discrimination in federal employment.[89] It clearly prohibits the local committees from choosing their office staffs on racial grounds; but it may go still further and govern the makeup of the local committees themselves. Once again, the problem is that the discrimination is not that of the federal government; it is that of the voters who choose all-white committees. But it can be said that by tolerating this discrimination, the Department of Agriculture makes it its own, and thus violates the executive order. Such an argument might well be accepted by a sympathetic court.

Attack on the election system may also be based on the Department of Agriculture's own regulations. 7 C.F.R. § 15.51, which paraphrases Title VI of the Civil Rights Act of 1964, prohibits discrimination by any "agency, officer or employee" of the Department.[90] The regulation clearly applies to

86. *See* 7 C.F.R. § 15.12, Appendix (1966).
87. *See* 42 U.S.C. § 2000e(b) (1964).
88. *See id.* § 2000d-1 (1964).
89. *See* 42 U.S.C. § 2000e (Supp. I, 1965).
It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons qualified, to prohibit discrimination in employment because of race, creed, color, or national origin, and to promote the full realization of equal employment opportunities through a positive, continuing program in each executive department and agency.
Id. Part I, section 101.
90. 7 C.F.R. § 15.51 (1966):
Discrimination prohibited.
(a) No agency, officer, or employee of the United States Department of Agriculture, shall exclude from participation in, deny the benefits of, or subject to discrimination any person in the United States on the ground of race, color, creed, or national origin under any program or activity administered by such agency, officer, or employee.

ASCS, and the argument for reading it to prohibit the *de facto* exclusion of Negroes from the program is the same as the argument for a broad reading of Title VI.[91] But even if it can be established that the ASCS elections operate in violation of an executive order and of department regulations, it can be debated whether limitations imposed on the system from within the executive branch may be relied on in litigation by a private party. Indeed, the problem of who, if anyone, may assert the unlawfulness of the ASCS program is likely to be a serious obstacle to any attack upon it in the courts.

C. *Standing*

1. *Standing to Assert Violations of Self-Imposed Restrictions.* Perhaps the most promising grounds of attack on the committee elections are to be found in rules laid down by the executive branch to govern its own conduct; but if these are to be independent grounds of attack, it must be assumed that they are not required by any statute or by the Constitution—that the executive branch observes them only because it has chosen to do so. It might seem logical that no outsider could ever hold an agency to rules of this kind; that violations of such rules should present a purely intramural problem. The courts, however, have not taken so simple a view. Where regulations provide procedural safeguards to the integrity of the administrative process, private parties aggrieved by breaches of the regulations are generally granted standing to rely on them.[92] The doctrine that an administrator may be bound by his own procedural regulations has been approved by commentators.[93] But does this mean that regulations forbidding discrimination may be binding on the Department of Agriculture?

Clearly these regulations are not procedural in the usual sense: they do not prescribe the means by which a person may be deprived of life, liberty or property. But regulations which require that agency personnel be chosen without regard for color may be said to affect the integrity of the administrative process. They are intimately related to a strong federal policy embodied in statutory and constitutional provisions. A court might be wise to hold that

(b) No agency, officer, or employee of the Department shall on the ground of race, color, creed, or national origin deny to any person in the United States (1) equal access to buildings, facilities, structures, or lands under the control of any agency of this Department or (2) under any program or activity of the Department, equal opportunity for employment, for participation in meetings, demonstrations, training activities or programs, fairs, awards, field days, encampments, for receipt of information disseminated by publication, news, radio, and other media, for obtaining contracts, grants, loans, or other financial assistance or for selection to assist in the administration of programs or activities of this Department.

91. See text accompanying notes 82-85 *supra.*

92. *See, e.g.*, Service v. Dulles, 354 U.S. 363 (1957); United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954).

93. *See* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW, CASES AND COMMENTS 859-65 (4th ed. 1960); Note, *Judicial Enforcement of Administrative Adherence to Express Regulations and Established Customs*, 23 GEO. WASH. L. REV. 751 (1955); 7 U. FLA. L. REV. 328 (1954).

these regulations bind the Department of Agriculture—and thus avoid basing its decision on constitutional grounds.

2. *Standing to Assert Violations of the Civil Rights Act.* In the unlikely event that a court is persuaded to hold Title VI of the Civil Rights Act of 1964 applicable to the ASCS program,[94] it will have to face the interesting question whether such a violation gives a cause of action to a private party. Congress does not seem to have contemplated a private remedy; Title VI provides for enforcement by federal administrators—who are bound to attempt negotiations before cutting off federal funds.[95] In other parts of the act, private remedies are explicitly provided for.[96] Yet one court has permitted a private action under Title VI, on the rather startling theory that Negroes are third-party beneficiaries of the contracts made when federal assistance is given.[97] A court wishing to take a more straightforward approach might simply argue that an effective way to serve the purpose of the statute is to give a remedy to the class of persons it was meant to protect.[98] To hold that Title VI provides a private remedy seems less difficult than to hold it applicable to ASCS at all.

3. *Standing to Assert the Rights of Others.* Whether the ASCS election system is challenged under the Constitution, under the Civil Rights Act, under an executive order or under departmental regulations, one serious standing problem is inevitable: the people truly victimized by the system will not be in court. The very vice of the system is that it perpetuates the exploitation of those too poor, ignorant or frightened to challenge white domination. To hold that these people have a right to relief, but that no one has standing to assert it but themselves, would be grotesque: a plaintiff could not succeed unless he alleged, in effect, that he was incapable of filing a suit.

A suit to challenge the elections which establish white control of the committee system might well be begun by Negroes who have unsuccessfully sought election to a committee. Of course, these plaintiffs could claim no absolute right to be elected; but their standing to sue should be upheld. A court might frankly recognize that, in a case of the kind supposed, certain rights can be vindicated only by a relaxation of usual standing requirements; there is precedent in the United States Supreme Court—in a civil rights case—for such candor.[99] Alternatively, a court might hold that, while a Negro candidate has no absolute right to be elected to a committee, he has a right to a fair chance of election—and the ASCS system deprives him of that right.

94. See text accompanying notes 86-89 *supra.*
95. 42 U.S.C. § 2000d-1 (1964).
96. *See, e.g.,* 42 U.S.C. § 2000a-3 (1964) (public accommodations and state action); 42 U.S.C. § 2000c-8 (1964) (prior right to sue for school discrimination in public education unaffected).
97. *See* Lemon v. Bossier Parish School Bd., 240 F. Supp. 709, 713 (W.D. La. 1965).
98. *Cf.* J.I. Case Co. v. Borak, 377 U.S. 426 (1964).
99. *See* Barrows v. Jackson, 346 U.S. 249 (1953).

Cases involving racial discrimination in jury selection may be seen as roughly analogous. No one has an absolute right to sit on a jury; but a potential juror has a right not to be barred from sitting by reason of his race alone.[100]

V. Conclusion

The decentralized committee system of the Agricultural Stabilization and Conservation Service is, in the South, substantially controlled by white farmers. This organization's power over the livelihood of the Negro farmer is disturbingly great, and the Negro has no adequate protection against its abuse. To leave such power over one race in the hands of another is contrary to the whole trend of modern American law and policy. If the ASCS system survives in its present form, it can only hinder the advance of human rights and racial harmony in the South and in the nation as a whole.

Because the exclusion of Negroes from the program is less a result of discriminatory conduct by government officials than of the structure of society in the rural South, attack on the committee system in the courts is difficult. But such an attack can succeed, if the Constitution, a statute, an executive order or a departmental regulation can be read as commanding in these peculiar circumstances affirmative action by government to combat racial injustice. If a duty to take this sort of action is found to exist, less fundamental obstacles to relief in the courts—doubts as to reviewability and standing—should not be insuperable.

But Congress, if it wished, could make all discussion of the courts' ability to change the ASCS program academic. Congress can and ought to either end local control of the committee system or find a way to ensure that farmers not blessed with white skin can share in that control. Congressional authority over the system is complete. The circuitous attack on discrimination made in the Voting Rights Act of 1965[101] may have been the only way around the constitutional difficulties faced by the draftsmen of that statute.[102] But no constitutional difficulties would face a Congress determined to eliminate racism from a federal program. The legislators who met the challenge of 1965 should not neglect to meet this less formidable one.

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100. Billingsley v. Clayton, 359 F.2d 13, 15 (5th Cir. 1966) (en banc), recognized this principle but denied relief on evidentiary grounds. For a case granting relief, see White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966).

101. 42 U.S.C.A. §§ 1971-73 (Supp. 1966).

102. *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966).