CAPTIVE OF THE COURT
A Federal Agency

Jeremy Rabkin

THE CHANCERY SUIT OF *Jarndyce* v. *Jarndyce*, in *Bleak House*, was one of Charles Dickens's most inspired creations: a suit into which "innumerable children have been born . . . innumerable young people have married" and "innumerable old people have died out of." Its present-day American equivalent is known at the moment as *Adams* v. *Bell*, a suit that is now approaching its fifteenth year of continuous activity. Its plaintiffs, nominally an assortment of obscure citizens, claim to speak for some 75 percent of the American people, neatly classified by race, sex, personal and linguistic handicap. The defendant is a government agency, the Office for Civil Rights (OCR) in the Department of Education (formerly in the Department of Health, Education, and Welfare). Over the years the *Adams* litigation has generated a continuing stream of complex remedial orders, which by now reach into all fifty states and the District of Columbia. Essentially, the suit has succeeded in placing this executive agency in what might be called judicial receivership, allowing a single federal judge—and a handful of private civil rights lawyers—to determine how it should enforce the civil rights laws Congress has confided to the agency's responsibility.

In the annals of contemporary judicial activism, perhaps only Judge Garrity's receivership of the Boston school district offers a parallel instance of interventionism on this scale. Just like the Boston busing case, the *Adams* litigation has taken the presiding judge, John Pratt, deeper and deeper into administrative detail—and further and further from his originally declared purpose. And just as the Boston public schools are now more segregated and more racially divided than they were when "desegregation" began there, the *Adams* litigation has left OCR in many ways a less effective and less trusted civil rights guardian than it was at the outset.

The most notable difference between the two cases is that, while Judge Garrity's direction of the Boston schools generated intense controversy from the beginning and is now widely condemned, the *Adams* litigation seems to be regarded in Washington as a force of nature. Congressional appropriation committees have meekly acquiesced in the personnel demands of the *Adams* orders and, until its recent vigorous appeal of the latest round of orders, the Justice Department patiently submitted to Judge Pratt's authority. Leading commentators in administrative law, like Harvard's Richard Stewart and Chicago's K. C. Davis, have nodded in approval at the *Adams* litigation; and no law journal has seen fit to question, as a constitutional monstrosity, the spectacle of a federal enforcement agency subject to ongoing judicial

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Jeremy Rabkin is assistant professor of government and director of the program on courts and public policy at Cornell University.

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How a Partisan Critique Became a Lawsuit

Adams v. *Richardson* was launched in the fall of 1970 as an action against Elliot Richardson, then secretary of the Department of Health, Education, and Welfare (HEW). Kenneth Adams, a black student in a Mississippi public school, obligingly lent his name to the case and then, still more obligingly, retired from any further role in the proceedings. The suit was actually initiated by the NAACP Legal Defense Fund, which recruited the Washington law firm of Rauh, Silard and Lichtman to conduct the litigation. Senior partner Joseph Rauh, a founding member of the Americans for Democratic Action, had already gained prominence as a leading critic of the Nixon administration, and the suit proved to be an excellent platform for his criticisms.

At the outset, the *Adams* suit focused entirely on OCR's enforcement of Title VI of the 1964 Civil Rights Act. Title VI prohibits "discrimination on the basis of race, color or national origin" in "any program or activity receiving federal financial assistance." It authorizes federal funding agencies to terminate funding to any recipient that refuses to cease discriminatory practices. The *Adams* suit charged that HEW (through its OCR unit) was not enforcing Title VI with sufficient vigor—and "focused" this complaint on enforcement activities in seventeen southern and border states.

The initial brief for the "plaintiffs" ventured six different causes of action in legalistic terms. But these were offered, "apart from their individual merits," as the brief candidly stated, as "symptoms of a general and calculated default by HEW in enforcement of Title VI." This political charge was, of course, the real crux of the suit, which accordingly invited the federal district court to oversee the broad enforcement policies of the responsible executive officials. As it happens, the political charge was substantially untrue; it rested on a fundamental misconception of OCR's enforcement capacity, a misconception that would haunt the litigation over the following decade and a half.

But first it is worth noticing how casually an essentially political complaint came to be accepted as the proper subject for a lawsuit—for the judicial heedlessness reflected in this acceptance would also haunt the litigation over the following decade and a half. How, to begin with, could Kenneth Adams have standing for such a suit? If he—or his champions in the Legal Defense Fund—believed that his own school was not meeting the prevailing legal standards for desegregation, it would have been quite easy for him to sue his own school district for direct relief. But how was he at all legally injured by OCR's alleged enforcement failures in *other* school districts and indeed in *other states*? Even if he prevailed on the merits in this lawsuit of continental dimensions, there could be no assurance that the resulting judicial remedy—with its comparably continental sweep—would actually redress the particular

local injury suffered by young Mr. Adams. And if he should prevail on the merits, why was poor Kenneth Adams the appropriate party to negotiate a remedial order on behalf of millions of others (who might well have very different concerns and priorities for OCR enforcement policy than he)? As if to preempt such questions, Rauh and his colleagues also offered the names of assorted "taxpayers and citizens" in various southern states as alternate or supplementary plaintiffs—suggesting that quite literally *anyone* might challenge executive enforcement policy in this area.

Remarkably, Judge Pratt in his initial decision did not find it necessary to say anything about who the plaintiffs were or why they had standing. Nor did the D.C. Court of Appeals in ruling on the Justice Department's protest of Judge Pratt's decision. Both courts evidently regarded standing as a mere anachronistic legalism that could not be allowed to deter the judiciary from correcting an administrative default. This cavalier approach was to have fateful consequences later on. By not specifying the precise parties injured by the default—as the judges would have been forced to do in confronting the standing question at the outset—the case took on a completely open-ended character that allowed it to expand to uncontrollable proportions in later years. In 1982, incidentally, noting that the suit had never been certified as a class action, the Justice Department sought to discover whether plaintiff Adams was (improbably) still in school and thus at all in need of the "further relief" then being sought. Judge Pratt summarily blocked the inquiry as irrelevant to the proceedings.

Equally cavalier—and perhaps equally fateful—was the appellate court's response to the argument that Judge Pratt's order was an impermissible infringement of prosecutorial discretion. Some years earlier, in dismissing a suit against the Justice Department for failing to take action against the harassment of civil rights workers in Mississippi, the same court had unanimously reaffirmed the constitutional doctrine of the unreviewability of prosecutorial discretion. In *Moses* v. *Katzenbach* (1965), the court declared that "the considerations of judgment and discretion apply with special strength to the area of civil rights. . . ." Yet in *Adams* the D.C. circuit court brushed this principle aside. "It is one thing," it declared, "to say that the Justice Department lacks the resources necessary to locate and prosecute every civil rights offender; it is quite another to say HEW may affirmatively continue to channel federal funds to defaulting schools." But surely it would be true of *any* school district, however technical or ambiguous its offense, that if HEW did not choose to punish its noncompliance with immediate funding termination, HEW would ipso facto "affirmatively continue to channel federal funds to it." And this surely could not change the fact that HEW, like the Justice Department and indeed like any other enforcement agency, would inevitably "lack the resources necessary to locate and prosecute every civil rights offender."

Judge Pratt's initial decision in the district court, handed down in 1972, found that OCR had delayed too long in moving to terminate federal funding to several hundred inadequately desegregated school districts. But OCR itself had identified these school districts as noncompliant and had never suggested that it could offer them complete dispensations from its compliance standards. The only issue was how long OCR could negotiate with these school districts in attempting to secure voluntary compliance. On this both the statute and the legislative history were silent. Nevertheless, Judge Pratt imposed a series of deadlines for the processing of OCR enforcement actions. The actual time frames were suggested by Joseph Rauh on the basis of his own estimates of what would be a reasonable period for administrative action—again without reference to any statutory or legal criteria. The court of appeals, affirming Judge Pratt's decisions, swallowed this improvisation without a murmur early in 1973.

From the outset, then, the *Adams* case asked Judge Pratt to do something quite different from merely "interpreting the statute and determining whether HEW has correctly construed its enforcement obligations"—as the court of appeals complacently put it. The case essentially required the judge to second-guess enforcement policies in a large regulatory program. This remarkable intervention seems to have been premised as a practical matter on two related assumptions: first, that OCR had been delinquent in enforcing civil rights standards, owing to the political machinations of the Nixon administration; and second, that its enforcement responsibilities were relatively clear.

The Fate of Black State Colleges

One issue in the *Adams* litigation has from the outset taken an erratic course all its own: the question of what to do with black state colleges. A number of states, including a few northern states, had long maintained state colleges with largely black faculties and student bodies. A successful process of integration, by its nature, would end the existence of these colleges, at least as distinctively black institutions. But for more than a decade now, the *Adams* court has been hectoring the Office of Civil Rights (OCR) to integrate these state college systems without threatening black colleges.

In the late 1960s, OCR warned ten states—Pennsylvania, Maryland, Oklahoma, and seven southern states—that they could lose their federal funding if they did not take affirmative action to eliminate the "racial identifiability" of their public colleges. None of the states was by then denying admission to any college on the basis of race, but black students were still applying overwhelmingly to the traditionally black colleges and white students almost exclusively to the others.

In general, the black colleges maintained far more lenient admissions requirements, and their complete merger with white colleges might therefore lower overall standards or force many black students out of college. Redistributing faculty arbitrarily among campuses posed other problems, since the qualifications of the two groups of faculty were quite different, as judged by such criteria as advanced degrees and publication records.

Thus, by the time of the original *Adams* decision in 1972, OCR had not yet figured out what measures it wanted the dual college systems to take, and naturally had still not reached agreement with these states on "corrective measures." The plaintiffs accordingly persuaded Judge Pratt to order OCR to initiate enforcement proceedings in this area, as in the others.

When the case was appealed, the D.C. court of appeals received an *amicus* brief from an association of black colleges, urging that the higher education elements in *Adams* be dismissed as a threat to their well-being. This appeal had its effect. In this one area, the higher court balked at Judge Pratt's presumption—not at all on legal grounds, but simply following its own policy instincts. The court declared that in higher education the problem was not, after all, the absence of statistical integration. Instead it was "the lack of state-wide planning to provide more and better trained minority group doctors, lawyers and other professionals" in which connection "black institutions currently fulfill a crucial need." Rather than dismiss this portion of the *Adams* suit, however, the appeals court simply overturned Judge Pratt's deadlines, holding that OCR must be given more time to "carefully assess the significance of a variety of new factors."

Careful assessment only revealed the intractability of the policy dilemmas involved, and OCR made little progress. So in 1974 the plaintiffs challenged the agency's settlements with eight of the states involved on the grounds that they did not assure enough integration. In April 1977 Judge Pratt ordered OCR to develop specific criteria for desegregation while "taking into account the unequal status of the Black colleges and the real danger that desegregation will diminish higher education opportunities for Blacks."

OCR then came up with an elaborate set of requirements, prescribing numerical "goals" for recruitment of black students and teachers to white colleges (although without parallel goals for recruiting whites to black colleges). More strikingly, it demanded that state systems encourage white students to apply to black colleges by eliminating "unnecessary program duplication" between nearby white and black institutions—thereby thrusting itself into the heart of educational planning in these states.

By 1982, following the imposition of a new set of deadlines by Judge Pratt in 1980, OCR had managed to obtain detailed compliance plans from all the affected states. It had also pledged to review the progress of these plans and renegotiate "more effective" plans within a few years if they did not have the expected effects. But the *Adams* plaintiffs were still not satisfied and went back to court. Judge Pratt agreed in 1983 to impose a new set of deadlines on OCR for negotiating new agreements with state systems that had not made enough progress. Given the intractability of the problem and the implacability of the plaintiffs, this part of the litigation, like the rest of the *Adams* enterprise, will undoubtedly stretch on for untold years to come.

–Jeremy Rabkin

Unfortunately for Judge Pratt, the truth was almost the exact opposite on both counts—as the subsequent history of the litigation would prove.

Forcing the Unenforceable

Like many sections of the 1964 Civil Rights Act, Title VI, as applied by civil rights agencies, came to mean something rather different from what its legislative sponsors had originally envisioned. During the congressional debates on the measure, concern about the possibility of funding cutoffs was by no means limited to die-hard champions of states' rights. Critics warned that cutting off federal funding would punish the innocent along with the guilty, harming black school children, for example, as much as segregationist school officials. Moreover, congressmen could be especially embarrassed by sudden withdrawal of federal funding from their districts.

In response to such concerns, the supporters of Title VI attached an array of conditions to the funding sanction. For example, the law prohibited its use until the funding agency "determined that compliance cannot be secured by voluntary means" and thereafter provided any accused recipient with a chance to rebut noncompliance charges in a formal administrative proceeding. Even then, the law provided that no cutoff occur until thirty days after notification had been given to the relevant appropriations committees in both houses of Congress. The Johnson administration itself assured wavering members of Congress that suits by the Justice Department (under another section of the 1964 Civil Rights Act) would provide the principal leverage for its desegregation efforts, not threats to terminate funding under Title VI. Thus Senator Abraham Ribicoff, floor manager for Title VI in the 1964 Senate debates, assured hesitant colleagues that "it would be a rare case when funds would actually be cut off."

The unusual circumstances of the mid-1960s, however, allowed HEW officials to escape for a brief period from these structural and political constraints. Congress had enacted the 1964 Civil Rights Act in response to mounting public revulsion at racial segregation in the South. As public attention focused on the dramatic struggle to desegregate the schools in that region, HEW's enforcement of Title VI was given great impetus. And the enactment of the first large-scale federal aid-to-education measure in 1965 afforded the department extraordinary financial leverage.

At first, circumventing all the restrictions carefully written into Title VI, HEW officials simply refused to approve grants to any southern school district unless it committed itself to a detailed plan for desegregation approved by the department. This tactic of "deferring" new funds, combined with cajolery and other inducements, succeeded in persuading the vast majority of southern school districts to take their first halting steps toward desegregation. Congress subsequently amended Title VI to outlaw the "deferring" technique after overreaching officials rashly tried to apply it to Mayor Daley's Chicago schools in 1965. But HEW's political momentum had already been established. The department needed no great political courage to initiate formal defunding proceedings in 1966 and 1967 against the several hundred hold-out school districts that refused to take any steps at all toward desegregation. And the overwhelming majority of these districts, too, capitulated before their funds were actually terminated.

The charge that the Nixon administration had worked a sudden reversal in this enforcement momentum was fed in part by administration rhetoric aimed at mollifying opinion in the South. But HEW's own statistics tell a different story. In 1968, when Nixon was elected, some 68 percent of black students in the South were still attending substantially all-black schools. By the fall of 1971 that figure had plummeted to 9.2 percent. Meanwhile, the proportion of black students attending predominantly white schools climbed from 18 percent in 1968 to 43 percent in 1971. On a statistical basis, the school systems of the *Adams* states were more fully integrated than those of the North and West, largely as a result of vigorous prodding by OCR. By 1970, the Nixon administration was actually pushing OCR to finish the integration drive quickly—so as to remove the issue from the 1972 elections.

Both Judge Pratt and the D.C. appeals court acknowledged this impressive progress in their initial opinions. But they were more impressed by the fact that HEW had initiated some 600 formal proceedings to stop federal

funding before 1970, but "only a small token number" since then, as Judge Pratt put it. The court pronounced this pattern "particularly significant in view of the admitted effectiveness of fund termination proceedings in the past to achieve the Congressional objective."

But the political isolation of the South—the essential prerequisite to aggressive reliance on the funding sanction—had been on the decline even before Richard Nixon entered the White House. In 1968, for example, over the sharp objections of Johnson administration officials, Congress had attached riders to the HEW appropriation requiring uniform policies and standards for Title VI enforcement throughout the country and the assignment of the same number of OCR enforcement officials to the North and West as to the South. At the time these riders were enacted OCR had subjected only one school district outside the South to a funding termination proceeding.

The political climate for civil rights enforcement was growing increasingly inhospitable, moreover, in large part because enforcement aims had greatly altered by the early 1970s. In the late 1960s, when OCR launched funding cut-off proceedings against hundreds of school districts, it was threatening only school districts that refused to accept race-blind assignment of students to the nearest schools. It was not until 1968 that the Supreme Court first endorsed the principle of racially (rather than geographically) based school assignments as a remedy for past segregation. And only in 1971 did the Court rule that cross-district long-distance busing could be imposed on desegregating school systems for the sake of statistical integration. HEW officials had indeed anticipated both decisions, trying from 1967 onward to cajole school districts into adopting ever more "effective" integration plans, as measured by the racial statistics of the moment. But it had pursued these larger enforcement ambitions almost entirely on the basis of bluff, without actually daring to invoke formal termination proceedings to back up those bluffs.

The initial judicial intervention in *Adams* was essentially an effort to call these bluffs. The core of Judge Pratt's 1973 injunction was directed at 201 school districts, which the plaintiffs had culled from OCR's case files in the course of pretrial discovery. Judge Pratt ruled that the agency's negotiations for voluntary compliance had gone on too long with 116 of these districts—all of which had been charged with inadequate integration many months earlier—and ordered OCR to initiate proceedings to terminate their funding within sixty days if it could not secure compliance agreements by then. In the remaining 85 districts, OCR had been fitfully investigating statistical evidence of racial imbalance (which put these districts in "presumptive noncompliance"). Judge Pratt ordered the agency to reach formal determinations of compliance or noncompliance within sixty days and then take action against the noncompliant districts in the same "time frames."

The main effect of these deadlines was simply to confirm that the agency had indeed been bluffing. OCR strove to achieve quick agreements by curtailing its own ambitions. Well over half the districts already charged with noncompliance proved to be much closer to compliance or much readier to remedy their deficiencies than the agency had realized in months and months of previous negotiation. Similarly, well over half the districts being investigated for presumptive noncompliance proved, on further quick inspection, to be in full compliance with the latest integration standards after all.

In districts where the agency could not reach quick agreement or a quick finding of compliance, it simply ignored Judge Pratt's enforcement deadlines. A full year after the court orders went into effect, OCR was still negotiating with several dozen of the school districts involved and threatening fund cutoffs to thirty-one of these districts. In only one case had it actually initiated formal proceedings to terminate funding.

If judicial intervention was intended to revive the credibility of OCR's funding sanction, it failed almost entirely. Judge Pratt never managed to wring from the agency, in all the years thereafter, more than the "small token number" of enforcement proceedings that he complained of in 1972. While the number of defunding proceedings each year between 1967 and 1970 averaged almost 150, the average fell to less than 12 a year between 1973 and 1978, and dwindled almost to zero between 1979 and 1984. On the other hand, the court could not prevent OCR from falling back on the obvious

alternative to bluffing in extended negotiations —namely, settling for more modest enforcement goals. Civil rights lawyers complained a good deal about the quality of OCR's investigations and the indulgent character of its settlements. But the plaintiffs did not try to involve Judge Pratt in the hopeless task of reviewing hundreds of separate settlements.

Instead they returned to court to pursue the same strategy that had achieved so little in the first round. In the spring of 1974 they asked Judge Pratt for further relief, complaining that OCR had still failed to resolve the compliance obligations of 40 school districts in the group of 85 presumptively noncompliant districts cited in the initial order fifteen months earlier. Beyond this, they complained that OCR had "regressed to its previous practice of inaction in hundreds of school districts," citing over 600 new cases where school districts were evidently or presumptively out of compliance with integration standards. In most of these districts, as the plaintiffs were well aware, complete racial balance could not be achieved without forced busing, and OCR was under tremendous political pressure not to impose busing.

In the summer of 1974, while the new *Adams* charges were still pending, Congress enacted this broad-based anti-busing sentiment into an amendment to a major education law. The amendment prohibited any federal agency from ordering "the transportation of any student to a school other than the school closest or next closest to his place of residence." The law did not prevent the courts from venturing new busing schemes in ensuing years. Top HEW officials, however, announced that they would respect the new restriction, which meant that a new round of court orders in *Adams* would be an empty exercise.

Nevertheless, in March 1975 Judge Pratt issued a new set of deadlines for action against several hundred school districts. Again OCR proceeded to go through the motions of investigating and settling, without actually securing much further integration and, of course, without actually invoking its sanction of funding termination.

But Pratt's orders also included a provision that turned out to give the litigation a renewed lease on life. Previously, the court had told OCR to act in cases in which the agency's own evidence suggested noncompliance. At the plaintiffs' urging, Judge Pratt laid down time frames for OCR to process any "complaint or other information of racial discrimination" regarding any school district in the South from any party whatsoever. OCR would have to investigate each such complaint within ninety days, negotiate for voluntary redress or compliance within the next ninety days, and if such negotiation failed, initiate formal enforcement proceedings within thirty days thereafter. The deadlines were suggested by the plaintiffs, who offered no argument or evidence in their behalf. Nor was the court given any indication of the range and complexity of issues that might be addressed under the catch-all formula of "complaint or other information of racial discrimination." In fact, this open-ended formula laid the basis for bringing almost all of OCR's enforcement efforts under the eventual control of the court.

New Missions, New Plaintiffs

OCR's implementing regulations for Title VI had promised that the agency would respond to any "complaint or other information of racial discrimination" involving an institution with HEW funding. But the regulations did not commit the agency to any particular response, much less to any deadlines in making this response. The provision, in fact, had little significance when the regulations were first issued in 1965 or during the rest of the 1960s. In those early years, OCR was almost entirely preoccupied with the effort to integrate southern school districts, and this enforcement effort relied almost entirely on racial enrollment statistics, collected for all school districts on an annual basis by the agency itself.

In the early 1970s, however, as integration drives in the South either achieved their ultimate objectives or bogged down in disputes over busing, OCR began to turn its attention to new kinds of discrimination issues. Initial efforts to challenge de facto school segregation in the North proved very discouraging, owing to intense political resistance and the difficulty of documenting official intent as a contributing factor in racial imbalance (as the courts still required). And here too there was the looming problem of busing. Instead, OCR began to

focus on issues relating to the internal operations of schools. It asserted authority to regulate the recruitment, selection, and promotion of teachers, for example—as well as their assignment to different schools—to prevent discrimination. In this area, following Equal Employment Opportunity Commission precedent, it felt free to define discrimination in statistical terms unrelated to intent. Toward this end, it began to collect relevant statistics on a nationwide basis. Similarly, it warned school districts against "discriminatory" imposition of student discipline sanctions and began collecting statistics from them on this. Guidelines were also issued on the assignment of students to different academic tracks within schools and the equitable funding of different programs within and between schools, again relying on statistical definitions of discrimination.

Title VI prohibits discrimination on the basis of national origin as well as race, and the agency seized on this to open another field of enforcement. In 1970 OCR notified school districts that in not taking "effective" steps to remedy the academic problems of "national origin–minority group" students, they would be violating Title VI—at least if the students' problems could be traced to their difficulties with the English language. Eventually under this policy schools were not only required to make an elaborate "educational diagnosis" of all students with English-language difficulties but also to provide them instruction in their native language (with "culturally suitable" materials) if necessary to maintain their academic progress.

Congress gave powerful additional impetus to this regulatory expansion with two new statutes, modeled on Title VI: Title IX of the Education Amendments of 1972, prohibiting discrimination on the basis of sex, and section 504 of the Rehabilitation Act of 1973, prohibiting discrimination by reason of handicap. By the mid-1970s, OCR had developed implementing regulations for these new statutes, which reached even more deeply into the internal operations of schools and colleges and staked out even more far-reaching notions of discrimination than Title VI. The Title IX regulations, for example, asserted enforcement jurisdiction over all aspects of school employment policies, from pensions to sick leaves, for all categories of employees, while also reaching guidance counseling, housing, health care, athletic programs and extra-curricular clubs—with discrimination usually defined in terms of statistically disparate impact rather than invidious intent. The section 504 regulations defined the term "handicap" to include such disparate problems as drug addiction, facial disfigurement, and speech defects; discrimination against the physically impaired was stretched to encompass failures to provide the special services, special facilities, or modified selection and promotion criteria (for students and employees alike) that would allow handicapped individuals to function like others.

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By the mid-1970s, then, OCR had developed a regulatory agenda of breath-taking proportions, envisioning unprecedented social transformations in several areas. In contrast to OCR's earlier goal of desegregating southern schools, however, the new agenda was extremely diffuse. Virtually every school district and college in America was arguably in violation of some aspect or another of the new requirements. It was not at all obvious where to begin enforcement efforts or where to concentrate these efforts. Nor was it at all obvious what the new requirements should be expected to achieve in many areas. Though pedantically detailed in some respects, the regulations were filled with ambiguities at crucial points, leaving to subsequent enforcement the task of resolving what such phrases as "reasonable accommodation" to the handicapped really meant. Meanwhile, OCR's regional investigators, accustomed to confronting southern school officials over simple racial enrollment figures, were plainly ill-prepared to negotiate complex new issues, such as the proper scale of bilingual education or women's athletic programs, in any sort of cooperative, understand-

ing manner. Yet there was no reason to suppose that OCR's ultimate leverage—its defunding sanction—would be any more widely available or credible in enforcing these complex new requirements than it had become in the later stages of the integration drive.

OCR's situation in the mid-1970s thus demanded a careful assessment of enforcement strategy and priorities. But this was precisely what the *Adams* litigation prevented. In the first place, the court orders of March 1975 simply absorbed too large a portion of OCR's enforcement resources. In June 1975 OCR officials testified that their regional offices in the South were forced to devote so much effort to comply with this directive that only 14 percent of their manpower was available for all other enforcement activities, such as efforts against sex discrimination and "language barrier discrimination." They petitioned Judge Pratt to extend or eliminate the deadlines for processing new complaints of race discrimination. Over the protests of the plaintiffs, he agreed to allow extensions of up to six months on the original deadlines. It was not enough.

In January 1976 OCR was sued by various parents of Mexican-American students and "other concerned Mexican Americans" in several southern states, represented by the Mexican-American Legal Defense Fund. They complained that OCR regional offices had been turning away their complaints on the grounds that the *Adams* order required them to "give priority to complaints of discrimination on the basis of race." They now petitioned Judge Pratt to allow them to intervene in *Adams* to protect their share of OCR resources. Meanwhile, the Women's Equity Action League (WEAL) had filed suit against OCR the year before for "failing to enforce adequately the laws designed to eliminate sex discrimination." Following the example of the Mexican-American group and citing parallel experiences with OCR regional offices in the South, the women's groups also sought intervention in *Adams*. Judge Pratt admitted the Mexican-Americans but, warning of "overloading the boat," tried to keep the women's groups out. WEAL promptly appealed this ruling and won an order from the court of appeals to admit the women's groups to *Adams*.

In fact, the original *Adams* plaintiffs themselves did not oppose these interventions or the new claims on OCR's resources which they represented. Indeed, Joseph Rauh and the NAACP Legal Defense Fund had launched their own new suit in 1975, styled *Brown* v. *Weinberger*, challenging OCR's failure to enforce integration standards in the remaining thirty-three states of the Union not covered by the *Adams* suit. If OCR did not have sufficient resources to meet all these new demands, Rauh argued, Judge Pratt could order the Office of Management and Budget (OMB) to seek funds and even order Congress to provide them. When Judge Pratt refused to go this far, the plaintiffs settled down to an extended negotiation with OCR officials to draw up enforcement priorities. In June 1976, Judge Pratt duly ratified the resulting plan. It called on OCR to investigate and settle (or move to invoke sanctions on) each new complaint under any of its jurisdictions within six months of receiving it—but allowed deferral in the processing of complaints in certain categories under certain specified conditions. In deference to the *Brown* suit, the plan now covered OCR operations in every state.

As it turned out, OCR had managed to reach agreement with the various plaintiffs only by promising far more than it could deliver. A year later, Judge Pratt was confronted with motions for further relief, protesting that OCR had failed to meet the required deadlines for 64 percent of the Title VI complaints and 69 percent of the Title IX complaints. The backlog of unprocessed complaints, which was supposed to be eliminated in the course of a year under the June 1976 plan, had actually grown larger. Predictably, these filings were followed almost immediately by a suit from the National Federation of the Blind, seeking to intervene in *Adams* on behalf of handicapped complainants, who were receiving virtually no attention from OCR, though the section 504 regulations had already gone into effect.

In what was by now a drearily predictable sequence, the new Carter administration leadership at OCR first tried to have the old orders dismissed and then ended up negotiating a new master plan for enforcement operations. This one was somewhat more flexible in its deadlines but also far more detailed in its direction of priorities. In response to OCR's concern about having all its resources preempted by individual complaints, the plaintiffs negotiated

the proper number, issue content, and time frames for agency-initiated compliance reviews —and this, too, went into the plan. In response to Judge Pratt's demands, the agency also promised to impress on OMB its absolute need for more resources—a "concession" the agency seems to have been all too ready to make.

For a time thereafter, OCR did seem to be turning over cases at a much faster rate, at least on paper. But by the end of 1980, it was again failing to meet its complaint processing deadlines for more than 60 percent of new complaints and was still nursing sizable backlogs. By the spring of 1981, the WEAL plaintiffs were urging Judge Pratt to impound all education grants until OCR processed its overdue cases or alternatively to sentence top agency officials to jail terms or punitive fines for contempt of court. When Judge Pratt demurred, a new round of bargaining ensued. In March 1983 the judge issued yet another modified set of enforcement deadlines and priorities, as recommended by the oversized club of plaintiff lawyers now engaged in the suit. This time OCR tried to appeal the judge's authority to impose such detailed orders—none of which after all had any basis in statute. That appeal is still pending before the D.C. Court of Appeals.

Assessing the Judge as Chief Executive

The *Adams* litigation failed almost entirely in its initial aim of getting OCR to use its funding sanction. It was equally a failure in restoring OCR's aggressive enforcement of integration standards in cases requiring busing. In response to these failures, the target of the litigation shifted after 1975 to the more general aim of improving OCR's management and operating efficiency. But this effort, too, has proved to be a dismal failure.

The experience of the plaintiffs and the judge in the earlier rounds should have taught them that OCR's problems could not really be blamed on the malevolent machinations of the White House or the indifference of successive presidential appointees at the agency. Still, they refused to face up to the ultimate source of its management problems: driven by its activist traditions from the 1960s and the demands of its new constituencies in the 1970s, OCR's leadership all too rarely mustered the administrative discipline or the political courage to consider the agency's enforcement capacities realistically and target its efforts accordingly. Thus from its first southern integration cases the agency was continually overreaching itself, initiating investigations it could not conclude, making charges and demands it could not enforce. As its agenda expanded in the course of the 1970s, the dissipation of its efforts and energies simply increased.

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Rather than bringing the agency to confront its limitations, the *Adams* litigation in many ways exacerbated its management problems. The agency's internal reporting systems were continually strengthened and refined during the 1970s, but largely in order to serve the data demands of the *Adams* plaintiffs rather than the needs of strong management. While generating mountains of data on the agency's success (or failure) in meeting complaint-processing deadlines, these systems failed to give OCR's Washington leadership much managerial control of regional office operations, or even provide it with a very clear picture of what was going on in the regional offices. As late as 1982, OCR officials admitted that they were not sure why the agency's performance in meeting complaint-processing deadlines varied so much from year to year and from one regional office to another.

What is indisputable is that the pressures of the *Adams* orders shifted OCR very heavily, at times almost exclusively, toward complaint-based enforcement. Many of the complaints the agency received were trivial or frivolous; many, on the other hand, were awkwardly large, calling for investigative procedures the agency had not yet developed or policy decisions it had not yet made. Internal agency studies have repeatedly confirmed what common sense all along suggested: that compliance reviews initiated by the agency itself, with both the site and the scope of the review under its control, are a

more productive use of resources than the processing of individual complaints. In fact, neither the Civil Rights Division of the Justice Department nor the Equal Employment Opportunity Commission has committed itself to pursuing every complaint it receives. Nothing in OCR's statutes suggests that it has any greater legal obligation in this regard and nothing in its experience suggests that it has any less need for selectivity and maneuvering room than these parallel agencies.

The lawyers involved in the *Adams* litigation insist that, whatever its failings, the suit has at least succeeded in securing extra personnel for OCR over the years. Leaving aside the question of whether this is a proper subject of judicial control, OCR had been growing at a far-above-average rate before Judge Pratt issued his first orders. Moreover, the additional increases that *Adams* brought were neither as large nor as long-lasting as successive settlements or court orders presumed they would be. In several areas they may well have inhibited necessary reforms by perpetuating unrealistic expectations.

Adams has also been praised for generally keeping agency leaders under pressure to improve. But OCR was already under considerable pressure from activist constituencies, and its long-term improvement often required it to resist their overeager demands. In some ways *Adams* made improvements more difficult. Managers knew that any controversial initiative could be quickly challenged by leaks from recalcitrant subordinates or second-guessing from resentful predecessors. At the same time, the intervening authority of the court inhibited successive department secretaries from imposing on OCR the discipline and direction which their own broader perspective and higher status could provide. Former HEW secretary Joseph Califano, among others, has maintained that the agency would have done far better without the interference of the *Adams* court. There is no reason not to take him at his word. The Equal Employment Opportunity Commission, a notoriously mismanaged agency in the late 1960s and early 1970s, improved its performance quite markedly in the late 1970s (in part by shifting smaller complaints to state agencies and developing quick mediation procedures for others)—and without the dubious help of a lawsuit.

Indeed, in retrospect, the failure of the *Adams* litigation seems to have been preordained by its structure. Judge Pratt, though claiming to be better equipped than Congress to oversee OCR's performance and determine its funding and staffing needs, still insisted that he could not be responsible for the details of OCR's operations. For their part, the civil rights lawyers conducting the litigation—and the successive settlement negotiations with OCR—did not really want to consider OCR's enforcement problems very seriously either, since whatever they learned might undermine their explicit litigational premise—that OCR need not establish or rank priorities, that it must do everything, everywhere, when and as demanded by its constituents. Perhaps if its goals had been much more modest, OCR might actually have aspired to full enforcement everywhere, as city fire marshals can make *every* business in town post exit signs and maintain working fire escapes. But the plaintiffs were even more insistent than OCR's leadership on the kind of ambitious, result-oriented enforcement that made this impossible.

ONE MIGHT SPECULATE that Judge Pratt finds a titillating sense of power in running a major federal agency year after year while administrations come and go, or that Rauh and his colleagues have relished the attorneys' fees they have gathered from *Adams* over the years (Judge Pratt having forced the government to compensate them for their efforts at $100–150 per hour). But it is not necessary to follow their example and attribute poor performance to bad motives. It is enough for the court of appeals simply to decide that a national enforcement agency should be returned to the control of officials whom the voters can replace every fourth November. If the court of appeals does not do so, Congress ought to stir itself and exercise its own responsibility for maintaining the separation of powers laid down in the Constitution.

True enough, the administrative scheme laid down by the framers of our constitution does not always ensure that enforcement agencies are well managed. But the *Adams* saga confirms that a lone federal judge and a small band of private attorneys are not likely to do any better. ■