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THE EXECUTIVE ORDER ON HOUSING: THE CONSTITUTIONAL BASIS FOR WHAT IT FAILS TO DO

MARTIN E. SLOANE* AND MONROE H. FREEDMAN†

I. BACKGROUND OF THE EXECUTIVE ORDER

IN AUGUST 1960, in the midst of his campaign for the Presidency, then Senator Kennedy made an important statement on the subject of housing discrimination:¹

Let me give one example of an important immediate contribution that could and should be made by the stroke of a Presidential pen.

Eleven months ago the Civil Rights Commission unanimously proposed that the President issue an executive order on equal opportunity in housing.

The President has not acted during this time. He could and should act now. By such action, he would toll the end of racial discrimination in all federal housing programs, including federally-assisted housing.

I have supported this proposal since it was made last September. The Democratic platform endorses it. A new Democratic Administration will carry it out.

Despite the fugitive nature of campaign promises it is doubtful under any circumstances that so direct and substantive a pledge could have been entirely ignored after the election. The candidate's use of the vivid phrase, "stroke of a Presidential pen," assured that his pledge would be remembered² and ultimately redeemed.

The dimensions of the "stroke," however, had not by any means been fully determined as President-elect Kennedy took office on Janu-

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The views expressed in this paper are those of the authors and do not purport to be those of the United States Commission on Civil Rights or the Housing and Home Finance Agency.

¹ Quoted in Lucas, *Integrated Housing: A Matter of Timing*, *The Reporter*, February 15, 1962, p. 30.

² The phrase "stroke of the pen" was used so often in the twenty-two months preceding the Executive Order's issuance that it tended to replace the term "Executive Order" in common usage. A magazine of political satire, for example, noting early in 1962 that the President "still hasn't stroked that pen," inaugurated an "INK FOR JACK" campaign on the tongue-in-cheek assumption that the reason for the delay was that "the White House has run out of ink." *Monocle*, 1962, p. 74.

ary 20, 1961. The proposal contained in the 1959 Report of the United States Commission on Civil Rights,³ to which Candidate Kennedy had referred, was primarily a recommendation for a statement of the principle of equal housing opportunity.⁴ The Commission, however, had not been specific regarding the affirmative steps by which this principle might be translated into reality.⁵ There was general agreement among exponents of an Executive Order on Housing that a meaningful Order should include within its scope Federally-owned housing, public housing, urban renewal, and housing financed with the aid of FHA-insured or VA-guaranteed loans.⁶ Beyond this, however, the scope was uncertain.

In the early fall of 1961, the President was reported to be awaiting publication of the 1961 Report of the United States Commission on Civil Rights before making a decision on his "stroke of the pen." In October 1961, the Commission presented its Housing Report⁷ to the President and the Congress, recommending the issuance of an Executive Order directed to "all Federal agencies concerned with housing and with home mortgage credit."⁸ The Report made it clear that when the Commission referred to "*all* Federal agencies concerned with housing and with home mortgage credit," it meant *all*, including not only the agencies that administer Federal housing programs,⁹ but also those Federal agencies that regulate and supervise mortgage lending institutions.¹⁰ This recommendation was supported by a detailed analysis of the significance of lending institutions in the housing market, and the

³ 1959 U.S. Comm'n on Civil Rights Rep. (hereinafter cited as 1959 Commission Report).

⁴ The Commission recommended in 1959 that "the President issue an Executive Order stating the constitutional objective of equal opportunity in housing, directing all Federal agencies to shape their policies and practices to make the maximum contribution to the achievement of this goal . . ." 1959 Commission Report 538.

⁵ The Commission further recommended that the President request it "to continue to study and appraise the policies of Federal housing agencies, to prepare and propose plans to bring about the end of discrimination in all federally assisted housing, and to make appropriate recommendations." Ibid. Thus, the Commission indicated that specific recommendations for achieving the goal of equal housing opportunity were reserved for a future Report.

⁶ See, for example, Leadership Conference on Civil Rights, *Proposals for Executive Action to End Federally Supported Segregation and Other Forms of Racial Discrimination*, August 29, 1961, p. 50. The Leadership Conference urged that:

To be effective, executive action in the area of housing should cover all housing currently enjoying the benefits of federal assistance as well as any future programs undertaken or maintained with Federal funds.

⁷ 1961 U.S. Comm'n on Civil Rights Rep., *Housing* (hereinafter cited as 1961 Commission Report).

⁸ 1961 Commission Report 150.

⁹ Principally the Housing and Home Finance Agency and its constituents (Federal Housing Administration, Public Housing Administration, Federal National Mortgage Association, Urban Renewal Administration, and Community Facilities Administration) and the Veterans Administration.

¹⁰ 1961 Commission Report 151.

extent of federal regulation of their activities.^{10a} The 1961 Commission Report served to end the uncertainty at least as to what the scope of the Executive Order *should* be. From that point on, it was generally agreed that for "full coverage"¹¹ the Executive Order should include mortgage lenders within its scope.

II. SCOPE OF THE EXECUTIVE ORDER

On November 20, 1962, the President fulfilled his campaign pledge and issued an Executive Order on Equal Opportunity in Housing.¹² Regardless of its scope, the issuance of this Order is an event of great moment in that it establishes for the first time an official policy against housing discrimination on the part of that branch of the Federal Government which executes the laws. In this sense the Executive Order constitutes a foundation upon which the structure of equal housing opportunity and free housing choice can be erected in time to come. But the Order, itself, does not by a "stroke of the pen" achieve these goals, nor can it, according to its present limited application, assure their eventual realization, even through vigorous and successful implementation by the agencies subject to its provisions. For the scope of the Order falls considerably short of a reasonably defined limit of Federal involvement in housing and home finance. This is true in at least two senses.

For one thing the principal thrust of the Order, as set forth in Section 101, relates almost entirely to housing and related facilities that are *hereafter* (after November 20, 1962) provided with Federal financial assistance.¹³ Thus, Federally-assisted housing already built and occupied before the date of the Order's issuance is outside the scope of Section 101.^{13a} Moreover, it is to be noted that in connection with several Federal housing programs (notably Public Housing and Urban

^{10a} Id. at 27-53.

¹¹ The term "full coverage" as understood by advocates of an Executive Order on Housing, is generally limited to the extent of Federal involvement in housing and home finance. The critical problem—of both law and policy—has been in defining the outer boundaries of such involvement.

¹² Exec. Order No. 11063, 27 Fed. Reg. 11527 (1962).

¹³ Section 101 directs that "all action necessary and appropriate" be taken to prevent discrimination with respect to housing and related facilities that are "owned or operated by the Federal Government" (Section 101(a)(i)) or are assisted by the Federal Government in any of the following ways:

(ii) provided in whole or in part with the aid of loans, advances, grants, or contributions *hereafter agreed to be made* by the Federal Government, or (iii) provided in whole or in part by loans *hereafter insured, guaranteed, or otherwise secured* by the credit of the Federal Government, or (iv) provided by the development or the redevelopment of real property purchased, leased, or otherwise obtained from a State or local public agency receiving Federal financial assistance for slum clearance or urban renewal with respect to such real property *under a loan or grant contract hereafter entered into. . .*" (Emphasis added.)

^{13a} Except, of course, for housing that is federally owned or operated.

Renewal) there is a considerable time lag between the granting of Federal financial aid and the ultimate construction and occupancy of the housing so aided. The critical cut-off date for purposes of Section 101 of the Executive Order, however, is the date on which the financial assistance is agreed to be made, not the date on which the housing is constructed or occupied, nor even the date on which money changes hands. In the case of Public Housing, the cut-off point is the date on which the Annual Contributions Contract (providing for future Federal subsidies to the public housing project) is executed.¹⁴ In the case of Urban Renewal, it is the date on which the Loan and Capital Grant Contract (providing for future slum clearance assistance) is executed.¹⁵ In both cases, years will usually elapse before the housing is actually constructed and occupied. Thus, if an Annual Contributions Contract or Loan and Capital Grant Contract were executed on November 19, 1962, (one day before issuance of the Executive Order) the command of nondiscrimination would be inapplicable with respect to the housing built well after that date pursuant to the contract. Consequently, for several years to come, we may well witness the continued discriminatory sale or occupancy, not only of existing housing built or sold with pre-Executive Order Federal aid, but also of housing yet to be constructed.

The Order, however, may prove to be sufficiently flexible to offset this disappointing prospect. Section 102, which addresses itself to housing and related facilities *heretofore* provided with Federal financial assistance, directs the relevant departments and agencies "to use their good offices *and to take other appropriate action permitted by law, including the institution of appropriate litigation, if required*, to promote the abandonment of discriminatory practices."¹⁶ Accompanying the olive branch of "good offices," then, is the more formidable (if vague) instrument—"other appropriate action." Strategic use of this provision

¹⁴ The Public Housing Administration requires that the following provision be inserted in all contracts for annual contributions which initially cover a public housing project or projects after November 20, 1962.

The Local Authority shall not discriminate because of race, color, creed, or national origin in the sale, leasing, rental, or other disposition of housing or related facilities (including land) included in any Project or Projects initially covered after November 20, 1962, by a contract for annual contributions under the United States Housing Act of 1937, or in the use or occupancy thereof. The Local Authority shall not, on account of race, color, creed, or national origin, deny to any family the opportunity to apply for such housing, nor deny to any eligible applicant the opportunity to lease or rent any dwelling in any such housing suitable to its needs.

Circular from Public Housing Commissioner Marie C. McGuire to Central Office Division and Branch Heads, Regional Directors, Local Authorities, and Housing Managers, dated November 28, 1962.

¹⁵ See Local Public Agency Letter No. 256, from Urban Renewal Commissioner William L. Slayton, November 30, 1962.

¹⁶ Emphasis added.

is a matter for careful development by the relevant departments and agencies with the help of the President's Committee on Equal Opportunity in Housing.¹⁷

The second shortcoming of the Executive Order—one which cannot be cured except by amendment—relates to the limited kinds of Federal assistance made subject to its provisions. While the Order is addressed generally to "all departments and agencies in the executive branch of the Federal Government,"¹⁸ its command of nondiscrimination affects only a fraction of the home financing in which Federal agencies play a part. The major inadequacy is that mortgage lending institutions are affected only to the extent that they engage in FHA and VA loans.¹⁹ The Order, then, does not represent full coverage, as comprehended by the Civil Rights Commission. The failure to cover federally supervised mortgage lenders constitutes a gap of considerable practical and economic significance. The institutions omitted are commercial banks, mutual savings banks, and savings and loan associations. They command, in the aggregate, resources of more than \$400 billion.²⁰ They also represent the major source of the "conventional" (non-FHA or VA) mortgage market, and it is, in fact, through them that most of the nation's home financing is done.

For example, at the end of 1961, the nonfarm residential mortgage debt amounted to \$174.6 billion.²¹ Of this amount, \$66 billion (38 percent) represented loans insured by FHA or guaranteed by VA.²² Of the remaining \$108.6 billion, which represented the outstanding "conventional" mortgage debts, \$79.4 billion was held as follows: commercial banks (\$12.6 billion); mutual savings banks (\$9.3 billion); and savings and loan associations (\$57.5 billion).²³ Virtually all of these institutions receive substantial Federal benefits and are subject to Federal regulation and supervision.²⁴ Thus, of the \$174.6 billion in out-

¹⁷ A most important problem in connection with Section 102 of the Order is the extent to which any action other than the use of "good offices" may legally be taken regarding housing "heretofore" provided with Federal assistance. This problem is beyond the scope of the present paper.

¹⁸ § 101.

¹⁹ Section 101(b) of the Executive Order directs that action be taken to prevent discrimination:

in the lending practices with respect to residential property and related facilities (including land to be developed for residential use) of lending institutions insofar as such practices relate to loans hereafter insured or guaranteed by the Federal Government.

²⁰ Commercial Banks hold \$278.6 billion; mutual savings banks hold \$43.8 billion; savings and loan associations hold \$82.1 billion (Figures are as of the end of 1961). See 1962 Fed. Reserve Bull. 1188, 1199.

²¹ 15 HHFA Ann. Rep. 354 (1961).

²² *Ibid.*

²³ Fed. Reserve Bull., *supra* note 20, at 1211, 1212.

²⁴ See Part III *infra* for discussion of the extent of such Federal supervision and the number and resources of the institutions so supervised.

standing nonfarm residential mortgage loans, more than 80 percent was held by institutions which, either through mortgage guarantees or over-all regulation and supervision, are closely controlled by the Federal Government. The Executive Order, however, limited as it is to FHA and VA home financing, affects lending institutions to the extent of less than 40 percent of this total.

In terms of home loans made during 1961, the figures show an even greater gap in coverage. Of the total amount of \$31.2 billion,²⁵ only \$6.6 billion (21 percent) were loans insured by FHA or guaranteed by VA.²⁶ And of the remaining \$24.6 billion (which represented "conventional" loans), almost \$19 billion were loans made by commercial and mutual savings banks and savings and loan associations.²⁷ Thus, more than 80 percent of the home loans made during 1961 were made by institutions which are closely controlled by the Federal Government. Yet, if the Executive Order, in its present form, had been issued on November 20, 1960, instead of November 20, 1962, only 21 percent of the home loans made during the following year would have been subjected to the requirement of nondiscrimination. Quite apart, then, from the question of whether these institutions *could* legally be subject to such a requirement, their key function in the nation's housing structure indicates that for an effective Order, they *should* be so subject.

The President has determined that at least for the present, the Executive Order will not affect mortgage lending institutions except to the extent that they engage in FHA or VA underwritten loans.²⁸ The relative merits of the President's decision to so limit his Executive Order have been discussed, from the standpoint of policy, both before and after its issuance. The question that has not been aired to any great extent is whether the President could legally amend his Order to cover federally supervised lending institutions, if he should recognize the need.²⁹ It is with this question that the following discussion is concerned.

²⁵ This figure represents nonfarm mortgage recordings of \$20,000 or less. See 15 HHFA Ann. Rep., *supra* note 21, at 351.

²⁶ *Ibid.*

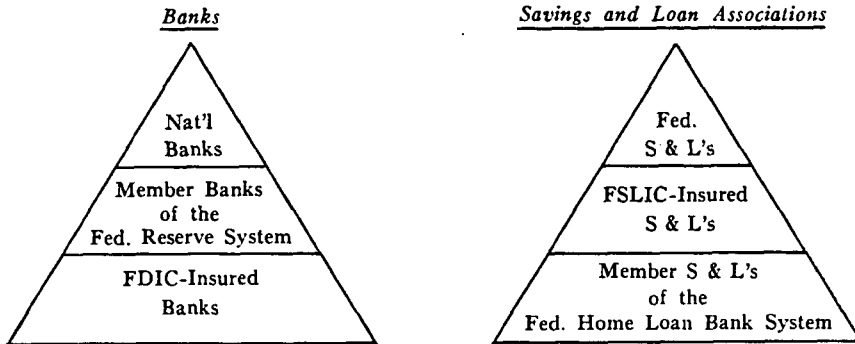
²⁷ *Id.* 75-76, 351

²⁸ In June 1961, the Federal Home Loan Bank Board, of its own accord, adopted a policy opposing discrimination because of race, color, or creed by the institutions under its supervision (savings and loan associations). In addition, the Board expressed the intention of implementing this policy through examination. See 1961 Commission Report 36. Although neither banks nor savings and loan associations are affected, as such, by the Executive Order, the Secretary of the Treasury and the Chairman of the Federal Home Loan Bank Board are nonetheless members of the President's Committee on Equal Opportunity in Housing, established by the Order. See § 401 of the Executive Order.

²⁹ The United States Commission on Civil Rights recommended that federally supervised mortgage lenders be covered "either by executive or by congressional action." 1961 Commission Report 151. Of the six members of the Commission, three are eminent

III. FEDERAL SUPERVISION OVER THE MORTGAGE LENDING COMMUNITY

Just as banks and savings and loan associations are separate in nature and organization,³⁰ so their supervision and regulation are conducted separately. The supervisory pattern in each case can be likened to a three-block pyramid.



With respect to banks, the upper block represents national banks, chartered and supervised by the Comptroller of the Currency.³¹ The middle block represents member banks of the Federal Reserve System, supervised by the Board of Governors of the Federal Reserve System. These are the 4,513 national banks, which are required by law to be Federal Reserve members,³² and 1600 of the 8920 State-chartered banks, which have voluntarily joined.³³

The broad base of the pyramid represents banks whose deposits are insured by the Federal Deposit Insurance Corporation (FDIC). These consist of all 6,113 member banks of the Federal Reserve System (both national and State-chartered), which are required by law to be

lawyers—Dean Robert G. Storey, Dean Erwin N. Griswold, and Dean Spottswood W. Robinson III. None expressed any reservation with respect to the legality of executive action to this end. Dean Storey's dissent (1961 Commission Report 151-153) was based entirely on his views regarding the policy underlying such action, not on its legality.

³⁰ For example, as the Civil Rights Commission has noted, savings and loan associations, unlike banks, "accept no deposits, pay no interest, and possess no independent capital structure. Their entire capital . . . consists of funds from individuals in the form of 'share accounts.' 'Share owners' receive dividends on their shares, not interest on deposits, and constitute, in effect, the associations' stockholders, not depositors." 1961 Commission Report 32.

³¹ As of the end of 1961, national banks constituted only 34 percent of the nation's 13,433 commercial banks, but they held more than 54 percent of all commercial bank resources (\$150.8 billion out of a total of \$278.6 billion). See Fed. Reserve Bull., *supra* note 20, at 1188.

³² Federal Reserve Act § 2, 38 Stat. 251 (1913), 12 U.S.C. § 282 (1958).

³³ Member banks, while constituting 46 percent of the total number of commercial banks in the country, as of the end of 1961, held more than 84 percent (\$235.1 billion) of their total resources. See Fed. Reserve Bull., *supra* note 20, at 1188.

FDIC-insured,³⁴ plus 6,997 State-chartered non-Federal Reserve member commercial banks and 330 mutual savings banks, which have voluntarily applied for and been granted the benefits of FDIC deposit insurance.³⁵

In all, 98 percent of the nation's commercial banks are FDIC-insured. They hold 99 percent (\$276.6 billion) of all commercial bank resources. In addition, of the 484 mutual savings banks in the country, 330 (68 percent) are FDIC-insured. They hold 85 percent (\$37.1 billion) of all mutual savings bank resources.³⁶

Federal supervision over the banking community is thus carried on by three agencies—Comptroller of the Currency: national banks; Board of Governors of the Federal Reserve System: State-chartered member banks; FDIC: State-chartered non-member insured banks. FDIC, however, has jurisdiction over institutions in the first two categories (national banks and State-chartered member banks) as well as those in the third (State-chartered non-member insured banks).³⁷ In fact, if FDIC should terminate the insurance of a bank that is also a member of the Federal Reserve System, the Board of Governors is required, in turn, to terminate that institution's membership in the Federal Reserve.³⁸ If the institution is also a national bank, the Comptroller of the Currency is required to appoint a receiver.³⁹ The crucial agency, therefore, for purposes of amending the Executive Order so as to cover banks, is FDIC, for it includes within its jurisdiction all banks that are supervised by the other two banking agencies.

With respect to savings and loan associations, the upper block represents Federal savings and loan associations, chartered and supervised by the Federal Home Loan Bank Board (FHLBB).⁴⁰ The middle block represents savings and loan associations whose accounts are insured by the Federal Savings and Loan Insurance Corporation (FSLIC), which is operated under the direction of the Federal Home Loan Bank Board.⁴¹ These consist of all 1,906 Federal savings and loan associations, which are required by law to be FSLIC-insured,⁴²

³⁴ Federal Deposit Insurance Act § 4(b), 64 Stat. 875 (1950), 12 U.S.C. § 1814(b) (1958).

³⁵ Figures are as of the end of 1961. See Fed. Reserve Bull., *supra* note 20, at 1188.

³⁶ *Ibid.*

³⁷ This is because all national banks and State-chartered member banks are required by law to have their deposits insured by FDIC.

³⁸ 64 Stat. 880 (1950), 12 U.S.C. § 1818(b) (1958).

³⁹ *Ibid.*

⁴⁰ As of the end of 1961, they constituted only 30 percent of the nation's 6,358 savings and loan associations, but they held 53 percent of all savings and loan resources (\$43.8 billion out of a total of \$82.1 billion). See Fed. Reserve Bull., *supra* note 20, at 1199.

⁴¹ 48 Stat. 1256 (1934), 12 U.S.C. § 1725(a) (1958).

⁴² 48 Stat. 1257 (1934), 12 U.S.C. § 1726(a) (1958).

and 2,315 of the 4,452 State-chartered savings and loan associations, which have voluntarily applied for and been granted the benefits of FSLIC insurance of accounts.

The broad base of the savings and loan pyramid represents associations that are members of the Federal Home Loan Bank System (FHLBS). These consist of all 4,221 FSLIC-insured associations (Federal savings and loan associations are required by law to be members of the FHLBS;⁴³ State-chartered FSLIC-insured associations are not required to be FHLBS members, but all are nonetheless members) plus 574 non-insured associations. In all, 75 percent of the nation's savings and loan associations are FHLBS members. They hold 98 percent (\$80.2 billion) of all savings and loan resources.

Unlike Federal supervision of the banking community, there is a concentration of Federal authority over savings and loan associations. The three functions carried out by three separate banking agencies is carried out by a single agency—the FHLBB—with respect to savings and loan associations. Also unlike the supervisory pattern in the banking community, the broadest category of savings and loan associations subject to Federal supervision consists not of insured associations, but of members of the Federal Home Loan Bank System (analogous to the Federal Reserve System). Another distinction is that State-chartered, FSLIC-insured associations are not required to be members of the FHLBS. Nonetheless, all FSLIC-insured associations are, in fact, FHLBS members.

Thus, the two crucial categories of lending institutions for purposes of amending the Executive Order so as to obtain full coverage are FDIC-insured banks and FHLBS-member associations.⁴⁴

IV. THE SCOPE OF EXECUTIVE POWER

The Issue Presented

An important first step in analyzing the constitutional validity of an amended Executive Order covering FDIC-insured banks and member savings and loan associations of the Federal Home Loan Bank System is to define the precise question to be resolved. There are at least three separate contexts in which the matter of nondiscrimination by such mortgage lending institutions might conceivably be tested:

1. A suit brought to require the FDIC and FHLBB to withhold

⁴³ 48 Stat. 133 (1933), 12 U.S.C. § 1464(f) (1958). Figures are as of the end of 1961.

⁴⁴ These two categories include all federally supervised lending institutions. With respect to savings and loan associations, however, it should be remembered that although all FSLIC-insured associations are, in fact, FHLBS members, they are not required to be. Therefore, in terms of broadening the Executive Order to cover all federally supervised savings and loan associations, legal authority must theoretically be found regarding FHLBS-member associations *and* FSLIC-insured associations.

their benefits from a member institution guilty of discrimination.

2. A suit brought to prohibit a lending institution whose deposits are insured by FDIC or that is an FHLBS member from discriminating.
3. A suit brought to prohibit the FDIC or FHLBB from imposing sanctions against a lending institution guilty of discrimination.

The three situations posed above present three separate issues of substantive law. In the first, the issue is whether the FDIC and FHLBB, as agencies of the Federal Government, are under a constitutional duty to take action to prevent discriminatory mortgage lending practices by institutions that receive their benefits. In the second, the issue is whether the lending institution in question, in its capacity as recipient of such Federal benefits, is so much an instrument of Federal policy or is so closely related to the Federal Government as to be an agency of the Federal Government or acting under color of Federal law.⁴⁵ Both of these issues involve the question of *duty*—in the first case, the duty of the Federal agency to prohibit discrimination by institutions receiving its aid (or of the President to direct such a prohibition on its part); in the second case, the duty of the institution receiving such Federal aid to adopt nondiscriminatory practices.

Neither of these, however, is the issue that would be presented by a broadened Executive Order. The third situation presents that issue. It is one not of *duty*, but of *power*—the power of the executive branch to require nondiscriminatory mortgage lending practices by institutions that receive the benefits of FDIC deposit insurance or membership in the FHLBS (including FSLIC insurance of accounts).⁴⁶

⁴⁵ In such a case there is substantial likelihood that the lending institution would be prohibited from discriminating, without the necessity for a broadened Executive Order. See, for example, *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), where it was stressed, on the basis of the 5th Amendment, that racial discrimination by the Federal Government is "unthinkable." See also *Hurd v. Hodge*, 334 U.S. 24, 34 (1948), where the mere enforcement by a Federal Court of a private discriminatory housing agreement was prohibited as being, *inter alia*, "contrary to the public policy of the United States." At least one category of lending institutions—national banks—appears to fall within this classification. The Supreme Court has declared that "National banks are instrumentalities of the Federal government, created for a public purpose. . . ." *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1875). The Court has further emphasized "the national character and purposes" of the system of national banks. *Easton v. Iowa*, 188 U.S. 220, 229 (1902). More recently, the Court has characterized national banks as "federal agencies," *First Nat'l Bank v. Missouri*, 263 U.S. 640, 656 (1923), and as "federal instrumentalities." *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 375 (1954).

⁴⁶ With respect to the President's power to *direct* the FDIC and FHLBB to impose a nondiscrimination requirement (in the unlikely event that either agency should refuse to comply with a Presidential *request* to take such action), both agencies are within the executive branch of government and are necessarily subject to the authority of the President, in whom the Constitution vests "the executive Power." (U.S. Const. art. II, § 1)

The distinction among these three issues was recognized, at least in the context of FHA and VA, in *Johnson v. Levitt & Sons*,⁴⁷ where a Federal District Court refused to enjoin a builder assisted by FHA and VA from engaging in discriminatory practices. The Court also refused to enjoin FHA or VA from providing him with such assistance. The Court recognized, however, that these agencies "probably" had the power to withhold aid in such a case, and that Congress certainly had the power to do so.⁴⁸

The question, then, is one of sufficiency of power. In the terms in which this question would likely arise, it is whether the FDIC and FHLBB can be said to have exceeded their powers by complying with a presidential directive to prevent discrimination in mortgage lending by FDIC and FHLBB-aided financial institutions.

The Basis of Executive Authority

We begin with the proposition that the President's Constitutional duty to "take care that the laws be faithfully executed,"⁴⁹ is not limited only to the enforcement of acts of Congress or treaties according to their express terms, but includes "the rights, duties and obligations growing out of the Constitution itself . . . and all the protection implied by the nature of the government under the Constitution."⁵⁰ Professor Corwin has written, "That the President is entitled to claim

Regarding the FHLBB, the act expressly provides: "The Home Loan Bank Board . . . shall be an independent agency (including the Federal Savings and Loan Insurance Corporation) in the executive branch of the Government." 69 Stat. 640-641 (1955), 12 U.S.C. § 1437. (Emphasis added.) The FDIC Act is silent concerning the Corporation's status. In view of the function of FDIC, however,—administering the law concerning the insurance of deposits—it seems apparent that it, too, is a part of the executive branch. See *Myers v. United States*, 272 U.S. 52 (1926). Furthermore, the FDIC does not grant licenses, nor is it involved in adjudication. There is, in short, no reason for ascribing to FDIC a status that is independent of the executive branch. Compare *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628 (1935); *Wiener v. United States*, 357 U.S. 349 (1957). In *Morgan v. TVA*, 115 F.2d 990, 994 (6th Cir. 1940), the Court, in deciding that the TVA is a part of the executive branch, said:

Whatever their character, [T.V.A.'s quasi-legislative and quasi-judicial functions] they are but incidental to the carrying out of a great administrative project. The Board does not sit in judgment upon private citizens and the government, and there is no judicial review of its decisions, except as it may sue or be sued as may other corporations. It is not to be aligned with the Federal Trade Commission, the Interstate Commerce Commission, or other administrative bodies mainly exercising clearly quasi-legislative or quasi-judicial functions—it is predominantly an arm of the executive department.

⁴⁷ 131 F. Supp. 114 (E.D. Pa. 1955).

⁴⁸ *Id.* at 116. In *Ming v. Horgan*, No. 97130, Calif. Super. Ct., Sacramento County (1958), 3 Race Rel. L. Rep. 693 (1958), on the other hand, a State court held that a Negro plaintiff had a constitutional right not to be discriminated against in connection with FHA and VA housing, thus indicating not only that these agencies had the power to withhold aid from discriminatory builders, but also the duty to do so.

⁴⁹ U.S. Const. art. II, § 3.

⁵⁰ *Cunningham v. Neagle*, 135 U.S. 1 (1889); cf. Corwin, *The President: Office and Powers* 169 (1957).

broad powers under his duty to 'take care that the laws be faithfully executed' has been demonstrated many times in our history."⁵¹

Nonetheless, there are certainly limits, though indistinct, on these "broad powers" to take executive action. As one authority has expressed it:⁵²

Although the President's general direction power is constitutional in its source, it is by no means absolute. On the contrary, all authorities agree that its exercise is subject to important limitations. Foremost among these is the well-settled rule that an Executive order, or any other Executive action, whether by formal order or by regulation, cannot contravene an Act of Congress that is constitutional. Thus, when an Executive order collides with a statute which is enacted pursuant to the constitutional authority of the Congress, the statute will prevail.

In the *Steel Seizure* case,⁵³ Mr. Justice Jackson, in a concurring opinion, delineated with somewhat more precision three categories of executive power:

1. That in which the President acts "pursuant to an express or implied authorization of Congress."⁵⁴ In such a case, Justice Jackson noted, the executive power is "at its maximum for it includes all that he possesses in his own right plus all that Congress can delegate."⁵⁵
2. That in which the President and Congress have concurrent authority, or in which its distribution is uncertain. This, to quote Justice Jackson's phrase, is "the zone of twilight."⁵⁶ In such a case, he said, the absence of Congressional legislation may "enable, if not invite," independent executive action. He added that the validity of executive action in the absence of Congressional action "is likely to depend on the imperative of events and contemporary imponderables rather than on abstract theories of law."⁵⁷
3. That in which "the President takes measures incompatible with the expressed or implied will of Congress." Here, "his power is at its lowest ebb" and "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."⁵⁸

⁵¹ Corwin, *op. cit.* supra note 50, at 104.

⁵² House Comm. on Gov't Operations, *Executive Orders and Proclamations: A Study of the Use of Presidential Powers*, 85th Cong., 1st Sess. 9 n.18 (1959).

⁵³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁵⁴ *Id.* at 635.

⁵⁵ *Ibid.*

⁵⁶ 343 U.S. at 637.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

In the *Steel Seizure* case, where the President's action was held unconstitutional, Congress had not simply remained silent regarding action to be taken in the event of a labor dispute in the steel industry, but had purposefully selected remedies inconsistent with seizure of the mills.⁵⁹ Even in a case of conflict between executive action and congressional will, however, an essential qualification must be borne in mind: executive action is limited only by "*constitutional* powers of Congress."⁶⁰

Utilizing Justice Jackson's delineation as the most useful judicial guide regarding the validity of executive action, the question remains, into which category would a broadened Executive Order covering federally supervised mortgage lenders fall. We will consider these categories in reverse order.

Has Congress indicated expressly or impliedly a course of action regarding housing or housing discrimination that would be incompatible with a broadened Executive Order?

No Congressional enactment has ever contained any suggestion that Federal aid to housing or home finance is to be administered on a discriminatory basis,⁶¹ nor that discrimination in mortgage lending is inappropriate for executive action. In short, Congress has not taken a position either expressly or impliedly that would be incompatible with executive action designed to assure nondiscriminatory access to mortgage credit from federally supported and supervised lending institutions. It has been suggested by opponents of the housing order that the failure of Congress to adopt proposed nondiscrimination amendments to housing legislation speaks against such action being taken by the executive.⁶² Such an argument, however, fails to appreciate the

⁵⁹ It is to be noted that three Justices would have upheld the President's power despite this fact. That Congress has provided specific remedies inconsistent with the President's action was stressed by four of the Justices comprising the majority of six.

Justice Jackson: "Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure . . ." (at 639).

Justice Burton: "the controlling fact here is that Congress . . . has prescribed for the President specific procedures, exclusive of seizure, for his use in meeting the present type of emergency. Congress has reserved to itself the right to determine where and when to authorize the seizure of property in meeting such an emergency" (at 660).

Justice Frankfurter: "nothing can be plainer than that Congress made a conscious choice of policy . . . Congress has expressed its will to withhold this power from the President . . ." (at 602-603).

Justice Clark: "where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis" (at 662).

⁶⁰ 343 U.S. at 637. (Emphasis added.)

⁶¹ In fact, were Congress ever to enact such legislation, a nice question would arise as to the responsibility of the executive branch with respect to administering such a patently unconstitutional law.

⁶² See, e.g., Palmer, "An Analysis of the Authority of the President to Issue an

well-established rule that "the rejection of legislation by Congress is not to be viewed as equivalent to the enactment of legislation of an opposite tenor."⁶³ Therefore, it seems clear that a broadened Executive Order would not fall within Justice Jackson's third category, where the President's power is "at its lowest ebb."

At the least, then, such an Order would come within Justice Jackson's second category, the "zone of twilight," where the absence of congressional legislation may "enable, if not invite," independent executive action. Congress, however, has not been silent regarding this subject, nor has the Supreme Court. In fact, there is a substantial body of law, both legislative and judicial, to support executive action designed to assure equal access to mortgage credit from federally supervised institutions.

First, confining ourselves to an examination of the law governing only the lending institutions and their supervisory agencies, such an Executive Order rests, in each case, on a stronger basis than Congressional silence. For example, section 6 of the Federal Deposit Insurance Act⁶⁴ sets forth as a statutory criterion which the FDIC Board must consider in determining whether to accept an applicant bank for insurance, "the convenience and needs of the community to be served by the bank." As the Civil Rights Commission commented regarding this statutory factor:⁶⁵

Where the FDIC dispenses its benefits, the banking "needs" (if not the "convenience") of the entire community, including minority groups, would seem to be entitled to consideration.

It is to be noted in this connection that there is no express statutory requirement that FDIC must consider the "convenience and needs" factor once the deposit insurance has been granted. The governing statute, however, authorizes the FDIC Board to exercise "all powers specifically granted . . . and such incidental powers as shall be necessary to carry out the powers so granted."⁶⁶ The FDIC Board is further empowered "to prescribe . . . such rules and regulations as it may deem necessary to carry out the provisions of this act."⁶⁷ In addition,

Executive Order Concerning Racial Integration in Federal Housing Programs," 108 Cong. Rec. 21684 (1962).

⁶³ Taylor, *Action in Equity by the United States to Enforce School Desegregation*, 29 Geo. Wash. L. Rev. 539, 542 (1961). See *Gemsco, Inc. v. Walling*, 324 U.S. 244, 265 (1945); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). In *Ming v. Horgan*, *supra* note 48, at 699, the court said: "If it be objected that Congress refused to . . . ordain [nondiscrimination], it must be replied that Congress could not ordain otherwise. . . ."

⁶⁴ 64 Stat. 876 (1950), 12 U.S.C. § 1814(b) (1958).

⁶⁵ 1961 Commission Report 50.

⁶⁶ 64 Stat. 881 (1950), 12 U.S.C. § 1819 (1958).

⁶⁷ 64 Stat. 882 (1950), 12 U.S.C. § 1819 (1958).

FDIC is authorized to terminate its insurance of any bank for violation of FDIC regulations.^{67a} It is difficult to argue, in the face of these broad grants of authority, that FDIC is powerless to assure that banks receiving the benefits of its insurance will serve the "convenience and needs" of the community while such insurance is in effect. Thus, FDIC appears to have ample discretionary and regulatory authority to take action pursuant to a directive from the President to assure equal access to mortgage credit from FDIC-insured banks for all qualified persons in the community, regardless of their race, religion, or national origin.

Furthermore, it is clear that a basic Congressional purpose in creating the system of Federal Deposit Insurance was the preservation of the free flow of credit.⁶⁸ As Representative Steagall, the guiding spirit of the FDIC legislation, explained:⁶⁹

This bill will preserve independent, dual banking in the United States to supply community credit, community service, and for the upbuilding of community life. That is what this bill is intended to do. That is the purpose of this bill; that is what the measure will accomplish.

In view of this emphasis on community credit needs, of which housing credit is such an important aspect, and in view of the important role that commercial and mutual savings banks play in supplying such credit,⁷⁰ it is arguable (beyond the necessities of this paper) that FDIC has an affirmative duty to adopt measures to assure equal availability of housing credit to all elements of the community from the lending institutions it benefits and supervises.

In the area of Federal supervision over savings and loan associations, the power to adopt such measures appears, if anything, more manifest. Unlike banks, which engage in various investment activities other than home financing,⁷¹ savings and loan associations are limited almost exclusively to residential mortgage credit. The legislative history regarding the creation of both the Federal Home Loan Bank System and the Federal Savings and Loan Insurance Corporation clearly demonstrates that a major purpose of both is to facilitate the flow of home mortgage credit so as to serve the nation's home buyers.⁷²

^{67a} 64 Stat. 879 (1950), 12 U.S.C. § 1818(a) (1958).

⁶⁸ See H.R. Rep. No. 150, 73rd Cong., 1st Sess. 6 (1933); 77 Cong. Rec. 3840 (1933). See also Golembe, *The Deposit Insurance Legislation of 1933: An Examination of its Antecedents and Purposes*, 75 *Pol. Sci. Q.* (1960).

⁶⁹ 77 Cong. Rec. 4033 (1933).

⁷⁰ In 1961, of the \$31.2 billion in home loans made, \$6.7 billion (21 percent) were made by such institutions.

⁷¹ An amended Executive Order, of course, would be concerned only with the home financing aspect of their investment activities.

⁷² Regarding the creation of the Federal Home Loan Bank system, the House Report stated as a principal reason: "Our national credit structure needs . . . these home loan banking units to serve the small saver and the home buyer in the cities and small

Again, the FHLBB has ample discretionary and regulatory authority to assure that this purpose is carried out—that institutions receiving the benefits of membership in the Federal Home Loan Bank System or of FSLIC insurance will not deny home loans on the arbitrary ground of race, religion, or national origin. The Federal Home Loan Bank Act states:⁷³

No institution shall be eligible to become a member of, or a non-member borrower of, a Federal home loan bank, if, in the judgment of the [Federal Home Loan Bank] board, . . . the character of its management or its home-financing policy is inconsistent with sound and economical home financing or with the purposes of this act.

The Act further states:⁷⁴

The [Federal Home Loan Bank] board . . . shall have power to adopt, amend, and require the observance of such rules, regulations, and orders as shall be necessary from time to time for carrying out the purposes of the provisions of this act.

Finally, the Act provides:⁷⁵

. . . the [Federal Home Loan Bank] board may, after hearing, remove any member from membership . . . if, in the opinion of the board, such member . . . (i) has failed to comply with any provision of this act or regulation of the board made pursuant thereto; . . . or (iii) has a management or home-financing policy of a character inconsistent with sound and economical home financing or with the purposes of this act.

With respect to the FSLIC, which was created as part of the National Housing Act,⁷⁶ the Act provides:⁷⁷

[The FSLIC] shall be under the direction of the Federal Home Loan Bank Board and operated by it under such bylaws, rules, and regulations as it may prescribe for carrying out the purposes of this title.

Further, the Act authorizes the termination of FSLIC insurance if the FHLBB finds that the institution in question "has violated its duty

towns." House Comm. on Banking and Currency, H.R. Rep. No. 1418, 72d Cong., 2d Sess. 8 (1932). See also Senate Comm. on Banking and Currency, S. Rep. No. 837, 72d Cong., 2d Sess. (1932).

Regarding the purpose in creating the Federal Savings and Loan Insurance Corporation, the House Report states that among the principal purposes are: "to improve conditions with respect to home-mortgage financing, . . . to eliminate the necessity for costly second-mortgage financing, to promote thrift and protect savings. . . ." House Comm. on Banking Currency, H.R. Rep. No. 1922, 73d Cong., 2d Sess. 1 (1934).

⁷³ 47 Stat. 726 (1932), 12 U.S.C. § 1424(a) (1958).

⁷⁴ 47 Stat. 737 (1932), 12 U.S.C. § 1437(a) (1958).

⁷⁵ 69 Stat. 640 (1955), 12 U.S.C. § 1426(i) (1958).

⁷⁶ 48 Stat. 1246, 1256-57 (1934), 12 U.S.C. §§ 1701, 1725(a), 1726 (1958).

⁷⁷ 48 Stat. 1256 (1934), 12 U.S.C. § 1725(a) (1958).

. . . or negligently permitted any of its officers or agents to violate any provision of any law or regulation to which the insured institution is subject."⁷⁸

It is apparent, therefore, that even on a narrow consideration of the statutes governing the lending institutions and their supervisory agencies, substantial authority exists to support the validity of a broadened Executive Order. There is no apparent reason, however, for examining each statute in vacuo, as if Congress had never enacted any complementary legislation. As Professor Corwin has noted:⁷⁹

. . . any particular statute is but a single strand of a vast fabric of laws demanding enforcement. . . . The President's duty "to take care that the laws be faithfully executed" has come, then, to embrace a broad power of selection among the laws for this purpose. . . .

Congress has, in fact expressly legislated a national policy that is relevant to a broadened Executive Order. In a statute first enacted almost 100 years ago, Congress provided:⁸⁰

All citizens of the United States shall have the same right in every State and Territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real . . . property.

In more recent legislation, Congress established, in 1949, a national housing objective: "a decent home and a suitable living environment for every American family."⁸¹ There is no room in this language for restrictions based upon race. As the President noted several months before issuing the Executive Order:⁸²

It is clear now, as it was then [in 1949] that this objective cannot be fulfilled as long as some Americans are denied equal access to the housing market because of their race or religion.

Yet, the Civil Rights Commission has reported that "the financial community in which these [Federal] agencies play so large and so vital a role is a major factor in the denial of equal housing opportunities to

⁷⁸ 68 Stat. 633-634 (1954), 12 U.S.C. § 1730 (1958).

⁷⁹ Corwin, *op. cit.* supra note 50, at 122.

⁸⁰ Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, reenacted in § 18 of the Act of May 31, 1878, 42 U.S.C. 1982 (1958). Although it once might have been argued that the language of section 1982 begs the question at issue here, the Supreme Court has expressly held that this statute precludes enforcement by Federal courts of racially restrictive covenants and that interpretation of this statute to permit such enforcement would "reject the plain meaning of [the legislative] language." *Hurd v. Hodge*, 334 U.S. 24, 34 (1948). See also *Oyama v. California*, 332 U.S. 633, 640 (1948); *Buchanan v. Warley*, 245 U.S. 60, 78 (1917).

⁸¹ 63 Stat. 413 (1949), 42 U.S.C. § 1441 (1958).

⁸² Hearing held in Washington, D.C. before the U.S. Commission on Civil Rights 12 (1962).

minority groups.”⁸³ Taking this fact in conjunction with the Congressional policy that is thereby frustrated, it is again arguable (beyond the necessities of the present paper) that the President has a *duty* to direct the government agencies involved to use their supervisory powers over the nation’s mortgage lending institutions to further this Congressional housing policy.

Executive *power*, on the other hand, seems manifest in such a situation, for a broadened Executive Order would appear to be well within Justice Jackson’s first category of Presidential powers: that in which the President acts “pursuant to an express or implied authorization of Congress.”⁸⁴ In such a case, executive power “is at its maximum.”⁸⁵

Nor does such authority derive from policies expressed by Congress alone. The Supreme Court of the United States has held that discrimination with respect to housing is “contrary to the public policy of the United States.”⁸⁶ This public policy against housing discrimination is of such force that in *Hurd v. Hodge*,⁸⁷ the Court prohibited a lower Federal court from enforcing a *private* discriminatory agreement on the ground (among others) that such enforcement “would be violative of that policy.”⁸⁸ The Court said:⁸⁹

The power of the federal courts to enforce the terms of private agreements is at all times subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution . . . [and] federal statutes. . . .

Surely the executive branch is under no less duty—and, *a fortiori*, has the power—to act in accordance with the same public policy against racial discrimination in housing and its necessary counterpart, home finance.

Finally, should the President broaden his Executive Order to include federally supervised mortgage lenders, there would be consistency throughout the executive branch with respect to equality of housing opportunity. In that event, and in view of the policy already established by Congress and the Supreme Court, it could be truly said that on this subject all three branches of the Federal Government speak with a single voice.

V. CONCLUSION

We conclude that for the following reasons an amended Executive Order directing the FDIC and the FHLBB to take necessary and

⁸³ 1961 Commission Report 51.

⁸⁴ *Supra* note 53, at 635.

⁸⁵ *Ibid.*

⁸⁶ *Hurd v. Hodge*, 334 U.S. 24, 34 (1948).

⁸⁷ 334 U.S. 24 (1948).

⁸⁸ *Id.* at 34.

⁸⁹ *Ibid.*

appropriate action to assure nondiscrimination in mortgage lending by the institutions they benefit and supervise would be desirable and valid:

1. Federally supervised mortgage lending institutions, which are responsible for most of the nation's home financing, are largely unaffected by the President's Housing Order.

2. The President, in exercising his Constitutional duty to take care that the laws be faithfully executed, has broad powers to assure that the benefits of federal assistance in housing and home finance are available to the American people on the basis of equal opportunity.

3. Both the FDIC and the FHLBB possess sufficient statutory authority to comply with a presidential directive to this end. In addition, a basic purpose in creating the systems of FDIC and FSLIC insurance and the Federal Home Loan Bank System was to aid and preserve the free flow of credit, of which housing credit is an important aspect. To the extent that persons are arbitrarily denied equal access to such credit on grounds of race, religion, or national origin, the achievement of this purpose is frustrated.

4. Congress has in no way limited the executive in this regard. On the contrary, both Congress and the Supreme Court have, on several occasions, expressed a national policy of equal housing opportunity. This policy cannot be realized unless there is equal access to housing credit. A broadened Executive Order, therefore, covering federally supervised mortgage lending institutions, would serve to bring this policy closer to achievement.⁹⁰

⁹⁰ Additional support for this conclusion includes the President's assertion of power consistent with the policies of the anti-trust laws. See 63 Yale L.J. 1124 (1954). Also, the President might act pursuant to his "very delicate plenary and exclusive power . . . as the sole organ of the Federal Government in the field of international relations. . . ." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Domestic racial discrimination is an issue in international relations. See, e.g., Hearing in Wash., D.C. before the U.S. Commission on Civil Rights 125-185 (1962). It is arguable that serious embarrassment to the United States can best be avoided by a broad Executive Order assuring equal access to housing and to home mortgage credit. As the Supreme Court noted:

It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success of our aims achieved, Congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. *U.S. Curtiss-Wright Export Corp.*, *supra* at 320.