NEW OPPORTUNITIES

Civil Rights at a Crossroads

Citizens' Commission
on Civil Rights



NEW OPPORTUNITIES:

CIVIL RIGHTS AT A CROSSROADS

Susan M. Liss and William L. Taylor, Editors

Report of the Citizens' Commission on Civil Rights

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FOREWORD

The Citizens' Commission on Civil Rights is a bipartisan group of former officials who have served in the federal government in positions with responsibility for equal opportunity. It was established in 1982 to monitor the civil rights policies and practices of the federal government and to seek ways to accelerate progress in the area of civil rights.

This study has two parts. Part One consists of the Report and Recommendations of the Commission, and includes a Statement of Goals for Civil Rights which the Commission encourages the new administration to endorse. Part Two is a series of working papers prepared by leading civil rights and public interest experts, with some contributions by private practitioners. Several of these authors also contributed to the Commission's two earlier studies of federal civil rights enforcement, Lost Opportunities: The Civil Rights Record of the Bush Administration Mid-Term (1991) and One Nation, Indivisible: The Civil Rights Challenge for the 1990s (1989).

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ABOUT THE AUTHORS

PART ONE

REPORT OF THE CITIZENS' COMMISSION ON CIVIL RIGHTS

New Opportunities: Civil Rights at a Crossroads

I. Introduction

This year marks the twenty-fifth anniversary of one of the most momentous years in the nation's long struggle for equality under law.

In April, 1968, Dr. Martin Luther King, Jr., the most eloquent and persuasive voice in the effort to break down walls of segregation and establish racial and social justice, was struck down by an assassin. Ever since, those who have sought to keep Dr. King's dream alive have had to wage a difficult battle to overcome increasing rationalizations of inequality and calls for separatism.

A month before the assassination, in March of 1968, the National Advisory Commission on Civil Disorders (the Kerner Commission) had issued its report on the causes of the racial disorders that had wracked American cities. The Commission's basic conclusion was that:

> "Our Nation is moving toward two societies, one black, one white--separate and unequal."

Since the Kerner Report, much has changed for the better in the United States. The protections of the civil rights laws have been strengthened and broadened to ban discrimination on the basis of gender, age, and disability, as well as race, religion and national origin. Much, however, remains to be done. There is evidence from many parts of our society that we still must deal with the Kerner Commission's prophecy.

With administrative and judicial enforcement, the desegregation promised by Brown v. Board of Education finally came to school districts throughout the South and other parts of the nation in the 1970s, to the point where except in the largest cities in the nation, most black and white children attend schools together. With desegregation and federal assistance to disadvantaged children, the racial achievement gap began to narrow and hundreds of thousands of minority youngsters gained access to higher education for the first time.

The exclusionary character of the job market began to change as well. Black citizens and other minorities entered many skilled blue and white collar occupations and professional fields

in more than token numbers. Gains in job opportunities brought gains in family income. And the progress made in education, employment, and other areas was undergirded by the lowering of voting barriers and the increasing potency of black citizens as a political force in the nation.

But the 1980s brought regression in many areas. The Reagan and Bush Administrations claimed that discrimination was virtually a thing of the past, that the nation had now arrived at a blissful state of color blindness and that the affirmative remedies and enforcement machinery that had brought progress in earlier times were no longer needed. But the evidence was to the contrary. Studies by the Urban Institute of the treatment of black and white job seekers, by the Department of Housing and Urban Development of the treatment of black and white homeseekers, by the Federal Reserve and several newspapers of the persistence of redlining by financial institutions all strongly suggest that discrimination remains a pervasive institutional problem.[1]

As federal assistance and concern waned, the gap between black and white children on achievement tests, which had closed significantly during the 70s and early 80s, began to widen again.[2] Early reports from the 1990 Census showed that racial disparities in family income did not ease significantly in the 1980s and actually grew in the Midwest.[3] Housing segregation remained an intractable problem in many places.[4] In other words, segregation -- particularly in public schools and housing -- remains one of our nation's most difficult problems.

And, while the social insurance system has lifted many segments of the population out of poverty, there are still millions in poverty, particularly among the elderly. At the same time, the proportion of children in poverty has been rising. In the hundred largest cities in the country nearly 3 children in 10 were poor in 1989. In 31 of these cities, at least half the black children were poor, in 19 at least half the Native American children were poor; in 10 at least half the Hispanic children were poor. Many rural areas also had disturbingly high rates of child poverty.[5]

As the economy and government's concern about civil rights declined, race relations worsened. Ugly racial incidents flared in Miami, Florida and Forsythe County, Georgia, in Howard Beach and Bensonhurst in New York City, and bitter feelings persisted long after the events. Racial tensions culminated in 1992 in the disorders in Los Angeles spurred by the acquittal of police officers accused of beating Rodney King, disorders that had a far more devastating and destructive impact in the minority community than the counterpart events in the 1960s that gave rise to the Kerner Commission. The task of easing racial tensions was made more complex by increased immigration and the growing diversity

of the Nation. Hispanic and Asian-Americans more frequently became the targets of racial and ethnic animus than in the past. Members of minority communities often found themselves at odds as they struggled over diminishing resources.

Most daunting of all is the combination of race and poverty and the structures and institutions that work to deprive the minority poor of opportunities for advancement. When the Kerner Commission wrote in 1968, many cities were still great centers of employment and economic activity. In 1992, employment and economic wealth have shifted to suburbs and the movement of middle class citizens of all racial and ethnic groups out of cities has intensified. The growing wealth of suburbs has brought superior educational and other public services often financed without great difficulty out of property and income taxes. For the minority poor in cities, services have declined, and cities face a form of triage in seeking to meet a host of health, social, housing and education needs.

This, in brief, is the challenging situation that faces a new Administration as it takes office in 1993. There is evidence that President-elect Clinton understands the importance of the task. In 1987, he wrote testimony opposing the nomination of Judge Robert Bork to the Supreme Court because Judge Bork's views threatened to reopen racial wounds that were healing and because then-Governor Clinton thought it important to get beyond race and focus on growth and jobs and education.[6] But the difficulties of meeting the challenge should not be underestimated. While economic stimulus is important, the rising tide it creates will not lift the boats of those who are mired in poverty and racial discrimination. While oiling up the rusted machinery of civil rights enforcement will help, it cannot provide opportunity for those who are worst off in society. Beyond these measures the Administration will need to confront the racial fears that keep people apart, to break down the physical and psychological isolation that locks the minority poor out of opportunity and to help provide the education, training and social services that will enable people to help themselves.

That is a very tall order indeed. The Kerner Commission closed its report with a quotation from one of its witnesses, the eminent scholar Kenneth B. Clark. Dr. Clark, after reviewing the reports of earlier Commissions established to investigate the causes of riots, concluded:

> "I must again in candor say to you members of this Commission--it is a kind of Alice in Wonderland--with the same moving picture reshown over and over again, the same analysis, the same recommendations, and the same inaction."[7]

A rereading of the Kerner Report in 1993 provides confirmation of Dr. Clark's somber analysis. So much that the Commission found wrong then remains wrong today.

But counsels of despair ought not to prevail. More positive change in civil rights and in the status of racial minorities, women, and people with disabilities has occurred in the last 25 years than at any previous time in history. At critical moments, the nation has shown both the courage and the capacity to change. Accordingly, our Commission offers this report to Congress and the new President in the hope that it will assist them in ushering in a new era of opportunity for all citizens.

II. Statement of Goals

Equal opportunity is one of our nation's most cherished goals. Its birthpangs have included bitter conflicts including a civil war and riots in our cities. As a nation, we have paid a terrific price. In spite of that price, and in spite of the setbacks during the last twelve years, we are determined to press on as a nation until the goal of equal opportunity is reached.

Discrimination and segregation -- direct opposites of equal opportunity -- deny to those who are its victims opportunity to achieve their highest possibilities. Many of our people are lacking the basics -- from education to housing to health care-- as a result of our nation's continuing legacy of discrimination.

Since the 1954 Brown v. Board of Education ruling declaring segregated education illegal, courts and the Congress have tried to follow the compass provided by Brown, not just in the area of education, but also in the areas of employment, housing, voting rights, and rights of people with disabilities. But even with the great advances presented by new laws and court decisions, equality of opportunity remains elusive for many Americans.

During the last twelve years our national leaders have fostered the divisions among Americans instead of seeking to heal them. The machinery of government has been used in a way that has encouraged divisiveness and tensions between Americans.

With a new President, our nation has a new opportunity to realize our long-deferred national goal of equality of opportunity. President-elect Clinton can help redirect our energies away from the divisiveness of the last decade. Through his leadership, he can encourage all Americans to live up to the goal expressed in Brown, that every American have an equal chance to reap the rewards of living in America.

We believe that one of the highest priorities facing the President-elect is the job of reuniting our nation. We urge him

to start this task by reaffirming our determination as a nation to reach these goals:

1. Our schools, colleges and universities must continue to move toward equality of opportunity through desegregation and through assurance that the services needed for educational advancement will be provided on an equitable basis to all.

2. Residential desegregation must be achieved. Discrimination in mortgage lending must be eliminated.

3. The right to vote must be provided to all citizens, and barriers to that right -- including language barriers and barriers to registration -- should be eliminated.

4. All who are qualified should have equal access to jobs, irrespective of race, color, creed, national origin, age, sex, or disabilities. In order to translate this goal into results, it is essential for all employers, public and private, to set objectives to be achieved in a reasonable period of time.

5. Enforcement of the civil rights laws and court decisions must be made a national priority, and resources must be made available to enforce the laws adequately.

6. To translate the promises of equality in the civil rights laws into real opportunities for all our citizens, a fair share of our nation's resources should be devoted to creating opportunities for access.

7. Our courts must no longer be viewed as an ideological arm of the executive branch of government, but must be restored to their constitutional role of an independent third branch of government. Appointments must be based on merit, and should reflect the diversity of America.

Affirming these goals is the first of many steps that must be taken to set the nation on the path to equality of opportunity once again.

III. A Snapshot of America, 1993

Data from the 1990 Census and from a number of other studies demonstrate that the legacy of segregation and other forms of discrimination continues to leave its mark.

A. Economic Statistics

Of the 249.6 million people counted in the official 1990 Census,[8] there were 30 million blacks, making up 12.1 percent of the population, up from 11.7 percent of the population in the 1980 Census. Latinos, according to the 1990 Census, number 22.4

million people, or 9 percent of the overall population and about 36 percent of the minority population. Asian/Pacific Islanders, numbering 7.3 million, are now 2.9 percent of the population, and Native Americans and the Eskimo/Aleut population combined was estimated to be 2 million.

Median family income in March 1990 for all white families was $36,915 compared with $21,423 for all black families. White married couple families had a median income of $40,331 compared to $33,784 for blacks. For male family heads without a wife present, whites had a median income of $30,570 compared with $21,848 for African-Americans. In families headed by a woman with no husband present, whites had a median income of $19,528, compared with $12,125 for blacks. The median income for Latino families was $23,400 (about 64 percent of the median income for non-Latino families), with a range from $18,000 to $31,000 depending on the Latino family's origin.

In 1990, the black poverty rate was 31.9 percent, Native Americans had a 30.9 percent rate. Latinos had a 28.1 percent poverty rate, and Asians/Pacific Islanders had a 12.2 percent poverty rate. For whites, 10.7 percent were below the poverty line, which in 1990 for a family of four was $13,359.

The statistics for the poverty rates of children are even more distressing. According to the 1990 Census reports, the poverty rate that year for children under 18 was 18.3 percent. Of black children, 40 percent lived in poverty while 32 percent of Latino children and 39 percent of Native American children were also below the poverty line.

The poverty rate for young children was even higher. In 1990, 5.3 million, or 23 percent, of children under six living in the United States were poor, up from 3.5 million, or 17 percent, in 1970. Fifty percent of black, and 40 percent of Latino children under six were poor in 1990, compared to 14 percent of white children.

While the official unemployment rate for the year 1990 was 5.5 percent, for blacks it was 11.3 percent and for whites, 4.8 percent. The "hidden unemployment rate," which includes those no longer seeking work and those who are involuntarily working part-time was 11.3 percent. However, for blacks, the "hidden" rate was 21.5 percent, and reached 60.9 percent for black male teenagers. The "hidden" rate for whites was 9.9 percent. For Latinos, the unemployment rate was 10 percent in March 1991, with Latino men showing the highest labor force participation rate among male populations of 78.2 percent either working or seeking work.[9] The labor force participation rate for Asian and Pacific Islander males was 72.1 percent.[10]

Median weekly earnings in 1990 were $427 for whites, compared with $329 for blacks. Black males had median weekly earnings of $360 compared with $497 for white males, and $272 for Latino males. Among women, African-American women had median weekly earnings of $308, compared with $355 for white women, and $194 for Latino women.

B. Health Statistics

Health statistics are as revealing as economic statistics. While an estimated 37 million Americans have no health insurance, 13 percent of those uninsured are white, 20 percent are black, and 32 percent are Latino.

In life expectancy, the statistics also speak for themselves. In 1989, the most recent year for which statistics are available, life expectancy for all Americans rose from 74.9 to 75.3 years, with life expectancy for whites up to 76 from 75.6 years in 1988. But for blacks, life expectancy was 69.2 in 1989, down from 69.4 in 1986. For black men, life expectancy dropped from 64.9 in 1988 to 64.8 in 1989, continuing a downward trend that began in 1984/85, after a decade of rising statistics. For black women, life expectancy rose from 73.4 to 73.5 years between 1988 and 1989.

The gap in infant mortality rates is also vast. For whites, there were 8.2 deaths per 1,000 live births in 1989, while for blacks, there were 17.7 deaths per 1,000 live births.

For Hispanics, a survey of Hispanic health appearing in the Journal of the American Medical Association[11] found that Hispanics suffer from an excess of incidence of certain cancers -- stomach, esophagus, pancreas and cervix. In addition, the incidence of tuberculosis among Hispanics is four times that of non-Hispanic whites, and Hispanics have three times the risk of diabetes than non-Hispanics. Farmworkers, a majority of whom are Hispanic, face special health problems. The infant mortality rate for farmworkers is about 25 percent higher than the national average, and the life expectancy of farmworkers is just 49 years.[12]

The AIDS epidemic has had a disproportionate impact in the minority community. Since January 1988, about 46% of reported AIDS patients have been minorities. In New York City, over two-thirds of the babies born HIV positive or with AIDS are black or Hispanic.

C. Education Statistics

African-American, Hispanic, Native American and poor children continue to lag behind other youngsters in educational opportunities and achievement. In virtually all subjects

(including reading, writing, mathematics and science) and grade levels tested, white and Asian students demonstrated greater proficiency than their black and Hispanic counterparts in the most recently reported National Assessment of Educational Progress (NAEP). For example, in science, the average scores for black and Hispanic 17-year-olds (253 and 262 respectively) in 1990 were less that those of white 13 year-olds (264). On fourth grade mathematics achievement tests, 70 percent of black, 58 percent of Hispanic, and 44 percent of Native American students scored below the most basic proficiency level, compared to 26 percent of white and 22 percent of Asian/Pacific Islander students who were not proficient.[13]

The NAEP data do not account for students who drop out. The high school dropout rate is unacceptably high for all racial groups, but the problem is particularly acute for Hispanics. In 1991, 35 percent of Hispanic, 14 percent of black, and 9 percent of white young adults had not completed high school.[14]

Although achievement gaps between white and non-white children have narrowed over the last two decades, recent assessment data reported by the National Center for Education Statistics indicates that this trend may be reversing. For example, the gap in 9-year-olds' reading scores between white and African-American students was 32 in 1980, 29 in 1988 and 35 in 1990. Between white and Hispanic 9-year-olds, the gap was 31 in 1980, 24 in 1988, and 28 in 1990.[15]

At the post secondary level, only 13 percent of black and 16 percent of Hispanic high school graduates completed four or more years of college in 1991, compared to 30 percent of whites. This represents a decline from 1975 when 15 percent of black and 17 percent of Hispanic high school graduates completed college.[16]

Moreover, significant educational gaps between poor and non-poor children persist. For example, although educators concur on the importance of early childhood education, such opportunities are limited for young children from low-income families. In 1990, Head Start enrolled only 27 percent of eligible children and state-funded preschool programs did not meet the rest of the need. Thus, while 75 percent of 3 to 5-year-olds whose families earned over $75,000 were able to attend preschool, only 40 percent of 3 to 5-year-olds in families earning under $30,000 were enrolled. As to children with disabilities, whose education is vital but more costly, only about one half of those from lower-income families (earning under $30,000 per year) are in preschool, compared to nearly 70 percent of those from families earning over $30,000.[17]

At the elementary and secondary level, our Nation's lowest-achieving students are concentrated in the schools with the highest levels of child poverty. For example, the Department of

Education reported that third-graders who attend high-poverty schools (where 75 percent or more of students are eligible for free or reduced-price lunches) were "three times as likely to score in the bottom 10th percentile" on a basic reading test as students in the lowest [less than 20 percent] poverty schools.[18]

Barriers to achievement also persist for girls and women. For example, girls continue to lag behind boys in math and science achievement (as reported by NAEP) in the middle and high school years and women continue to earn fewer post-secondary degrees than men do in these subjects.[19]

D. Civil Rights Enforcement

The abysmal state of the machinery of civil rights enforcement, and the overwhelming need to reinvigorate that machinery have been documented by this Commission in its two prior reports, Lost Opportunities: The Civil Rights Record of the Bush Administration Mid-Term (1991) and One Nation, Indivisible: The Civil Rights Challenge for the 1990s (1990). The working papers of civil rights experts, published as Part Two of this report, also set forth in detail the failed policies of the last twelve years.

IV. Meeting the Goals: Recommendations of the Citizens' Commission on Civil Rights

A. Presidential Leadership and Appointments

1. Reaffirm National Commitment to Equal Opportunity

The Commission urges the new President to reaffirm our national commitment to equal opportunity for all Americans by exercising moral leadership to bring the diverse threads of America together.

There are many indications that the new President understands the importance of bringing America together again. His campaign, his transition, and even the theme for his inauguration have stressed that this is a time of hope and renewal in our nation. After years of racial divisiveness and bitter rhetoric, America is ready for new opportunities to work together and move forward.

More than any one task, it is critical that the President reestablish a national consensus that every American should be given the opportunity to succeed. He must make it clear that assuring equality of opportunity for all persons is among the highest priorities of his Administration and that the commitment will be implemented not only through enforcement of all laws but also by speaking out against all bigotry. Strong enforcement of civil rights laws and court decisions and support for the

enactment of other legislation are essential to provide access to equal opportunity. Sustained and visible condemnation of expressions of prejudice or bigotry, whatever the source, along with efforts to heal racial and other divisions will help realize the goal of "one nation, indivisible."

2. Create Cabinet-Level Task Force

The Commission urges the new President to create a Cabinet-level task force to address the issues surrounding inter-group tensions and conflicts. The President should instruct a task force on inter-group tensions to develop and submit to him within sixty days a coordinated action plan for dealing with the causes and consequences of these conflicts. After the initial action plan is drafted, the task force should then meet with civil rights leaders on a regular basis in order to assess progress in dealing with inter-group conflicts.

A critical domestic issue confronting our nation is the dismal state of ethnic and race relations. The 1990 Census shows the growing diversity of our nation; by the year 2050 it is now projected that there will be no ethnic majority. Yet at the same time that our nation's diversity is increasing, the gaps between whites and minorities continue to increase. These gaps have produced tensions between groups that are growing at alarming rates. These tensions threaten to undermine our progress economically and morally.

The Commission urges the President to establish an inter-agency, Cabinet-level task force to address immediately the problems of inter-group tensions and conflicts. The task force on inter-group tensions should immediately evaluate the causes for increasing tensions and conflicts between and among whites and minority groups and should, within sixty days, recommend to the President an action plan to address these problems. Among the issues the task force should address is whether the Community Relations Service, now located in the Department of Justice, can be upgraded sufficiently to serve as an effective force for resolving conflicts and ameliorating tensions or whether a different mechanism is needed. Following that initial period, the task force should continue to meet with civil rights leaders on a regular basis. The task force should serve as a forum to address these issues on a continuing basis, and should include representatives from the Executive Office of the President, the heads of all Departments, as well as representatives from the U.S. Civil Rights Commission and the Equal Employment Opportunity Commission.

3. Appoint People with Commitment to Vigorous Enforcement

The most visible way for the President to demonstrate his commitment to opportunity for all is by appointing experienced persons committed to vigorous civil rights enforcement and to the implementation of civil rights legislation and court decisions to positions of leadership in agencies responsible for equal opportunity.

Reaffirming our national commitment to equal opportunity for all is a critical first step in moving our nation forward. Appointments to the following agencies and offices are important barometers of the new President's commitment:

-- Chair, Commissioners, and Staff Director, United States Commission on Civil Rights.

-- Chair, Commissioners, General Counsel, Equal Employment Opportunity Commission.

-- Assistant Attorney General for Civil Rights, Justice Department

-- Director, Community Relations Service, Justice Department

-- Assistant Secretary for Civil Rights, Department of Education.

-- Director, Office of Fair Housing and Section 3 Compliance, Department of Housing and Urban Development.

-- Solicitor, Department of Labor.

-- Director, Office of Federal Contract Compliance Programs, Department of Labor.

-- Associate Administrator, Office of Minority Small Business and Capital Ownership Development, Small Business Administration.

-- Director, Office of Women's Business Ownership, Small Business Administration.

-- Members of the Board of the Legal Services Corporation.

Equally important is the tone that the President sets for his appointees. We urge the President to make clear to his appointees that civil rights statutes, regulations, and remedies sanctioned by the courts should be vigorously enforced. In area after area, enforcement of the laws of equal opportunity has lapsed over the last twelve years. The new Administration must indicate from its start that such law enforcement will be a high priority in its efforts to foster a more just society.

4. Appoint Judges with Commitment to Equal Justice Under Law

In making judicial appointments, the President should require, above all other considerations, that the nominees share his commitment to equal justice under law. We also urge the President to achieve diversity in his judicial appointments by including in his selections qualified women and minorities committed to equal justice under law.

President Clinton has the immediate opportunity to appoint over 100 new federal trial and appeals court judges. These appointments should reflect the diversity of America, and should be made by selecting highly qualified and distinguished attorneys who share the new President's commitment to equal justice under law. The Reagan-Bush judiciary, nearly exclusively white, male, and Republican, has frequently abrogated the traditional role of the federal courts -- to protect the civil and constitutional rights of the least powerful citizens in our society.

If the federal judiciary is to return to its constitutional role as the independent, third branch of government that protects minority rights in a democratic society, it is essential that those who come before the courts have faith in the fairness of the system. If the federal judiciary remains overwhelmingly white and male, even at a time when more women and minorities have achieved great success in the legal profession, citizens' trust in the system is likely to be further reduced. For that reason, it is important that the courts more accurately reflect the diversity in our nation.

The President-elect has an opportunity to have an impact very early in his term in filling some 100 judicial vacancies. It is especially important that minorities be appointed to some of the vacancies on the appeals courts of the Fourth, Fifth, and Eleventh Circuits, where large numbers of minority Americans live and where there is only a handful of minority judges. The Commission urges the President to fill these vacancies rapidly, and to include among his nominees minorities and women of the highest caliber whose records reflect a personal and professional commitment to equal justice under law.

In addition, the Commission recommends that the process for recommending judicial nominees be administered through senior personnel at the Justice Department, who are likely to have had significant experience with the federal courts, and therefore be best able to make appropriate selections. Of course, coordination and input from the White House will be essential to an efficient selection process.

In sum, the Commission recommends that the President use the following criteria for the selection of federal judges:

-- A nominee should be a person of unquestioned integrity, ethical standards and good character, a member in good standing of every bar of which he or she is a member, and in sound physical and mental health.

-- A nominee should have demonstrated outstanding legal ability and competence, as evidenced by broad and substantial legal and other experience, and be a person of unquestioned intellect.

-- A nominee should have demonstrated concern for and commitment to the individual rights protected by our Constitution and laws, including the right to privacy and to equal justice under the law. A strong indicator of such a commitment would be substantial public service and pro bono legal efforts to help protect such values.

--A nominee should have a proven respect and appreciation for our constitutional system of government and the separation of powers, for established legal precedents that protect individual rights, and for the impact of the law and government action on individuals.

-- A nominee should have "judicial temperament," including a reputation for being fair, open-minded, even-tempered, and free from bias against any class of individuals.

-- Nominees should reflect an affirmative effort to make the federal bench more reflective of the racial, ethnic, gender, and other diversity of our nation and the legal profession.

B. The United States Commission on Civil Rights

Revitalize the United States Commission on Civil Rights

A strong, independent, bipartisan United States Commission on Civil Rights should make an important contribution to monitoring federal civil rights enforcement and should help shape the future direction of federal policy that seeks to provide equal opportunity for all Americans. A new Chair of the U.S. Commission should be appointed as soon as possible to begin the agency's revitalization. As the Commission regains its competence and independence, additional funding should be sought for it by the Administration and consideration should be given to additional legislative steps to assure the agency's independence.

The U.S. Commission on Civil Rights was established to be an independent, bipartisan, fact-finding agency in 1957, and served as America's conscience during the 1960s and 1970s to help remedy decades of injustice. The agency was brought close to death during the Reagan Administration, when its leadership tried to use the Commission to further the partisan political agenda of the President. Following its reauthorization in 1989, the Commission took modest steps to reassert its independence during the Bush Administration, including urging President Bush to support the Civil Rights Act of 1990.

President-elect Clinton can remedy the Commission's loss of stature and direction by appointing a new Chair who can again serve as a national conscience on civil rights issues. New Commissioners should also be sought who will bring expertise, stature and a determination to have the agency once again play a leadership role on civil rights.

The new Commission, by combining its fact-finding powers with a renewed sense of mission, should again become a significant voice in identifying and seeking solutions to the critical problems confronting our nation in the field of civil rights. These include the growing racial and economic isolation of America's poorest citizens, and the continuing problem of inter-group tensions and conflicts. In addition, the new Commission should reincorporate into the agency's mission frequent evaluations of federal civil rights policies and enforcement. The Commission should have sufficient independence to be able to look critically at the new Administration's efforts to restore the machinery of civil rights enforcement, and to call attention to deficiencies in enforcement without fear of dismissal or political retribution such as occurred in the Reagan era.

C. Federal Civil Rights Policies and Remedies

1. <u>Provide Necessary Resources for Enforcement</u>

If federal policies developed to ensure equality of opportunity are to be made effective, the President-elect must send a clear message to all federal departments and agencies that he expects civil rights laws to be enforced. Effective enforcement requires sufficient resources, appropriate monitoring and information collection policies, and a willingness to apply sanctions where negotiations fail to cure violations. The decline of enforcement during the 1980s was marked by a diminution of resources to perform law enforcement, failures to investigate and monitor, and a dearth of data for use in assessing compliance by virtually every agency charged with responsibility for civil rights law enforcement. In order to achieve a revitalization of federal civil rights enforcement, the President should ensure that the enforcement agencies receive the funds needed to have

professionally trained personnel and manageable workloads. In addition, the President should direct that all necessary information be collected and published to facilitate efficient enforcement of civil rights laws.

As a result of the passage of the Voting Rights Act extension, the Fair Housing Act Amendments of 1988, the Civil Rights Restoration Act, the Civil Rights Act of 1991, and the Americans with Disabilities Act, the civil rights responsibilities of federal departments and agencies, already large, have increased significantly. However, the budgets of these agencies have not kept pace with their increased responsibilities. Effective law enforcement is not possible without adequate resources. One of the early tasks of the new Administration must be to devote more resources to funding the civil rights law enforcement agencies.

Similarly, information collection and data analysis are critical to civil rights law enforcement. Since 1981, the federal government has fallen woefully short in performing this key function, in part because the incumbent Administration scorned the use of statistics as a means of detecting even gross patterns of discrimination. Data, including comprehensive analyses of the nature and extent of systemic discrimination against racial and ethnic minorities, women, and people with disabilities, is necessary so that the agencies can perform their statutory law enforcement duties.

Data collection burdens can be minimized, and duplication avoided, through coordination of agency collection efforts under the auspices of a coordinating group either in the Department of Justice, the EEOC, or under the auspices of an office in the Executive Office of the President, such as the Office of Management and Budget. The Commission urges the President to create a coordinating group early in the administration to review data collection and other issues of mutual concern to the civil rights law enforcement agencies.

2. Reinstate Use of Affirmative Remedies and Permit Voluntary Affirmative Action

We recommend that the President direct the departments and agencies of the federal government to reinstate the use of affirmative remedies for violations of civil rights laws and to permit voluntary affirmative action to increase opportunities for full participation in our society.

Both Presidents Reagan and Bush contended that civil rights policy should be based on a so-called "colorblind" standard. That standard erroneously assumed that the legacy of past discrimination has been erased, and that America no longer has

any obligation to continue to work to overcome the consequences of legal inequality which existed for more than a century.

Unfortunately, the long legacy of discrimination remains, and is unlikely to be eradicated without affirmative steps by government and the private sector to increase opportunities in education, employment, and housing. Research and investigation have demonstrated that affirmative action policies have enhanced opportunities of minorities, including economically disadvantaged persons.[20] The nation has enough experience with affirmative action to implement balanced policies that do not impair the ability of employers to hire qualified persons and that do not unduly trammel the interests of males and non-minorities. Federal policy should encourage affirmative action programs designed both to address past discrimination and to promote opportunity, both as remedies for violations of the civil rights laws, and as voluntary plans implemented for the business reasons of employers.

Increasing opportunities for minorities and women business development and ownership must also be addressed. Business ownership is an important source of economic advancement in our nation, a source that historically has been limited for women and minorities. The Supreme Court's 1989 decision in Croson v. City of Richmond has required state and local governments to re-assess their efforts to create opportunities for women and minorities in business, and in many instances, resulted in revisions to or elimination of plans for affirmative action in contracting directed to providing opportunities and redressing historical discrimination. Efforts should be undertaken to assess the impact of the Croson case on minority business development, and to implement policies that promote, rather than discourage, business development opportunities for women and minorities.

3. Encourage Use of "Disparate Impact" Standard

We recommend that the President direct the departments and agencies of the federal government to correct civil rights policy to encourage application of the "disparate impact" standards in employment and housing discrimination cases.

The Reagan and Bush Administrations took a major backward step by directing civil rights enforcement agencies, particularly those enforcing fair housing laws and equal employment laws, not to pursue litigation under a "disparate impact" theory of liability. The "disparate impact" theory acknowledges that even when there has been no clear intent to discriminate, the hiring decisions of an employer, or the rental policies of a landlord, may have consequences which violate the laws of equal opportunity.

The "disparate impact" standard of liability for employment arises out of the 1971 case of Griggs v. Duke Power Co. In that case, the Supreme Court ruled that an employer may be found to have violated federal equal employment law where an employee offers satisfactory proof that the employer's practice or practices resulted in inequitable or disparate impact on women or minorities, even if unintended. In subsequent cases, the "disparate impact" theory was also utilized by courts to find landlords responsible for violations of the fair housing laws where the landlord's tenant selection policies resulted in a lack of opportunity for minorities to rent, even if there was little or no evidence of intent to discriminate.

This critical legal standard has not been used in litigation and enforcement policy for the last twelve years. The result is that many minority citizens have no remedy when they are excluded from opportunities by practices that lack justification even though they may not be prompted by racial animus. Since these kinds of practices constitute the great bulk of discrimination today, the new Administration must again use the "disparate impact" standard if it is to address the core issues of opportunity through an effective civil rights enforcement program.

4. Target Civil Rights Policies to Protect Economically Disadvantaged

Civil rights policies should be targeted to protect the rights of economically disadvantaged citizens, with particular emphasis on policies directed to those citizens who have been most affected by the continuing legacy of discrimination in employment, housing, and education.

Civil rights laws could make a difference in the lives of more low-income citizens if enforcement resources were directed to addressing issues at the intersection of race and poverty. Civil rights policies that neglect low-income minorities, women, and people with disabilities impose unacceptable economic and social costs. We urge the new Administration to target civil rights enforcement efforts toward the needs of those most economically disadvantaged.

5. Enact and Fund Programs that Provide Access to Equal Opportunities

Programs should be enacted, and adequately funded, that provide access to the equal opportunities guaranteed by the civil rights laws.

The new President has indicated support for several new initiatives in job creation and training, housing, and education, and we applaud his goal. It is essential that these new efforts

be designed to assist our most economically disadvantaged citizens, and to provide those citizens with the training and skills to participate effectively in our society.

New initiatives should build on lessons learned from past efforts to provide opportunities for our least advantaged citizens. Some prior programs, such as Head Start, have proven successful, but have never received the funding necessary to serve all who are eligible. Indeed, Head Start and Chapter 1, the program to provide compensatory education for "at risk" children, today are not funded at the levels that were in place 20 years ago. The resources of other programs, like those created pursuant to the Job Training and Partnership Act, have provided training opportunities for some, but have too frequently targeted those who already have some skills at the expense of disadvantaged women and minorities who need more than a small push into the job market. Other programs already exist but have yet to be funded, such as the Displaced Homemakers Self-Sufficiency Assistance Act and the Women in Apprenticeship and Non-Traditional Occupations Act.

A successful job training program targeted to the most disadvantaged should take into account the particular barriers that exist for the hardcore unemployed, and should be designed to enable the targeted groups to participate in the programs. These programs should include basic education skills, support services such as dependent care and transportation, and exposure to non-traditional occupations for women. The goal of these programs should be to assist participants to achieve long-term economic self-sufficiency. Moreover, it is important that measurements used to assess progress in such programs be free from biases that may create barriers for women, people of color, individuals with disabilities, individuals with limited English proficiency, and older workers.

Job creation efforts, such as promotion of emerging technologies, development of our nation's infrastructure, and conversion of defense industries to civilian technology, should include policies that will ensure the participation of women and other disadvantaged citizens in the benefits of these new jobs and business opportunities.

Legal services for the poor is another program that, if adequately staffed and funded, should help provide access to the equal opportunities guaranteed by the civil rights laws. Since the Reagan Administration, the federal Legal Services Corporation (LSC), which furnishes financial assistance to local legal services programs, has been under the direction of those who were, at best, indifferent, and at worst, hostile, to providing legal services to the poor. In addition, the program has been targeted for elimination, has been woefully underfunded, and has

been operating without permanent authorizing legislation since 1980. Administration support for the LSC -- through appointments, funding, and support for a strong reauthorization -- will help legal services clients -- among our nation's poorest -- to achieve better access to equal opportunities.

6. Assess Whether Services for People with Limited English Proficiency are Adequate

The Commission recommends that the President order a government-wide assessment of whether the needs of people with limited English proficiency (LEP) are met as LEP Americans attempt to obtain services to which they are entitled.

The 1990 Census demonstrates tremendous growth in the number of language minority Americans who may not be proficient in English. Many of these Americans are entitled to government services, ranging from public education, to Social Security benefits, to housing, to hospital care.

There is some evidence that programs and assistance to language minority citizens are not adequate to meet their needs. For example, programs to provide services to students with limited English proficiency have been severely reduced, even as the numbers of such children continue to increase at rates that may be two and one-half times the overall rate of increase of school-age children. Similarly, bilingual facilities are lacking in the Social Security offices, even in those areas with high numbers of language minority beneficiaries.

A government-wide, comprehensive review of the current status of bilingual services will facilitate identification of areas for improvement. Such a review should particularly target services to the poor and disadvantaged provided by the Departments of Education, Health and Human Services, Housing and Urban Development, and Agriculture.

7. Close the Minority Health Gap with Adequate Universal Health Benefit Coverage

The Commission believes that improving minority health and closing the health gap between whites and minorities should be a national priority. Universal health coverage will help meet that goal for poor and disadvantaged citizens, but the basic package of benefits must be sufficiently comprehensive.

The health gap between minority and white Americans is reflected in the stark statistics set forth in Section III, above, and should be addressed immediately.

Universal health benefits coverage should help to reduce the health gap. Since minority Americans are less likely than other

groups to be covered by private health plans, universal health benefits coverage should have a substantial, beneficial impact on minorities, and expand their access to health care. However, the basic package of benefits must provide broad coverage. If plans are developed that require beneficiaries to purchase expensive add-ons to a package of benefits which is supposed to be basic, but is in fact insufficient, then universal health coverage will not address the critical needs of the poor and disadvantaged.

8. Ensure Access to Equal Educational Opportunity

a. Prevent Dissolution of Desegregation Orders if Vestiges of Prior Segregation Remain

We recommend that the President direct the Department of Justice to develop a legal policy designed to prevent the dissolution of court orders mandating school desegregation until all vestiges of prior discrimination are eliminated to the greatest extent practicable.

Following two Supreme Court decisions in cases involving court-ordered desegregation, critical questions remain concerning the dissolution of desegregation orders and Justice Department policies about the circumstances in which continuing discrimination should preclude the dissolution of a court-ordered desegregation decree.

In prior reports, the Commission has stated its view that school desegregation decrees should not be dissolved until all vestiges of prior discrimination have been eliminated. These vestiges include housing segregation, as well as educational deficits that continue as a result of prior school segregation.

In its two landmark remedy decisions of the 1970s, Swann v. Charlotte Mecklenburg Board of Education and Keyes v. School District No. 1 of Denver, Colo., the Supreme Court clearly identified residential segregation as a product of enforced racial segregation of public schools. When schools are segregated by race, neighborhoods come to be defined by the racial identity of the schools. The Bush Administration disregarded these decisions and argued in the Supreme Court that school desegregation decrees could be dissolved even if residential patterns of segregation had not significantly eased. If the Court were to accept this position (it has not done so yet) and were to permit a return to "neighborhood schools" after dissolution of court orders, the result would be widespread resegregation of schools.

In addition, in its 1977 decision in Milliken v. Bradley (Milliken II), a unanimous Supreme Court found a clear nexus between segregation in public schools and the educational deficits incurred by minority children who attend racially

isolated schools. In Milliken II and subsequent cases, the Court has upheld orders requiring local and state education authorities to fund educational improvement programs to address these educational deficits. A refusal to recognize continuing problems in educational performance as a vestige of segregation would result in premature termination of improvement efforts.

The issue in these cases is not simply one of interpreting the legal responsibilities of school officials under Brown v. Board of Education. As the Commission has noted in previous studies, school desegregation remedies when properly implemented have been an important tool in improving the educational performance of minority children and providing them with access to higher education and employment opportunities. To permit a return to segregation would place major barriers in the path of the Clinton Administration's professed goal of preparing all children for the education and employment challenges of the next century.

Accordingly, the Commission urges the Clinton Justice Department to adopt a firm policy designed to preclude dissolution of court decrees until all vestiges of prior segregation have been eliminated. Nor should districts that have achieved unitary status be permitted to adopt "neighborhood" assignment plans when they have foreknowledge that such plans will result in segregation.

b. School "Choice" Policies Should Take Account of Impact on Racial and Socioeconomic Segregation

We recommend that the Clinton Administration in weighing the efficacy of policies governing "choice" in public education take full account of the likely impact of any proposed policy on the segregation of children by race and socioeconomic status in the schools and the impact upon opportunities for those most in need of educational assistance.

Over the past 15 years, parental choice has become an element of many school desegregation plans, in the form of magnet schools that permit parents to select among schools that have differing subject matter emphases or differing education methodologies. In most cases admission to magnet schools is controlled to assure that there will be desegregation and care is taken to pursue policies (e.g., affirmative outreach, removal of screening tests) that will bring children of all income levels into magnet programs. Even so, much is still to be learned about the impact of magnet programs and about the relative opportunities of students attending magnet and non-magnet schools.

In the 1980s,"choice" in a different form was put forward by some as a cure for problems that exist in public education. In this guise, choice would be introduced not as a means of achieving another educational goal such as school desegregation, but on its own merits as a way to introduce a healthy competitiveness into public school systems and to encourage all schools to excel in order to attract children. Promoters of this brand of choice argue that while choice would be open to all, it would offer the greatest benefits to lower income parents who currently lack the means that others have to select schools for their children by selecting their neighborhoods or enrolling their children in private schools. Here, too, while programs have been put into effect by statute in several states, there is very little experience with which to evaluate the claims of proponents.

The Commission believes that President-elect Clinton has properly rejected policies that would subsidize private school choice on grounds that such policies would divert needed resources from the public schools which the overwhelming majority of minority and economically disadvantaged students will continue to attend. If more limited policies of public choice are to be considered, we believe that there must first be a comprehensive and careful analysis of their likely impact on minorities and the poor. One critical element of such an analysis would be a review by the Department of Education of choice programs already in place to determine their impact on the isolation of students by race and socioeconomic status. The review should also examine whether low-income parents under existing or proposed programs are given information and resources (including transportation) that are needed to make meaningful choices, what happens to students who remain in public schools that are not popular choices, whether choice diverts attention from other needed educational reforms, whether choice programs are in fact educationally sound and whether they foster diversity, tolerance and understanding.

Until such a review is concluded, the Commission recommends that the Administration withhold any endorsement of "choice" initiatives.

c. Address the Needs of Language Minority Students

We recommend that the President direct the Department of Education to undertake additional initiatives to address the critical needs of the rapidly-increasing number of language minority students, and should seek sufficient resources for the Department and its program offices, including the Office of Civil Rights, to accomplish this goal.

The 1990 Census provides clear evidence of the enormous growth in the number of language minority immigrants who have

settled in the United States. In past generations, the public schools in America provided the children of immigrants with the tools to move into the mainstream of society and make their way up the economic ladder. Without serious attention to the current needs of this large and growing population, the current generation may not receive the same benefits from the public school system.

Inflation and more than a decade of neglect by officials in the Department of Education have taken a large toll on the programs to provide services to language minority students. At the same time, the population of children with limited English proficiency continues to increase; one expert suggests that the number of language minority students is growing at two and one-half times the overall rate of increase of school-age children.

The needs of these children simply cannot be met without a significant increase in federal resources. But resources alone are not sufficient. There is also a critical shortage of teachers who have been trained to educate today's diverse, multi-cultural, multi-lingual population. The federal government must take the lead in encouraging institutions of higher education to revamp teacher training programs so that new teachers, as well as current teachers, arrive in the classroom with the full range of skills that are necessary in order to educate diverse student populations effectively.

One result of the current lack of appropriate teacher training for language minority students may be the over-inclusion of these students in special education programs. In many instances, language minority students are inappropriately placed in special education classes solely because of their limited English language skills. In 1991, the Office of Civil Rights indicated that it would attempt to address this important problem through comprehensive compliance reviews, but it is unclear whether such reviews were performed. The Commission renews its recommendation that such reviews should begin <u>immediately</u>. Where language minority students are properly placed in special education settings, it is critical that these children, too, receive linguistically-appropriate services.

d. <u>Reinstitute the Policy Encouraging Minority Scholarships</u>

We recommend that the President direct the Department of Education to reinstitute the policy regarding minority scholarships which encouraged access to higher education for minorities.

It is well documented that access to higher education is a critical step up the ladder of economic success in our society. As set forth in detail in our two prior reports, during the 1980s

minority access to higher education fell, and is only now beginning to recover.

The prior Administration did much to discourage minority access to higher education with its restrictive minority scholarships policy. The Commission believes that for minority access to higher education to continue, it is imperative that scholarship assistance be available. The Commission urges that the new Secretary of Education adopt a policy which assures access and encourages minority participation in higher education. If revisions are necessitated by other higher education policies the Administration is considering, the Administration should satisfy itself that any new policy will result in an expansion of opportunity for minority students.

e. Work with Leaders of Historically Black Colleges to Achieve Desegregation of State Colleges and Universities

We urge the President and the new Secretary of Education to work with the leaders of the nation's historically black colleges to resolve the problems encountered in efforts to desegregate state institutions of higher education.

The problem of how to integrate state-supported higher education systems that were operated as racially dual systems and that include state-run historically black colleges is currently under debate in the wake of the Supreme Court's decision in the Fordice case in Mississippi. Crafting a policy that maintains the traditions of strong minority institutions while providing access to equal educational opportunities will require careful balancing of competing interests. One challenge is to strengthen the educational offering at some historically black institutions and assure that it is not duplicated at predominantly white colleges and universities in the same system. We urge the new Secretary of Education to address this issue promptly by convening a meeting of leaders in the higher education and local communities directly and indirectly affected by the Fordice case.

f. Support Changes in Chapter 1 Program

The Commission recommends that the President support changes in Chapter 1 of the Elementary and Secondary Education Act designed to assure that the economically disadvantaged children served by the Act will learn at the high levels expected of non-disadvantaged children.

Reviews conducted by educators and education advocates of the operation of Chapter 1 prior to its scheduled reauthorization in the 103rd Congress have concluded that while the law has contributed to significant gains by disadvantaged children in mastering basic skills, it has not prepared the great majority of

young people to meet the educational and occupational challenges of the 1990s and beyond. These challenges will require that the education provided to all children enable them to aquire higher order as well as basic skills.

This Commission agrees with the conclusion of other groups--notably the Commission on Chapter 1--that virtually all children can learn at high levels and there is a solid foundation of knowledge on which principals and teachers can draw to make this happen. We believe that high standards should be set for all students, that new forms of assessment measuring what students actually know and can do should replace the current norm-referenced tests, and that schools and school districts should ultimately be held accountable for assuring that students make continuous progress toward meeting high standards.

To accomplish this, the resources provided by Chapter 1 should be focused on professional development designed to increase the capacity of teachers and principals, on parent literacy and other programs designed to empower parents to play a greater role in their children's education, and on ways to assure that the health and social service needs of children that can become barriers to learning are identified and addressed. Finally the federal government should concentrate its assistance in the areas of greatest poverty and should insist that each state take action to assure that vital educational services and opportunities are provided on a comparable basis throughout the state. Under the current system in all but a handful of states, economically disadvantaged students who live in property poor districts are deprived of many of these services -- and, hence, of educational opportunities -- and federal assistance does not begin to compensate for state inequities.

As one member of our Commission, the Honorable Augustus F. Hawkins has said, "education is the civil rights issue of the new age." There is no issue more vital to securing equality of educational opportunity than reform and full enforcement of Chapter 1.

9. Revitalize the Equal Employment Opportunity Commission

The Commission believes that revitalization of the Equal Employment Opportunity Commission should be a high priority for the new Administration. A new chair, vice-chair, commissioners, and a general counsel all dedicated to fulfilling the agency's mission should be named as soon as possible. The revitalized Commission should develop systemic approaches to law enforcement, and should revise current agency policy and permit retroactive application of the 1991 Civil Rights Act.

Revitalizing the Equal Employment Opportunity Commission is critical for effective civil rights law enforcement. For the last twelve years, the agency's leadership has demonstrated a lack of commitment to enforcement of the laws of equal employment opportunity. New leadership of the agency is a critical first step.

Policies as well as personnel should be changed. First, the new Commission should once again commit itself to using systemic approaches to law enforcement, such as class action lawsuits. While individual cases may well be appropriate under some circumstances, systemic litigation should also be used to combat discrimination. Second, the new Commission should work with representatives of various advocacy and constituent groups to implement a system of alternative dispute resolution, designed to protect the rights of complainants and reduce the agency's backlog. In addition, the new Commission should reverse the policy currently in place and instead permit retroactive application of the Civil Rights Act of 1991. Although the courts are currently divided on whether Congress intended the Act to have retroactive application, at least one federal court of appeals has ruled in favor of retroactivity. Until the federal courts settle the question of retroactivity, the EEOC should permit its staff to apply the Act retroactively, where appropriate.

10. Support Early Passage of Pending Legislation on Voter Registration, Family Leave, Equal Remedies, and Justice for Wards Cove Workers

We recommend that the Administration support early passage of four pending pieces of civil rights legislation: National Voter Registration Act; Family and Medical Leave Act; Equal Remedies Act; and the Justice for Wards Cove Workers Act.

These four legislative measures have been thoroughly reviewed and debated during the last several years. Two of them, the National Voter Registration Act and the Family and Medical Leave Act (both of which were endorsed by this Commission in its 1991 report), were passed by Congress, but vetoed by President Bush, and the vetoes were sustained by narrow margins. The Equal Remedies Act and the Justice for Wards Cove Workers Act both close loopholes created by the 1991 Civil Rights Act.

The Equal Remedies Act would ensure that victims of intentional on-the-job discrimination on the basis of gender, religion, and disability receive full damages to compensate for their losses. The Civil Rights Act of 1991 -- for the first time -- allowed victims of intentional discrimination based on gender, religion, or disability to seek compensatory and, where appropriate, punitive damages for their injuries. However, the law placed an arbitrary cap on damages for these victims of

intentional discrimination -- a cap that does not exist for victims of race or national origin discrimination. The Equal Remedies Act will remove the damages cap and eliminate the blatant inequity that currently exists in the law of damages for violations of the civil rights laws.*

The Justice for Wards Cove Workers Act is also designed to eliminate a loophole created by the 1991 Civil Rights Act. That Act reversed the Supreme Court's 1989 decision in Wards Cove v. Atonio for all Title VII claims except those brought by the original plaintiffs in the Wards Cove case. That case involved a challenge brought by Alaskan cannery workers against systematic practices that denied jobs and promotions to Native American and Asian-American cannery workers. The Civil Rights Act of 1991, by overturning the Wards Cove decision, was designed to eliminate such discriminatory practices and to compensate victims of those practices. However, the final version of the Civil Rights Act of 1991 contained a provision that exempts the cannery itself from the new legal standards. No other employer in the country was given this special exemption. Simple fairness requires that the Wards Cove workers be covered by the new legal standard created by Civil Rights Act of 1991, and receive the legal protections of that law.

11. Give Early Consideration to Legislation Ensuring Racial Justice in Capital Sentencing and Eliminating the Discriminatory Effect of the 1986 Immigration Reform and Control Act

The Commission recommends that the new Administration give early consideration to two additional pieces of civil rights legislation, the Racial Justice Act and repeal of the employer sanctions portions of the Immigration Reform and Control Act.

A substantial record has been created over the last four years of the need for passage of the Racial Justice Act and for repeal of the employer sanctions portions of the Immigration Reform and Control Act.

The Racial Justice Act calls attention to the realities of race discrimination in capital sentencing. The Act would address the disparities in the application of the death penalty depending on the race of the victim and of the accused. At least three studies have documented this pattern of inequity. The Act sets a federal standard of nondiscrimination in capital cases, and provides a remedy for cases tainted by racial considerations.

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* Commission member Erwin Griswold dissents from this paragraph of the report.

The discriminatory impact of the employer sanctions provisions of the Immigration Reform and Control Act has been documented in a 1990 General Accounting Office study, as well as in a number of other studies.[21] The Senate Judiciary Committee's Subcommittee on Immigration and Refugee Affairs has held a series of hearings to consider repeal of the employer sanctions provisions of the law. We believe that revision of the law to reduce its discriminatory impact should be given early consideration by the new Administration.

12. Review the Recommendations of the Authors of the Working Papers Published with This Report

The Commission urges the President, the Congress, the Attorney General, the Assistant Attorney General for Civil Rights, the Secretaries of the Departments of Health and Human Services and Housing and Urban Development, and the Chair of the Equal Employment Opportunity Commission, and other appropriate sub-cabinet and agency officials to review and give serious consideration to the recommendations of the authors of the working papers in Part Two of this report. Those recommendations identify with great specificity needed improvements in policy and enforcement of fair housing laws, voting rights, equal employment opportunity, minority health, racial justice, and laws safeguarding the civil rights of people with disabilities. The working papers also identify areas for policy and enforcement improvements particularly affecting ethnic and language minority citizens, and set forth specific recommendations concerning reauthorization and revitalization of the Legal Services Corporation.

ENDNOTES

1. Regarding the Urban Institute study, see the working papers prepared by "Testing for Discrimination in America," a conference sponsored by the Rockefeller Foundation and the Urban Institute, Washington, DC, (Sept. 26, 1991). See also Margery Austin Turner, Raymond Struyk, and John Yinger, Housing Discrimination Study (Synthesis) (Washington, DC: Department of Housing and Urban Development, Aug. 1991); Glenn B. Canner and Dolores S. Smith, "Home Mortgage Disclosure Act: Expanded Data in Residential Lending," Federal Reserve Bulletin (Nov. 1991), at 859-81.

2. See National Center for Education Statistics, Trends in Academic Progress (1991) (comparing NAEP readings scores for white and African American students).

3. Felicity Barringer, White-Black Disparity in Income Narrowed in 80's, Census Shows, N.Y. Times, July 24, 1992, at A1, A16.

4. See, e.g., Sam Roberts, Shifts in 80's Failed to Ease Segregation, N.Y. Times, July 15, 1992, at B1, B4 (indicating the persistence of black-white segregation in New York City despite major population shifts).

5. Children's Defense Fund, City Child Poverty Data from the 1990 Census (1992).

6. See Nominations of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 4320 (1989) (statement of Governor Bill Clinton).

7. Report of the National Advisory Commission on Civil Disorders, ["The Kerner Report"] (1968), at 265.

8. The figures in the 1990 Census are subject to dispute. A number of analysts believe that the census significantly undercounts minorities living in the inner cities of urban areas, based on studies showing that as much as 5 percent of the minority population was not counted in the 1980 Census. See Citizens' Commission on Civil Rights, Lost Opportunities: The Civil Rights Record of the Bush Administration Mid-Term (1991), at 153.

9. David Anderson, Communications Consortium Media Center, Newsroom Guide to Civil Rights (forthcoming 1993) (citing National Urban League analysis of U.S. Department of Labor statistics).

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14. Id. at 76.

15. Commission on Chapter 1, Making Schools Work for Children in Poverty (1992), at 22; National Center for Education Statistics, Trends in Academic Progress (1991).

16. 1992 Goals Report, at 132-33.

17. Id. at 69-70, 267. See Children's Defense Fund, The State of America's Children 1991, at 44-45.

18. U.S. Department of Education, National Assessment of the Chapter 1 Program, The Interim Report (1992), at 160.

19. 1992 Goals Report, at 88-91, 113-14.

20. See William L. Taylor and Susan M. Liss, Affirmative Action in the 1990s: Staying the Course, 524 The Annals of the American Association of Political Science 30 (Sept. 1992).

21. See U.S. General Accounting Office, Immigration Reform: Employer Sanctions and the Question of Discrimination (Mar. 1990); National Council of La Raza, Unfinished Business: The Immigration Reform and Control Act of 1986 (Dec. 1990).

PART TWO

WORKING PAPERS

RACE, POVERTY AND INEQUALITY

by Gary Orfield and Sean Reardon

During the 1960s, discrimination and poverty were recognized by the federal government as the two central obstacles to opportunity in American society. Blacks, particularly in the South and poor people, particularly in inner city poverty areas, were seen to confront drastic barriers that made it impossible for them to have a real chance in U.S. society. The policies of the new civil rights laws and War on Poverty programs including Headstart, Job Corps, Upward bound and aid for public schools with concentrated poverty, as well as the Model Cities program, were all designed to break these barriers. At a time of rapid economic growth and low unemployment it seemed that a moderate attack on these barriers would do a great deal to open the doors of opportunity.

During the past two decades there has been a vacuum of debate on some of the most dramatic and ominous changes in our communities. The changes have been ignored in part because they have the most dramatic effects on relatively powerless groups--the young, the poor, and inner city Blacks and Hispanics. The fundamental problem is that a large share of central city nonwhite children are growing up in settings which have no working links to the jobs and higher education necessary to success in American society. They are growing up in a separation as severe as that of the old South and more debilitating in some

crucial aspects.

Although Martin Luther King and the Kerner Commission warned repeatedly of the danger of these developments in the late 1960s, a rapid futher deterioration has spurred almost no public debate and has triggered no major congressional or judicial initiatives for two decades.

Segregation by race and poverty exists in metropolitan areas on a vast scale, the underlying trends mean that it will get worse if nothing is done. Apart from a few localities, nothing of consequence is being done. In spite of many billions of dollars invested in a variety of compensatory education, housing, and other programs to increase opportunity in inner city communities, no city has developed a set of policies that have created genuinely equal opportunity for young people in areas of concentrated segregation and poverty. Although it is very important to pursue those policies that have shown some significant benefits, it is also essential to consider, once again, feasible policies to diminish the isolation and concentration and to increase successful integration in American society.

The U.S. is a society which is overwhelmingly urban and which will be half minority by the middle of the 21st century according to Census Bureau projections. (New York Times, Dec. 4, 1992). Sometime before then metropolitan areas will become predominantly minority and long before that our public schools will become predominantly nonwhite across the U.S. as they have

in our largest state, California, during the past decade. We cannot afford a society in which the growing sector of our youth are isolated in inferior schools and neighborhoods from which it is very difficult to move into the mainstream of our society.

The Deterioration of Central City Communities

As the overall society has become more unequal in terms of distribution of income and job opportunities, the cities have had to absorb most of the growth in improverishment and hopelessness while the suburbs have dominated the growth in jobs and wealth. The changes have been even more dramatic for the schools and the city school systems and other institutions serving the young have been transformed into overwhelmingly non-white institutions serving great concentrations of children from low income families with many problems and supported by a tax base which includes a smaller and smaller share of the wealth of the larger urban community.

During the past decade the efforts of the federal and state governments to offset the growing problems facing inner city school districts have been largely abandoned. The schools and other institutions now face extreme inequality based on racial and economic isolation at a time when federal efforts to deal with urban poverty are virtually nonexistent and a time in which the efforts to deal with racial segregation on a metropolitan scale are modest and isolated, though some show considerable possibilities of success.

A basic reality that is almost never mentioned in public discussion is that we have no large-scale workable models for achieving equal opportunity in communities and schools isolated by race and poverty. If families have the most powerful impact on opportunity and the relationships between a child, his family, and the other families in his community are the most important shaping influences in his life, living in a setting where his own and most of the other families experience devastating poverty and have few hopes for success in the broader economy creates conditions which are extraordinarily negative for children.

The institutions that serve such communities are, of course, critical, but they would have to function much better than their suburban counterparts to provide genuinely equal opportunities given the problems the students bring with them to school and the concentration of those problems in their classrooms. We would have to find support for a long term policy of treating these schools much better, in terms of resources and assignments of teachers and administrators than suburban schools. These schools have to cope with homelessness, severe health and nutrition problems, an atmosphere of gangs and violence threatening children, and few jobs for high school graduates.

The integration movement came to a stop with Martin Luther King fighting with very limited success against the system of segregation and inequality in metropolitan Chicago in the 1966 Chicago Freedom Movement. Chicago housing and school segregation levels have changed very little to this day. Major efforts by

the executive branch to break the system of metropolitan separation ended with President's Nixon's attack on urban school desegregation and on policies to change suburban housing patterns. The initiative was taken for a time by the federal courts and many of the cities of the South experienced desegregation under the Supreme Court's 1971 Swann decision. By 1974, however, the Court had become more conservative and city-suburban desegregation was blocked by a divided 5-4 vote on the Supreme Court in the metropolitan Detroit case, Milliken v. Bradley. The same Court, in the Rodriguez case created a barrier to school finance reform in the federal courts. The decisions showed that the Court would accept both separation and inequality. The program supporting educational change and human relations training to make school desegregation more successful (the Emergency School Aid Act) was repealed in the first year of the Reagan Administration.

Under the Reagan and Bush Administrations there was more pressure from the executive branch to dismantle existing school desegregation policies than to initiate any new ones. Since 1980 there has been not only a drastic decline in urban civil rights regulation but also a drastic cut in the urban and housing programs that created leverage for change.

Americans are deeply committed to the idea of equal opportunity. A generation ago a vast transformation of American law and politics during the civil rights revolution led to a recognition that these beliefs were incompatible with the history

of Black education in the South and to the implementation of major social and educational changes designed to remedy the enormous inequalities in opportunity available to Blacks and Whites. During the past two decades, however, while evidence has accumulated about the continuing severity of these problems in metropolitan society, discussion of them has virtually disappeared from our political debate. Educational policy ignored metropolitan inequalities by race and class and often adopted reforms that have the consequence of punishing further those who have experienced inferior educational preparation. Today, as the country faces the task of training a metropolitan population of extraordinary diversity for future opportunities much more dependent upon educational credentials, it is important to reexamine the question of systemic inequalities.

This paper assesses contemporary evidence of metropolitan inequalities, describing the extent to which advantaged and disadvantaged children attend separate and unequal schools within metropolitan American, and consider some of the mechanisms by which segregated schools provide unequal curricula.

Race, Poverty & Separate and Unequal Schools in the Metropolis

The U.S. is largely a metropolitan society. The 1990 Census showed the vast majority of Americans--including 76% of whites, 84% of blacks, and 92% of Hispanics--living in metropolitan areas which cover one-sixth of the nation's land mass. Some 78 million people lived in the 12 largest metropolitan areas alone

(Statistical Abstract of the United States 1991: 27).

Among all American students, 46% of whites, 56% of blacks and 67% of Hispanics went to school in metropolitan areas of more than one million people in the fall of 1990. In the suburbs of these metropolitan areas, the public schools were 78% White and Asian; central-city public schools, in contrast, were 62% Black and Hispanic. Private schools, however, in central cities and suburbs alike, enroll relatively few Black and Hispanic students. Only 29% of private school students in central cities, and 13% in suburbs, were either Black or Hispanic (see table 1).

Table 1:

Student Enrollment in Metropolitan Areas
with more than A Million Residents, Fall 1990
(in thousands)

	Public Schools			Private Schools			
	Hisp.	Black	White & Asian	Hisp.	Black	White & Asian	Total
CITY	1142	1734	1780	82	87	420	5245
CITY %	24.5%	37.2%	38.2%	13.9%	14.8%	71.3%	
SUBURBS	976	762	6123	59	72	845	8837
SUBURBAN %	12.4%	9.7%	77.9%	6.0%	7.4%	86.6%	

Source: Computed from Table 5, U.S. Bureau of the Census, Current Population Reports, Series P-20;, No. 460, School Enrollment--Social and Economic Characteristics of Students: October 1990, GPO, 1992: 27-28.

Throughout this report, Whites are Non-Hispanic Whites.

Within the largest metropolitan areas, minority students are highly concentrated in central city public schools but whites are

not. 57% of blacks but only 26% of whites lived in central cities (U.S. Bureau of the Census, 1991a: 23). The basic trends for minority students show that virtually all major school districts have had trends of shrinking White and middle-class enrollments for decades. In fact, the total number of White students in the U.S. fell sharply from 1968-1986 as a result of plummeting White birth rates (Orfield, Monfort, Aaron, 1989: 1).

In 1986, the nation's 25 largest urban school districts served 27% of the nation's African American students, 30% of Hispanic students but only 3% of whites (Orfield & Monfort, 1988). In metropolitan Atlanta, for example, 98% of the area's white high school students attended suburban schools by 1986 (Orfield & Ashkinaze, 1991).

There is no evidence that these trends will reverse themselves or that changes in school policy will change these settlement patterns. Trends of middle class suburbanization are continuing. Census Bureau studies of migration patterns between 1985 and 1990 show that each year "central cities lost 1.6 to 3.0 million residents while their suburbs. . .gained 1.9 to 3.2 million persons (U.S. Bureau of the Census, 1991b: 5). The overwhelming majority of those who left central cities for the suburbs were White and/or middle-class, leaving central cities with increasing concentrations of minority and low-income families. The growth of minority middle class population is now largely suburban as well, though the suburbs are also segregated, especially for blacks.

Increases in Social and Economic Disparities in Metro Areas

As the city schools became more heavily minority and poor, the overall economic disparities between cities and suburbs were growing. Very wide disparities between city and suburban family income developed in a number of large metropolitan areas by 1980. By the early 1990s, even including many smaller metro regions, the average city family was only earning about two-thirds as much as the average suburban family.

Table 2:

Ratio of City to Suburban Income, 1989-1991
Families in All Metro Areas over One Million Population

year	cities	suburbs	ratio
1989	30578	43801	.70
1991	31655	46061	.69

Source: Money Income of Households, Families and Persons in the United States: 1991: p. 40, table 13.

The disparities between city and suburbs in terms of welfare dependency were even more striking. The cities bore the great bulk of the metropolitan burden of providing for families with such serious needs that they received some form of public assistance. During a single year more than a fifth of the residents of central cities could receive some sort of public aid. When the Census Bureau compared the use of welfare programs (AFDC, General Assistance, food stamps, medicaid, housing assistance, and Supplemental Security Income), they found that in

the late 1980s, near the peak of economic growth in the last decade, about one-seventh of the population received aid from at least one of these programs each year. Black participation was about four times the white level and Hispanic participation was about three times the white level. The data showed a striking difference between the cities and the suburbs. 12.1% of city residents compared to only 3.8% of suburban residents were receiving benefits from at least one of these programs throughout both 1987 and 1988. The city rate of long-term dependency was 318% of the suburban rate during this period.(Characteristics of Recipients and the Dynamics of Program Participation: 1987-1988, Current Population Reports, P70-31, GPO 1992: pp. 2-11.

This meant that cities, with a much lower base of taxable income had very much higher concentration of households with severe and continuing needs for help. Children from such families also often produce extraordinary demands on the schools.

The loss of white and middle class families and students in central cities was not caused by busing; it occurred in cities which always had neighborhood schools and also in cities that abandoned desegregation orders. Atlanta, for example, decided against a busing plan in 1973 but experienced one of the most drastic losses and Los Angeles' precipitous decline continued after elimination of all mandatory desegregation in 1981 (see table 2; Orfield and Ashkinaze, 1991).

Table 3:

Change in White Enrollment Percentage, 1967-1988

by Type of Desegregation Plan

	1967	1988	Change	Plan
New York	48	21	-27	N & M
Chicago	41	12	-29	N & M
Los Angeles	55	16	-39	N
Philadelphia	40	24	-16	N & M
Detroit	41	9	-32	N
Houston	54	16	-38	N & M
Atlanta	41	7	-34	N & M
Cleveland	43	23	-20	B
Dallas	63	19	-44	N & B
Milwaukee	73	34	-39	M

Source: U.S. Department of Education, Office for Civil Rights data tapes; Orfield & Monfort, 1992: 21-22.
Plan: N=neighborhood; M=magnet; B=citywide mandatory busing most plans are complex; only dominant categories given

A massive change in metropolitan areas that has received very little attention is the enormous growth of Hispanic students in the U.S. The share of Hispanic students has soared from one-twentieth in the late 1960s to one-tenth today, and Census projections show that there are likely to be as many Hispanic residents in the U.S. by 2010 as there are blacks today (Statistical Abstract of the United States 1991: 14). The Hispanic population is much younger than either the white or the black population, even more concentrated in metropolitan areas and overwhelmingly located in public schools. Hispanic poverty grew substantially during the 1980s, even among families with full time, low-wage jobs.

This soaring population has become steadily more isolated in schools segregated by race and income during the past two decades and its segregation is now more severe than that of black youth (Orfield & Monfort, 1992). Hispanics experience dropout problems much more serious than those of blacks and Hispanic education problems are most severe in schools segregated by race and poverty (Espinosa & Ochoa, 1986: 77-95).

Race and Poverty

One of the great difficulties in formulating possible solutions to the problems of metropolitan educational equality is the complex interaction of issues of race and poverty. To a very considerable extent the problem of concentrated poverty is a problem of minority students only. In studies of a number of metropolitan areas, for instance, no predominantly poor white high schools have been found and there has always been an extremely high relationship (correlation of .8 or .9) between race and poverty.

In other words, the existing patterns of income distribution and residential segregation in the society mean that it is almost impossible to disentangle the problems of race and poverty in American schools. Although a substantial majority of poor people in the U.S. are white, poor white children in metropolitan areas seldom live in areas where poverty is so concentrated that the school is dominated by poor children. Poor Whites appear to have more residential options and poor Whites are much more likely to

be only temporarily poor (as a result of a divorce, health problem or job loss) and to be able to continue living in a non-poor area (Duncan, 1984).

White schools are overwhelmingly middle class schools. In metropolitan Los Angeles, for example, predominantly White high schools (those with more than 80% White students) averaged only 2.7% low-income students; predominantly-minority high schools, in contrast, averaged 33.3% low-income students (Jaeger, 1987, table XIII). And in metropolitan Chicago, the correlation between minority percentage and low-income percentage for elementary schools was .895--so high that, for statistical purposes, the two measures are virtually indistinguishable (Scheirer, 1991, table B-8).

The Fourteenth Amendment and the civil rights laws prohibit unequal treatment of racial minorities in public institutions, but they apparently provide little, if any, protection against unequal treatment of the poor. Many of the inequalities in schools, however, derive from the concentrated poverty that is the result both of a historic and contemporary job discrimination and housing segregation. Unfortunately, the framing of the issue solely in racial terms often leads both blacks and whites to conclude that desegregation plans assume that black institutions are inferior and that there is a distinct value in having blacks sitting next to whites in school. Their actual benefits come primarily from obtaining access to the resources and connections of institutions which have always received preferential treatment

and to the expectations, competition, and values of successful middle class educational institutions which routinely prepare students for college. It is vital to recognize that black and Hispanic children face schools of concentrated poverty and racial segregation because of a history of discrimination and also that the concentrated poverty tends to create many extraordinary stresses on the school and its teachers. With few exceptions, only minority schools have to deal with these problems in metropolitan America and these problems are often interpreted as racial problems.

Some of the least successful and most bitterly resisted desegregation plans, which have received intense conservative attention, have been those in which the desegregation plan has not provided access for minority students to middle-class schools but has merely brought together two disadvantaged and hostile groups. The efficacy of alternative strategies for breaking the relationship between race, poverty and educational inequality in education can be examined by comparing desegregation plans. With rare exceptions there have been no other large scale efforts to provide access for the most disadvantaged students to much more successful schools. These plans, though this was not their objective, have produced a wide variety of patterns of racial and economic integration.

Inequality on a Metropolitan Scale

Contemporary metropolitan educational inequalities are

evident in data on achievement test scores, dropout rates, course offerings, and teacher preparedness. Metropolitan areas have a two-tiered educational systems: one tier serving the mostly White and suburban children of affluent and middle-class families, and the other for the mostly minority and urban students from low-income families and communities.

Inequalities in the Midwest's largest metropolitan region--Chicago--show the big city pattern. (The Chicago and Detroit public schools had the majority of all black public school students from Ohio to Minnesota in 1988). In 1988, 1,081,000 children were enrolled in public schools in the Chicago metropolitan area. 30% of them were Black, 13% Hispanic, and slightly more than 50% White. Most attended schools that were sharply racially segregated. 223,000 Blacks (69% if all Blacks) attended schools that were 90-100% minority. Only 3350 White students were enrolled in these schools--a Black/White ratio of 70:1. Similarly, 63% of the White students--390,000--along with only 5500 Black students, were enrolled in schools that were 90-100% White--a ratio of 71:1. Over half of the children in public schools in the Chicago metro area--attended schools where 70 of every 71 students shared their skin color. All but one of the 90-100% White schools are in the suburban communities surrounding Chicago, and 94% of the students in 90-100% minority schools are within the city of Chicago (see table 3). Chicago schools have, on average, far higher percentages of low-income students than those in the suburbs--an average of 73% (Scheirer, 1989).

Achievement Inequalities

Were the overwhelming concentration of minority and low-income students in urban schools not systematically connected to patterns of low achievement in those same schools, we might argue that, educationally at least, patterns of segregation were not cause for concern. But in virtually every large metropolitan area studied, low-income minority students and middle-class White students attend schools that are not only separate, but that are profoundly unequal as well.

In metropolitan Chicago, students in suburban schools averaged 35-40% of their students in the top quartile on nationally-normed math tests; students in Chicago schools, in contrast, ranged from a high of 22% in the top quartile in third grade to fewer than 8% by tenth grade. These patterns were intimately tied to race and class. A breakdown of 10th-grade test scores by race and location shows that only 6% of the Black 10th-graders in Chicago public schools perform in the top quartile nationally, compared with 36% of White 10th-graders in the Chicago suburbs. Hispanic students perform somewhat better than Black students, but still well below national averages and far behind Whites (see table 4).

Test scores vary dramatically by income as well. Non-magnet Chicago elementary schools with 90-100% low-income students averaged only 23% of their students above the national median in math, compared to 74% of suburban students.(Scheirer, 1991, table 13).

The same relationship holds in other large urban communities, suggesting that the relationships are systemic and structural. In metropolitan Los Angeles, for example, a comparison of 12th-grade standardized math, reading, and writing scores reveals the same pattern. Los Angeles City (LAUSD) schools averaged lower scores in math, reading, and writing than schools in the rest of LA county, which in turn had lower average scores than the surrounding suburbs of San Bernadino, Riverside, and Orange counties. Moreover, the differences between schools in the city and suburbs increased from 1976 to 1986. Math scores in the suburbs, for example, climbed while they dropped in the city (see figure 2).

In Milwaukee, the pattern is the same. Results of the 1984 Iowa Test of Basic Skills (ITBS), given in grades 2, 5, 7, and 10 in most metropolitan Milwaukee area districts, show that no suburban district reporting data had fewer than 59% of the students in any grade with comprehensive scores above the national median. In contrast, except in grade two, fewer than 45% of Milwaukee Public Schools (MPS) students scored, on average, at the same level. And though 55% of MPS second graders did score above the national median, this was still 27 percentage points behind suburban second graders, fully 82% of whom scored above the national median (see table 5). The differences between urban Blacks and suburban Whites are even more dramatic: by 10th grade, only 22% of Black students in MPS schools scored at or above the national median, compared with 71% of White suburban

10th-graders. The authors of the report containing these findings conclude their study:

> In summary, our study revealed two very different worlds of educational achievement; worlds separated by but a few miles, yet by much greater distances in terms of acquired skills, institutional success, and future prospects. (Witte & Walsh, 1985, p. 21)

The national consistency of these patterns is demonstrated by NAEP results, which show that in 1984, only 19% of disadvantaged urban 17-year-olds had "adept" reading skills, compared to 50-55% in advantaged suburban communities (NAEP, 1985). Being in a school with three times as high a fraction of the students performing well makes a great deal of difference for a student.

Dropout and Attrition Differences

Stark as they are, comparisons of high school test scores often underestimate the differences between predominantly minority and low-income urban districts and the mostly White, middle-class, suburban districts because they do not take into account patterns of difference in the number of students who drop out of school before or in high school. Nationally, central city districts have annual dropout rates of 6.2%, close to double the 3.7% rate of suburban districts (Kaufman & Frase, 1990, cited in ERIC Digest, 1991), but the differences are generally greater in larger metropolitan areas. In metropolitan Philadelphia, the

dropout rate[1] in the city is four times that in the four suburban counties surrounding the city (see table 6). Similarly, the Milwaukee Public Schools' annual dropout rate of 11% is double the state average, and 4-5 times that of most suburban school districts (Study Commission on the Quality of Education in the Metropolitan Milwaukee Public Schools, 1985; Witte, 1985).

Table 4:

Philadelphia Metropolitan Area Dropout Rates

	annual rate[a]	4-year rate[b]
Philadelphia:	8.1%	30%
All Suburbs:	2.1%	8%
Bucks County:	2.1%	8%
Chester County:	1.5%	6%
Delaware County:	2.9%	11%
Montgomery County:	2.0%	8%

(source: calculated from data from Commonwealth of Pennsylvania Department of Education, 1986)

[a] The annual dropout rate here is figured as the number dropouts in 1984-85 divided by the total 1984-85 enrollment in grades 7-12.

[b] The four-year rate is estimated as: $1-(1-\text{annual rate})^4$

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[1]Because dropout rates are calculated a number of different ways, rates may not always be comparable across districts or metropolitan areas. In this paper we cite two basic kinds of dropout rates, annual (or event) rates, and cohort rates. Annual rates give the percentage of students who drop out of a school or district from all grades in a given year. Cohort rates give the percentage of students entering their 9th- or 10th-grade who have dropped out by the time their cohort graduates four or three years later. There is a great deal of variation even among the way these rates are calculated in different studies and in different cities. Therefore, in this paper we present dropout rates from only one study at a time, and then only to compare districts within a particular metropolitan area. Our intention is not to provide definitive reports of actual dropout rates, but only to show that they differ sharply by race, SES, and location.

Four-year attrition rates in large urban districts are typically around 50%; in many cases, more students drop out than graduate. Cleveland's graduation rate of 50% is the lowest in the state. In the 1985-86 school year, for example, more students dropped out of Cleveland schools than graduated (Cleveland Plain Dealer, February 17, 1987). LAUSD's estimated 22% junior high dropout rate combined with its 39% high school rate gives it a net dropout rate of over 50%. And Burch, in a careful study of dropout patterns in New Jersey urban school districts, concludes that:

> there are really two school systems in New Jersey--one consisting of most suburban and rural districts, which have relatively low dropout rates and few major academic problems; the other consisting of a much smaller number of big, needy urban districts, many of which have [four-year] dropout rates of from 40 to 60 percent. (Burch, 1992, p. ix)

Moreover, the differences in dropout rates between urban and suburban districts are not only in the number of dropouts, but in who drops out, and when. In the Milwaukee public schools (MPS), students who drop out tend to do so earlier than their suburban counterparts. In Los Angeles County, 55% of Black and Hispanic dropouts left school by the 10th grade; only 41% of White dropouts left schools as early (Los Angeles County Office of Education, 1989).

In Chicago, while the overall attrition rate in Chicago schools was 47.7%--compared to 8.5% in suburbs--within Chicago,

attrition was highest in schools with more minority and low-income students--in 1981-82 seven Chicago schools had four-year dropout rates of 70% or more, and these schools averaged 92% minority and 72% low-income students, far above the city averages (Orfield, Mitzel, et al, 1984). In metropolitan Atlanta, predominantly-Black schools had 1986 attrition rates 12% higher than predominantly-White schools (40% to 28%) (Orfield & Peskin, 1991).

Unequal Curriculum

Low-income and minority students are concentrated in schools within metropolitan areas that tend to offer different and inferior sets of courses and levels of competition, creating a situation where the most disadvantaged students receive the least effective preparation for college. A fundamental reason for this pattern is that schools do not provide a fixed high school curriculum. The actual working curriculum of a high school is the result of hiring decisions for staff, counseling advice, and choices of students from among the options offered. Schools with high concentrations of well-prepared students offer rewarding teaching experiences and often attract highly qualified teachers in pre-collegiate subjects. Schools with less-prepared students in less-desirable areas to work may have trouble staffing some courses. Even if they can find a teacher, they may not have enough students to fill classes or to keep a teacher fully occupied. In such circumstances the classes normally either

disappear or are watered down in their requirements so that they are no longer equivalent to similar courses elsewhere. Even if advanced classes are offered, one key component--challenging competition from other excellent students--may well be lacking. The practical barriers to excellent pre-collegiate instruction in high-poverty schools are recognized to be so severe that the accomplishments of one teacher, Jaime Escalante, who taught AP calculus in one Hispanic school in California became celebrated across the U.S., though the same course is routinely offered in a great many suburban schools.

As a result of staffing difficulties and high school students' course selections (themselves often the result, in predominantly low-income schools, of inadequate advice from school counselors), low-income, urban schools do not offer the same range and level of courses as their more affluent suburban counterparts. The differences in curricula are relatively small in elementary schools, and grow dramatically by the time students reach middle and high school. Middle schools in suburban, low-poverty communities, for example, are more than twice as likely as urban, predominantly low-income and minority middle schools to offer their students the opportunity to take algebra (25% vs. 11%) and foreign language (30% vs. 13%) (Becker, 1990; Mac Iver & Epstein, 1990, cited in CDS, 1990).

By high school, the differences are even sharper. Nationally, roughly 34% of classes in high schools with fewer than 10% minorities are classified as homogeneously-grouped high-

ability classes; in high schools with more than 90% minority students, only 11% of classes are classified the same way. Similarly, high-wealth high schools offer three times as many high-ability classes as low-ability classes; high-poverty schools offer roughly equal proportions of each (see Oakes, 1990, figure 2.3). Not only do white and wealthy schools offer proportionately more high-ability classes, but a larger share of their students take such classes (see Oakes, 1990, figures 3.4 & 3.5). Wealthy and predominantly white schools offered two to three times as many Advanced Placement (AP) courses per student as do low-income, predominantly minority schools (Oakes, 1990) (for SES, $F=11.28$, $p<0.001$; for racial composition, $F=3.05$, $p<0.05$) Oakes (1990) found that 59% of all disproportionately-minority math and science classes were general-level courses, while 85% of disproportionately-white courses were either academic- or advanced- level courses (see table 5).

Table 5:

Level of High School Science and Mathematics Classes, by Racial Composition of Class

Class racial makeup as compared to school makeup	percentage of classes that are: general	academic	advanced	total
disproportionately minority	59%	36%	5%	100%
racially proportionate (w/in 10% of school makeup)	23%	51%	25%	100%
disproportionately white	15%	49%	36%	100%

Chi-square=107.414, $p<0.001$
(source: Oakes, 1990, p. 44)

This table includes only those schools with less than 90% or more than 10% white students.

Tracking placement decisions are often made inequitably. In a national study of tracking, researchers found that 70% of high-SES sophomores who performed in the top quartile on an ability test were in an academic track, while 4% were in a vocational track.

Table 6:

Placement Rates in Advanced Work Classes and Exam Schools, by Race, Boston 1985-86

RACE:	GRADE 4: (adv. work)	GRADE 7: (exam schl)	GRADE 10: (exam schl)
Black	8.7%	14.0%	12.7%
White	8.8%	29.9%	28.6%
Hispanic	5.7%	7.9%	9.1%
Asian	13.6%	27.1%	40.3%

(source: Dentler & Wheelock, 1990, p. 8)

Among low-SES sophomores, only 54% of top-quartile students were in an academic track, and 10% were in vocational tracks. Moreover, these differences increased by the students' senior year--80% of high-SES and 52% of low-SES top-quartile seniors were in academic tracks (Vanfossen, Jones, & Spade, 1987). Clearly, talented students in high poverty schools are likely to get less academic opportunity than their more affluent peers.

Teacher Preparedness

The striking differences in course offerings and tracking are compounded by differences in the teaching pool available to teach in urban and suburban schools. Suburban schools, particularly those in communities that are predominantly wealthy and white, report fewer vacancies, and fewer difficulties filling those they have, in science and mathematics positions. For example, 37% of principals in high-poverty schools, over 50% in 90+% minority schools, and 40% in inner-city schools reported difficulties finding qualified biology teachers, compared to only 10% in high-wealth schools, 15% in 90+% white schools, and 15% in suburban schools (Oakes, 1990, figure 4.3). Young teachers working in high poverty inner city schools find the job less rewarding and are more likely to consider leaving teaching.

As a result, schools serving poor and minority children often hire less-qualified teachers than advantaged schools. In metropolitan Chicago, suburban teachers were much more likely to have advanced degrees and degrees from more selective institutions than their urban counterparts. Moreover, even within the city, the most qualified teachers were found in schools with the smallest minority and low-income populations, meaning that "minority and low-income students tend to be in schools and school districts with . . . less well prepared teachers and counselors [and] larger class sizes" (Orfield, Mitzel, et al, 1984, p. 117). In Milwaukee as well, urban schools and schools with predominantly low-income students had

many fewer teachers with MA's than suburban districts (Walsh & Witte, 1985). Likewise, Texas teachers in heavily minority and low-income districts have lower average teacher test scores (Ferguson, 1991).

Not only do predominantly low-income and minority urban districts and schools often have less qualified teachers, but they generally distribute their teachers inequitably within schools as well. Because tracking tends to distribute the most highly-qualified teachers disproportionately to high-track classes--whose students are disproportionately white and higher-SES--low-income and minority students are taught overwhelmingly by the least qualified teachers available in metropolitan areas. Only 52% of low-track high school teachers in low-SES schools are certified, and only 38% hold Bachelor's degrees (see Oakes, 1990, figure 4.12). But even high-track students in disadvantaged schools often do not have highly qualified teachers. In fact, more low-track suburban students have certified math and science teachers than do high-track students in low-SES, minority, urban schools (see table 7).

Table 7:

Qualifications of Secondary Teachers in High- and Low-Ability Classes, by School Status

	Low-Ability Classes		High-Ability Classes	
Teacher Qualifications	Low-SES Minority Urban	High-SES White Suburban	Low-SES Minority Urban	High-SES White Suburban
Certified-Science/Math	39%	82	73	84
Bachelor's-Science/Math	38	68	46	78
Master's in Science/Math	8	32	10	48
NSTA Qualified	11	36	5	47
NCTM Qualified	23	26	4	16
Computer Coursework	41	61	69	62

(source: Oakes, 1990, p. 66)

These patterns of curricula and tracking inequalities are not new. In 1959, James B. Conant studied high schools throughout the U.S. and found big city high schools often had predominantly vocational tracks, while suburban schools were characterized by college preparatory programs and superior staffs. "A number of [suburban schools] have acquired excellent reputations throughout our country," wrote Conant, "largely because they are well financed and have been able to build strong administrative, guidance, and teaching staffs.... In these schools, it is not unusual for the college-preparatory group to be 75 percent or more of the student body..." (Conant, 1959, p. 92). In the early 1960's, data show that teachers in inner-city schools had a median of only four years experience, compared to 19 years in high-status schools, and were far more likely to be

substitutes--only 6% of teaching positions in high-status schools were staffed by substitutes, compared to 36% of those in inner-city schools (Havighurst, 1966, p. 195). Jonathon Kozol spent the 1964-65 school year as one such substitute in the Boston Public Schools, and his widely-read book, Death at an Early Age, describing that year made clear to a broad public the appalling conditions that passed for education in Boston's Black neighborhoods (Kozol, 1967). The fact that Kozol felt compelled, some 25 years later, to write about hauntingly similar problems speaks to the persistence and consistency of the inequalities we see today (Kozol, 1991). Clearly these patterns are long-standing, deeply-rooted, and are not self-curing.

Teachers contracts normally allow teachers to transfer out of schools where which they find difficult to those where they would prefer to work after they gain experience. This often results in the schools with the highest concentrations of low income minority students having few teachers with much experience and many brand-new teachers with none and many substitutes for positions that cannot be covered by certified teachers.

Separate and Unequal Schools

An examination of achievement test scores, dropout rates, course offerings, tracking patterns, and teaching credentials in metropolitan area schools reveals a structure of educational opportunity that is highly stratified at every level by both race and class. By the time they reach high school (if they do), students in urban districts have a narrower range of course

offerings and fewer opportunities for advanced and college-preparatory coursework than their suburban counterparts. Within urban districts, schools with more White and middle-class students offer more advanced courses, taught by more qualified teachers, than predominantly minority and low-income schools. And within schools, tracking assignments disproportionately assign white students to high-level classes and more-qualified teachers.

The average urban minority student is on the bottom rung of a highly stratified ladder: he is in a district with fewer resources, fewer qualified teachers, and fewer course offerings than others in the area. Within that district, he is in a school with a disproportionately high percentage of minority and low-income students and fewer advanced course offerings. He is in low- or general-track classes taught by the least-qualified teachers in the school. Moreover, even if he were assigned to a high-track within his school, his teachers would likely be less well-credentialed than any of the low-track teachers in a nearby white suburb.

Given these differences, it is not surprising that students in disadvantaged schools show less achievement on standardized tests and drop out at higher rates than those in advantaged schools. While school success is dependent on many complex factors, it is certainly true that students learn better the more opportunities they have for learning, in the school, the community, and at home. If the schools lack certified teachers, offer few

academically challenging courses, and track disadvantaged students disproportionately into low-level courses; if the community is economically depressed, with few libraries, museums, and other non-school educational opportunities; and if a large number of adults with high school diplomas are unable to find adequate employment; these factors clearly influence the lack of success of many disadvantaged students.

For the last two decades these patterns, and the underlying social ills to which they point, have been consistently ignored. "What seems unmistakable," writes Jonathon Kozol,

> but, oddly enough, is rarely said in public settings nowadays, is that the nation, for all practice and intent, has turned its back upon the moral implications, if not yet the legal ramifications, of the Brown decision. The struggle being waged today, where there is any struggle being waged at all, is closer to the one that was addressed in 1896 in Plessy v. Ferguson, in which the court accepted segregated institutions for black people, stipulating only that they must be equal to those open to white people. The dual society, at least in public education, seems in general to be unquestioned." (Kozol, 1991, p. 4)

Lessons of the Civil Rights Era

The civil rights movement and the poverty program of the 1960s created for a brief time the political preconditions for examining and trying different solutions for the systemic differences in educational opportunities for minorities and poor children. The government reports, the decisions of the courts, and the academic research of the period lead to major proposals to deal with what were widely seen as the underlying causes of inequality--racial discrimination and poverty. The War on

Poverty education programs assumed that the poor needed additional targeted resources and programs and that simply giving more money to existing institutions would do little good. New institutions and programs were needed.

This was the origin of Headstart, college financial aid programs, Job Corps. Many other experiments grew out of the conviction that basic change was needed, as did the mandates for school desegregation.

The basic idea of the civil rights movement and the primary goal of the court decisions and civil rights laws of the 1960s was that the fundamental institutions allocating opportunity in our society, particularly the public schools, were racially unfair. The lesson that the movement drew from American history was that, in communities with profound racial divisions, institutions serving the subordinate race were "inherently unequal" and that the only way to achieve equal opportunity was by destroying the wall of separation, winning access to the schools preparing the dominant group for adult success in the society and the economy. The goal was social reconstruction and the development of a non-racial set of integrated schools.

These goals were embodied in the policies that included the Supreme Court decisions in Brown v. Board of Education and a series of decisions in the late 1960s and early 1970s spelling out the constitutional requirement for truly integrated schools. They were included in the 1964 "War on Poverty", the civil rights acts, the creation of basic federal aid programs for schools and

colleges built around the needs of lower income students. All of these policies were premised on conclusions that equal opportunity did not exist and that basic change required outside coercion, incentives, or creation of new institutions whose basic function was to expand opportunity.

By the end of the 1960s the basic conclusion by many liberal analysts of the Great Society was that their reforms did not go far enough and that they had not reached the basic barrier to opportunity remaining after striking down Southern segregation laws--the ghetto system of the North. Many of the more far-reaching reforms, such as Head Start, Job Corps, and college aid showed benefits but not enough to change the basic relationships. There were still very deep racial barriers defended by fierce resistance. It was the raw force of resistance to housing integration in Chicago that defeated Martin Luther King's most important northern campaign.

In the face of obvious inequalities in metropolitan education there were no important initiatives for equity under way either in government or in the courts. The lessons about the kinds of changes that might work that had been won in the civil rights and poverty struggles of the 1960s were now largely forgotten.

Desegregation plans in large cities were weakened and dismantled through a combination of legal reverses, political pressure, lack of federal enforcement of civil rights law, and a desire by minority officials to maintain control of urban school

districts. It has not been from minority public belief that integration has failed or is unimportant.

The issue of integration was not dropped because blacks came to prefer segregated schools. Although many Blacks may be dismayed by the inequities in a particular local plan, the commitment to integrated education remains very strong. A 1992 national survey commissioned by the Boston Globe, found that Blacks and Hispanics by more than 3-1 majorities supported busing if it was the only way to integrate schools. A 1989 national study by the Harris Survey found that more than two-thirds of black and white parents whose children had been bussed to integrated schools found the experience "very satisfactory."(Boston Globe, January 5, 1992).

The issue was dropped because government would not enforce the law and no private civil rights organizations had the capacity to enforce the law. It was dropped because the effort to change the political direction of the federal courts succeeded by the 1980s, and there was no enforceable right to a desegregated education for millions of central city minority children.

The Feasibility of Desegregation Strategies.

School desegregation on a metropolitan level is a feasible strategy with major benefits. The first metropolitan desegregation plans were implemented more than twenty years ago and there is now a rich body of experience that permits

comparison of the results with different more limited forms of desegregation and with neighborhood schools and residentially based school segregation.

The key advantages of metropolitan-wide desegregation are that it produces by far the highest level of integration; that the integration and the overall enrollment patterns are much more stable than in other kinds of plans; that the integration is much more likely to be the educationally beneficial kind produced when minority children get access to high achieving middle class schools, and that the plans create a sense of common, metropolitan wide, interracial shared concern for the public schools, a quality virtually non-existent today in many urban communities. There is also some evidence that metropolitan-wide school integration fosters the development of more widespread school integration.

Table 8 shows the level of desegregation and the stability of desegregation, measured by the change in white enrollment for several of the largest metropolitan-wide desegregation plans compared with several of the largest school districts with neighborhood schools or purely voluntary desegregation plans.

Table 8:

Desegregation and Decline in % White Enrollment
by Type of Desegregation Plan

	whites in school of typical black student	blacks in 90-100% minority sch	decline in % white 1967-1988
Metropolitan Mandatory Desegregation			
Indianapolis	46.7	0.0	-18
Tampa	58.5	0.6	-13
Ft. Lauderdale	36.1	26.5	-13
Las Vegas	64.4	0.0	-12
Nashville	52.3	1.0	-16
Jacksonville	44.1	13.8	-12
Neighborhood Schools & Magnet Programs			
New York	9.8	75.0	-27
Chicago	4.8	84.7	-29
Atlanta	3.9	91.9	-34
Baltimore	9.4	70.0	-18
Houston	10.1	70.3	-38

Source: Office for Civil Rights data; Orfield and Monfort 1992: table 14.

During the Reagan Administration, the Justice Department argued in federal courts that desegregation plans should be dissolved in part because they produced so much white flight. When the Reagan Civil Rights Commission commissioned research on the subject, however, it found that the most massive plans, involving county-wide mandatory desegregation achieved the most

racial integration with substantially lower levels of decline in the fraction of white enrollment. The study reported that the county-wide plans had "an exceedingly large desegregative effect." It reported much smaller losses of white students associated with the implementation of much more far-reaching plans.(Welch and Light 1987: 58-59).

A comparative analysis of studies of achievement gains from desegregation plans concluded that the gains were much larger for black students transferred to suburban white schools. Crain and Mahard concluded that the larger benefits might be because it was "the most complete form of socioeconomic desegregation."(Crain and Mahard 1981: 72-73). A recent study comparing the college experiences of black students graduating from predominantly minority and largely white high schools in the nation's largest metropolitan areas showed a much greater probability of completing college in the 1980s for the graduates of the predominantly white schools, even when the student's own test scores were held constant.(Camburn 1990). Studies following black students for fifteen years after their transfer to suburban Hartford schools found major impacts on college and adult employment. In other words, there are important reasons to think that metropolitan-wide desegregation is not only a feasible strategy but one with considerable benefits in terms of expanding opportunity.

The political cross-pressures of the last generation have narrowed policy discussion and led to quiet acceptance of an

improbable set of implicit conclusions--that isolation does not matter and that schools segregated by both race and poverty can be made equal. Both of these conclusions fly in the face of the evidence of pervasive inequality.

Reviving Action against Structual Inequalities in Education

The first step toward a better set of policies is a candid recognition of the problem and of the need for governmental action to provide equal education within metropolitan areas.

A civil rights agenda for the next decade should be to devise remedies that would alleviate the syndrome of self-perpetuating isolation by race and income in central cities and some older sectors of suburbia. They must include: policies that would extend successful interventions as widely as possible; policies that bring excellent teachers into high poverty schools; policies that prevent small-time local politics from wrecking school programs in big cities; policies that honor and support successful models of dealing with inequality and desegregation; policies that strongly encourage cross district desegregation at least on a voluntary basis; strong targeted fair housing and mortgage finance enforcement; policies designed to increase equity in magnet and choice programs and in tracking within schools.

Within those broad goals, the following specific steps could be taken:

1) accelerated enforcement of fair housing laws

particularly against large sales and rental and mortgage funding institutions;

2) serious enforcement of fair employment and affirmative action requirements in suburban school district hiring to break down the staff separation that so clearly marks metropolitan areas;

3) creation of funds and incentives for voluntary city-suburban desegregation, which could build upon possibilities under some of the state choice laws;

4) serious sustained support for those inner city programs with records of success in inner city schools;

5) Justice Department and Education Department support for policies of metropolitan school and housing integration;

6) strong federal opposition to the dissolution of viable plans;

7) restoration of the Emergency School Aid Act, the HUD bonuses for regional affordable housing integration strategies.

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FEDERAL FAIR HOUSING ENFORCEMENT: THE BUSH RECORD AND RECOMMENDATIONS FOR THE NEW ADMINISTRATION

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I. Introduction

Assessing the Bush Administration's fair housing enforcement efforts at mid-term, the Citizens' Commission concluded in 1991 that despite significant problems, the Administration had made substantial progress from the Reagan years and that signs were "encouraging" in a number of areas.[1]

The Commission was careful to point out in 1991, however, that it was still too soon to tell whether the Department of Housing and Urban Development (HUD) would prove up to the task of processing and prosecuting complaints under the newly enacted Fair Housing Amendments Act competently and efficiently, and that it was unclear whether the Housing Section of the Department of Justice would be able to overcome political and policy constraints imposed from above to regain its historic leadership role in enforcing the federal fair housing laws.

Two years later, at the conclusion of the Bush Administration, federal fair housing enforcement has proved a disappointment. Most of the blame lies with HUD, whose enforcement efforts have all but collapsed under ineffective leadership, poor organization, and mismanagement at both the national and regional level that have resulted in a crippling backlog of complaints and an inability to win significant damage awards for victims.

HUD has found reasonable cause to believe discrimination exists in a mere two percent of total complaints filed, while no-cause findings and administrative closures remain inexplicably high. This result is surprising given HUD's own recent testing studies that show discrimination occurring at rates of 50 and 60 percent. Investigations and cause findings are badly delayed, virtually no Secretary-initiated or prompt judicial action cases have been filed, and substantial-equivalency reviews are far behind schedule. Delegation of no-cause authority to the regional offices has created severe administrative problems, little progress has been made resolving protracted public housing suits, and the Assistant Secretary for Fair Housing has played politics with FHIP grants.

The Housing Section of the Justice Department has continued to make steady,

albeit modest, progress, but has found its enforcement efforts hampered by an inability to prosecute disparate impact cases, inadequate staff and funding to maintain both an aggressive pattern and practice case docket and handle the growing influx of HUD election cases, opposition from the Office of the Attorney General and the White House to group home litigation on behalf of the disabled, and resistance from the banking regulatory agencies to requests for assistance in lending discrimination cases.

The background for all of these developments, including the framework and requirements of the 1988 Fair Housing Amendments Act, is reviewed in the Commission's 1991 Report. The purpose of this chapter is not to repeat that discussion, but rather to update the earlier Report by providing an assessment of federal fair housing enforcement efforts during the second half of the Bush Administration.

The remainder of the chapter is divided into three sections. Part II focuses on HUD's fair housing performance over the last two years, analyzing the timeliness of complaint investigations and reasonable cause determininations, case dispositions, damage awards, and organizational problems. This section also examines the absence of prompt judicial action and Secretary-initiated complaints.

Part III assesses the Justice Department's performance, reviewing new cases filed, damage awards, enforcement initiatives (such as the Department's nascent testing program), and the political constraints noted above. Conclusions and recommendations are set forth in Part IV.

II. Department of Housing and Urban Development

A. Complaints Received and Timeliness of Investigations and Reasonable Cause Determinations

In its 1991 Report, the Citizens' Commission expressed concern over HUD's "continuing inability to process complaints and complete investigations in a timely manner."[2] HUD's most recent statistics indicate that the problem has only worsened. As reported by HUD, the record is appalling.

HUD received 4,457 complaints in 1990, approximately 500 more than in 1989.[3] Under the Fair Housing Act, HUD is expected to complete its investigation of each complaint in 100 days. During the course of 1990, HUD failed to meet that deadline in 64% (2,941) of its cases.[4] At the end of 1990, 1,845 complaints that had been pending without completed investigations for more than 100 days remained open.[5]

For the entire 1990 calendar year, HUD managed to make cause determinations and issue charges in only 81 cases.[6]

B. Case Disposition

Of the 4,457 complaints received in 1990, HUD closed 4,138.[7] A closer look at the closed cases reveals several disturbing trends. HUD "administratively closed" 1,739 (42%) of the 4,138 closed cases.[8] Administrative closure is permitted only where complaints are withdrawn, complainants cannot be located, or where HUD lacks jurisdiction.[9] It is extraordinary to find that four out of ten complaints filed with HUD require administrative closure. No explanation has been provided by HUD for the high rate of administrative closures, and apparently HUD retains no public record of its reasons for administratively closing any particular case.

HUD conciliated 1,709 (41.3%) of the 4,138 cases closed in 1990.[10] Yet the median damage recovery per conciliation was a mere $825, down from the 1989 median of $1881.[11] The 1989 figure itself is shockingly low given the powerful remedial provisions of the 1988 Fair Housing Amendments Act. The 1990 figure is inexcusable, particularly when compared with increasingly frequent six figure damage recoveries obtained in federal court.

"No-cause" determinations also remained disturbingly high. Of 690 determinations on the merits made in 1990, HUD found reasonable cause to believe illegal discrimination had occurred in only 81 (11.7%) of those cases, or 1.8% of the total complaints received in 1990.[12] HUD found "no-cause" in 609 cases.[13]

Although HUD has yet to release reports on its enforcement activities for 1991 and 1992,[14] statistical information obtained through Freedom of Information Act requests indicates that the number of administrative closures has remained high in 1991 and 1992, while the number of cause determinations remains low. Between March of 1989, when the Fair Housing Amendments Act took effect, and July of 1992, HUD administratively closed 6,724 (44%) of the total number of complaints filed, while finding cause in only 342 (2%) of complaints filed.[15]

The low percentage of cause determinations is even more perplexing when contrasted with the results of HUD's most recent nationwide housing discrimination study. This study, based on 3800 fair housing tests conducted in 1991 in metropolitan areas across the country, found that Latinos and African Americans encountered discrimination between 50 and 60 percent of the time when attempting to rent or purchase housing.[16]

C. Administrative Hearings

HUD administrative law judges conducted hearings in a total of only 13 cases in 1990.[17] Since March of 1989, hearings have been held and decisions rendered by administrative law judges in barely thirty cases. HUD's ALJs are not to blame for the paucity of rulings. Virtually all cases prosecuted by HUD's Office of General Counsel have been commenced and decided within the statutory time limits contained within the Fair

Housing Act.[18] Rather, fault lies with the backlogged investigative process discussed above.

The administrative law judges are to be faulted, however, for the low compensatory damage awards that have been ordered in cases where respondents have been found to have violated the Fair Housing Act. To date, eighteen decisions have resulted in compensatory damage awards for discrimination on the basis of familial status. The median award in those cases is $5,953.[19] Chief Administrative Law Judge Heifetz must be credited for two large compensatory damage awards in cases involving racial discrimination.[20] Setting aside those two decisions, however, the median compensatory damage award in cases finding respondents liable for racial discrimination is $12,022.[21] The median award in handicap discrimination cases is $5,650;[22] for sex discrimination the median award is $3,930.[23]

These awards compare unfavorably with awards obtained in private sector federal court cases. Since 1981, twenty-two reported private sector race discrimination fair housing cases have resulted in a median compensatory damage award of $34,663.[24] (This figure does not include the largest fair housing compensatory damage award won to date -- $850,000 in a race discrimination jury trial.)[25] One of the first private sector families with children cases to go to trial recently resulted in a compensatory damage award alone of $415,000.[26]

D. Secretary-Initiated Complaints

In its 1991 Report, the Citizens' Commission noted that during the first year of operation of the Fair Housing Amendments Act HUD failed to issue a single cause determination in a Secretary-initiated complaint. The Commission found it "troubling" that HUD had not taken advantage of its new enforcement powers to focus resources on under-litigated areas.[27]

Since the release of that Report, HUD has failed to make use of its statutory powers under the Fair Housing Amendments Act to file complaints on its own initiative. Although HUD reports that it "identified 15 situations" in 1990 for possible Secretary-initiated actions, the agency has yet to file its first Secretary-intiated complaint.[28] This record of neglect and inaction is inexcusable.

E. Prompt Judicial Action

In certain instances time may be of the essence if meaningful relief is to be preserved for the complainant. The Fair Housing Amendments Act expressly authorizes the Department of Justice to seek prompt judicial action at HUD's request in those cases where temporary or preliminary injunctive relief is required to preserve the status quo until the investigation of the complaint has been resolved.[29]

Inexplicably, HUD referred only one case in 1990 for prompt judicial action to the Justice Department.[30] HUD's failure to seek prompt judicial action is reflected in conciliation statistics showing that 71% of all cases conciliated in 1990 resulted in no housing relief for the complaining party.[31] Presumably, housing relief was not available in these cases because the desired unit was filled during the time the case was pending.

F. State and Local Referrals

Complaints received by HUD must be referred to state and local agencies whose fair housing laws have been determined by HUD to be "substantially equivalent" to the Fair Housing Act. The Fair Housing Amendments Act allows HUD to certify a state or local agency only if that agency provides substantive rights, procedures, remedies, and the opportunity for judicial review equivalent to that provided under the Fair Housing Act.

The Fair Housing Amendments Act permitted states and localities that had already been certified at the time the new Act took effect to retain certification for a forty-month grace period. In its 1991 Report, however, the Citizens' Commission noted that halfway through that forty month period, only six jurisdictions had submitted new laws to HUD for certification. The Commission warned that if this trend continued, HUD would find itself in a difficult predicament; unable to refer complaints to states and localities no longer deeemed to be substantial equivalents, HUD would be "inundated with new complaints."[32]

In January 1992 HUD extended the forty-month grace period for eight months to allow states and localities additional time to enact substantially equivalent fair housing laws. Thus, as of September 13, 1992, any agency that did not provide substantive protections, remedies, and procedures equivalent to Title VIII lost its certification as a substantial equivalent. As of November 15, 1992, however, only fifteen states and eleven local jurisdictions had been certified.[33]

It appears that the Commission's fears have been realized. HUD now has jurisdiction over all complaints originating in all but the fifteen states and localities currently certified. Already faced with a crippling backlog of cases, HUD's predicament will only worsen.

Much of the blame lies in HUD's failure to provide states and localities with prompt and useful assistance in preparing legislation that will survive a substantial equivalency review. The Office of General Counsel and the Office of the Assistant Secretary for Fair Housing Enforcement have offered no leadership in this area, and are now destined to suffer the consequences of their neglect.

G. Delegation of No-Cause Determinations

In an effort to expedite complaint processing, in January, 1991 the Office of General Counsel relinquished sole authority to make reasonable cause determinations. OGC delegated that authority in part to counsel in HUD regional offices, and in part to regional investigators in the Office of Fair Housing Enforcement.

Delegation of no-cause determinations has had a profound and deleterious effect on the complaint evaluation process. First, delegation has resulted in a highly complex, bifurcated system of review that favors findings of no-cause.

The process begins at the level of the field investigator in the regional office. Typically the field investigator is not an attorney. If the investigator finds no-cause, that decision is not automatically reviewed. If the investigator believes there is cause, the decision must be sent to the office of the Assistant Secretary for Fair Housing Enforcement in Washington (FHEO). FHEO can issue a no-cause determination, which in turn is not generally reviewed, but cannot issue a finding of cause.

If FHEO recommends cause, the complaint is sent to the Office of General Counsel, and from there to regional counsel. If regional counsel finds no-cause, the decision is again not subject to automatic review. If regional counsel finds cause, the decision is final, unless the complaint involves allegations of discrimination on the basis of handicap or familial status. In those situations, the Office of General Counsel in Washington reviews the cause recommendations and makes the final determination.

At virtually every level of the complaint evaluation process findings of no-cause are generally final, while cause recommendations are automatically subject to further referral and review. In short, cause recommendations are examined far more carefully than no-cause determinations.

Second, the system inevitably fosters conflicting and inconsistent applications of law and procedure. Regional investigators and counsel are free to find no-cause based on idiosyncratic interpretations of the Fair Housing Act. Private fair housing organizations across the country have reported receiving clearly erroneous no-cause rulings that violate well established fair housing case precedents.

Third, the system has opened the door to abuse by field investigators. Private fair housing organizations, as well as individual complainants, have reported in recent months that regional FHEO investigators have used their no-cause authority to pressure parties to settle complaints for insubstantial sums, or to remove unwanted cases from their docket in an effort to reduce the backlog of complaints.[34]

H. The Fair Housing Initiatives Program and Testing

Under the Fair Housing Initiatives Program (FHIP), Congress appropriated funds for HUD to make available to private, non-profit fair housing organizations for fair housing testing and enforcement. With limited state funding now available for the private, non-profit fair housing organizations, the FHIP funds have become the only lifeline for many of these organizations.

In 1992 Congress amended the FHIP program to increase the amount and scope of FHIP funding.[35] $21 million has been appropriated for FHIP for fiscal year 1993, and $26 million for 1994. This represents nearly a five-fold increase from the FHIP funding levels for 1989.

Notwithstanding this much needed increase in FHIP appropriations, HUD has played politics with applications for FHIP funds from private fair housing organizations. In 1991, for example, the National Fair Housing Alliance -- the country's largest and most effective private fair housing organization, and an outspoken critic of HUD's enforcement program -- received only a small fraction of its funding request (and far less than fair housing organizations not on record criticizing HUD) despite receiving the highest point total in the competitive application review.

HUD has also failed to use private fair housing organizations across the country that have FHIP testing programs to refer complaints for testing. Testing is an easy, efficient, and effective means of investigating the merits of an complaint. Over four years after passage of the Fair Housing Amendments Act, HUD has not made any progress in utilizing this important investigative technique in evaluating complaints it receives.

I. Public Housing Suits

In its 1991 Report, the Citizens' Commission noted that HUD had ignored its affirmative obligations under Section 808 of the Fair Housing Act to administer HUD programs in a nondiscriminatory manner, and that the Bush Administration had done little to settle the costly, protracted litigation charging HUD with operating segregated and discriminatory public housing.[36] Over the last two years, HUD has continued to ignore its Section 808 responsibilities and virtually no progress has been made in resolving pending public housing cases in cities across the country.

Most public housing in major metropolitan areas remains highly segregated. The time has come for the Attorney General to direct the Housing Section and the Civil Division of the Justice Department (which defends HUD in public housing cases) to work together to reach fair settlements in the pending public housing suits that fully recognizes HUD's affirmative obligations under Section 808.

III. Department of Justice

A. New Cases Filed

Under the Fair Housing Amendments Act, the Department of Justice has authority to bring primarily two types of cases. The Department may, on its own initiative, file cases involving a "pattern or practice" or an issue of "general public importance,"[37] and the Department must file suit on behalf of all complainants who have received a reasonable cause determination from HUD and have elected to prosecute their case in federal court, rather than before a HUD administrative law judge.[38]

In the first two years of enforcement under the new Act, the Justice Department received a total of only forty election cases from HUD.[39] This left the Department free to concentrate on pattern or practice cases. Accordingly, during those years a record number of pattern or practice cases (approximately forty-eight) were initiated.[40] The unprecedented increase in filings was cited approvingly by the Commission in its 1991 Report.[41]

During the last two years, however, the number of new pattern and practice cases filed has dwindled. This trend, while plainly unfortunate, is the inevitable result of a substantial increase in the number of election cases referred from HUD to the Justice Department. In 1991 and 1992, the Department of Justice received and filed 140 election cases. With less time and resources to devote to the development of pattern or practice suits, new filings of these cases in 1991 and 1992 dropped to approximately forty.[42]

Whether it might have been possible for the Housing Section to file additional pattern and practice cases during this time period given its staffing limitations remains an open question. It can be argued that more aggressive leadership could and should have produced more cases without new legal staff. It is only logical, however, that a threefold increase in mandatory election cases should cause a leveling or reduction of the "voluntary" pattern and practice docket.

Amicus brief filings and interventions in pending cases brought by private organizations and individuals remain disappointingly small in number. In 1991 the Department filed five amicus briefs, down from eight in 1990, and in 1992 it filed only three briefs.[43] In 1991 and 1992 the Department intervened in few, if any, pending suits.[44] These numbers are attributable in large part to opposition within the Solicitor General and Attorney General's office, and do not fairly reflect the Housing Section's commitment to vigorous fair housing enforcement. Nevertheless, the numbers are particularly disappointing given clear proof that the Department's presence has affected the outcome of cases where it has chosen to intervene or file as a friend of the court.

Recently, for example, the U.S. Court of Appeals for the Seventh Circuit held that the Fair Housing Act does apply to homeowners' insurance companies who "redline" or

discriminate on the basis of race.[45] The decision was a landmark victory for fair housing advocates, who have long argued that redlining by insurance companies has hindered the efforts of African-Americans and other minorities to obtain home mortgage loans. The court's decision relied heavily on a legal position taken on a particular issue by the government in its amicus brief.

Similarly, in *United States v. Balistrieri*,[46] where the Department argued strongly for a broad interpretation of the Fair Housing Act before the Seventh Circuit, it won an important decision affirming the right of fair housing testers to obtain compensatory damages for emotional distress, embarassment, and humiliation.

B. Damage Awards

Aside from the importance of compensating deserving victims for injuries suffered, large damage awards are important because the publicity accompanying large verdicts and settlements acts as a deterrent to future discrimination by landlords and property owners.

Compensatory damage awards obtained by the Justice Department for victims as part of case settlements have improved somewhat during the last two years, but still do not compare favorably with results obtained in recent private fair housing cases. Most of the Department's compensatory damage awards have remained in the $5,000 to $20,000 range.[47] Four private fair housing cases tried in the summer of 1992 alone, however, resulted in six figure compensatory damage awards.[48]

Likewise, although the Department recently won an important appellate decision affirming its right to seek both unlimited punitive damages and civil penalties in pattern or practices cases,[49] few Department cases have resulted in significant punitive damage awards or civil penalties.[50] The comparison with recent private fair housing case punitive damage awards is not favorable. Two cases brought within the last year have resulted in six figure punitive damage awards, and one individual familial status case produced $2,000,000 in punitive damages.[51]

The total monetary relief obtained by the Justice Department on behalf of all aggrieved parties has, however, grown steadily over the course of the last two years. In 1991 the Department obtained $738,028 in monetary awards, up from $712,122 in 1990. In 1992 monetary relief jumped to $2,934,798.[52] (The 1992 total does not include a landmark settlement in a New York Housing Authority case that resulted in approximately $20 million in housing vouchers for claimants).[53] For this the Department deserves credit, even if the median case award has not kept pace with awards in the private sector.[54]

C. Enforcement Initiatives and Interpretation of the Fair Housing Amendments Act

In its 1991 Report, the Citizens' Commission cited a series of new case filings and amicus briefs as evidence that the Justice Department had begun to reassert its traditional leadership role in aggressively seeking expansive and progressive interpretations of the Fair Housing Act.[55]

Developments over the course of the last two years support the Commission's 1991 assessment in some respects, and contradict it in others. While the Department has continued to prosecute vigorously garden variety disparate treatment cases and has produced the first significant monetary settlement in the area of lending discrimination, political and policy constraints imposed from above by the Solicitor General, the Attorney General, and the White House have hampered the Housing Section's ability to enforce the Fair Housing Act.

1. Refusal to Use Disparate Impact Theory

It is well established in discrimination law that a practice or action can be found discriminatory if it is undertaken with discriminatory intent, or if it has an adverse impact on minority individuals. Nine U.S. Courts of Appeal have held that disparate impact can be used to establish a violation of law under the Fair Housing Act. The Supreme Court has expressly approved the use of disparate impact theory in the employment discrimination area, and the 1991 Civil Rights Act recently affirmed Congressional approval of the practice in employment cases.

Notwithstanding the many legal precedents, and notwithstanding the efforts of the Johnson, Nixon, Ford, and Carter Justice Departments to prosecute disparate impact cases, the Reagan Justice Department repeatedly refused to prosecute disparate impact cases under the Fair Housing Act in the belief that the Act did not support such a claim.[56]

At the time the Commission issued its 1991 Report, it was not clear precisely what position the Bush Justice Department would take.[57] Over the course of the last twenty months that has changed; the Department now contends that because the Supreme Court has not yet expressly ruled on the applicability of disparate impact theory under the Fair Housing Act it is not obligated to proceed with impact cases. This position has resulted in countless lost enforcement opportunities and severely weakened the Department's ability to initiate new pattern and practice suits.

2. Moratorium on Group Home Cases

As passed by Congress in 1988, the Fair Housing Amendments Act extended protection to the disabled. Since that time, in many areas across the country group homes for the disabled have been thwarted by local community bias and discriminatory local zoning

ordinances from renting houses in single family neighborhoods. Critical to the success of group home programs is the concept of "normalization," or the ability to find housing in de-institutionalized single family residential communities that permits disabled program participants to become quickly integrated into the mainstream of community life.

Until the fall of 1992 the Department of Justice aggressively prosecuted group home cases, with remarkable success.[58] In recent months, however, as a result of political pressure from Bruce Fein and other conservatives, DOJ has ceased bringing these cases on behalf of recovering alcoholics and substance abusers, and in one important and precedent-setting appeal now pending in the U.S. Court of Appeals for the Ninth Circuit, has balked at prosecuting the case, and actively considered dropping the appeal and abandoning the group home.[59] The outcome of this appeal will have significant ramifications for all future litigation on behalf of the disabled under the Fair Housing Act.

Protecting the rights of group homes for the disabled to obtain housing of their choice is of fundamental importance. Many of these group homes, like Oxford House (the aggrieved party in the Ninth Circuit appeal), provide valuable and needed therapeutic services to recovering alcoholics and substance abusers in financially weakened, drug-infested cities across the country at no expense to the public. Frequently there is no equivalent public program available to make up for the loss of private group home programs.

3. Lending Discrimination

In September of 1992 the Department of Justice announced a landmark $1,000,000 settlement in a lending discrimination suit brought against Decatur Federal Savings and Loan in Atlanta.[60] The settlement represents a substantial achievement for which the Department deserves credit. Its importance is twofold. First, *Decatur* was the first pattern and practice race discrimination case filed by the Department against a lending institution. Second, after investing two years and hundreds of thousands of dollars in expert assistance, the Department now has an investigatory and injunctive model to follow in prosecuting cases against other lending institutions.

It is not entirely clear, however, why lending cases like *Decatur* have been so long in coming, and why many more such investigations are not in the works. The need for new investigations of lending institutions by the Department of Justice is critical. Recent studies of lending practices in cities around the country clearly demonstrate patterns of bias against minority loan applicants and minority areas.[61]

Fault for the investigatory delay may not lie only, or even primarily, with the Justice Department. The regulatory agencies charged with oversight of banking activities, such as the Office of Thrift Supervision, the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency, have access to bank computer tapes that provide all of the information about bank lending practices necessary to determine if an institution is discriminating in violation of the law. These

agencies, however, are not carrying out their responsibility to investigate aggressively, and are not cooperating with the Department of Justice in providing the necessary information about bank practices. In *Decatur*, for example, Justice Department investigators were shocked to find that Decatur had received an "excellent" Community Reinvestment Act (CRA) rating from the agency responsible for monitoring its lending practices.

4. Testing

Over the course of the last fourteen months the Department of Justice has developed its own fair housing testing program. The Department is now using both its own employees, and testers from private, local fair housing organizations to conduct testing in pattern and practice cases.

Although the details of the program remain confidential, the size of the program is sufficient to support prosecution of a steady stream of "tester" cases. The first two tester cases were filed by the Department in November of 1992.[62]

Initiation of the testing program is a welcome development. In many cases discrimination is difficult, if not impossible, to prove without testing evidence. The use of testers will allow the Department to file and prosecute successfully and efficiently substantially more pattern and practice suits.

It remains to be seen, however, just how successful this program will prove, how aggressive the Department will be in using its new testing resources, and whether the Department will apply these testing techniques to other more complex, although equally important, areas of enforcement, such as mortgage lending discrimination.

IV. Conclusion and Recommendations

After a tentative but hopeful start during the first two years of the Bush Administration, federal enforcement of the Fair Housing Amendments Act has stumbled badly over the last two years. Most of the blame lies with HUD, which has proved incapable of carrying out its duties under the Act to process and prosecute complaints effectively and efficiently. The Department of Justice has continued to make modest progress in many areas, but because of political constraints placed on the Housing Section and the Civil Rights Division generally, the Department has not been able to provide the leadership required to make substantial progress in the fight against housing discrimination.

If federal fair housing enforcement is to be truly effective, the following steps need to be taken immediately:

The Department of Housing and Urban Development

(1) Secretary-Designate Cisneros should direct the new Assistant Secretary for Fair Housing and Equal Opportunity to undertake a thorough review and audit of FHEO's handling of complaints and investigations. Specifically, the Assistant Secretary should:

(a) demand a public accounting from each regional HUD office as to why so few cause determinations have been made;

(b) demand a public accounting from each regional HUD office as to why over 40% of HUD complaints have resulted in administrative closures, and determine if administrative closures are being used improperly to force a reduction in the complaint backlog;

(c) investigate conciliation practices at the regional offices to determine why so many complaints are resolved for so little money, and direct regional conciliators not to use the conciliation process to force a quick resolution that is unfavorable to the complainant;

(d) end the delegation of no-cause authority to regional investigators and regional counsel; all no-cause determinations should be reviewed by the Assistant Secretary in Washington, and all regional counsel, regional HUD offices, and the Office of General Counsel should understand that on issues of fair housing enforcement they report directly to the Office of the Assistant Secretary;

(e) send legal staff from the Office of General Counsel and experts from the private fair housing bar to the regional offices to re-train investigators and regional counsel in complaint evaluation and investigation;

(f) issue new performance standards and create an internal audit and review procedure for all regional personnel to insure the complaint backlog is not reduced at the expense of complainants' legal rights;

(g) direct regional investigators to refer complaints to local private fair housing organizations for immediate fair housing testing wherever possible;

(h) submit the long overdue annual HUD enforcement reports to Congress.

(2) Secretary-Designate Cisneros should direct the Office of General Counsel to establish a strike force comprised of its best legal staff to investigate, prepare for litigation, and charge twenty-five Secretary-initiated complaints in calendar year 1993.

(3) Secretary-Designate Cisneros should direct the Office of General Counsel to create a "prompt judicial action hotline," staffed by its lawyers in Washington and available both to the public and regional HUD investigators, to monitor and investigate complaints at the regional offices that may require emergency action to insure meaningful housing relief.

(4) The Assistant Secretary for Fair Housing, working with the Office of General Counsel, should assemble a permanent advisory team of private fair housing advocates and lawyers to train HUD legal staff in the preparation of evidence on compensatory damages for use at administrative hearings.

(5) The Assistant Secretary for Fair Housing should establish a task force to assist states and localities in preparing legislation that will survive a substantial equivalency review.

(6) Fair Housing Initiatives Program funding should be allocated expeditiously to private fair housing groups solely on the basis of merit.

(7) Secretary-Designate Cisneros should issue a mandate to the Assistant Secretary for Fair Housing to review the performance of all personnel within the Office of Fair Housing and Equal Opportunity, and transfer or terminate all personnel who have failed to demonstrate adequate commitment to efficient and competent fair housing enforcement.

The Department of Justice

(1) The new administration should move quickly to reverse the Reagan-Bush approach to discriminatory effect theory and reaffirm the Justice Department's historic commitment to the prosecution of disparate impact cases. The Civil Rights Division, and the Housing Section in particular, should be directed to initiate disparate impact litigation where appropriate.

(2) Attorney General-Designate Baird should move forthwith to end the moratorium on group home cases and direct the appellate section of the Civil Rights Division to continue to prosecute the appeal in the Ninth Circuit Court of Appeals on behalf of Oxford House in *City of Edmunds v. Oxford House*.

(3) The new admininstration should move rapidly to coordinate the work of

the regulatory agencies and the Department of Justice in investigating and prosecuting new cases of lending discrimination in major cities across the country. The regulatory agencies should be instructed to undertake more rigorous investigations of the industry's lending practices. Given the importance of private investment in the nation's inner cities to future economic recovery, eradicating lending discrimination should be a top fair housing priority for the new administration.

(4) The Housing Section should be provided with additional funding to expand its nascent testing program. Specifically, the Secretary-Designate should direct the Section to apply testing techniques in non-traditional enforcement areas, such as lending discrimination. The Justice Department should assist private groups in monitoring lending discrimination by issuing a formal policy statement making clear that testers can apply for loans without violating federal "false statements" laws.

(5) The Housing Section should significantly increase both the number of cases in which it intervenes on behalf of private plaintiffs, and the number of amicus briefs filed on behalf of private parties. One attorney in the Housing Section should be designated as the Department contact for amicus requests in fair housing cases.

(6) The new administration should immediately seek additional funding from Congress to staff ten new attorney positions within the Housing Section dedicated solely to the prosecution of pattern and practice cases. The Housing Section should not be forced to sacrifice new pattern and practice litigation in order to continue to prosecute its expanding docket of mandatory election cases.

(7) Large compensatory and punitive damage awards have the salutary effect of forcing landlords and property owners to take housing discrimination seriously. The private fair housing community has been more aggressive than the Department in seeking large settlements and damage awards. Although the Department has made modest progress, it should place a priority upon attempting to increase damage awards by (a) pushing more cases with strong facts to trial; and (b) working with the private fair housing bar and advocacy community to develop effective litigation tactics.

(8) Attorney General-Designate Baird should direct the Civil Division to work with the Housing Section to settle expeditiously and fairly all pending private litigation alleging discrimination and segregation in the operation of public housing.

General Recommendations and New Legislation

(1) The new administration should convene a White House summit on housing issues before the end of 1993. As part of that summit, representatives from the Department of Justice, HUD, and private fair housing organizations, should explore the possibility of new legislation to create a federal Fair Housing Commission, similar to the EEOC, to

coordinate enforcement of all federal anti-discrimination laws related to housing. Representatives from HUD, Justice, and the private fair housing community should also use the summit to explore ways (a) to improve joint prosecutions; and (b) to build an overall coalition of housing groups to combat housing and poverty problems in the nation's cities.

(2) The inability of many to obtain homeowners' insurance as a result of racial "redlining" of inner city areas has created a roadblock to the purchase of home mortgage loans by minority applicants and those who live in minority areas.[63] With the recent judicial ruling that homeowners' insurance companies are covered under the Fair Housing Act,[64] the new administration should initiate legislation requiring the insurance industry to meet the same type of disclosure requirements that lending institutions have long been required to satisfy under the Community Reinvestment Act and the Home Mortgage Disclosure Act. These latter two laws have proven effective in providing the public with information about where loans are made, to whom, and why applicants are turned down. Clear evidence of redlining in the insurance industry justifies requiring the insurance industry to disclose where and to whom homeowners' insurance is being provided.

ENDNOTES

1. Citizens' Commission on Civil Rights, Lost Opportunities, p. 104 (1991) (hereinafter referred to as "1991 Commission Report").

2. Id. at 107-08.

3. U.S. Department of Housing and Urban Development, 1990, The State of Fair Housing, pp. 6-7 (Nov. 4, 1991) (hereinafter "HUD 1990 Report").

4. Id.

5. Id. Although HUD is required under the Fair Housing Act to provide annual reports to Congress on the progress of its enforcement efforts, see 42 U.S.C. §3608(e)(2), HUD has yet to publish any report for 1991 or 1992.

6. Id. at 7-8.

7. Id. at 6-7.

8. Id. at 7.

9. Id.

10. Id.

11. Id.

12. Id. at 7-8.

13. Id.

14. Under §3608(e)(2) of the Fair Housing Act, HUD is required to submit an annual report to Congress on its enforcement activities. The 1990 Report was not issued until November of 1991, and as noted in note 5 above, as of the date of this writing, HUD has still not issued reports for 1991 or 1992.

15. These statistics are based on summaries of information released by the Department of Housing and Urban Development, on file with author.

16. M. Turner, R. Struyk, & J. Yinger, Housing Discrimination Study, U.S. Department of Housing and Urban Development (June, 1991).

17. HUD 1990 Report at 14. Nine of the thirteen cases were against a single mobile home park. In effect, therefore, HUD prosecuted only five different respondents during all of 1990.

18. Id.

19. HUD v. Morgan, No. HUDALJ 08-89-0077-1 (7-25-91) ($14,297.99 compensatory award); HUD v. Denton, No. HUDALJ 05-90-0012-1, 05-90-0406-1 (11-12-91) ($13,210 compensatory award); HUD v. Kelly, No. HUDALJ 05-90-0879-1 (8-26-92) ($10,430.76 compensatory award); HUD v. Murphy, Nos. 02-89-0202-1 through 02-89-0206-1 (7-13-90) ($10,033.20 compensatory award); HUD v. Properties Unlimited, Nos. HUDALJ 02-89-0308-1 and 02-89-0309-1 (8-5-91) ($9,291.14 compensatory award); HUD v. Lewis, No. HUDALJ 07-91-0055-1 (8-27-92) ($8,438.50 compensatory award); HUD v. Paradise Gardens, Nos. HUDALJ 04-90-0321-1 and 04-90-0726-1 (10-15-92) ($7,500 compensatory award); HUD v. Carter, No. HUDALJ 03-90-0058-1 (5-1-92) ($6,000 compensatory award); HUD v. Holiday Manor, No. HUDALJ 05-89-0544-1 (3-23-92) ($5,250 compensatory award); HUD v. Jeffre, No. HUDALJ 05-90-0258-1 (12-18-91) ($4,500 compensatory award); HUD v. Frisbie, No. HUDALJ 07-91-0027-1 (5-6-92) ($4,000 compensatory award); HUD v. Rollhaus, No. HUDALJ 07-90-0309-1 (12-9-91) ($2,860 compensatory award); HUD v. Edelstein, No. HUDALJ 05-90-0821-1 (12-9-91) ($2,701 compensatory award); HUD v. Guglielmi, No. HUDALJ 02-89-0450-1 (9-21-90) ($2,500 compensatory award); HUD v. Leiner, No. HUDALJ 02-90-0051-1 (1-3-92) ($2,500 compensatroy award); HUD v. Wagner, No. HUDALJ 05-90-0775-1 (6-22-92) ($2,000 compensatory award); HUD v. TEMS Association, Nos. HUDALJ 04-91-0064-1 and 04-91-0066-1 (4-9-92) ($1,250 compensatory damages); HUD v. DiBari, No. HUDALJ 01-90-0511-1 (9-23-92) ($401 compensatory award).

20. HUD v. Tucker, Nos. HUDALJ 09-90-1008-1 (8-24-92) ($101,276.69 compensatory award); HUD v. Blackwell, No. HUDALJ 04-89-0520-1 (12-21-89) ($44,594.21 compensatory award).

21. HUD v. Cabusora, No. HUDALJ 09-90-1138-1 (3-23-92) ($25,000 compensatory award); HUD v. Jerrard, No. 04-88-0612-1 (9-28-90) ($15,591.56 compensatory award); HUD v. Gaultney, No. HUDALJ 04-88-0587-1 (9-27-91) ($5,000 compensatory award); HUD v. Leiner, No. HUDALJ 02-90-0051-1 (1-3-92) ($2,500 compensatory award).

22. HUD v. Dedham Housing Authority, No. HUDALJ 01-90-0424-1 (2-4-92) ($12,100 compensatory award); HUD v. George, No. HUDALJ 01-89-0383-1 (8-16-91) ($4,350 compensatory award); HUD v. Williams, No. HUDALJ 02-89-0459-1 (3-22-91) ($500 compensatory award).

23. HUD v. Baumgardner, No. HUDALJ 05-89-0306-1 (11-15-90) ($5,000 compensatory award); HUD v. Rollhaus, No. HUDALJ 07-90-0309-1 (12-9-91) ($2,860 compensatory award).

24. Ragin v. Macklowe Real Estate Co., No. 88 CV 5665 RWS (S.D.N.Y. June 29, 1992) ($200,000 compensatory award); Payne v. Century 21, No. 2260 Oct. 1989 Term (Philadelphia C.P. Ct. Aug. 17, 1992) ($100,000 compensatory award); Grayson v. Rotundi & Sons Realty

Co., No. CV 83-0844 (E.D.N.Y. Sept. 9, 1984) ($65,000 compensatory award); Littlefield v. Mack, 954 F.2d 133 (7th Cir. 1992) ($50,000 compensatory award); Douglas v. Metro Rental, 327 F.2d 252 (7th Cir. 1987) ($40,000 compensatory award); Davis v. Mansards, 597 F.Supp 334 (N.D. Ind. 1984) ($37,780 compensatory award); Sutton v. Bloom, 710 F.2d 1188 (6th Cir. 1983) ($33,101.34 compensatory award); City of Chicago v. Matchmaker Real Estate Sales Center, 1991 U.S. Dist. Lexis 4435 (April 5, 1991) ($33,000 compensatory award); Wilson v. Westgate Apartment Limited Partnership, No. 90-1424-A (E.D. Va. July 10, 1991) ($27,500 compensatory award); Green v. Century 21, 740 F.2d 460 (6th Cir. 1984) ($27,000 compensatory award); Pollitt v. Bramel, No. C-1-86-983 (S.D. Ohio Sept. 8, 1987) ($25,000 compensatory award); Rogers v. 66-36 Yellowstone Blvd. Cooperative Owners, Inc., 599 F. Supp. 79 (E.D.N.Y. 1984) ($25,000 compensatory award); Holifield v. Rossford Hills Apartments, No. 3:91 CV 7249 (N.D. Ohio Feb. 28, 1992) ($23,660 compensatory award); Saunders v. General Services Corp. 659 F. Supp. 1042 (E.D. Va. 1987) ($14,800 compensatory award); Hamilton v. Svatik, 779 F.2d 383 (7th Cir. 1985) ($12,500 compensatory award); Hobson v. Humphreys, Inc., 563 F.Supp. 344 (W.D. Tenn. 1982) ($10,000 compensatory award); Shaw v. Cassar, 558 F.Supp. 303 (E.D. Mich. 1983) ($10,000 compensatory award); Stewart v. Furton, 774 F.2d 706 (6th Cir. 1985) ($8,800 compensatory award); Asbury v. Brougham, 866 F.2d 1276 (10th Cir. 1989) ($7,500 compensatory award); Tolliver v. Amici, 800 F.2d 149 (7th Cir. 1986) ($5,000 compensatory award); Miller v. Apartments & Homes of New Jersey, Inc., 646 F.2d 101 (3rd Cir. 1981) ($4,451 compensatory award); Pinchback v. Armistead Homes Corp., 689 F.Supp. 541 (D. Md. 1988) ($2,500 compensatory award).

25. Spann v. Colonial Village, C.A. No. 86-2917 (D.D.C. May 14, 1992). If this award is added to the twenty-two federal court decisions cited above, the median compensatory damage award would jump to $70,112.

26. Timus & the Fair Housing Council of Greater Washington v. William J. Davis, Inc., C.A. No. 91-0882 (D.D.C. July 14, 1992).

27. 1991 Commission Report at 109-110.

28. HUD 1990 Report at 8-9.

29. 42 U.S.C. §3610(e).

30. Prentice Hall, Fair Housing-Fair Lending, Vol. VII, No. 8, p.7 (Feb. 1, 1992).

31. HUD 1990 Report at 7.

32. 1991 Commission Report at 109.

33. Technically, these jurisdictions were not certified for all time, but were allowed to enter into an Interim Referral Agreement with HUD for a two year period to allow the federal agency to monitor the jurisdiction's performance. See information provided by HUD upon request, on

file with author.

34. Reports from private fair housing organizations suggest that regional investigators are also using their authority to administratively close cases in order to pressure parties into settlement or eliminate backlogged cases. These organizations also report that HUD investigators are in some instances refusing to take complaints in order to reduce the complaint backlog.

35. P.L. 102-550 (signed by President Bush Oct. 28, 1992).

36. 1991 Commission Report at 112.

37. 42 U.S.C. §3614(a).

38. 42 U.S.C. §3612(o).

39. "DOJ Fair Housing Case Activity Since March 12, 1989," (Dec. 7, 1992 Report).

40. Id.

41. 1991 Commission Report at 113.

42. "DOJ Fair Housing Act Case Activity Since March 12, 1989," (Dec. 7, 1992 Report).

43. Id.

44. Id.

45. NAACP v. American Family Mutual Ins. Co., 1992 U.S. App. Lexis 26682 (7th Cir. 1992).

46. Nos. 91-2379, 91-2493 (7th Cir. Nov. 24, 1992).

47. "DOJ Fair Housing Act Case Activity Since March 12, 1989," (Dec. 7, 1992 Report). Without controlling for numbers of victims in a given case, median compensatory damage recoveries by the Justice Department on behalf of individuals for calendar year 1990 was $18,513; for 1991, $13,649; for 1992, $22,071 (excluding the Decatur $1,000,000 settlement on behalf of 48 victims). Id.

48. Timus & the Fair Housing Council of Greater Washington v. William J. Davis, Inc., C.A. No. 91-0882 (D.D.C. July 14, 1992) ($415,000 in compensatory damages awarded to individual plaintiff and fair housing organization); Spann v. Colonial Village, C.A. No. 86-2917 (D.D.C. May 14, 1992) ($850,000 in compensatory damages awarded to individual plaintiff and two fair housing organizations); Payne v. Century 21 Real Estate Corp., No. 2260 (Phila. C.P. Ct. Aug. 17, 1992) ($100,000 in compensatory damages awarded to individual plaintiff); Ragin v. Harry Macklowe Real Estate Co., C.A. No. 88 CV 5665 (S.D.N.Y. June 29, 1992) ($200,000 compensatory damage award).

49. United States v. Balistrieri, Nos. 91-2379, 91-2493 (7th Cir. Nov. 24, 1992).

50. "DOJ Fair Housing Act Case Activity Since March 12, 1989," (Dec. 7, 1992 Report).

51. Timus & the Fair Housing Council of Greater Washington v. William J. Davis, Inc., C.A. No. 91-0882 (D.D.C. July 14, 1992) ($2,000,000 punitive damage award); Payne v. Century 21 Real Estate Corp., No. 2260 (Phila. C.P. Ct. Aug. 17, 1992) ($100,000 punitive damage award); Littlefield v. Mack, 954 F.2d 133 (7th Cir. 1992) ($100,000 punitive damage award).

52. "DOJ Fair Housing Act Case Activity Since March 12, 1989," (Dec. 7, 1992 Report).

53. United States of America v. New York City Housing Authority, 92 Civ. 4873 (S.D.N.Y. June 29, 1992).

54. See note 47 supra.

55. 1991 Commission Report at 113-114.

56. Id.

57. Id. at 116.

58. Id. at 114.

59. City of Edmunds v. Oxford House and United States of America v. City of Edmunds, Nos. 92-36640 and 92-36735 (9th Cir.).

60. United States of America v. Decatur Federal Savings and Loan Assoc., C.A. No. 1 92-CV-2198 (N.D. Ga. Sept. 17, 1992).

61. See, e.g., Munnell, Browne, McEneaney, Tootell, Mortgage Lending in Boston: Interpreting HMDA Data, October, 1992 (published under auspices of the Federal Reserve Bank of Boston).

62. United States of America v. Curcuru, No. 92 CV 75867 (E.D. Mich. Oct. 1, 1992); United States of America v. Grillo, No. 92 CV 75869 (E.D. Mich. Oct. 1, 1992).

63. See, e.g., Squires, et al., "Insurance Redlining, Agency Location, and the Process of Urban Disinvestment," Urban Affairs Quarterly, Vol. 26, No. 4, June 1991.

64. NAACP v. American Family Mutual Ins. Co., 1992 U.S. App. Lexis 26682 (7th Cir. 1992). See note 45 supra and accompanying text.

FAIR HOUSING RIGHTS OF PERSONS WITH DISABILITIES

--by Robert S. Ardinger

For people with disabilities, early 1992 marked the beginning of significant implementation of the Americans with Disabilities Act, with the January 26, 1992 effective date for public accommodations, State and local governments and general transportation provisions; and July 26, 1992 for certain employers. In addition, as the Clinton administration takes Office, the new construction provisions for public accommodations will take effect, applying to all new construction of public accommodations for first occupancy after January 23, 1993.

These events have given new life and attention to other civil rights laws, notably Section 504 of the Rehabilitation Act of 1973, the 1988 amendments to the Fair Housing Act, and in some cases the Architectural Barriers Act. More of the attention, however, has been from architects, builders, businesses, and consumers and other private sector individuals than from the U.S. Department of Housing and Urban Development. Concerned about meeting requirements for the ADA, individuals and organizations have become more aware that there are a number of laws mandating access in various buildings and facilities, and protecting the rights of persons with disabilities. As a result, more effort has been made to walk through these various requirements and ensure that all applicable laws are met or being met. This does not mean, of course, that HUD has been doing nothing. But the federal agency charged with implementing provisions of the Americans with Disabilities Act as it relates to State and local government housing programs, the 1988 Fair Housing Act amendments, Section 504, and the Architectural Barriers Act has missed many opportunities to take advantage of the current civil rights climate in assuring the rights of persons with disabilities.

NEW RECOMMENDATION

1.More Efficient Enforcement of the Various Laws Providing Rights to Persons with Disabilities: the Architectural Barriers Act of 1968 (ABA); Section 504 of the Rehabilitation Act of 1973 (Section 504); the Fair Housing Act, as amended (FHA); and the Americans with Disabilities Act (ADA) in terms of state and local government housing programs.

During the latter part of the Bush Administration, HUD's Office of Fair Housing and Equal Opportunity (FHEO) took two steps which have undermined any cohesive effort which may have occurred to coordinate an effective implementation of the various

laws affecting persons with disabilities in Housing: (1) FHEO delegated to the Regional Offices the responsibility to make both compliance and noncompliance determinations under Section 504, as well as the responsibility to make no reasonable cause determinations under the FHA; and (2) FHEO underwent a reorganization that eliminated the former Section 504 branch.

Delegation of Authority - HUD's Office of Fair Housing and Equal Opportunity delegated to the Regional Offices the responsibility to make findings of compliance and noncompliance under Section 504. This resulted in the return of a large backlog of cases from HUD Headquarters to the Regional Offices without review by trained Headquarters staff. HUD Headquarters has not provided intensive training to all of its Regional Office staff in Section 504 regulatory requirements and case law. Thus, the Regional Offices' record of making legally correct and supportable findings under Section 504 has been good in only about fifty percent of the cases, with only a few Regions producing good work. Since the delegation of authority, the number of Section 504 complaints filed each year has dropped, and it is likely that the delegation is responsible in part for this decline. Where cases recommending compliance and noncompliance are no longer reviewed by headquarters staff, complaints that might otherwise have merit are now closed at the Regional level.

Reorganization - In Lost Opportunities, one of the issues was the lack of staffing resources devoted to Section 504 compliance. Only one small branch in the organization focused on Section 504, with a branch chief hired in 1990 and a staff of four. It was recommended that HUD increase the staff level assigned to Section 504 compliance and also establish an additional unit to address Section 504 and Fair Housing issues in public housing and other HUD-subsidized housing programs. Instead, the reorganization of FHEO resulted in an "Office of Investigations" which is broken down into two divisions: Fair Housing Enforcement Division (FHED) and the HUD Program Investigations Division (HPID). The FHED handles the Fair Housing Act, while the HPID handles laws requiring nondiscrimination in federally assisted programs, such as Title VI, Section 504, Section 109 and the Age Discrimination Act. In the past year, HPID has lost several staff, including the former branch chief assigned to Section 504 and the division director, and these staff have not been replaced. The FHED has also lost several staff, including both branch chiefs. This lack of staffing and resources puts the effective enforcement of both Section 504 and the Fair Housing Act in considerable question.

In addition, the loss of the Section 504 branch has created a loss of focus on Section 504, with most of the attention and staff resources going to enforce the Fair Housing Act. While it is of utmost importance for HUD to devote considerable staff energy to the Fair Housing Act and to improve its performance in

this regard; it is not acceptable for this to occur at the expense of enforcement efforts for Section 504. Section 504 imposes stricter requirements on recipients of HUD funding to provide for the housing needs of persons with disabilities. Nationwide statistics and studies have shown that persons with disabilities are at a significant economic disadvantage. Because of this, many people with disabilities must rely on federally assisted housing programs and services to meet their housing needs. Under the Fair Housing Act, a person with a disability has the right to make modifications to a dwelling unit, but must do so at his or her own expense. The Fair Housing Act does set requirements for accessible and adaptable design in a broad number of newly constructed dwelling units, but these requirements only provide for "adaptable" dwellings, and not dwellings that are fully accessible at the time of construction. Again, any costs to make a unit fully accessible must be covered by the person with a disability. Finally, the Fair Housing Act sets NO requirements for removal of architectural barriers in existing, privately owned housing. Section 504's stricter requirements, if properly enforced, would provide for greater housing opportunities for people with disabilities. Under Section 504, recipients must operate their housing programs so that the program, when viewed in its entirety, is readily accessible to and usable by people with disabilities, thus the cost of ensuring accessibility is borne by the recipient of HUD funds, and not the person with a disability. Further, new construction and alterations of existing housing must provide for specific percentages of fully accessible units, and accessible public and common use areas. Existing federally assisted housing, even if not undergoing alterations, must evaluate their programs and take steps to remove barriers.

Need for Better Training in Investigation of Complaints Alleging Discrimination on the Basis of Handicap - It was not until the 1988 Amendments to the Fair Housing Act that the protections of the law were extended to persons with disabilities. Thus, many of HUD's staff assigned to Title VIII investigations are unfamiliar with principles and theories of discrimination based on handicap, and relevant case law. Further, many HUD investigators and legal staff, particularly in the regional offices, are not fully familiar with principles of discrimination and case law under Section 504. As a result, complaints that deal with issues other than the most obvious cases of reasonable accommodations and reasonable modifications, result in improper findings of "compliance" or "no cause." This is particularly true in cases involving discrimination in terms, conditions, and privileges of sale or rental of a dwelling; and in cases which involve disabilities such as mental illness, multiple chemical sensitivity, or drug or alcohol addiction.

Another type of discrimination against people with disabilities that goes largely unrecognized occurs in employment.

Under Section 504, HUD is also responsible for investigating employment practices of its fund recipients. When discrimination occurs it often is intentional and grows out of a fear or dislike of persons with disabilities, or a desire to prevent people with disabilities from attaining positions of leadership or power, similar to the types of discrimination which occur on the basis of race. HUD should actively seek out and/or develop training for its staff that addresses all of the potential kinds of discrimination which have been directed at persons with disabilities to deny them services, participation, equal opportunity, jobs and promotions, and individual empowerment and leadership.

NEW RECOMMENDATION

2.Implementation of the Americans with Disabilities Act - (1) HUD should give high priority to implementing Title II of the ADA as it relates to housing and community development programs; (2) HUD should also make it a high priority to coordinate seriously with the Department of Justice to ensure full and speedy implementation of ADA in all areas where HUD funds programs that are subject to Titles I or III of the ADA.

Title II: HUD could and should make a significant contribution in assuring the implementation of Title II of the Americans With Disabilities Act. Title II applies to all programs, services and activities provided or made available by public entities. The Department of Justice has named HUD as the designated agency with responsibility to enforce Title II in housing programs. Thus, HUD is responsible for processing complaints alleging discrimination in all programs, services, and regulatory activities relating to state and local government public housing, and housing assistance and referral, regardless of whether the state and local public entity is a recipient of funds from HUD. HUD is authorized to process such complaints according to the procedures established by the DOJ Title II regulation.

Under Title II, a public entity is any State or local government, or any department, agency, special purpose district, or other instrumentality of a State or States or local government. HUD indicated during its last series of Accessibility Seminars/Town Meetings that it is considering the scope of Title II coverage with respect to public housing agencies. HUD is trying to decide whether Title II covers all public housing agencies, or just those public housing agencies that are a distinct part or branch of the local government or that are strictly state-funded and operated. In view of the important role that public housing plays in providing housing within a specific local government jurisdiction, HUD should take the position that Title II covers all public housing agencies,

regardless of how the public housing agencies are funded or whether or not they are a distinct part of the local government. HUD should then immediately take steps to notify public housing agencies (PHAs) that they are subject to Title II of the ADA and provide technical assistance to assist PHAs in meeting their ADA responsibilities.

DOJ's Title II regulation provides that when a federal agency receives a complaint of disability discrimination against a public entity, the agency will determine if it has Section 504 jurisdiction for the issues of the complaint, and if it does, the agency will process the complaint under both Title II and Section 504 according to its Section 504 complaint processing procedures. Under various HUD programs, such as the Community Development Block Grant (CDBG) entitlement and non-entitlement programs, the HOME Program, Shelter Plus Care, Congregate Housing Services, programs authorized under the Stewart B. McKinney Homeless Assistance Act and the National Affordable Housing Act, etc., funds are provided to States, cities, urban counties (as well as private, non-profit organizations) for a range of housing programs, services and activities. Many of these programs and activities fall under either Title II or Title III of the ADA, and possibly both. HUD and the Department of Justice should be working closely to ensure that the scope of coverage of Title II is clearly understood, and that public entities subject to both Section 504 and Title II are aware of their Title II obligations.

Further, it appears that the Department of Justice is taking the position that Title II applies only to those programs, services and activities that are actually owned or operated by a public entity, and that extension of financial assistance by a public entity to a private entity is not a covered Title II activity. While this may be an accurate interpretation of the law, it could also be argued that the provision of financial assistance by itself is a means by which a program, service or activity is "made available" by a public entity. This would be particularly true if the program carried out by a private entity receiving such assistance would not otherwise be available without the extension of such financial assistance from the public entity. Many privately developed housing programs are provided in this manner. HUD and the Department of Justice should look closely at this issue to be sure the law is being correctly interpreted.

Title III - As already stated above, HUD provides funding under various programs for a wide range of programs, services and activities that ultimately will be carried out at the local level by either public entities or private organizations. For example, funds provided under the CDBG program, and under the Secretary of HUD's discretionary grants, provide for a range of activities that most likely fall under Title III of the ADA. The Department of Justice's regulation for Title III, however, says very little

about investigation of Title III complaints, other than that the Department of Justice will investigate alleged violations of Title III. This is unfortunate, since HUD is in a far better position than DOJ to notify its recipients of any obligations imposed on the recipient by Title III of the ADA, and to make it a condition of receipt of the financial assistance that the recipient comply not just with Section 504 but also with Title III. In terms of compliance, HUD could concurrently process complaints filed under Title III where HUD has Section 504 jurisdiction. Therefore, HUD should coordinate with the Department of Justice to determine if a delegation of authority with regard to Title III, where HUD has Section 504 jurisdiction, is appropriate. This will ensure that individuals protected by both laws will receive the broadest possible remedies available to them, even if they file a complaint under only one of the applicable laws.

Title I - Similar to the discussion above with respect to Title II of the ADA, the Department of Justice's regulation for Title II of the ADA indicates that if a complaint alleges employment discrimination subject to Title I of the ADA, and the agency has Section 504 jurisdiction, the agency must process the complaint following the procedures issued by the Department of Justice and the Equal Employment Opportunity Commission (EEOC). To ensure that complaints of this nature are properly handled, HUD should actively coordinate with DOJ and EEOC to determine these procedures and train staff on how to investigate employment complaints falling under both Title I and Section 504.

NEW RECOMMENDATION

3.HUD should take a stronger stand with respect to implementation of the new construction requirements of the Fair Housing Act.

On March 6, 1991 HUD issued final Fair Housing Accessibility Guidelines which provide for less accessibility than the "Option One" recommendations in HUD's proposed Guidelines. Some news reports have indicated that Vice President Dan Quayle's Council on Competitiveness directed HUD to make changes in the Guidelines that resulted in these lesser provisions. For example, in the final Guidelines, only one bathroom need be made accessible, whereas in the proposed Guidelines all bathrooms would have been accessible. The final Guidelines allow for sunken or raised areas within a dwelling unit, without requiring accessibility, even though the legislative history for the Fair Housing Act indicated it was Congressional intent that persons with disabilities have an accessible route into and through the dwelling unit equal to that of nondisabled persons. Other areas of concern are: the final Guidelines allow a 4-inch drop or more at patio/deck doors in some situations; the site impracticality

criteria has been revised to include a "20% minimum" that is being viewed by many builders as the maximum number of units which must be accessible; and the inclusion of a second test for determining site impracticality that requires even fewer accessible units.

HUD should carefully monitor implementation of the new construction requirements, and develop methods for counting the number of new units which are adaptable and comply with the law. HUD should also be able to determine how many units in new buildings are not in compliance with the law so that the Department can publish adjustments to its guidelines and regulations on accessibility.

Over the past two years, HUD has held a series of Accessibility Seminars around the country aimed at providing technical assistance to the building industry, consumers, building code officials, and other organizations. These seminars have been highly useful in providing technical assistance to the building industry and interested groups, and have identified a number of areas where some clarification of the Accessibility Guidelines is merited. One significant such area has evolved since a memorandum was issued by HUD General Counsel Frank Keating, which asserts that single story dwelling units built over individual garages, often referred to as "carriage units," need not be made accessible. This memorandum was issued in December of 1991, and has been widely distributed by the building industry, even though HUD has issued no formal amendment to the Guidelines, or its Fair Housing Act regulation, to address this seemingly arbitrary exemption. HUD stated during its last round of seminars, that while a decision has generally been made to exempt such units, HUD would issue a formal policy interpretation which would set out the specific circumstances which must be met before the exemption would be allowed. To date, HUD has been silent on this question, which both confuses builders and violates the public notice and comment procedures of the Administrative Procedures Act.

HUD should take immediate steps to publish technical guidance materials that provide clarifications of the various issues that have been raised as a result of the seminars. In particular, if HUD has determined that an exemption for single story dwelling units built over individual garages is allowable under the law, HUD should address the issue without delay either by means of a proposed rule amendment, or a formal policy interpretation, and seek public comment before finalizing the interpretation.

NEW RECOMMENDATION

4.More aggressive enforcement of Section 504 of the Rehabilitation Act of 1973, as Amended; and of the Architectural Barriers Act of 1968.

Since the late sixties and early seventies when the Architectural Barriers Act and the Rehabilitation Act were passed, HUD's progress in implementing these laws has been painstakingly slow and ineffective. HUD has historically given little attention to the Architectural Barriers Act, which would apply to all public housing facilities being built or altered with assistance from HUD. HUD did not publish a final Section 504 regulation until 15 years after the Rehabilitation Act was passed. During the Reagan Administration, HUD's Office of Fair Housing and Equal Opportunity did make some progress, but efforts in this regard have typically been given lower priority than HUD's enforcement of other civil rights laws.

Section 504 - HUD needs to improve its implementation and enforcement of Section 504 in both public housing and in other HUD-funded activities, particularly programs such as the CDBG program, programs authorized under the Stewart B. McKinney Homeless Assistance Act and the National Affordable Housing Act. HUD has apparently focused its Section 504 implementation efforts in the form of large conferences, the "Section 504 Town Meetings." While the Town Meetings have certainly provided helpful information, they only provide one or two days of "overview" type training and can not reach a large number of recipients, since not all recipients can afford to travel to those cities where the meetings have been held. Such "overview" training also can be difficult to understand by recipients because of the broad range of housing and community development programs which are subject to Section 504. Recipients are unsure of exactly what they must do in their specific program to be in compliance with Section 504. Additionally, some Section 504 requirements apply only to certain recipients, such as the requirement imposed on public housing agencies (PHAs) to conduct needs assessments. The last series of Section 504 Town Meetings provided little new information than the previous year, and used a number of newly trained staff who either were unable to answer questions or answered questions incorrectly. HUD has not provided recipients with any specific handbooks or technical assistance guidance, or other compliance tools, beyond the Section 504 regulation, to assist them in complying with Section 504.

Many of the deadlines specified in HUD's Section 504 regulation for achieving Section 504 compliance have long since passed, such as the requirement for federally funded programs to conduct self-evaluations and to make nonstructural changes within 60 days of July 11, 1988 (the effective date of HUD's Section 504

regulation). In addition, the deadlines for development of transition plans (within six months of July 11, 1988); the requirement for PHAs to conduct both self-evaluations and needs assessments; to develop transition plans to carry out corrective actions identified; and to develop plans for providing accessible units, have also passed. Not only have the deadlines for completing these reviews passed, but the deadlines for making structural changes have also changed. For recipients other than public housing, structural changes should have been completed by July 11, 1991. For public housing, structural changes should have been completed by July 11, 1992. It appears that HUD is conducting very few compliance reviews to ensure that these Section 504 requirements have been met or are being met.

HUD should make a concerted effort to develop program specific Section 504 handbooks and technical assistance materials, and get the materials into the hands of the recipients who need them. In addition, HUD should increase the number of Section 504 compliance reviews it conducts each year, and ensure that the compliance reviews focus on recipients of all types of HUD programs and activities, and not just public housing.

Architectural Barriers Act - It is disappointing to see that the deficiencies in HUD's enforcement of the Architectural Barriers Act reported in Lost Opportunities are basically the same. HUD's Office of Fair Housing and Equal Opportunity has made some improvement by relocating the Architectural Barriers Act function to the Office of the Assistant Secretary in FHEO. The Assistant Secretary of FHEO took a more active role in ABA compliance, and was named Chairman of the Architectural and Transportation Barriers Compliance Board (ATBCB). Thus, ABA complaints have received quicker attention, and HUD has played a greater role in matters before the ATBCB. Unfortunately, though, HUD still has not corrected the inaccessibility of L'Enfant Plaza, which provides Metro and pedestrian access to HUD, which the ATBCB found in violation of the ABA in 1989.

Another area that continues to be unresolved is application of the Architectural Barriers Act to the CDBG program. Secretary Kemp made a policy decision to apply the ABA to the CDBG program, a reversal of Secretary Pierce's position that the ABA did not apply to the CDBG program. HUD has developed a proposed regulation to effect this decision, but the regulation, when reviewed by the ATBCB, was found lacking because HUD incorrectly took the position that it can only impose this requirement administratively. The ATBCB Legal Counsel argued that HUD has statutory authority to impose the ABA on the CDBG program. To date, this question has not been resolved and thus, this much needed regulation still has not been issued.

Enforcement of the Architectural Barriers Act in public housing is another area being overlooked. Unlike Section 504's

concept of program accessibility, the ABA requires that buildings financed in whole or in part with federal funds be designed and built in accordance with specific accessibility standards. These standards are the Uniform Federal Accessibility Standards (UFAS). In other words, the ABA applies to each and every building which a PHA constructs or alters. When complaints are filed, the focus is generally on Section 504 compliance, and many buildings which should have been built or altered in compliance with the UFAS do not comply because the less stringent program accessibility concept of Section 504 has been applied. The result is that only some of the buildings a PHA builds or alters, rather than all of them, comply with accessibility requirements, when in fact, each such building should comply.

New Recommendation

5.Enforcement of Title VI of the Housing and Community Development Act of 1992 Consistently with the Fair Housing Amendments Act of 1988.

The Housing and Community Development Act of 1992 permits public housing authorities to create elderly-only housing, thereby reducing and in some cases excluding access to the only available efficiency and single bedroom units of public housing to people with physical and mental disabilities. In writing its implementing regulations, HUD must ensure that the creation of elderly-only housing will not result in a loss of housing to people with disabilities and in an obvious adverse, disparate impact.

HUD is also responsible for writing regulations that enable assisted housing providers whose housing is elderly only to limit and in many cases to deny access to people with disabilities. HUD must write regulations that strictly define "elderly-only housing" so as not to leave housing providers with the discretion to make the determination that their housing is "elderly-only."

The new law also requires HUD to issue regulations that identify appropriate admission and screening requirements in public and assisted housing. HUD must issue regulations that are consistent with the regulations that they issued under the Fair Housing Amendments Act.

Some housing providers currently require tenants with disabilities to sign leases that include additional provisions that require these tenants to participate in mental or physical health or service programs. HUD must instruct all public and private housing providers that such practices violate the Fair Housing Act and must, with the Department of Justice, vigorously prosecute such cases. (The Fair Housing Act prohibits a landlord

from imposing "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of ... handicap...." 42 U.S.C. 3604 (f)(2).

Too often, HUD program personnel and program policies do not recognize that people with mental disabilities (and physical disabilities) can and have a right to live independently in integrated housing. In order to achieve that goal, both HUD and local housing authorities must employ and consult with people with disabilities in all stages of housing policy development and implementation. Once that happens, programs which now require tenants with mental disabilities to accept particular medical or social services in order to live outside institutions will be replaced by both integrated housing and voluntary health and social service programs.

Conclusion

Because of amendments enacted in 1988, the Fair Housing Act now protects people with disabilities from discrimination in the purchase and rental of housing. In order to ensure that the law would be effective in securing equal opportunity in housing for people with disabilities, it incorporated the concept of "reasonable accommodation." That concept requires all those who are involved in any aspect of housing, including its regulation, to make changes in the policies, practices, rules, and physical structures in order to accommodate the needs of tenants and purchasers with disabilities. The changes must be reasonable ones, and are not required if they impose undue burdens on the housing providers.

Some of the changes require no expense, and are simply changes in rules and attitudes. For example, in Cason v. Rochester Housing Authority, 748 F.Supp. 1002 (N.D. N.Y. 1990), the court explained that the Housing Authority violated the Fair Housing Act when it refused to accept as tenants applicants with disabilities, because the housing authority believed they were not "capable of independent living." As the judge said, the housing authority's responsibility is to ensure that the tenants complied with their leases, not to dictate how they were going to comply. It is the tenants' responsibility to continue or to obtain the assistance they needed to maintain their apartments and to pay their bills.

It is the housing authority's job to manage the housing responsibly, including making any reasonable accommodations that would enable tenants with disabilities to meet their tenancy obligations. The housing authority is not permitted, however, to exclude applicants with disabilities because of their physical or psychiatric diagnoses and assumptions based on the diagnoses that they would not be good tenants.

It is HUD's responsibility to ensure that all HUD program officials, and not only those working in the Washington office of the Fair Housing and Equal Opportunity Office, are familiar with and apply the mandates of the Fair Housing Act. There is substantial confusion within HUD, both in Washington and in the regional and field offices, as to how to conform housing program regulations to Fair Housing Act requirements. Only the Secretary can effectuate a consistent enforcement of the civil rights laws and the housing laws. There is an urgent need to do so in order to correct the ongoing illegal housing denials and the perpetuation of housing discrimination against and segregation of people with disabilities.

by Elizabeth Heller Eto

THE AFFORDABLE HOUSING DISPOSITION PROGRAM OF THE RESOLUTION TRUST CORPORATION

I. INTRODUCTION - THE AFFORDABLE HOUSING CHALLENGE

The nation faces a serious shortage of affordable housing. According to HUD's American Housing Survey for 1989, 3 out of every 4 poor households was unable to find affordable housing, and more than half of the nation's poor households spent at least 50% of income on housing costs.[1] Moderate-income households also experience difficulty meeting housing costs. In 1989 almost one third of all renters earning between $15,000 and $30,000 per year paid more than 30% of income for housing costs.[2]

In recent years, the supply of low-cost rental units has declined while the number of families living in poverty has increased. As a result, in 1989 that there were an estimated 4.1 million more low-income renters than low-rent units.[3]

There are many reasons for the affordable housing deficit. One is the growing number of households living in poverty, which increased 24% from 1978 to 1989.[4] At the same time, the availability of low-cost rentals has declined. Private, unsubsidized rental units have been lost through abandonment of deteriorated properties, gentrification of neighborhoods and condominium conversions.[5]

Many more units have been lost as the result ofthe dramatic reductions in funding for federal housing programs. Appropriations

for HUD's subsidized housing programs fell from a peak of $32.2 billion in fiscal 1978 to $10.4 billion in fiscal 1992.[6] These reductions partly reflect a change in policy away from new construction to the provision of less expensive housing vouchers for tenants.

More significantly, the funding cuts reflect a reduced commitment to providing assistance to additional low-income households. In each fiscal year 1977 through 1980, HUD provided rental assistance to an additional 290,000 low-income households. Even though the number of low-income households requiring assistance increased from 1981 to 1991, HUD commitments provided assistance to only 78,000 additional households in each of those years.[7]

As a result, many households in need of government housing assistance, including homeless families and families on the verge of homelessness, are placed on waiting lists with waits typically lasting 18 months or more. Many jurisdictions have closed their waiting lists because requests for assistance so greatly exceed the supply.[8] In New York, a qualified family faces a wait of approximately 20 years for public housing.[9]

An encouraging new idea for developing affordable housing has recently appeared from an unexpected source - the massive federal bailout of the savings and loan industry. The legislation providing for the bailout, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)[10] included a requirement that certain residential properties owned by failed

thrifts as a result of foreclosures be marketed by the government as affordable housing. This requirement led to the creation of the Affordable Housing Disposition Program (AHP) of the Resolution Trust Corporation (RTC).

Many participants and observers were disappointed with the program in its early stages. Initially the program generated few sales, and utilized marketing methods ill-suited to the task of attracting low-income buyers for its single-family homes or of maximizing the creation of low-income rental units. In the past year, however, sales have begun to show substantial increases, and there is cause for optimism that AHP will create substantial numbers of low-cost housing opportunities. If AHP fulfills the hopes it has engendered in recent months, its aims and methods should be replicated by the other federal agencies with residential real properties to sell.[11]

II. AN OVERVIEW OF AHP

The Resolution Trust Corporation (RTC) was established to assume control of failed federally-insured savings institutions and to liquidate their assets. Among the assets to be sold by RTC are many units of residential real property. Under the AHP, those residential units that do not exceed defined appraised value limits are required to be marketed to a restricted range of buyers.[12]

Eligible single-family homes are to be sold to qualifying households who promise to reside in the home for at least one year

or to institutional buyers who will resell the homes to qualifying households or rent them to lower-income tenants.[13] Participating multi-family properties are marketed to buyers who agree to reserve at least 35% of the units for occupancy by lower-income tenants at restricted rental rates for the remaining useful life of the structure.[14] Condominiums may be sold either as single-family units or as a multi-family property.[15] Condominium developments sold as multi-family properties are generally required to be rented exclusively to lower income households.[16]

According to the authorizing statute, AHP restrictions upon purchaser qualifications and occupancy are to be imposed for a limited sales period.[17] Originally this period was about three months. Various adjustments have been made to the duration of the restricted marketing period, but the three-month figure is useful for understanding the basic structure of the program. When the restricted marketing period expires, unsold properties leave the AHP, and are sold to the highest bidder, without income-related occupancy restrictions. The chance to create new low-cost housing is lost and the properties become investment opportunities for market-rate real estate developers. Thus, the success of the AHP as a means to develop affordable housing depends upon RTC's ability to market its properties to eligible buyers and to enable those buyers to close quickly, before the property enters the open market.

Therefore, much of the criticism that has been directed at RTC for its handling of the affordable housing inventory has focussed

on the slow pace at which sales occurred, especially sales of multi-family properties. In response to this criticism, some important FIRREA amendments were enacted in December 1991, and RTC published revised AHP regulations in May 1992. Since that time, the AHP has been promoted through aggressive marketing methods, and through financing packages that are flexible and geared to the needs of low-income buyers and housing providers.[18]

While sales results are not yet conclusive, especially in the multi-family program, it appears that restricting the pool of potential buyers need not preclude the efficient disposition of assets.[19] The efficient disposition of assets is an important consideration for the RTC, which was mandated to minimize the cost of the S & L bailout to the taxpayer.[20] Maintaining an extensive real estate inventory is costly. In June 1990 it was estimated that maintenance of RTC's affordable single-family housing inventory alone cost almost $400,000 per day, or approximately $12 million per month.[21] And in view of the cost savings realized by the use of existing structures, as compared to the construction of new low-cost housing by the federal government,[22] this type of program appears to offer a promising means of increasing the supply of affordable housing.

III. AHP'S RESPONSE TO CRITICISM

A. Criticism of Single-Family Sales Program

The AHP's single-family sales efforts have enjoyed a fairly good response rate. As of June, 1992, 78% of all single-family

homes marketed through the program had been sold to qualified purchasers, and 69% of the purchasing households had incomes below 80% of the national median.[23] Initial sales rates were much lower and were hampered by the delegation of marketing responsibility to private contractors. In some cases, these contractors were inadequately supervised to ensure that substantial efforts were made to market the homes to low- and moderate-income purchasers.[24]

An additional problem contributing to the disappointing sales pace was that RTC had not established comprehensive or well-functioning information systems. Public listings of available properties often proved to be inaccurate. RTC had serious problems maintaining and retrieving essential data about the properties in its inventories, including their physical descriptions and characteristics, condition and value, occupancy status, locations and the identities of the responsible marketing contractors.[25]

Beginning in 1991, RTC instituted a number of more aggressive marketing methods for single-family homes, including auctions, home fairs, and sealed bids. Information about the properties has been made more accessible to potential purchasers. These improvements have led to a relatively high rate of sales of single-family homes, often to households that could not buy a home without such a program.[26]

B. Criticism of Multi-Family Sales Program

The multi-family sales program has been criticized both for

the slow pace of sales and for failing to maximize affordable housing opportunities when sales were made. These disappointments were keenly felt, because it is the multi-family properties that offer the potential the house the greatest numbers of needy households. It is this program that has made the greatest changes and improvements.

Multi-family sales have been severely hampered by the brevity of the restricted marketing period, because it is difficult to put together the necessary financing to support a bid for a major real property investment within the statutory ninety days.[27] With such unrealistic time limits, it appeared that multi-family properties were essentially just marking time in the AHP, waiting to be offered on the unrestricted market. In a distinct policy shift, RTC now exercises its discretion in favor of re-marketing all unsold multi-family properties through AHP, greatly enhancing the probabilities that these properties will be sold with low-income occupancy restrictions.[28]

In the statute authorizing the AHP, RTC is instructed to give preference among competing bidders to the purchaser who would create the most low-income units for the longest duration.[29] In practice, however, at least some of RTC field offices have favored bids offering higher cash values, which tended to favor for-profit entities maintaining only the minimum number of lower-income units. Nonprofit groups or government agencies which planned to house more low-income tenants and recover less rental income could not make competetive bids.[30] RTC has sought to ameliorate this problem by

requiring application of price handicaps to bona fide offers that would reserve greater numbers of units for tenants in lower income groups.[31]

Maximization of low-cost units is also being pursued through a policy change affecting bulk sales. Under the AHP, 35% of all dwelling units in multi-family buildings are to be restricted to occupancy by lower-income families. Purchasers who acquired several properties through a single negotiation have interpreted RTC regulations to permit them to satisfy the low-income requirement in the aggregate; so long as 35% of the total number of units are restricted, the restrictions are not applied in each and every property.[32] Under this interpretation, an investor can acquire several properties cheaply through the AHP and rent some of them entirely at market rates.

RTC's policy permitting this practice has been criticized because it enables the purchaser to take advantage of a substantial government housing subsidy in order to acquire a profit-making investment, whereas maintaining low-income occupancy in each property would better maximize the availability and geographic dispersal of affordable housing.[33]

RTC has recognized this problem and has issued a policy statement affecting properties entering AHP on or after June 2, 1992. After that time, bulk purchasers will be required to reserve at least 15% of each property for tenants from lower income groups.[34]

While all of these changes - re-marketing unsold properties

through AHP, price handicapping, and prohibiting aggregation of low-income units in bulk sales - are important, none would have a great impact on the program by themselves. However, in combination with a new direct sales program and the development of flexible seller-financing,[35] AHP's multi-family sales approach has been fundamentally changed. RTC is now marketing virtually all of its multi-family properties through a program of direct sales to public agencies and nonprofit organizations. This program has attracted an enthusiastic reponse.[36]

IV. MAXIMIZING AFFORDABLE RENTALS THROUGH DIRECT SALES AND SELLER FINANCING

A. Direct Sales Program

Since enactment of the RTC Refinancing, Restructuring and Improvement Act in December 1991, RTC has had the power to suspend the commencement of the three-month marketing period for single-family and multi-family properties in order to enter direct negotiations with public agencies and nonprofits.[37] This relieves these organizations from the pressure to compete in open bidding. RTC has currently made direct offerings of about 300 multi-family properties.[38]

Under the direct sales program, public agencies receive the first notification that properties are available. If no public agencies submit expressions of serious interest after 30 days, the properties are then offered to nonprofit purchasers for a second 30-day period.[39] If serious interest notices are given during

these special offer periods, the agencies and nonprofits have another 30 days in which to submit a bona fide offer. Only if these two exclusive offerings do not generate a willing buyer will RTC make a general marketing effort.[40]

B. Seller-Financing

RTC has also devised an innovative seller-financing plan which, in combination with the direct sales program, offers an opportunity for public agencies and nonprofits to work together to develop low-cost rental housing.[41] In addition to offering 95% financing for a 15-year term, RTC also offers a 2-year "bridge loan" requiring only a 1% down-payment. This loan enables agencies or nonprofits to bridge the gap between the time constraints of the AHP and the usually lengthy process of securing financing through HUD, Fannie Mae, or tax exempt bonds.

Using a bridge loan, a public agency can purchase an AHP property in order to resell it to a nonprofit when the nonprofit has secured financing. RTC will pay a 5% commission to public agencies who resell properties to nonprofits.[42]

A further advantage of RTC's bridge loan program is that the amount can be increased to 25% of the purchase price of the property if necessary to finance rehabilitation costs.[43] The program thus addresses the major problems faced by public agencies or nonprofits with limited capital resources: the time needed to secure financing and funds to make a deteriorated property habitable.

Public agencies and nonprofits have responded enthusiastically to these programs. Whereas less than 25% of the multi-family AHP properties sold as of July 1992 had been purchased by agencies or nonprofits,[44] it now seems likely that very few properties will remain to be sold through standard AHP bidding procedures.

It is too early to report the direct sales program as a complete success. The first direct sales offerings will probably not close before the spring of 1993. However, those who are actively involved with the direct sales process are very encouraged by the changes implemented by RTC.[45]

V. CONCLUSION

According to HUD's American Housing Survey for 1989, over 24 million American households currently spend over 30% of income to cover housing costs.[46] As of July 1992, RTC reported sales or accepted offers encompassing 44,410 rental units and 19,790 single-family homes.[47] Clearly, the AHP will not solve the nation's affordable housing crisis. However, it contains seeds of several important ideas, including the use of existing housing stock, encouragement of partnerships between public agencies and private groups, targeted marketing approaches, and innovative financing packages.

If multi-family sales figures rise substantially in 1993, the policies developed through RTC's affordable housing program will have shown their value as means of creating low-cost housing at a

relatively low per-unit cost to the taxpayer. At the same time, these policies will have enabled the federal government to efficiently dispose of a costly real estate inventory. The ideas germinated by RTC, if adopted by the other agencies charged with the disposal of residential real estate, have the potential to significantly expand the supply of new affordable housing opportunities.

VI. RECOMMENDATIONS

1. Congress should pass an appropriations bill sufficient to enable RTC to implement the program enlargements and improvements contained in the RTC Refinancing, Restructuring, and Improvement Act of 1991 ("1991 Act").

Discussion: The 1991 Act authorized RTC to extend the AHP marketing period for single-family properties to 180 days,[48] to increase the low-income occupancy requirement to 40% from 35% of multi-family properties,[49] and to increase the number of multi-family properties marketed through the AHP.

The number of eligible multi-family properties would be increased by including properties held by RTC in a conservatorship capacity.[50] RTC's powers to dispose of an institution's assets vary somewhat depending upon whether it is holding the institution in a receivership or conservatorship capacity. The AHP originally included only residential properties held by RTC in receivership.[51] RTC does have the power to sell the residential real property

holdings of institutions in conservatorship, but these properties did not fall within AHP under the original statutory framework. This distinction has been a source of criticism, because it has allowed attractive properties that may have satisfied AHP appraised-value limits to be sold without the notification process that alerts developers of affordable housing that properties are available.[52]

The 1991 Act enabled RTC to sell single-family and condominium properties out of conservatorships, but could not authorize extending that treatment to multi-family properties without an additional appropriation.[53] RTC is also prohibited from implementing the changed minimum low-income occupancy restriction and the extended notice period for single-family homes, because effecting each of these changes was determined to increase the cost of implementing the AHP, requiring an additional appropriation beyond the funds already budgeted for RTC. Thus, under the Omnibus Budget Reconciliation Act of 1990, ("OBRA"),[54] the amendments cannot be implemented until an additional appropriation is made.

Implementation of each of the changes would permit the creation of additional affordable housing opportunities in a cost-efficient manner. Therefore, Congress should appropriate the additional funds needed.

2. Congress should pass an appropriations bill to fully fund the Affordable Housing Disposition Program of the Federal Deposit Insurance Corporation (FDIC).

Discussion: The 1991 Act also included a provision establishing an affordable housing program for the residential inventories of failed federally-insured commercial banks. The FDIC program is, in most respects, identical to the RTC's AHP.[55]

The FDIC program is not yet operational because it is blocked by OBRA until sufficient additional funds are specifically appropriated. Again, implementation of this program would increase the creation of affordable housing opportunities from existing housing stock. With the benefit of RTC's experience to identify and resolve the potential problem areas of such a program, the FDIC AHP could also make a cost-efficient contribution to the nation's affordable housing stock.

3. Legislation is needed to enable RTC to adjust the property eligibility limits to account for higher appraised values in high-cost areas, such as New England and California, thus expanding the pool of housing to be sold through the program.

Discussion: The inflexible price limitations now in place preclude RTC from reserving appropriate properties for low-income occupancy in high-cost areas. For example, under current rules, a single-family home with an appraised value over $67,500.00 is not eligible for the AHP.[56] In high-cost areas, very few single-family homes are appraised at that level.

With the increased success RTC has demonstrated in marketing homes to low- and moderate-income homebuyers, and in attracting public and private interest in multi-family properties, RTC should

be permitted to extend the program to high-cost areas, where affordable housing is often scarcest. Authority to adjust appraised-value eligibility was included in the legislation authorizing the FDIC's AHP.[57] RTC should receive a similar authorization.

4. The results of RTC's direct sales and seller-financing programs should be followed closely. If these programs produce a high rate of successful transactions leading to the creation of thousands of new low-cost rental units, affordable housing programs modelled on the RTC AHP should be implemented in other agencies responsible for the disposition of real property. These agencies include HUD, VA, and GSA.[58]

Discussion: The recommendations discussed above would significantly expand and improve the existing RTC AHP. However, in the context of all federally-owned real estate, or of the total assets of the RTC alone, the properties being sold through AHP represent a mere drop in the bucket.[59] If the AHP proves to be a success, the definition of eligible affordable disposition properties should be expanded to include other types of assets held by RTC, such as hotels and other commercial real estate, or non-performing loans backed by real estate. If these assets are currently being sold at substantial discounts to profit-motivated investors, it would appear to entail no greater risk to offer them first to providers of low-income housing for a limited period of time.

Furthermore, the AHP could serve as a model for other property disposition programs, including those operated by HUD and the Department of Veterans' Affairs. Neither of these agencies currently impose income restrictions when selling foreclosed FHA- or VA-insured properties.[60] Using the marketing techniques and affordable targets developed for the RTC program, these other agencies could become an important source of assistance to low- and moderate-income homebuyers and renters.

The RTC program includes additional advantages for serving the needs of low- and very low-income renters. AHP's low-income occupancy restrictions are imposed for the useful life of the structures. Also, tenant eligibility is targeted, at least in part, to renters earning no more than 50% of the median area income.[61] In this respect, AHP surpasses the requirements of other affordable housing programs, including the new HOME program, which has a slightly higher income target,[62] and which allows projects developed using HOME funds to revert to market rates after 5 to 20 years, depending on the level of subsidy.[63] If AHP is able to attract investors despite these more strenuous restrictions, it should be considered whether imposing similar requirements in other housing programs would increase the availability of affordable housing without increasing the risks or costs associated with such programs.

ENDNOTES

1. The American Housing Survey is the primary source of housing data collected by the federal government, and is published by the Bureau of the Census and the Housing and Urban Development Department's Policy and Research office. The 1989 Survey was published in 1991. The survey includes vacant, owner-occupied, and renter-occupied housing units, but does not include data on the homeless.

As used here, "poor" households receive annual incomes below the federally-established poverty line, which varies by household size. The poverty line for a family of three in 1989 was $9,885.00.

A unit of affordable rental housing, as that term is used here, costs no more than 30% of a household's income. The 30% figure parallels the contribution to housing costs required to be made by persons receiving assistance under Section 8 and other federal housing programs. See, 42 USC 1437a(a).

2. Center on Budget and Policy Priorities and Low Income Housing Information Service, A Place to Call Home (1991), (hereinafter cited as "CBPP/LIHIS report") p. 11.

3. CBPP/LIHIS report, p.4.

4. CBPP/LIHIS report, p. 3.

5. CBPP/LIHIS report, p. 6.

6. Id. at 30.

7. Id. at 31.

8. These data pertaining to waiting lists include persons waiting for assistance from programs which receive funds from state- and locally-funded sources in addition to federal monies.

9. CBPP/LIHIS report, at 28-30.

10. 12 U.S.C. 1441a

11. Such agencies include HUD and VA, both of which gain title to residential real property through defaults on insured loans. In 1991 various agencies of the federal government disposed of 190,000 housing units, but only 40,000 were targeted to low- and moderate-income buyers, by RTC and by the Farmers Home Administration. "From the Director," RTC, The Silver Lining, Summer 1992, at 3.

12. 12 U.S.C. 1441a(c), 12 C.F.R. 1609.

13. 12 U.S.C. 1441a(c)(2)(B). Qualifying households earn no more than 115% of the area median income. 12 U.S.C. 1441a(c)(9)(L). If a purchasing household were to sell the home within the first year, RTC would recover 75% of any profit from the sale. 12 U.S.C. 1441a(c)(2)(C).

14. 12 U.S.C. 1441a(c)(3). Of the reserved units, 20% must be reserved for very low-income families. 12 U.S.C. 1441a(c)(3)(E)(i). The statute defines lower-income families as earning no more than 80% of the median income for the area, while very low-income families earn no more than 50% of the median. 12 U.S.C. 1441a(c)(9)(H) and (Q).

15. 12 U.S.C. 1441a(c)(14).

16. 57 Fed. Reg. 19507 (May 6, 1992).

17. 12 U.S.C. 1441a(c)(2)(B) (marketing period for single-family homes), 12 U.S.C. 1441a(c)(3)(B) (multi-family), 12 U.S.C. 1441a(c)(14)(B) (condominiums).

18. See, sections III and IV, infra.

19. Indeed, as RTC president Albert Casey has stated, "[t]he program is a great vehicle to move our lowest-priced properties. If we didn't have it, we couldn't move them." "A Chat With Albert Casey," RTC, The Silver Lining, Summer 1992, at 4.

20. 12 U.S.C. 1441a(b)(3)(C).

21. Testimony of Rep. Bruce Vento, hearing before the RTC Task Force of the House Banking Committee, June 25, 1990, at 49.

22. According to RTC estimates, AHP multi-family properties have cost an average of $10,244 per unit to develop. The cost of new construction is approximately $78,000.00 per unit, according to an estimate by the National Association of Housing and Redevelopment Officials. (Telephone conversation with Gregory Orfalea, RTC Information Specialist, December 7, 1992.)

23. "Affordable Scorecard," RTC, The Silver Lining, Summer 1992, at 7.

24. See, e.g., GAO Performance Assessment of RTC for 1991, submitted to the Senate Banking Committee on March 5, 1992, at 14, and testimony of John T. McEvoy, Exec. Dir. Nat'l. Council of State Housing Agencies before the Senate Banking Committee, October 24, 1991, at 8.

25. GAO Performance Assessment, supra. at 26-27. McEvoy testimony, supra. at 5.

26. See note 23, supra.

27. As a result, in many cases RTC accepted offers on multi-family properties which could not be brought to closing. As of December 1991, almost half of the multi-family properties marketed under AHP had been the subject of failed bids. Testimony of Bart Harvey, Vice Chairman, The Enterprise Foundation, before the Senate Banking Committee, March 5, 1992, at 3. As of June, 1992, RTC reported that of the 865 multi-family properties offered through the program since its inception, RTC had sold or accepted offers on 406. "Affordable Scorecard," RTC, The Silver Lining, Summer, 1992 at 7. Of the unsold properties, 111 had been sold to private investors without AHP limitations. Telephone conversation Gregory Orfalea, RTC Information Specialist, November 23, 1992.

28. 12 U.S.C. 1441a(c)(3)(G) (discretion to reoffer). RTC has announced that those multi-family properties which have not been sold will be re-marketed through AHP under the new direct sales program. See section IV. A., infra.

29. 12 U.S.C. 1441a(c)(5).

30. Bart Harvey testimony, supra. at 5.

31. 57 Fed. Reg. 19506 (May 6, 1992).

32. See, 12 C.F.R. 1609.8(c)(5).

33. Bart Harvey testimony, supra. at 3. John T. McEvoy testimony, supra. at 9. While AHP is not technically a subsidy program, AHP target prices take account of the absence of sales commissions and other costs common to private real estate transactions and are set according to an appraisal which assumes 35% of each property's units will provide limited income to the owner. 12 C.F.R. 1609.2(r), 1609.7(a)(3), 1609.7(b)(3).

34. 57 Fed. Reg. 24937 (June 12, 1992).

35. See section IV, infra.

36. "Multifamily Direct Sales Off to Fast Start," RTC, The Silver Lining, Summer 1992, at 1.

37. 12 U.S.C. 1441a(c)(13).

38. Conversation with Gregory M. Orfalea, RTC Information Specialist, November, 23, 1992.

39. This effort to increase opportunities for non-profit developers is consistent with provisions of the 1990 National Affordable Housing Act, which mandate that a minimum of 15% of a jurisdiction's allocation of federal housing funds be dedicated to projects implemented by qualified community housing development groups. 42 U.S.C. 12771.

40. See, RTC AHP brochure, "Direct Sales Program for Public Agencies and Nonprofit Organizations."

41. 12 U.S.C. 1441a(c)(6) (authority for seller-financing). RTC also offers seller-financing to single-family AHP home purchasers, with lower down-payments and more flexible underwriting criteria than are applied in private sector financing. See, RTC brochure, "Buying and Financing A Single-Family Home."

42. See RTC brochure, Direct Sales Program for Public Agencies and Nonprofit Organizations.

43. Id.

44. "RTC Hits 50% for Apt. Sales," RTC, The Silver Lining, Summer 1992, at 3.

45. Conversation with Jim Edmondsen, Executive Director, Cornerstone Housing Corporation, November 17, 1992.

46. See section I, supra.

47. RTC AHP Bi-Monthly Report, June/July 1992.

48. 12 U.S.C. 1441a(c)(2)(B).

49. 12 U.S.C. 1441a(c)(3)(E)(ii)(II).

50. 12 U.S.C. 1441a(c)(9)(E)(ii).

51. When a failed savings and loan is in receivership, RTC is selling off the non-performing assets of the institution. RTC also manages some failed thrifts as on-going concerns in conservatorship, attempting to sell the institution intact.

52. See, e.g., Testimony of David Cooke, RTC CEO before the RTC Task Force of the House Banking Committee, June 25, 1990, at 29: since AHP commenced operations in August 1989, 0 multi-family properties had been sold within the program and 21 had been sold out of the program, from institutions held in conservatorships.

53. See 12 U.S.C. 1441a(c)(9)(D)(i) and 12 U.S.C. 1441a(c)(9)(G)(i).

54. Pub.L. 101-508, 104 Stat. 1388 (Nov. 5, 1990).

55. See: 12 U.S.C. 1831q. The RTC and FDIC are required to consult and cooperate with each other in the operation of their affordable housing programs, and are permitted to enter into any agreements necessary to efficiently coordinate the two programs. Pub.L. 102-242 Sec. 241(b).

56. 12 U.S.C. 1441a(c)(9)(G)(II).

57. 12 U.S.C. 1831q(p)(4-7).

58. See note 11, supra.

59. For example, of the assets administered by RTC's California field office, 91% are not residential real property, and only about 1% of the entire inventory, in dollar, book-value terms, can be sold through the AHP as it is currently structured. The asset inventory of the California field office is not necessarily representative of RTC's inventory nationwide, but residential real property accounts for less than half of RTC assets in every area of the country. Conversations with Annette LePique, RTC Affordable Housing Specialist, California Field Office, November 17, and December 15, 1992.

60. See note 11, supra.

61. See section II, supra.

62. 12 U.S.C. 12744. At least 90% of HOME funds used for rental housing must be reserved for housing of families earning no more than 60% of the area median income.

63. 24 C.F.R. 92.252(a)(5) (1991).

EQUAL EMPLOYMENT OPPORTUNITY

By Helen Norton, Jennifer Bills, Dulce Donovan,
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I. Introduction

The federal government has both the ability and the responsibility to improve and expand equal employment opportunity for all working Americans, regardless of gender or race.[1] In addition, as the nation's largest employer, the federal sector can and should provide a model for other employers by adopting and implementing proactive initiatives to advance employment opportunities. Leadership on these issues from the Administration creates a climate for the country as a whole, and thus remains critically important.

In the 1991 edition of Lost Opportunities, we urged the Bush Administration to generate an affirmative civil rights agenda, including a revitalization of the federal EEO enforcement agencies.[2] Unfortunately, the attitudes and policies of the Bush administration instead suggested its abdication of leadership responsibility in this area. In fact, in many cases, the Bush Administration actively opposed initiatives designed to advance equal employment opportunity. In addition, the enforcement efforts of the agencies charged with enforcing the nation's EEO laws under President Bush proved disappointing, if not dismal.

The incoming Clinton Administration now has the opportunity to reverse 12 years of the Reagan and Bush Administrations'

divisive rhetoric and policy -- rhetoric and policy that undercut our nation's longstanding commitment to equal opportunity and split us apart as a people. To reverse this assault on antidiscrimination policy, the Clinton Administration should first act quickly and visibly by appointing individuals with demonstrated commitment to equal employment opportunity principles to key leadership positions. It should also immediately begin to use the bully pulpit of the Presidency to make clear that America's continued economic competitiveness -- along with its traditional commitment to fundamental principles of fairness and equity -- demand zero tolerance for employment discrimination.

In addition, the Clinton Administration should become the driving force behind vigorous enforcement of our nation's antidiscrimination law. Through executive and administrative agency action, it should aggressively enforce existing federal civil rights laws -- Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Equal Pay Act, and Executive Order 11246 -- prohibiting invidious gender- and race-based discrimination in the workplace. At the same time, the Administration should move forward with an affirmative policy agenda to advance and improve equal employment opportunity. For example, it should develop, promote, and sign key legislative initiatives that enable women and people of color to break through the glass ceiling, diminish the wage gap, and otherwise

expand employment opportunities. We discuss these initiatives in some detail below.

II. The American Workforce

The need for our nation to renew its commitment to equal employment opportunity is unquestionable. Study after study confirms the measurable effects of job discrimination on workers' lives. For example, women and people of color, and especially women of color, experience a significant wage gap compared to their white male counterparts.[3] Women working full-time and year-round earn on average only 69.2% of men's earnings -- which translates into a shortfall of nearly half a million dollars in women's average lifetime earnings! Black men earn 72.9% of white men's earnings, while Hispanic men earn 65.3%. Women of color continue to face double discrimination based on race and sex: while white women earn 68.7% of white male earnings, black women earn 61.8% and Hispanic women earn 53.6% of white men's salaries.[4] And in fact, after several years of small but steady progress, 1991 marked the first time the wage gap has actually widened (by 2 percentage points) since 1981.[5]

These figures painfully illustrate the link between equal employment opportunity and economic security for working Americans and their families. On-the-job discrimination punishes workers unfairly -- as well as the families that depend on their paychecks for food, clothing, and shelter. Women, for example, work not only because they want to participate in public life and

because they bring needed skills and talents to the workplace, but also because they must work to support their families. Indeed, nearly two out of three women workers are single, divorced, widowed, separated, or are married to husbands who earn less than $15,000 a year; many women workers are heads of their households.[6] Sixty percent of married women with children under six are in the workforce. And, as of 1990, seventy-five percent of women with school-aged children are in the labor force.

And the workforce is becoming even more diverse. The U.S. Department of Labor predicts that from 1990 to 2005, women will account for 15 million (62%) of the 26 million net increase in the civilian labor force.[7] By the year 2000, people of color will make up nearly a third of the American workforce. Together, women, people of color, and immigrants will account for 85% of the net growth in the American labor force in the 1990s. Thus the American economy is increasingly reliant on the labor of women and people of color.

Because our economy must rely more on women and people of color to produce goods and deliver services, recognizing and embracing the increasingly diverse face of the American workforce promotes efficiency as well as justice. Business resistance to reconciling workplace policy with the changing reality of the American workforce only slows growth and stifles innovation. Effective management of the opportunities and challenges presented by this diverse workforce must become a priority for the American economy if we are to compete in a global market.

Our continued competitiveness depends on our willingness and ability to integrate the skills and talents of women and people of color into the workforce.

III. LEGISLATIVE OPPORTUNITIES FOR EXPANDING EQUAL EMPLOYMENT OPPORTUNITY FOR WOMEN AND PEOPLE OF COLOR

A. President Bush's Response to Legislative Initiatives

Throughout his term, President Bush was confronted with a number of significant legislative opportunities for expanding equal employment for women and people of color. His record in responding to these proposals was, for the most part, extremely disappointing.

1. The Civil Rights Act of 1991 (CRA)

After President Bush vetoed the Civil Rights Act of 1990, Congress reintroduced a new civil rights bill in 1991. After months of opposition, the President finally signed the Civil Rights Act of 1991 in the wake of the Anita Hill/Clarence Thomas hearings due to tremendous pressure from the American public, leading advocacy organizations, and Congress. The CRA of 1991 responds to the series of 1989 Supreme Court decisions that undermined legal protections against on-the-job discrimination.[8] It also allows -- for the first time -- women, people with disabilities, and religious minorities to collect monetary damages in cases of intentional employment discrimination. (However, as discussed below, the amount of those damage awards is arbitrarily capped under the CRA, an unprecedented development in civil rights law.)

2. The Family and Medical Leave Act (FMLA)

By providing job security to workers who need up to 12 weeks of leave to care for a newborn or newly-adopted child, or for a seriously ill family member, the FMLA would ensure that workers faced with family or medical emergencies would not be forced to choose between their families and their jobs. With his second veto of the bill in September 1992, President Bush again rejected a crucial piece of legislation that would expand equal employment opportunities for women and men struggling to accommodate both work and family responsibilities.

3. The Equal Remedies Act (ERAct)

The ERAct would ensure that victims of intentional on-the-job discrimination on the basis of sex, religion and disability (such as sexual harassment and pregnancy discrimination) receive full damages to compensate them for their losses. The Civil Rights Act of 1991 -- for the first time -- allowed victims of intentional discrimination based on gender, religion, or disability to seek compensatory and, where appropriate, punitive damages for their injuries. Unfortunately, however, the 1991 law placed arbitrary and unprecedented caps on the amount of damages that could be recovered by victims of intentional sex, religion, or disability discrimination, while victims of race and/or national origin discrimination are entitled to receive as much damages as they can prove. Even though the ERAct would merely lift these arbitrary caps to ensure that these victims of discrimination receive treatment equal to that received by

victims of other forms of invidious discrimination, the Bush Administration opposed the bill and it did not come to the floor for a vote during the 102nd Congress.

4. Justice for Wards Cove Workers Act

This bill is designed to eliminate a loophole created by the Civil Rights Act of 1991, which reversed the Supreme Court's 1989 holding in Wards Cove v. Atonio (on the standards for evaluating Title VII disparate impact claims) for all Title VII claims except those brought by the original Wards Cove plaintiffs. Wards Cove involved a challenge brought by Alaskan cannery workers against systematic practices that denied jobs and promotions to Native Alaskan and Asian American cannery workers. By overturning the Court's decision in Wards Cove, the Civil Rights Act of 1991 was designed to eliminate such discriminatory practices. However, after intense lobbying by the Wards Cove Packing Company itself, a provision was inserted into the bill that exempts the cannery from the restored legal standards; no other employer was given this special exemption. In short, the Justice for Wards Cove Workers Act would simply ensure that the claims of the Wards Cove plaintiffs would be subject to the same legal standards as all other disparate impact claims. The Bush Administration did not take an official position on this bill, although it supported the original provision in the CRA of 1991 that exempted Wards Cove Packing Co. from coverage.

5. Federal Employee Fairness Act (FEFA)

Under Title VII, discrimination complaints by any of the three million federal workers are processed through a system entirely separate from that governing private-sector workers. This federal-sector system is riddled with institutional obstacles that weigh against complainants. For example, federal government workers' complaints are first investigated by the workers' agency -- in other words, the complaints are investigated by the agency charged with discrimination, thus raising conflict of interest issues. The Federal Employee Fairness Act would transfer authority to investigate and evaluate discrimination claims from the employing agencies to the EEOC. It would also set time limits for agencies to provide information at each stage of the investigation; under the current system, agencies can -- and often do -- delay responses for years. Despite acknowledging serious flaws in the federal-sector EEO complaint process, in 1992 EEOC Chair Evan Kemp testified against FEFA on behalf of the Bush Administration, urging instead more minimal regulatory changes.

6. Non-traditional Employment for Women Act (NEW) and Women in Apprenticeship and Nontraditional Occupations Act.

Although he opposed or resisted the major civil rights initiatives described above, President Bush did support two smaller-scale bills to expand women's employment opportunities in nontraditional jobs (nontraditional jobs are those in which 75% or more of those employed are men). Signed into law in December 1991, the NEW Act boosts efforts to attract women to the skilled

trades. It amends the Job Training Partnership Act to require goals for training and placing women in jobs traditionally dominated by men and to disseminate information about successful strategies for nontraditional employment and training opportunities. The law also sets aside funds from the JTPA's national activities appropriation to make grants to the states to develop demonstration programs to train and place women in nontraditional employment.[9]

Signed into law by President Bush in October 1992, the Women in Apprenticeship and Nontraditional Occupations Act follows up on the NEW Act by improving retention of women working in the skilled trades. It seeks to address access, advancement, pay equity, and sexual harassment issues that women in nontraditional fields face on the job every day -- and that discourage them from joining skilled trades. It provides technical assistance and incentives to private employers wishing to set up apprenticeship programs for women in the skilled trades.

B. Legislative Recommendations for the Clinton Administration.

President-elect Clinton can expect action on several pieces of EEO legislation at varying points during his first year in office. His enthusiastic and visible support for these important measures would provide a public demonstration of our nation's renewed commitment to the promise of equal employment opportunity. Thus the Clinton Administration should support the following legislative initiatives:

- the Family and Medical Leave Act
- the Equal Remedies Act
- the Justice for Wards Cove Workers Act
- the Federal Employees Fairness Act

In addition, the Clinton Administration should also consider the possibility of developing and supporting legislation or other initiatives to close the wage gap. Despite the coming 30th anniversary of the Equal Pay Act of 1963 in June, 1991 Census Bureau data show that women on average still earn only 70% of men's earnings. People of color often fare even worse, earning on average 55-72% of the earnings of white men. Strong support for new pay equity legislation was demonstrated by Greenberg-Lake's 1991 national poll, which found strong majorities in support of such legislation across gender, race, and party lines.

IV. THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission enforces Title VII of the Civil Rights Act of 1964,[10] the Equal Pay Act,[11] the Age Discrimination in Employment Act, section 501 of the Rehabilitation Act, the Americans with Disabilities Act, and the Civil Rights Act of 1991. In addition, under Executive Order 12067, it is charged with providing leadership and coordination among the federal agencies involved in equal employment opportunity issues.[12]

A. LEADERSHIP

Effective EEO enforcement depends on committed and experienced leadership. Policy at the EEOC is set by five commissioners who are nominated by the President and confirmed by the Senate. Currently, they are: Chair, Evan Kemp, Jr., Vice-Chair, Rosalie Silberman, and Commissioners, Tony Gallegos, Joy Cherian, and Joyce Tucker. The General Counsel of the EEOC, who is also nominated and confirmed also plays a significant role in setting EEO policy.

Over the past twelve years, the EEOC leadership has failed to demonstrate a commitment to protecting the rights of employment discrimination victims. For example, in June, 1991, Kemp sent a letter to then-White House Chief of Staff John Sununu recommending that the president veto legislation that was eventually enacted as the Civil Rights Act of 1991.[13] The EEOC's sagging enforcement statistics also demonstrate that its leadership has not vigorously enforced the EEO laws -- as the number of EEOC class action suits has plummeted, its settlement rate has been halved, and the rate at which charges have been dismissed without remedy to the individual claimant has doubled.

Moreover, under the Reagan and Bush Administrations, opportunities for public participation in the EEOC's policymaking decisions have virtually evaporated. In particular, the number of Commission meetings that are open to the public has decreased markedly over the past 12 years. In FY 1980 and FY 1981, when Eleanor Holmes Norton was EEOC Chair, the Commission held 60

public meetings each year.[14] In FY 1982, when Clarence Thomas became Chair, the number decreased sharply to 35 public meetings. In FY 1983, there were 27 meetings; in FY 1984, 33 meetings; in FY 1985, 27 meetings; and in FY 1986, 30 meetings. By FY 1990 and FY 1991, the number of public meetings held by the Commission had plummeted even further to three each year.[15] Key EEOC policy decisions have generally been made by "notation vote", with memoranda and recommendations circulated individually to Commissioners for approval and rejection, thus avoiding public meetings and opportunities for input and discussion.

B. POLICY DEVELOPMENTS

1. Equal pay

Despite the promise of the Equal Pay Act of 1963, women still earn on average only 70% of men's earnings. People of color often fare even worse, earning on average 55-72% of the earnings of white men. A 1992 bipartisan poll of women found that, along with health care reform, equal pay was their top priority -- across race and party lines. The effectiveness of measures like the Equal Pay Act is largely determined by the vigor with which the EEOC interprets and implements such laws.

Before 1982, the EEOC took the initiative in the area of wage discrimination by filing amicus briefs in important cases,[16] by conducting hearings on wage discrimination in the workplace, and by commissioning a National Academy of Sciences Study on wage discrimination. Since 1982, however, the EEOC has done little on wage discrimination. Indeed, it allowed hundreds

of cases to languish for years without resolution and it restrictively interpreted Gunther to preclude disparate impact claims of wage discrimination, thus guaranteeing that many potential cases were never investigated.

EEOC enforcement of the Equal Pay Act's requirements of equal pay for equal work has been particularly dismal over the last 12 years. While the agency filed 79 Equal Pay Act cases in 1980 under Eleanor Holmes Norton, it filed only six in 1991. And, in 1992, the EEOC filed only two Equal Pay Act cases.[17]

The lack of Equal Pay Act cases, as well as of Title VII wage discrimination cases, can be explained in large part by the EEOC's practice of viewing charges of discrimination narrowly and solely as individual cases. Because it has neither the mechanism, nor the incentive to evaluate the potential for expanding individual charges into systemic cases, potential Equal Pay Act and Title VII wage discrimination cases are not being developed.

2. Implementation of the Civil Rights Act of 1991

The enactment of the Civil Rights Act of 1991 provides new opportunities for strengthening workplace rights of women and people of color. In particular, it provides -- for the first time -- compensatory and punitive damages for victims of intentional discrimination on the basis of gender, religion, and disability. However, the Act's effectiveness depends largely on how it is interpreted and implemented by the Equal Employment Opportunity Commission (EEOC) and other enforcement agencies.

Just weeks after the Civil Rights Act of 1991 went into effect, the EEOC announced that it would not apply the damages provision of the Act retroactively to ensure meaningful remedies for discrimination victims -- i.e., it would not seek compensatory and punitive damages or jury trials in cases filed prior to the Act, or in cases filed after enactment that challenged pre-Act conduct.[18] This is an unnecessarily crabbed interpretation of the Act inconsistent with Supreme Court case law,[19] and certainly inconsistent with the EEOC's mission of leadership in vigorous law enforcement.[20] Indeed, the Act explicitly provides that it is to take effect upon enactment,[21] and takes special care to make reference to the inapplicability of a few specific sections to pending cases -- demonstrating that the Act is intended to apply to pending cases unless specifically provided otherwise.

Moreover, even in cases arising after the effective date of the Act, advocates charge that the EEOC has failed to negotiate for compensatory and punitive damages on behalf of complainants.[22] Even more remarkably, the Office of General Counsel has instructed regional attorneys in the Ninth Circuit not to seek damages with respect to pre-Act discrimination, despite the Ninth Circuit's holding that the Civil Rights Act <u>should</u> be applied retroactively![23]

3. <u>Systemic and class action litigation</u>

In many contexts, discrimination is system-wide, infiltrating an entire institution or industry. Strategic class-

based legal action is thus required to attack effectively practices that harm large numbers of women and people of color. Such systemic litigation not only provides meaningful remedies for the victims of discrimination, but also deters continued discrimination by employers. Because such litigation is often beyond the resources of most private individuals and attorneys, Congress has authorized the EEOC to attack broad institutional patterns and practices of discrimination through systemic litigation.

Even though class actions have been proven effective in attacking systemic discrimination and in maximizing limited resources for greatest effect, the EEOC, as a matter of policy since the early 1980s, has concentrated almost exclusively on litigating individual complaints at the expense of class actions. As an example of this concerted retreat, the EEOC in 1992 filed only 43 class action suits, just 12% of all cases filed.[24] This is a dramatic decrease from 1980 efforts under Eleanor Holmes Norton, when two-thirds of all cases filed by the agency were class actions -- 218 in all. Moreover, the EEOC currently makes no effort to seek out systemic violators; it simply waits for complaints to come through the door.

The use of "testers" is another tool in identifying and eliminating systemic discrimination. Testers apply for jobs with the sole purpose of uncovering discriminatory employment practices. Their use can prove the existence of discrimination as well as deter it, and has been successful in the fight against

housing discrimination. Although the EEOC issued a 1990 policy guidance announcing that it intended to used information from "testers" as a means of detecting illegal discrimination,[25] the Commission has filed no charges or lawsuits involving the use of testers. Nor has it taken any action to develop its own employees as testers as part of efforts to target industry-wide discriminatory practices. (Other government agencies, such as HUD, HHS, and the Department of Justice, have used testers with great success.)

4. Pregnancy discrimination

The Supreme Court's 1991 decision in Johnson Controls prohibits as illegal sex discrimination the all-too-common practice of firing or excluding women of child-bearing age from jobs that pose reproductive health hazards, even though those jobs may pose risks for male workers as well. In its first post-Johnson Controls effort to prohibit the use of fetal protection policies, the EEOC filed suit against the Sundstrand Corporation in September, 1992, charging that it violated Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991, by reassigning a female employee to a lower-paying position when it learned of her pregnancy.[26] The EEOC also claimed that Sundstrand's policy of refusing to allow pregnant females to work in certain positions discriminated against them as a class.[27] Additional litigation of this sort is necessary to root out pregnancy discrimination in the form of gender-based exclusionary

policies that limit employment opportunities while failing to address workplace hazards issues.

Other forms of pregnancy discrimination should also be addressed. For example, the Commission apparently generally refuses to approve litigation of pregnancy discrimination claims brought solely on the theory that the employer's provision of little or no medical leave disparately impacts pregnant women.[28] While courts have held that the disparate impact theory may be used to challenge medical leave policies that are too short to cover the normal pregnancy leave,[29] and the EEOC's own regulations contemplate such challenges,[30] the EEOC has apparently chosen to follow the Department of Justice in asserting the contrary.[31]

5. Uniform Guidelines on Employee Selection Procedures

Commission leaders continue to oppose the Uniform Guidelines on Employee Selection Procedures (UGESP),[32] which clarify the way in which Title VII's prohibition of hiring and promotion discrimination applies to employee selection procedures that are facially neutral but have the effect of discriminating against women and people of color.

Although the EEOC has not formally proposed revisions to the guidelines, the Commission leadership continues to attack them. For example, in a May, 1991, letter to then-White House Chief of Staff John Sununu, Chairman Kemp criticized the Guidelines as "present[ing] a virtually insurmountable legal obstacle to any employer's use of either educational credentials or tests of job-

related competency."[33] On the contrary, numerous judicial decisions have upheld educational requirements or competency tests as job-related.[34]

C. EEOC ENFORCEMENT PERFORMANCE

1. Enforcement statistics

Even as the EEOC under Reagan and Bush retreated from systemic litigation, individual victims of discrimination became increasingly unlikely to receive any remedy at all. At the close of 1992, the EEOC's backlog of cases stands at 52,856.[35] Average processing time for complaints has increased to 9.7 months -- up from 3 to 6.5 months in 1980.[36]

At the same time, the EEOC's record for resolving complaints has taken a nosedive. Its settlement rate has been cut in half -- from 32.1% in 1980 to 13.2% in 1992.[37] And the rate at which charges have been dismissed with no remedy at all for the individual claimant (classified as no-cause findings) has more than doubled -- from 28.5% in 1980 to 61% in 1992.[38]

Moreover, critics of the EEOC's complaint processing system also point out that the EEOC completely fails to accept charges for 70 to 80% of those individuals who come to EEOC offices. This may be due to investigators' quota requirements, which generate incentives for investigators to minimize their inventory by turning away or dismissing charges. In evaluating investigators' performance, the EEOC focuses almost entirely on the quantity of investigations closed and the average number of

days spent per case. This system clearly creates pressures that work solely to the disadvantage of charging parties by encouraging incomplete investigations, quick closures through no-cause findings, and a preference for simple as opposed to complex cases like class actions.[39]

2. Service of traditionally underrepresented communities.

While civil rights advocates charge that all complainants are poorly served by the EEOC for instance, due to the agency's failure to promptly and thoroughly investigate charges,[40] advocates who represent Hispanic complainants report that the EEOC has done a particularly dismal job of serving the Hispanic, Native American, and Asian American communities.[41]

The EEOC's poor record of serving the Hispanic community was first documented in Analysis of the EEOC's Services to Hispanics in the United States (The Hispanic Charge Study),[42] which was prepared by an EEOC-appointed task force. The Hispanic Charge Study found that most Hispanics were either unaware of or simply did not trust the EEOC.

The study also concluded that the EEOC had not hired or promoted Hispanics to policymaking or executive positions within the agency, had pursued very little litigation on behalf of Hispanics, had little presence in the Hispanic community, and failed to perform quality investigations on behalf of Hispanic claimants, and had allocated inadequate resources to the job of serving the Hispanic community. According to complainants' advocates, the EEOC's record of serving the Hispanic community

has not improved during the decade following the Hispanic Charge Study; in fact, it has worsened.[43]

D. RECOMMENDATIONS FOR THE EEOC

1. Appointments and Leadership

Clearly, the key to resurrecting the EEOC's effectiveness and credibility as the nation's lead EEO enforcement agency is committed, activist leadership -- which has been sorely lacking over the past 12 years. Nearly all of the current Commissioners and the General Counsel should be replaced as soon as possible by individuals who have demonstrated their commitment to vigorous enforcement of EEO law.

In general, the EEOC should assert leadership in coordinating federal antidiscrimination efforts. The EEOC should coordinate the interpretive policy of the OFCCP and other key enforcement agencies to ensure consistent enforcement of antidiscrimination law. For example, the EEOC and OFCCP should develop a joint rule in light of the Civil Rights Act of 1991 to enable the OFCCP to negotiate and conciliate for compensatory and punitive damages when intentional discrimination by federal contractors is discovered by compliance reviews.

In addition, EEOC Commissioners should abandon their practice of closed-door meetings and decision-making by memo and notation, and should instead return to an open-door policy of open and regular Commission meetings, where policy decisions are discussed and determined with input from the public.

2. Equal pay

Given the critical importance of pay equity for women and people of color, the Administration should take leadership in aggressively enforcing and implementing these laws. The EEOC should fulfill its mandate to enforce the Equal Pay Act and Title VII's prohibitions on wage discrimination through targeted litigation. (The EEOC can reach out to women's groups and other civil rights advocates to help identify industries infected by systemic wage discrimination.) The EEOC should review its Equal Pay Act regulations in light of case law developments over the last 12 years to ensure that they're tough, effective, and up-to-date. The EEOC should also consider developing a clearinghouse to provide technical assistance to employers on implementing compensation systems free from wage discrimination and pay inequities.

3. Enforcing the Civil Rights Act of 1991 to Ensure Meaningful Remedies for Victims of Invidious Discrimination

Because the issue of Civil Rights Act retroactivity remains an open question in several circuit courts of appeal,[44] the EEOC should immediately reverse its policy opposing retroactive application of the Act in those circuits. In addition, many report that the EEOC is not even advising complainants charging post-Act discrimination about the availability of compensatory and punitive damages as part of the relief to which they are entitled. The EEOC should immediately inform plaintiffs of their right to damages and should affirmatively negotiate for

compensatory and, where appropriate, punitive damages on behalf of aggrieved plaintiffs.

Despite the significant impact of the Civil Rights Act of 1991 on federal antidiscrimination law, the EEOC has yet to issue interpretive regulations. The EEOC should immediately develop regulatory guidance for the Civil Rights Act of 1991.

4. Attacking systemic discrimination

The EEOC should substantially increase its investment in class action suits. In particular, it should implement a system for identifying and litigating class-wide charges to combat systemic discrimination. For example, the EEOC should launch "strike forces" to target offending employers and industries, conducting pro-active and highly visible compliance reviews. In addition, the EEOC should work with constituency groups to identify likely targets for compliance reviews.

As another tool in identifying and eradicating systemic discrimination, the EEOC should use its own testers to uncover discriminatory employment practices, and to litigate when discrimination is discovered. Although the EEOC moved in the right direction by agreeing to use information from testers, the Commission should use its own employees as testers to gather information on discriminatory employment practices, as well as accept charges filed by civil rights and community organizations on behalf of testers.

Moreover, given the importance of the Uniform Guidelines in eradicating the discriminatory effects of systemic job

discrimination, the EEOC should withdraw its attacks on the Guidelines and abandon plans to revise or eliminate them.

5. Improving the EEOC's complaint processing system

The size of the current backlog means that many charges have been languishing without investigation or resolution for years -- and, too often, such justice delayed is justice denied. As a result, the EEOC must act quickly to reduce its backlog and to improve the quality of its complaint processing system. Some urge the EEOC to explore some sort of Alternative Dispute Resolution scheme to resolve charges expeditiously and to reduce its enormous backlog. While reducing the backlog is key to the EEOC's success, however, any ADR processes must guard against biases that adversely impact complainants, who often are not represented by counsel and who may be urged to accept settlements short of full relief despite having suffered serious inequities.

Some EEOC observers also suggest that intake staff should be separate from investigative staff since investigators have an incentive to ignore or turn away cases -- especially time-consuming complex or systemic cases -- in order to meet strict performance quotas. Indeed, the EEOC should re-evaluate its criteria for evaluating investigators' performance in light of the clear pressures created by the current system that disadvantage complainants. The EEOC could also grant extra credit to personnel investigating systemic cases to encourage investigation of complex cases that may involve industry-wide discriminatory practices.

6. Sexual harassment

Sexual harassment is among the biggest obstacles to women's job security and employment opportunities. As the agency charged with enforcing federal law prohibiting sexual harassment, the EEOC must provide visible and vigorous leadership on this high-profile issue.

For example, the EEOC should develop additional standards, through litigation and regulatory review, to ensure that sexual harassment cases are evaluated fairly and in a non-discriminatory way. For example, it should develop guidance on use of the "reasonable person" standard to evaluate sexual harassment claims, and on limiting the admissibility of plaintiffs' prior sexual history.

7. Pregnancy discrimination

Along with sexual harassment and pay discrimination, pregnancy discrimination is the leading barrier to women's employment opportunities. Again, the EEOC must provide visible and vigorous leadership on this issue by enforcing Title VII's prohibition on pregnancy discrimination.

In addition, the EEOC should undertake affirmative enforcement efforts (e.g., targeted litigation) against gender-based exclusionary policies in light of the Supreme Court's holding in UAW v. Johnson Controls. More specifically, the EEOC should lead development of an interagency task force (involving the EEOC, NIOSH, DOL, including OFCCP and OSHA) to develop

strategies for dealing with workplace reproductive hazards without discriminating on the basis of gender.

In light of case law and regulatory guidance to the contrary, the Commission should also abandon its informal policy of refusing to approve litigation of pregnancy discrimination claims brought solely on the theory that the employer's provision of little or no medical leave disparately impacts pregnant women. Given the adverse impact of such practices on women, the EEOC should immediately reverse this policy.

V. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

The OFCCP is part of the Labor Department's Employment Standards Administration. It implements Executive Order 11246, as amended, which prohibits discrimination by federal contractors on the basis of sex, race, religion, or national origin, and requires contractors to take affirmative action to ensure equal employment opportunity. When effectively enforced, the Executive Order and its affirmative action requirement -- along with its authorization to initiate proactive compliance reviews and to, if necessary, cancel federal contracts of egregious offenders -- is a tremendous tool for expanding employment opportunities for women and people of color.

A. LEADERSHIP

OFCCP leadership experienced an all-time low in the mid-1980s when key Reagan Administration officials first tried to abolish the Executive Order entirely and later undercut its

effectiveness through lax leadership and enforcement. However, under Cari Dominguez as OFCCP Director and, later, Assistant Secretary for Employment Standards, OFCCP performance made some improvement in recent years. The OFCCP -- and the Department of Labor in general -- have been most effective in using their bully pulpit to shed light and attention on pressing EEO problems, such as the Glass Ceiling. Unfortunately, however, such efforts have often focused too narrowly on public relations and education, with little emphasis on actual enforcement.

B. POLICY

1. The Glass Ceiling Initiative

Secretaries of Labor Dole and Martin developed a "Glass Ceiling Initiative" to restructure the OFCCP's compliance review program to examine -- for the first time -- employers' advancement plans to see how employees are selected for key leadership and management positions. To date, however, this initiative has been focused too narrowly on public relations, rather than enforcement. Indeed, much of the Department's Glass Ceiling rhetoric -- and the focus of its compliance reviews -- have failed entirely to acknowledge that the Glass Ceiling is another term for sex and race discrimination (the DOL instead uses nomenclature like "artificial barriers to advancement" that fails to implicate the need for tough EEO law enforcement).

2. The Glass Ceiling Commission

Established by the Civil Rights Act of 1991, the Glass Ceiling Commission is charged with conducting a study and

preparing recommendations to eliminate "artificial barriers to the advancement of women and minorities" and to increase the number of women and people of color in corporate management and decision-making positions. Headed by the Secretary of Labor, this Commission is scheduled to produce its first report by February 1993. Some have expressed concern that, without committed leadership, this Commission may become yet another "paper tiger" concentrating on endless study of a problem, rather than generating solutions,

3. Women in the Skilled Trades Initiative

Secretaries of Labor Dole and Martin also developed and implemented an initiative to encourage recruitment and retention of women into higher-paying skilled trades jobs. Like the Glass Ceiling Initiative, this is a positive step in giving badly-needed visibility to the issues of job training, occupational segregation, and nontraditional work. Again, however, it fails to go far enough by focusing on public relations and education to the virtual exclusion of enforcement efforts.

C. ENFORCEMENT PERFORMANCE

After several years of steady increases in compliance reviews and conciliation agreements completed, these numbers have slipped over the last year. For example, after reaching an all-time high of 6,232 compliance reviews completed in 1989, this figure dropped to 5,372 in 1991.[45] 3,789 reviews were completed in the first three quarters of 1992.[46]

Much more troubling, however, is the steep dip in the number of affected class findings and administrative complaints filed during the Reagan-Bush years. Class actions -- and, in the specific OFCCP context, actions on behalf of "affected classes" -- have long been proven effective in attacking systemic discrimination and in maximizing limited resources for greatest effect. During the last full year of the Carter Administration, the OFCCP made 391 affected class findings.[47] This number plunged dramatically during the Reagan years to an all-time low of 46 in 1986.[48] More recently, the OFCCP made 99 affected class findings in 1991, and 130 in the first three quarters of 1992.[49] Statistics on the number of administrative complaints (enforcement efforts taken when attempts to negotiate a conciliation agreement with violating contractors fail) show a similar trend: After filing 53 administrative complaints in 1980, the OFCCP filed only five in 1982 and improved to 34 in 1991 (14 were filed in the first three quarters of 1992).[50]

Furthermore, the OFCCP's debarment authority -- the power to cancel or deny federal contracts to contractors engaging in repeated or egregious discrimination -- is perhaps its most powerful tool in enforcing Executive Order obligations. Yet, under the Reagan and Bush Administrations, the OFCCP rarely invoked this power. A total of 11 debarments were ordered during the 12 years of the Reagan-Bush Administrations, compared to 13 debarments ordered during the four-year Carter Presidency!

C. RECOMMENDATIONS FOR THE OFCCP

1. Appointments. Once again, the key to effective, credible enforcement efforts is committed, activist leadership. Thus, the person selected to be Director of the DOL's Office of Federal Contract Compliance Programs (OFCCP) should be an individual with demonstrated commitment to vigorous enforcement of EEO law. Other key positions that require demonstrated commitment to equal employment opportunity include: Solicitor of Labor, Assistant Secretary for Employment Standards, Assistant Secretary for Employment and Training, Director of the Bureau of Apprenticeship and Training, Assistant Secretary for Occupational Safety and Health, and Director of the Women's Bureau.

2. Equal Pay

The OFCCP should take a leadership role in the critical area of equal pay by, for example, undertaking Equal Pay Act compliance reviews of federal contractors, with zero tolerance for violations by contractors. These EPA compliance reviews should become part and parcel of standard compliance review procedure, and should examine pay and promotion practices with respect to race and gender, including an analysis of contractors' wage structures.

Under Reagan and Bush, legislation requiring the Department of Labor to establish a pay equity technical assistance clearinghouse to help employers voluntarily implement their own pay equity plans stalled. A Clinton Administration should quickly establish such a clearinghouse in either the EEOC or the

DOL. Models for such a technical assistance clearinghouse already exist in both agencies: the DOL currently operates a Work and Family Clearinghouse, while the EEOC operates technical assistance programs to assist employers in complying with the Americans with Disabilities Act.

3. Attacking systemic discrimination

The OFCCP should substantially increase its investment in action on behalf of "affected classes" (classes of workers employed by federal contractors who have been the victims of employment discrimination) and to implement a system, as part of its compliance reviews, for identifying affected-class charges to combat systemic discrimination. For example, the OFCCP should launch "strike forces" to target offending employers and industries, conducting pro-active and highly visible compliance reviews. (Such strike forces were developed by the EEOC and OFCCP under the Carter Administration; they haven't been used since.) In addition, the OFCCP should work with constituency groups to identify likely targets for compliance reviews.

When systemic discrimination by a federal contractor has been found, the OFCCP should require contractors to take corrective action and provide remedial relief to members of the affected class. And, where necessary to punish and deter repeated and/or egregious discrimination, the OFCCP should use its debarment power to deny or cancel federal contracts to offending contractors.

4. Civil Rights Act of 1991

The EEOC, OFCCP, and other key enforcement agencies should coordinate their interpretive policy to ensure consistent enforcement of antidiscrimination law. For example, one of the key provisions of the 1991 Act is its provision, for the first time, of compensatory and punitive damages for victims of intentional discrimination on the basis of sex, religion, or disability. In light of the Civil Rights Act of 1991, the OFCCP should negotiate and conciliate for compensatory and punitive damages when intentional discrimination by federal contractors is discovered by compliance reviews, coordinating such policy with the EEOC.

5. Glass Ceiling

The Administration should use the Glass Ceiling Commission's visibility, as well as its mandate for recommendations and implementation strategies, as the basis for providing leadership in developing effective EEO policies and programs. For example, the Commission should address the range of informal employment practices (such as reliance on word-of-mouth recruiting to identify candidates for promotion) that too often work to exclude women and people of color from leadership positions.

The OFCCP should also shift its emphasis under the Glass Ceiling Initiative to include greater attention to enforcement. For example, Glass Ceiling reviews that examine corporate recruiting, hiring, and advancement practices should become part and parcel of every compliance review. And, where discriminatory

practices are discovered, the OFCCP should require contractors to take corrective action and provide remedial relief to victims.

6. Women in the Skilled Trades

In addition, the OFCCP should shift emphasis of its Women in Skilled Trades Initiative (designed to increased women's participation in apprentice programs in skilled trades jobs) beyond public education to include greater focus on enforcing EEO requirements in apprenticeship programs.

7. Regulatory reform

The OFCCP's regulations implementing the Executive Order are significantly outdated, and have not been updated since the 1970s. The OFCCP should bring its enforcement regulations into the 1990s by undertaking a comprehensive review, with appropriate updating and revision.

VI. DEPARTMENT OF JUSTICE

Title VII confers exclusive authority on the Attorney General to engage in litigation challenging patterns or practices of employment discrimination by state and local governments.[51] The Department also has limited authority to redress employment discrimination by federal contractors.[52]

A. LEADERSHIP

Prior to the Reagan-Bush era, the Department of Justice was a leader in the enforcement of federal equal employment opportunity. By initiating precedent-setting employment discrimination cases, the DOJ's Civil Rights Division exerted an

extraordinary influence over discrimination litigation. For example, through its litigation efforts the Division helped establish the groundbreaking principle that racially neutral employment practices that have a disparate impact on protected groups or perpetuate the effects of past discrimination violate Title VII.[53]

Under Nixon, Ford, and Carter, the Civil Rights Division was also a leader in developing effective and innovative remedies for employment discrimination. The Division maintained that "affirmative action steps must be taken to correct the effects [of] past discriminatory employment practices."[54] The Division advocated back pay, retroactive seniority, and the use of numerical goals and timetables as necessary and legitimate means of redressing past employment discrimination under Title VII.[55]

However, under Assistant Attorney General William Bradford Reynolds during the Reagan Administration, the Department's Civil Rights Division retired from its role as an enforcer of federal equal employment law and instead successfully dismantled settled areas of civil rights law and policy.[56]

During the Bush years, the Department's Civil Rights Division under Assistant Attorney General John Dunne was not as activist as Reynolds in assailing antidiscrimination principles. Nevertheless, Dunne accepted and continued positions adopted by the Department under Reynolds. For example, Dunne and the DOJ have yet to disavow the Department's Reagan-era animosity to affirmative action remedies.

As another example of abdication of its civil rights enforcement mandate, the Department of Justice played a key role in the Administration's opposition to the Civil Rights Act of 1991, testifying against the bill before congressional committees in the House and the Senate. The legislation proposed to reinstate the framework for evaluating and redressing employment discrimination claims that was eviscerated by the Supreme Court in the late 1980s.[57] John Dunne and the Department of Justice, however, maintained that at least three of the Court's decisions had not substantially altered pre-existing employment discrimination law and argued that Congressional action was therefore unnecessary with regard to those cases.[58] Remarkably, the Justice Department's position during the hearings was inconsistent with positions it had taken in litigation as recently as 1989.[59]

B. <u>POLICY DEVELOPMENT AND ENFORCEMENT</u>

Over the course of the Bush Administration, the Department lacked an affirmative and comprehensive litigation strategy. Rather than maximizing its resources and impact by challenging large-scale employment selection practices by state and local governments, the Department focused its efforts on individual cases, attempting to redress employment discrimination on a case-by-case basis.[60] As a result of this ineffectual trial strategy, vast areas of employment discrimination remain unexamined and unchallenged.

Moreover, since the enactment of the Civil Rights Act of 1991, the Justice Department has issued no policy statements regarding that Act. However, it has argued in the courts that the Civil Rights Act of 1991 should not be applied retroactively -- a position antithetical to its mission to enforce civil rights statutes vigorously and forcefully.[61] Indeed, the DOJ appears to have deliberately gone out of its way to urge an unduly narrow interpretation of the Civil Rights Act by directly contradicting its position in numerous other cases where it sought to apply a new law retroactively to pre-existing claims.[62]

C. RECOMMENDATIONS FOR THE DEPARTMENT OF JUSTICE

1. Appointments and Leadership

Demonstrated commitment to EEO principles should be a prerequisite for the Assistant Attorney General for Civil Rights.

As another demonstration of a renewed commitment to EEO, the Department of Justice's Civil Division should work to settle outstanding employment discrimination cases against the federal government as an employer, and should coordinate its interpretation of Title VII with the Civil Rights Division.

2. Attacking systemic discrimination

The Department of Justice should initiate more pattern-and-practice challenges to sex- and race-based discrimination in the public sector. State and local governments traditionally employ large numbers of women and people of color who are

disproportionately excluded from certain positions -- such as those on state and local construction projects and in police and fire departments -- and disproportionately concentrated in low-paying jobs. Although DOJ has exclusive authority to bring Title VII pattern and practice cases against state and local governments, its record has been poor under Reagan and Bush; over the past few years it has initiated very few new employment cases. The DOJ should develop strike forces to engage in targeted investigation and litigation of the employment and wage practices of public employers in these occupations. This is especially important in light of the Clinton Administration's plans to invest in infrastructure, with likely job creation in the construction industry and skilled trades.

3. Enforcing the Civil Rights Act of 1991

The DOJ should also reverse its position against retroactive application of the Civil Rights Act of 1991, and should argue that the Act should apply to cases pending at the time of its enactment in circuits where the issue remains an open question.

VII. GENERAL RECOMMENDATIONS

In addition to the legislative and enforcement agency initiatives described above, the Clinton Administration should also:

- Exert visible leadership by using the Administration's "bully pulpit" on equal employment opportunity issues. In stark contrast to the Reagan Administration's use of the Department of

Justice and other key officials to launch a public attack on our nation's antidiscrimination laws, the Clinton Administration should immediately undertake a high-profile effort to assert zero tolerance for employment discrimination -- through, for example, early speeches by President Clinton and other top officials, such as the Attorney General, the Secretary of Labor, the Solicitor of Labor, EEOC Commissioners, and the OFCCP Director. President-elect Clinton could point out that women and people of color will account for 90 percent of the growth in the U.S. workforce in this decade. Clearly, effective management of the opportunities and challenges presented by this diverse workforce will become a priority for American businesses seeking to attract and retain the best employees and to compete in a global economy. The Administration should make clear that equal employment opportunity law is essential in helping to integrate the skills and talents of women and people of color into the workforce.

- Work with Congress to create a climate of support for EEO enforcement. In addition to the specific measures for boosting agency performance outlined above, the Administration should affirmatively seek out opportunities to work with Congress -- through, for example, periodic Congressional oversight hearings of key enforcement agencies -- to build partnerships between the executive and legislative branches to boost EEO enforcement efforts.

- Ensure that any job training initiatives include EEO principles. **To the extent that the Administration undertakes job**

training and/or job creation efforts, these measures must be drafted with equal employment opportunity principles in mind. These efforts must ensure that the jobs government helps to create will provide women and people of color with decent wages, benefits, and advancement opportunities, and that women and people of color are included in federal job training programs.

- Act as a model employer for American businesses by implementing effective federal sector EEO policies. The Administration should make clear that, as an employer, it will not tolerate job discrimination. For example, once the General Accounting Office has completed its pay equity study of federal pay practices, the Administration should act swiftly to implement necessary measures to eliminate race- and gender-based pay discrimination in the government.

In addition, agency heads must make EEO principles a top priority -- and key personnel should be evaluated in part by their success in reducing discrimination.

- Support family-friendly workplace policy. Without responsive workplace policy, the struggle to accommodate competing work and family responsibilities often works to limit employment opportunities for women and men. In addition to signing the Family and Medical Leave Act, the Clinton Administration should support working families by providing federal sector employees with programs to support working families -- including family and medical leave, child care, and flexible work arrangements. Moreover, the Administration should

ensure that any job training and/or job creation efforts include attention to the need for family-supportive workplace policy.

- Reward improvements in enforcement agency performance with increased funding. Historically poor enforcement performance by agencies like the EEOC has often discouraged additional investment by Congress. However, given the importance of equal employment opportunity enforcement, the Clinton Administration should follow up improvements in agency performance with requests for increased funding to ensure further progress.

ENDNOTES

1. In this chapter, we focus almost exclusively on equal employment opportunity policy as it applies to gender and race. Other chapters will address other equally important employment discrimination issues, such as those involving disability and/or age.

2. Lost Opportunities: The Civil Rights Record of the Bush Administration Mid-Term, Citizens Commission on Civil Rights, 1991.

3. "Questions and Answers on Pay Equity," National Committee on Pay Equity, April 1991, (Source: U.S. Census Bureau, Current Population Reports, Series P-60), pp. 1-2.

4. Id.

5. Id.

6. Id.

7. "Women Workers: Outlook to 2005", U.S. Dept. of Labor, January, 1992, p. 1.

8. E.g., Lorance v. A.T.&T. Technologies, Inc., 109 S.Ct. 2261 (1989); Martin v. Wilks, 109 S.Ct. 2180 (1989); Patterson v. McLean Credit Union, 109 S.Ct. 2304 (1989); Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989); Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989).

9. "Highlights of Legislation Affecting Children, Youth, and Families Enacted Into Law During the 102nd Congress," Information from Select Committee on Children, Youth, and Families, U.S. House of Representatives, Part 1, p.2.

10. 42 U.S.C. § 2000e, et seq.

11. 29 U.S.C. § 206(d) (1963); authority to enforce the Equal Pay Act was transferred to the EEOC from the Department of Labor pursuant to Reorganization Plan No. 1, 3 C.F.R. 321 (1978), during the Carter Administration.

12. Order No. 12,067 § 1-201 (June 30, 1978).

13. "Head of Job Panel Assails Bias Bill," The New York Times, June 25, 1991.

14. Senate Subcommittee on Employment and Productivity, Oversight Hearings on the Equal Employment Opportunity Commission, April 1992 [Hereafter "Oversight Hearings"], Oral testimony of Del. Eleanor Holmes Norton, p. 11; Statement of Sen. Paul Simon [hereafter "Testimony of Simon"], p. 86.

15. Statement of Simon, p. 86.

16. The EEOC was amicus in Gunther v. County of Washington, 452 U.S. 161 (1981) (holding that Title VII forbids intentional gender-based wage discrimination in jobs that may not be substantially equal) and IUE v. Westinghouse, 631 F.2d 1094 (3d Cir. 1980), cert. denied, 452 U.S. 967 (1981) (holding that women in predominantly female job classifications could still compare their wages to wages paid to males in predominantly male job classifications, even though the job classifications were not substantially equal).

17. Women Employed, EEOC Enforcement Statistics (1992).

18. EEOC Policy Guidance on Application of Damages Provisions of the Civil Rights Act of 1991 to Pending Charges and Pre-Act Conduct [hereafter "Policy Guidance on Application of Damages"], December 27, 1991, p. 8. The Commission has yet to offer any policy guidance whatsoever on the retroactivity of provisions of the Civil Rights Act of 1991 other than those concerning damages.

19. In Bradley v. School Board of Richmond, the Supreme Court held that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. 696, 711 (1974).

20. Indeed, many courts defer to EEOC interpretations of Title VII and other civil rights statutes. This deference offers another example of the need for the EEOC to exert leadership in its interpretive policymaking -- and thus its unduly narrow interpretation of Civil Rights Act retroactivity is even more troubling.

21. Civil Rights Act of 1991, § 402.

22. Oversight Hearings, written testimony of Women's Legal Defense Fund, Women Employed, National Women's Law Center, and Equal Rights Advocates [hereafter "WLDF Testimony"], pp. 7-9.b.

23. November 13, 1992 Memorandum from EEOC General Counsel Donald Livingston to All Regional Attorneys on Retroactivity of the Civil Rights Act of 1991.

24. Women Employed, EEOC Enforcement Statistics (1992)

25. EEOC Policy Guidance: Whether "testers" have standing to file charges of employment discrimination against employers, employment agencies and/or labor organizations which have discriminated against them because of their race, color, religion, sex or national origin, November 20, 1990.

26. EEOC Press Release: "EEOC News: EEOC Sues Sundstrand Corporation; Alleges Company Maintains Illegal 'Fetal Protection' Policy," September 30, 1992.

27. Id.

28. WLDF Testimony at 16-17.

29. See Abraham v. Graphic Arts International Union, 660 F.2d 811 (D.C. Cir. 1981).

30. See EEOC Pregnancy Guidelines, 29 C.F.R. § 1604.10(c) (1991) (recognizing disparate impact theory under the Pregnancy Discrimination Act where leave is inadequate).

31. In an amicus brief filed in the Seventh Circuit cases of Scherr v. Woodland School District #50 and Maganuco v. Leyden Community High School District 212, 867 F.2d 974 (1988), the Department of Justice argued that the language of the Pregnancy Discrimination Act and its legislative history should be interpreted to exclude disparate-impact challenges.

32. 43 Fed. Reg. 38290 (August 25, 1978).

33. WLDF Testimony at 13.

34. Id. at 12-14.

35. Women Employed, EEOC Enforcement Statistics (1992).

36. Id.

37. Id.

38. Id.

39. Moreover, the EEOC in 1991 eliminated its only mechanism for reviewing no-cause findings. See "EEOC Eliminates Policy Allowing Automatic Review of 'No Cause' Findings," BNA Daily Labor Report (Feb. 20, 1991). Up until that time, the EEOC's Determinations Review Program (DRP) was available to receive complainants' appeals of the EEOC's no-cause findings. With the abolition of the DRP, no accountability mechanism exists to review no-cause dismissals.

40. Oversight Hearings, Oral testimony of Richard T. Seymour on behalf of the Lawyer's Committee for Civil Rights Under Law, pp. 18-19; oral testimony of Nancy B. Kreiter on behalf of the Women's Legal Defense Fund, Women Employed, National Women's Law Center, and Equal Rights Advocates, pp.28-29; WLDF testimony. pp.3-4.

41. Written testimony of Claire Gonzales, on behalf of National Council of La Raza, Oversight Hearings [hereafter "Testimony of Gonzales"], pp. 2-5.

42. U.S. Equal Employment Opportunity Commission's Task Force, Equal Employment Opportunity and Hispanics: An Analysis of the Equal Employment Opportunity Commission's Services to Hispanics in the United States, Washington, DC, December 2, 1983.

43. Written testimony of Gonzales at 5-7.

44. There is currently a split among the Circuit Courts of Appeal that have considered the retroactivity of the Civil Rights Act of 1991: The Ninth Circuit has ruled that the CRA does apply to cases pending at the time of its enactment, while six other circuit courts have ruled to the contrary. Five circuits have yet to consider this issue.

45. Women Employed, Summary of OFCCP Enforcement Activity (1992).

46. Id.

47. Id.

48. Id.

49. Id.

50. Id.

51. The Civil Rights Act of 1964 42 U.S.C. § 2000e (codified as amended in various sections of the U.S. Code).

52. The Department of Justice is authorized to bring suit against federal contractors who are alleged to be in violation of Executive Order 11246, as amended.

53. See Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding that employment practices that are fair in form but discriminatory in operation violate Title VII) (Department of Justice as amicus curiae); Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969) (holding that neutral seniority system tied to past cuts into employees' present right not to be discriminated against and violates Title VII), cert. denied 397 U.S. 919 (1970); United States v. Local 36, Sheet Metal Workers, 416 F.2d 123 (8th Cir. 1969) (holding that employment referral system according work referrals based on experience resulting in present and future discrimination violates Title VII).

54. To Eliminate Employment Discrimination: A Sequel, United States Commission on Civil Rights (1977) at 277 n.76 [hereinafter 1977 Civil Rights Commission Report] (quoting a memorandum from the Chief of the DOJ Employment Section); E.g., Local 53, International Association of Heat and Frost Insulators and Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969) (holding that courts are permitted to order such affirmative action as appropriate to redress past discriminatory employment practices).

55. 1977 Civil Rights Commission Report supra note 4 at 277 n. 76; See United States v. Local 86, Ironmakers, 443 F.2d 544 (9th Cir. 1971) (holding that judicially imposed ceiling requirements on union's apprenticeship program did not violate Title VII).

56. For example, the Department supported third party challenges to consent decrees embodying affirmative action plans. The Department was ultimately successful in its attempts in Martin v. Wilks, 109 S. Ct. 2180 (1989). In Wilks, the Supreme Court agreed that affected third parties could not be prevented from collaterally attacking a consent decree concluding earlier civil rights litigation, even where they had declined to intervene in the original case, or where their interests had been sufficiently represented by parties in the original lawsuit. See also Withers & Winston, "Equal Employment Opportunity," Report of the Citizen's Commission on Civil Rights, One Nation, Indivisible: The Civil Rights Challenge for the 1990's 193 (1989).

57. For a discussion of the Supreme Court decisions that generated the need for the need for the CRA of 1991, see Mincberg and Brake, "The Civil Rights Act of 1990," Report of the Citizen's Commission on Civil Rights, Lost Opportunities 23 (1990).

58. Dunne argued that Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989), Martin v. Wilks, 109 S. Ct. 2180 (1989), and Wards Cove Packing Co., Inc. v. Atonio, 109 S. Ct 2115 (1989) had not created a need for corrective legislation by Congress. The Civil Rights Act of 1991: Hearings on H.R.1 Before House of Representatives Comm. on Education and Labor, 102nd Cong., 1st Sess. 544 (1991) [hereinafter Hearings] (prepared statement of John R. Dunne, Assistant Attorney General, U. S. Department of Justice, Civil Rights Division).

59. The Department argued at the hearings that Wards Cove simply "clarified the evidentiary burdens in cases brought under Title VII." Hearings, supra note 11, at 545 (prepared statement of John R. Dunne). However, in defending Title VII cases brought against it, the Department had argued that Wards Cove imposed a greater burden on plaintiffs attempting to prove disparate impact employment discrimination. See Hearings, supra note 12, at 564,

568-71 (prepared statement of the Leadership Conference on Civil Rights).

60. For example, in 1990 the Employment Litigation Section of the Department of Civil Rights initiated a total of twenty cases under Title VII. Of those twenty, six suits challenged discriminatory employment practices or patterns. Fourteen suits sought to remedy individual cases of discrimination. In contrast, in 1987 the Employment Section initiated twenty-nine suits. Twenty suits challenged pattern discrimination and nine suits challenged individual instances of discrimination. Letter from James Angus, Chief Employment Litigation Section, Civil Rights Division, United States Department of Justice, to Claire Gonzales, Senior Civil Rights Policy Analyst, National Council of La Raza (via facsimile September 6, 1991).

61. See e.g., Gersman v. Group Health Assoc., Inc., 975 F.2d 886 (D.C. Cir. 1992) (holding that portions of the Civil Rights Act of 1991 do not apply retroactively).

62. E.g., United States v. Murphy, 937 F.2d 1032, 1036-38 (6th Cir. 1991) (False Claims Act); United States v. Peppertree Apartments, 942 F.2d 1555, 1560 (11th Cir. 1991); United States v. 6.93 Acres of Land, 852 F.2d 633 (1st Cir. 1988) (amendments to Equal Justice Act)United State v. Marengo County Comm'n, 731 F.2d 1546, 1552-55 (11th Cir. 1984) (amendments to Voting Rights Act); United States v. Dallas County Comm'n, 739 F.2d 1529, 1534 (11th Cir. 1984) (amendments to Voting Rights Act).

Employment Testing

Joseph Sellers & Claudia A. Withers

The use of testing to detect and challenge discrimination has been an important vehicle for the enforcement of the civil rights laws in the areas of housing and public accomodations for more than 30 years. The techniques that have worked so well in those areas are now being applied to the workplace. In employment tests, testers are paired to ensure that they appear comparably qualified to an employer and that they differ only in their race, gender or other protected characteristic. A comparison of the treatment which the testers receive from prospective employers, therefore, can reliably reveal differences attributable to discrimination.

The use of testing offers for the first time a proactive means to detect and challenge discrimination without reliance upon the initiation of charges. Testing permits targeted investigations of employers' hiring practices, which often rely only upon leads or demographic data. Ultimately, employment testing provides the opportunity, through the creation of laboratory conditions, to detect and challenge discrete incidents of discrimination in hiring decisions which have largely gone unexposed and unchallenged in the past. This development holds the potential to greatly enhance, if not revolutionize, the strategies applied to detect and curb employment discrimination.

Testing has four general applications in the field of employment discrimination. Each application serves a different purpose and warrants separate consideration. Together, this array

of applications offers a broad, effective means of detecting and challenging discrimination in the workplace.

1. Using Testing to Survey the Workforce

Testing may be used to survey the workforce of a community to determine the extent to which discrimination influences hiring decisions. The results of such surveys can yield insights about obstacles to employment in the entire business community or in a sector of it.[1]

Survey results can inform a variety of public deliberations. Enforcement agencies, such as the EEOC and state and local Fair Employment Practice Agencies, can use these results to measure the effectiveness of their efforts to curb discrimination and to direct their resources to those segments of the community where disparities in treatment are most pronounced. Similarly, legislatures can rely upon testing results to assess the effectiveness of existing laws prohibiting discrimination and to consider the sufficiency of the resources appropriated to address employment discrimination.[2]

For example, in 1992 the Fair Employment Council of Greater Washington (FEC) conducted a testing-based study designed to examine the extent of job discrimination affecting the Latino population in the Washington metropolitan area.[3] The study was conducted at the request of the D.C. Latino Task Force and the U.S. Civil Rights Commission following the civil disturbances involving the Latino community in the Adams Morgan and Mount Pleasant

Sections of Washington in May of 1991. The FEC's study, which found, among other things, that in more than 20% of the tests Latino job applicants were treated less favorably than their Anglo counterparts, became a part of the report developed by the U.S. Civil Rights Commission as part of its investigation. It has also become a part of the record upon which the District of Columbia City Council will rely in its decisions regarding proposed amendments to the District of Columbia Human Rights Act. [4]

2. Use of Testing to Monitor Compliance with Injunctive Remedies

Employment discrimination litigation in which plaintiffs are successful often concludes with the issuance of injunctive relief by the court or agency before which the case is pending. Such remedies may direct an employer to refrain from the commission of discrimination in the future or mandate that the employer take specific steps to remedy the effects of past discriminatory conduct. These remedies might include affirmative recruitment, the implementation of special training programs, or the pursuit of hiring or promotions guided by appropriate goals. In order to ensure compliance with these injunctive orders, provision for monitoring of the employer's conduct is often provided. The supervision that such monitoring affords is essential to the permanent elimination of discrimination from the workplace.[5]

Most monitoring entails a review of records maintained by the employers subject to the injunctive provisions. Typically, these records consist of counts of the numbers of employees or applicants

who have sought employment. Statistical measures can be applied to these numbers to determine whether the numbers of persons selected who belong to the group protected by the injunctive provisions comport with the numbers of persons who could be expected to have been selected by a legitimate, nondiscriminatory system.[6] Thus, most monitoring has relied upon statistical measures of the results of a large number of selection decisions to determine whether the decisionmaking at issue comports with the injunctive provisions.

Although traditional monitoring techniques are a powerful vehicle for the enforcement of injunctive provisions, they suffer from several significant limitations. First, they depend on records that employers themselves generate and therefore are only as reliable as the employers' efforts to generate and collect the data. Second, the information often will require someone, often the employees or applicants who have applied for the jobs in question, to identify his or her race, age, disability or other characteristic protected by the injunctive remedies, which may intrude upon the privacy of some and create the impression for others that discriminatory practices are still being committed. Third, and perhaps most important, statistical monitoring depends upon an ability to detect discrimination from differences between actual and predicted results from a substantial number of selection decisions. Isolated incidents of discrimination and discriminatory practices affecting only small numbers of persons will evade detection by most, if not all, such statistical measures.

By contrast, testing affords a mechanism for monitoring

compliance with injunctive provisions not constrained by these limitations. First, testing may be conducted by the parties who monitor the employer's conduct, replacing the employer's role in generating and collecting the data with a highly objective, professional and discrete means of observing and recording the employer's treatment of testers who, in all relevant respects, are comparably qualified for the positions they seek. Second, testing eliminates the need to ask employees or applicants to identify their race, gender or other characteristic. Third, testing will detect differences in treatment in isolated conditions and discriminatory practices which affect only small numbers of persons. No statistical measures are necessary to evaluate the results of these tests; rather, each test affords direct insight into the employer's conduct. Discrimination can be detected from individual selection decisions and no aggregation of the results from multiple selection decisions is necessary.

3. The Use of Testing to Investigate Allegations of Employment Discrimination

Direct evidence of discrimination is rare and, where such direct evidence exists, corroboration is even more rare. In particular, detecting discrimination in hiring decisions traditionally has been very difficult and, even where discrimination is suspected, it is rarely challenged. Most applicants for employment never observe the treatment of other applicants, much less the treatment of other applicants who may have comparable background and experience. Thus, unless the

mistreatment is overt, applicants who have been subject to discrimination will normally lack the means of determining that the treatment they received was unlawful. Moreover, where discrimination is suspected, most applicants lack the evidence with which to mount an effective challenge to the unlawful conduct. And, even those who have the necessary proof to support a claim of discrimination may be reluctant to undertake costly and burdensome litigation, particularly when their first priority is finding a job.[7] Accordingly, testing is a particularly important vehicle for detecting the existence of discrimination in hiring decisions.

4. The Use of Testing to Challenge Hiring Discrimination

In what may be its most powerful, and most controversial, application, testing may be used directly to challenge discrimination in hiring. Relying upon legal principles well-established in testing for discrimination in housing and public accomodations, testers who encounter discrimination during a test may themselves serve as plaintiffs in litigation challenging that discrimination.[8] While this application of testing must be carefully conducted to withstand the rigors of litigation, it provides a powerful weapon to combat hiring discrimination and provides probably the most economical means of enforcing the civil rights laws.

Testers may initiate litigation where the treatment they receive creates an inference of discrimination. The process giving rise to the litigation is straightforward. The testers conduct

their tests in the same careful, objective manner that is required of the other uses of testing. At the conclusion of each test, the treatment received by each of the paired testers is reviewed and compared to determine whether there are differences in treatment. These differences are then evaluated to ascertain whether they are modest and inconsequential, and therefore legitimate variations, or are significant variations from which an inference of discrimination may be drawn. After each tester is apprised of the treatment that his or her counterpart received, where an inference of discrimination may be drawn the tester disadvantaged during the hiring process is afforded an opportunity, after consultation with counsel, to initiate litigation challenging the misconduct.

Pending Litigation Although the demands of litigation make this application of testing the most difficult to implement, it has already led to litigation on a few occasions. The Fair Employment Council of Greater Washington has pioneered in the use of testing to detect and challenge hiring discrimination and, along with the affected testers, it has brought the only two cases in the courts based on EEO testing evidence.[9]

The first case was filed in May of 1991 in the federal district court in Washington, D.C., alleging race discrimination in the denial of referrals to two black testers by the large, national employment referral agency Snelling & Snelling and its Washington franchise.[10] The case relied upon two tests conducted on consecutive days in December, 1990. In both tests, the testers,

who were male college students whose only material differences were their race, visited the Washington franchise of Snelling & Snelling to seek a job referral. In the first test, while the black tester was waiting to be interviewed, his white partner was offered a referral which ultimately led to a job offer. In the second test, the black tester was never even given the chance to submit an application for employment. Instead, he was advised that there were no jobs available for candidates with his credentials. Minutes later, his white partner presented similar credentials and was offered a referral that led to a job offer. The litigation has been brought on behalf of the two black testers and the Fair Employment Council, invoking 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964 and the D.C. Human Rights Act. A motion to dismiss the claims of testers under §1981 on grounds that they lack standing was denied by the U.S. District Court for the District of Columbia.[11]

The second case was filed in June, 1991 in the District of Columbia Superior Court against another employment referral agency.[12] Here, the testers were deployed in response to a complaint of sexual harassment brought to the EEO Intake Program of the Washington Lawyers' Committee for Civil Rights Under Law. Two tests were conducted, in each of which a pair of testers comprised of a woman and a man sought employment referral services. The female testers each were solicited, as had been the initial complainant, to engage in a sexual relationship with the proprietor in exchange for a waiver of the referral fee. The paired male

testers were simply asked to pay a fee for the referral. The case has been brought on behalf of the woman who initially sought the job referrals, the two female testers and the Fair Employment Council, invoking the D.C. Human Rights Act. The case was tried to a jury and resulted in a mistrial. A second trial is scheduled.

In these cases, the testers have sought the full range of remedies that are available to any other victim of employment discrimination.[13] Accordingly, they have sought declaratory and injunctive relief and compensatory and punitive damages.[14] The testers have sought damages for the emotional harm caused by their discriminatory treatment, while the Fair Employment Council has sought damages for harm caused by 1) diversion of its resources away from other activities to investigate and challenge the discrimination and 2) frustration of its mission to promote equal employment opportunity in the Washington metropolitan area.[15]

EEOC Policy on Testing Following a long line of authority endorsing the rights of testers to bring claims of discrimination, In 1990 the EEOC issued a policy guidance to its regional offices, stating that testers denied equal employment opportunities for a reason prohibited by EEO laws have been harmed and may challenge the discrimination themselves.[16] As an interpretation of Title VII, the statute which the EEOC is authorized to enforce, the EEOC's policy guidance normally is entitled to considerable deference.[17]

In reliance upon this policy guidance, the EEOC has filed

amicus curiae briefs in the FEC litigation supporting tester standing under 42 U.S.C. §1981 and Title VII.[18]

Challenges to the Use of Testing

Challengers to the standing of testers have advanced three arguments, none of which are convincing. First, opponents of testing contend that testers incur voluntarily any injury they suffer and, therefore, the testers and not the discriminating employer are actually the cause of the harm. The U.S. Supreme Court has held otherwise for more than three decades.[19]

Second, oppponents argue that since testers have no intention of accepting an offer of employment, they have suffered no harm when a job offer is withheld, even for discriminatory reasons. A number of courts have also rebuffed this argument.[20] Testers have the same right as other applicants to receive accurate information about the availability and nature of jobs and the same right to negotiate for employment as applicants who intend to accept job offers. The denial to testers of referrals to potential employers constitutes an act of discrimination regardless of their ultimate plans to decline offers of employment.

Third, the standing of organizations such as the Fair Employment Council has been challenged based on the premise that, even if their testers have suffered discrimination, the organizations have suffered no resulting harm. However, the Supreme Court in Havens Realty Corp. v. Coleman answered this challenge by establishing a framework for organizations that

oversee testing to establish standing in their own right. The Court concluded in that case that as long as significant resources must be diverted from other program activities to "identify and counteract" the discriminatory practices complained of, the organization has suffered harm sufficient to confer standing.[21] Organizations like the Fair Employment Council, whose programs include such activies as public education, research, and the delivery of services to the community should enjoy standing when the litigation they initiate based on testing requires a significant diversion of resources from other operations.

Finally, opponents of the use of testing as an enforcement tool contend that it is flawed because of its use of deception. This challenge compares testing to entrapment in criminal law. While testing must always be conducted in a responsible manner, the comparison to entrapment is wrong. The entrapment defense is relied on by criminal defendants who contend that the government has induced the commission of a crime by direct involvement in an illegal enterprise.[22] To the contrary, in civil rights testing, testers are instructed <u>not</u> to suggest a discriminatory outcome of their test. Where an intent to discriminate is expressed, it is initiated by the subject of the test.

Numerous courts have accepted this distinction in approving the use of testing in civil rights cases, likely in recognition of the strong national policy supporting vigorous enforcement of the antidiscrimination laws. The Seventh Circuit confirmed this acceptance in a housing case relying upon tester evidence:

> It is frequently difficult to develop proof in discrimination cases and the evidence provided by testers is frequently valuable, if not indispensable. It is surely regrettable that testers must mislead commercial landlords and homeowners as to their real intentions to rent or buy housing. Nonetheless, we have long recognized that this requirement of deception was a relatively small price to play to defeat racial discrimination. The evidence provided by testers both benefits unbiased landlords by quickly dispelling false claims of discrimination and is a major resource in society's continuing struggle to eliminate the subtle but deadly poison of racial discrimination.[23]

Conclusion

Employment testing can be used in a variety of ways as part of a comprehensive civil rights enforcement program. The results of testing can also play a valuable and necessary role in educating the community regarding the existence and extent of discrimination in the workplace. While it is impossible to predict with certainty the outcome of employment testing in the courts, there is great potential for the use of testing by public and private entities to enforce the civil rights laws and eradicate discrimination.

1. See Fix & Struyk, "An Overview of Auditing for Discrimination" (Urban Institute: Aug. 1991).

2. For example, with assistance from the Urban Institute, the General Accounting Office conducted a study to test the extent to which employers' hiring decisions were influenced by the national origin and citizenship of the applicants. See GAO, Immigration Reform: Employer Sanctions and the Question of Discrimination, at 29-31 (March, 1990). The test results, which found widespread discrimination, became a principal basis upon which Congress decided to extend the prohibitions against citizenship discrimination in the Immigration Reform and Control Act.

3. Bendick, Marc Jr., Charles Jackson, Victor Reinoso, and Laura Hodges, "Discrimination Against Latino Job Applicants: A Controlled Experiment," Human Resouce Management 30(4), pp. 469-484 (1991).

4. The proposed amendment, entitled the "Human Rights Amendment Act of 1992," would, among other things, add citizenship status as a protected category under the Act.

5. See, e.g., Northcross v. Bd. of Ed. of Memphis City Schools, 611 F.2d 624, 637 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980); Richmond Black Police Officers Ass'n v. City of Richmond, 548 F.2d 123 (4th Cir. 1977).

6. Differences between the actual and expected rates of selection of the persons protected by the injunctive provisions can be measured to determine if they are attributable to chance or some other reason such as discrimination. See Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977); Palmer v. Shultz, 815 F.2d 84, 90-97 (D.C. Cir. 1987).

7. It is not surprising, therefore, that charges of hiring discrimination are much less frequently filed with the EEOC than allegations of discrimination at other stages of employment. In 1986, for example, of 48,756 charges filed alleging race discrimination, only 4,147 involved refusals to hire. Nor has this ratio changed. In 1990, 47,394 charges of race discrimination were filed and only 3,714 involved denials of hire. The experience of the Washington Lawyers' Committee's EEO Intake Program is entirely consistent with this pattern. While the Intake Program reviewed in excess of 900 EEO claims in 1990, only about 50 claims involved in any way a challenge to a hiring decision.

8. On three separate occasions, the Supreme Court has endorsed the right of persons acting as testers to bring litigation challenging discrimination they encounter during their tests. See Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982)(testers denied housing may bring claims under the Fair Housing Act); Pierson v. Ray, 386 U.S. 547 (1967)(testers may bring claims challenging segregated bus station under 42 U.S.C. § 1983); Evers v. Dwyer, 358

U.S. 202 (1958)(tester may challenge segregated seating on bus).

9. "Job Agency Is Sued Over Alleged Bias After "Sting" Tactic," The Wall Street Journal, May 3, 1991; "D.C. Employment Agency Accused of Discrimination," Washington Post, May 3, 1991; "Job Agency Bias Suit is "Tester" Case," Washington Times, May 3, 1991.

10. See Fair Employment Council of Greater Washington, et al. v. Snelling & Snelling, et al., C.A. No. 91-0989 (D.D.C.).

11. See Order, FEC, et al. v. BMC et al., C.A. No. 91-0989 (D.D.C. Dec. 26, 1991).

12. See Fair Employment Council of Greater Washington, et al. v. Molovinsky, No. 91-7202 (D.C. Sup. Ct.).

13. Since the testers were not deprived of an offer of employment that they would have accepted, they have elected not to seek back pay.

14. Courts have regularly allowed the award of damages to testers in fair housing cases to remedy the emotional harm caused by discrimination they encountered during tests. See United States v. Balistrieri, Nos. 91-2379 & 91-2493 (7th Cir. November 24, 1992); Bryant v. Kay Brothers Builders, C.A. No. B-86-534 (D. Md. Feb. 18, 1988); Saunders v. General Services Corp., 659 F. Supp. 1042, 1060-61 (E.D. Va. 1987). Punitive damages have also been awarded to testers. See City of Chicago, et al. v. Matchmaker Real Estate Sales Center, Inc., 1991 U.S. Dist. LEXIS 4435 (April 5, 1991).

15. The right of organizations like the FEC to seek damages for such harm has received strong support from the courts. See Havens Realty Corp., 455 U.S. at 1363; Spann v. Colonial Village, Inc., 899 F. 2d 24, 27-29 (D.C. Cir.), cert. denied, 111 S. Ct. 508 (1990).

16. See EEOC, "Policy Guidance on the Use of EEO Testers," EEOC Compl. Man., (BNA) § 405:6899 (Nov. 20, 1990). The guidance directed the regional offices to accept charges of discrimination brought by testers.

17. See Griggs v. Duke Power Company, 401 U.S. 424, 433-34 (1971); Udall v. Tallman 380 U.S. 1, 4 (1965).

18. See Brief of EEOC, FEC, et al. v. Snelling & Snelling, et al., No. 91-0989 (D.D.C.).

19. See cases cited in note 8, supra.

20. See Watts v. Boyd Properties, Inc., 758 F. 2d 1482, 1485 (11th Cir. 1985); Meyers v. Pennypack Woods Home Ownership Assoc., 559 F. 2d 894 (3d Cir. 1977); Coel v. Rose Tree Manor Apts., Inc., No. 84

- 1521, 1987 U.S. Dist. LEXIS 9212 (E.D. Pa. Oct. 13, 1987); Village of Bellwood v. Gorey & Assocs., 664 F. Supp. 320, 324-26 (N.D. Ill. 1987); Biggus v. Southmark Mgmt Corp., No. 83-C-4024, 1985 WL 1751 (N.D. Ill. June 13, 1985); Sherman Park Community Ass'n v. Wauwatosa Realty Co., 486 F. Supp. 838, 842 (E.D. Wis. 1980).

21. Havens, 455 U.S. at 363, 379; see also Spann v. Colonial Village, Inc., 899 F. 2d 24, 28 (D.C. Cir. 1990), cert. denied, 111 S. Ct. 598 (1990); Pacific Legal Foundation v. Goyan, 664 F. 2d 1221, 1224 (4th Cir. 1981).

22. See United States v. Russell, 411 U.S. 423, 435 (1972); Sherman v. United States, 356 U.S. 369 (1958).

23. Richardson v. Howard, 712 F. 319, 321 (7th Cir. 1983).

VOTING RIGHTS ENFORCEMENT IN THE BUSH ADMINISTRATION: THE FOUR-YEAR RECORD

by Frank R. Parker[1]

Introduction and Summary

The Bush Administration's record on voting rights has been uneven, with many of its successes overshadowed by vetoes, opposition to strong voting rights protections, and enforcement failures. Although President Bush supported the extension of the bilingual voting assistance provisions of the Voting Rights Act, he vetoed the "motor voter" voter registration bill, which would have removed discriminatory barriers to registration of minority voters and the disabled. The Administration also opposed the Presley/Rojas override bill designed to overrule two Supreme Court decisions that allowed governmental bodies to reduce the powers of newly-elected minority public officials without federal review under Section 5 of the Voting Rights Act.

The Administration's greatest success has been in lodging Section 5 objections to racially discriminatory redistricting plans adopted after the 1990 Census. Assistant Attorney General John R. Dunne objected to congressional and/or state legislative redistricting plans in eleven states covered by Section 5, and these objections contributed to the dramatic increases in black and Hispanic representation in Congress and state legislatures in recent elections.

However, redistricting plans in four states covered by the Section 5 preclearance requirement--which diluted minority voting strength and failed to create as many majority minority districts

as available alternative plans--eluded Justice Department review pursuant to a loophole that exempts court-ordered plans from federal preclearance. In the Texas case, the Justice Department itself helped defeat the Section 5 review process by objecting to a legislatively-enacted state Senate plan, which allowed a court-ordered plan with fewer winnable Hispanic districts to go into effect without Section 5 preclearance.

Regarding Section 2 of the Voting Rights Act, which applies nationwide, the Justice Department has filed and participated in several significant cases, but overall it has failed vigorously to enforce Section 2. Over the past four years the Voting Section, which with 37 attorneys is the largest in the Civil Rights Division, has filed only seven new Section 2 lawsuits, and in 1992 filed only one such lawsuit. This is fewer per year than were filed under Assistant Attorney General William Bradford Reynolds--who was hostile to Section 2--and fewer than were filed in any four-year period of the Reagan Administration. Private civil rights organizations, with far fewer attorneys, have filed many more Section 2 lawsuits during this period. The Voting Section has been especially remiss in failing to remedy racial discrimination in local redistricting which the Justice Department itself identified in Section 5 objections to 24 Mississippi county redistricting plans and 16 Louisiana parish redistricting plans.

The Supreme Court's landmark 1986 decision in Thornburg v. Gingles, which simplified the proof requirements under the

Section 2 results test, has enabled minority voters to win challenges to discriminatory voting and election practices in scores of cases across the country.

However, the Solicitor General in Supreme Court briefs has adopted an interpretation that undermines that decision. The Solicitor General has refused to accept the majority opinion in that case as controlling, and instead has espoused the position taken by the four-justice minority. Under this interpretation, whether a challenged voting system denies minority voters an equal opportunity to elect candidates of their choice is not determinative of a Section 2 lawsuit.

The Solicitor General's position already has had an adverse impact in two cases challenging discriminatory at-large judicial elections. The Supreme Court, at the Solicitor General's urging, suggested in dicta--contrary to the congressional purpose behind Section 2--that courts could consider a state's reasons for maintaining at-large voting for judges in deciding whether the challenged system results in discrimination against minorities.

Finally, the Bush Administration has continued a policy begun in the Reagan Administration of targeting minority political activists and voters for what many consider to be discriminatory and selective FBI investigations and Justice Department prosecutions for alleged vote fraud. Complaints against Republican "ballot security" programs and white offenders go unprosecuted.

I. Justice Department Voting Rights Responsibilities

The right to vote is fundamental to this country's democratic form of government, and therefore protection of the right to vote without discrimination is critical. Over the past 10 years, statutory and judicial developments have made the legal standards protecting minority voting rights stronger than ever before. Congress's 1982 amendments to the Voting Rights Act that eliminated the necessity of proving discriminatory intent to establish a violation, and the Supreme Court's subsequent simplification of the proof required under this 1982 "results" standard in Thornburg v. Gingles,[2] discussed later, have provided strong impetus for striking down voting practices that deny or dilute minority voting rights.

Despite the fundamental nature of the right to vote, and despite these recent legislative and judicial developments that have strengthened minority voting rights protections, the Bush Administration, despite some successes, has failed in significant instances to provide strong protection for minority voting rights.

The Attorney General has the ultimate responsibility for legal enforcement of voting rights protections in the Justice Department. However, for the past four years of the Bush Administration this responsibility appears to have been fragmented among various divisions of the Justice Department, apparently with very little coordination among these divisions.

The primary duty for voting rights enforcement rests with the Assistant Attorney General in charge of the Civil Rights

Division, who has been John R. Dunne, and the Division's Voting Section. Under Section 2 of the Voting Rights Act,[3] the Department is responsible for filing affirmative lawsuits anywhere in the country to eliminate voting practices and methods of election that have a racially discriminatory result.

Under Section 5,[4] the Department is responsible for reviewing voting law changes, including redistricting plans, submitted to it for preclearance by ten covered states and parts of seven others. The submitting state or locality has the burden of proving that the voting law change in not racially discriminatory in purpose or effect. If the Assistant Attorney General objects to the change, it may not be implemented unless the covered jurisdiction obtains a declaratory judgment in the U.S. District Court for the District of Columbia that the change is not discriminatory in purpose or effect.

The Civil Rights Division also is responsible for enforcing the bilingual voter registration and voting requirements for non-English-speaking citizens; for enforcing the Uniformed and Overseas Citizens Absentee Voting Act; for defending bailout suits filed by covered states and localities seeking to exempt themselves from the Section 5 preclearance requirement; for dispatching federal examiners (registrars) and observers (poll watchers) to covered states when needed; and for criminal prosecutions of violations of federal election and voting laws involving racial discrimination and intimidation based on race.

Other divisions that play a role in the voting rights

enforcement process are the Solicitor General's office, which represents the Department's position before the Supreme Court and controls Justice Department appeals in the federal courts; the Office of Legislative Affairs, which represents the Department's position on legislation before Congress; and the Criminal Division, which has responsibility for prosecution of federal crimes, including those relating to voting and election matters not involving discrimination or intimidation based on race.

II. Opposition to Voting Rights Legislation

One of the hallmarks of the eight years of the Reagan Administration was its opposition to legislation strengthening voting rights protections for minorities. Thus, the Reagan Administration vigorously opposed the 1982 amendment to Section 2 of the Voting Rights Act that eliminated the requirement of proving discriminatory intent in voting rights cases in favor of a "results" test and an extension for 25 years of the Act's time-limited provisions, including most critically the Section 5 preclearance requirement. These amendments were critical to continued protection for minority voting rights, passed both houses of Congress with overwhelming bi-partisan support, and in the end--despite the Administration's best efforts to defeat them--were signed by President Reagan.[5]

Similarly, the Bush Administration has opposed key voting rights legislation, including the "motor voter" voter registration bill, which President Bush vetoed, and the Presley/Rojas override bill to plug a Supreme Court-created

loophole in the Section 5 preclearance requirement.

A. The Motor Voter Registration Bill

The motor voter registration bill was designed to make it easier for eligible citizens to register to vote and to eliminate the current, state-by-state patchwork of discriminatory barriers to voter registration in federal elections. These discriminatory barriers include requirements that persons must travel to a central location, such as the county courthouse, to register to vote; limited hours and days for registration; restrictions on the appointment of deputy registrars; and the like. The bill was both a good-government measure to increase voter participation in federal elections, and also a civil rights bill to strike down registration restrictions that have a discriminatory impact on minorities.[6] In addition, the bill was strongly backed by groups representing disabled persons, who believed that mail-in registration and making voter registration available at state social service agencies would increase voter registration rates of disabled persons.

The bill provided for three methods of registration: (1) automatic voter registration whenever a qualified person applied for, or renewed, his or her driver's license; (2) registration by mail; and (3) registration at governmental offices serving the public, including welfare offices and unemployment offices. Supporters estimated that over time the bill would register 90 percent or more of the eligible electorate. Current voter registration rates are difficult to determine because most state

rolls contain large numbers of ineligible voters who have died or moved away. One measure of current registration levels is participation in elections. Studies have shown that only 55 percent of the eligible voting age population voted in the 1992 presidential election, and only 50 percent voted in the 1988 presidential election, despite reports of high turnout of registered voters.[7] Participation rates in congressional elections are typically much lower.

In 1990 and 1991 the bill was passed by decisive votes in the House of Representatives but blocked by Republican opposition in the Senate when supporters were unable to win enough votes to invoke cloture. In 1992 supporters found enough votes for cloture, and the bill (S. 250) passed the Senate by a 61-38 vote on May 20 and the House on a 268-153 vote on June 16.[8]

However, President Bush vetoed the bill on July 2. In his veto message, the President contended that the legislation "imposes an unnecessary and costly Federal regime on the states and . . . is, in addition, an open invitation to fraud and corruption," charges that the bill's supporters and experts on voter participation contended were unsupported.[9]

B. The Presley/Rojas Override Bill

The other major voting rights legislation which the Bush administration opposed was a bill (H.R. 5236) designed to overturn the Supreme Court's decisions in Presley v. Etowah County Commission[10] and Rojas v. Victoria Independent School District.[11] Both of these cases were unsuccessful challenges to

governmental actions that reduced the governmental powers of newly-elected minority public officials.

The issue was whether these discriminatory actions were covered by the preclearance requirement of Section 5 of the Voting Rights Act. The plaintiffs contended that they were covered, and Solicitor General Kenneth W. Starr, on behalf of the United States, filed an amicus curiae brief in the Supreme Court in the Presley case supporting the plaintiffs' position.

In the Presley case newly-elected black county commissioners challenged the actions of two majority-white county commissions that transferred decision-making authority over district budgets and county road construction from the individual county commissioners, including the black commissioners accountable to voters in majority black districts, to the whole commission or to white appointed officials. The Supreme Court held that these were not changes affecting voting that were covered by Section 5.

In Rojas, after an Hispanic member was elected, the county school board, which previously had allowed items to be placed on its agenda for meetings when only one member requested them, changed its procedural rules to require two votes to place any item on its agenda. This change prevented the Hispanic school board member from placing issues of concern to the Hispanic community on the school board agenda. The district court ruled that this change was not covered by Section 5, and the Supreme Court summarily affirmed.

The Supreme Court's decision in the Presley case was bitterly denounced by both the New York Times and the Washington Post, not only as inconsistent with prior decisions that took a broad view of the scope of Section 5 coverage, but also as the first instance in which the Supreme Court had rejected the Justice Department's interpretation of Section 5 coverage. "No act of Congress in this generation has earned or received more respect," said the New York Times of the Voting Rights Act. "Yet the Court casually accepts evasions of its purpose, casting aside a whole body of Federal lawmaking aimed at forcing white majorities to share political power with minorities."[12] Similarly, the Washington Post commented: "A rigid, clerkish, fundamentally unsynmpathetic court has found and raised another problem where none needed to exist. In the process it has unnecessarily sent another issue back to Congress to be resolved."[13]

The House Judiciary Committee, by voice vote, on June 4, 1992, reported out the Presley/Rojas override bill (H.R. 5236). The bill would have amended Section 5 to cover any change of procedural rules, voting practices, or transfers of decision-making authority that affected the powers of an elected official.[14] The bill also contained a section that overruled the Supreme Court's decision in West Virginia University Hospitals v. Casey and allowed prevailing plaintiffs in voting rights cases to recovery their expert witness expenses as part of costs.[15]

However, in a dramatic reversal from the position it took in

the Supreme Court, the Justice Department on the morning of the scheduled committee vote informed the committee that the Bush Administration opposed the bill. Contrary to its Supreme Court brief in the Presley case, the Administration stated that it "believes that the Voting Rights Act as currently written is sufficient to fulfill its purposes and consequently opposes this proposal."[16]

No floor vote was taken on the bill. In light of the Bush Administration's opposition to the bill and the fate of the motor voter registration bill, the chances that the Presley/Rojas override bill could have become law during the 1992 session of Congress were not good.

C. No Convincing Case for Opposing these Bills

The Bush Administration's opposition to these two bills reflected a continuity with the Reagan Administration's opposition to legislation that strengthened voting rights guarantees. It also undermined both the Bush Administration's stated intent not to repeat the mistakes of the past and its professed support for strong civil rights protections for minorities.

Moreover, it appears that the Administration's opposition to both measures was predominantly ideological, reflecting an anti-civil rights, anti-minority posture. Sponsors of both measures had made strong cases for their adoption. There is no doubt that the motor voter registration bill would have significantly expanded opportunities for voter registration, particularly among

groups--such as minorities--with the lowest registration rates. The Presley/Rojas override bill would have corrected Supreme Court rulings that most observers consider contrary to the spirit of prior Supreme Court decisions and that limited Section 5 coverage in a manner that has great potential for abuse.

In addition, the Administration failed to make convincing cases against either of the bills. The argument that the motor voter registration bill would be costly and invite vote fraud was unconvincing and unsupported. A majority of states now have one or more of these procedures (either driver's license registration, mail-in registration, and/or agency-based registration), and there have been no significant documented complaints of excessive cost or vote fraud caused by these procedures.[17] The Presley/Rojas bill was consistent with the Administration's position in its Supreme Court brief, and the Administration's letter opposing the bill not only directly contradicted its prior position but also failed to state any reasons for this change of position.

Further, it appears that the Administration's decision to oppose these bills was reached without any consultation with the leadership of the Civil Rights Division or with attorneys in the Department's Voting Section, who have primary authority for voting rights enforcement and extensive experience in dealing with minority voting rights issues.

The one piece of legislation which the Administration did not oppose was the extension of the bilingual voter registration

and election assistance provisions of the Voting Rights Act (H.R. 4312). These provisions, last extended in 1982, were scheduled to expire in August, 1992. President Bush supported the bill, although his Administration disagreed with some of the provisions expanding its coverage, and signed it into law. The bill extended bilingual voting assistance for 15 years and provided expanded coverage to any locality in which at least 10,000 persons speak a single language other than English, which would include urban areas such as Los Angeles, San Francisco, and Philadelphia.[18]

III. Justice Department Section 5 Enforcement

A. Section 5 Objections

Section 5 of the Voting Rights Act, for covered states, is the first line of defense against racially discriminatory voting law changes. Under Section 5, ten states and parts of seven others, mostly located in the South and Southwest and which in the past had disfranchised minorities or used English-only elections, are required to submit all their voting law changes for federal preclearance either by the Justice Department or by a three-judge U.S. District Court for the District of Columbia.[19] The submitting jurisdiction has the burden of proving that the change is not discriminatory, and if the Justice Department objects to the change (and/or the D.C. district court denies preclearance), the change may not be implemented.

During the Reagan years, William Bradford Reynolds, as the

Assistant Attorney General in charge of the Civil Rights Division and the official responsible for enforcing Section 5,[20] subverted the remedial purposes of Section 5 in a number of important ways. Reynolds objected to voting law changes at a much lower rate than his predecessors, approved discriminatory redistricting plans that later were struck down by the federal courts as racially discriminatory, approved changes that the Department previously had rejected, and unduly restricted what kinds of changes were covered by the preclearance requirement.[21]

The Bush Administration's Section 5 enforcement record under Assistant Attorney General John R. Dunne has been an improvement over the prior record. To my knowledge, there are no instances in which the Department approved discriminatory redistricting plans that later were struck down by the courts, no instances in which the Department approved discriminatory changes to which it previously had objected, nor any instances in which the Department placed any improper restrictions on what kinds of changes are covered. Indeed, the Justice Department's Supreme Court brief in the Presley case indicates that the Department has properly taken an expansive interpretation of the scope of the Section 5 preclearance requirement.

The single most important development in minority political participation in the past four years has been the unprecedented increase in the number of black and Hispanic members of Congress in the 1992 elections--and gains in state legislatures as well--following the creation of a large number of new majority black

and Hispanic districts in redistricting after the 1990 Census.

These new majority minority districts were necessary to help remedy the long-term, severe underrepresentation of minorities in Congress and state legislatures. Despite the enormous rise in the number of minority elected officials since 1965, minorities have continued to be disproportionately underrepresented in Congress and in state legislatures, particularly in the South.[22] During 1991 and 1992, state legislatures and federal courts in redistricting lawsuits created 15 new majority black and 8 new majority Hispanic congressional districts. In the 1992 congressional elections, 13 new black members of Congress and 6 new Hispanic members of Congress were elected from these new majority minority districts, producing a dramatic 53 percent increase in black and Hispanic representation in Congress.

At the state legislative level, in 1991 and 1992, because additional majority black districts were created, black representation increased in every Southern legislature, except Alabama. The largest increases were in Mississippi, where black representation in the state legislature increased 75 percent (from 24 to 42), and Louisiana, where black representation increased 60 percent (from 20 to 32).[23]

These increases in the number of majority black and Hispanic districts were in response to three major factors: the 1982 amendment to Section 2 of the Voting Rights Act; the Supreme Court's decision in Thornburg v. Gingles in 1986, which state legislatures widely interpreted as requiring them to create

additional minority districts;[24] and Justice Department Section 5 objections to discriminatory congressional and state legislative redistricting plans.

During 1991 and 1992 the Department objected to congressional redistricting plans and/or state legislative redistricting plans from eleven states, including some states only partially covered by Section 5, including Florida, New York, and North Carolina (see table 1). This high rate of Section 5 objections required most covered state legislatures to create more majority black and Hispanic congressional and/or legislative districts than they originally proposed. As table 1 shows, in some covered states the Justice Department objected to subsequent plans until additional majority minority districts were drawn. These Section 5 objections--and the threat of Section 5 objections to discriminatory plans--for covered states, provided a significant impetus to create additional majority black and Hispanic congressional and state legislative districts.

An analysis of the Justice Department's Section 5 objection letters indicates that Dunne, in reviewing new congressional and state legislative redistricting plans, applied a standard of review that examined a number of factors to determine whether the submitting jurisdiction has met its burden of proving that the submitted plan does not have a discriminatory purpose or a discriminatory result that violates Section 2.[25] The Department examined such factors as the impact of the proposed district boundaries on minority population concentrations to determine

whether there was fragmentation or packing of minority voting strength; whether the plan protected white incumbents at the expense of creating additional majority minority districts; whether the plan unnecessarily limited the number of majority minority districts, especially when alternative plans showed that additional majority minority districts could have been created; and the reasons given by state officials to justify their proposed district boundaries.

Table 1. Justice Department Section 5 Objections to Congressional and State Legislative Redistricting Plans, 1991-92

Alabama	
Congressional	3/27/92
Arizona	
Senate	6/10/92
House	6/10/92
Florida*	
Senate	6/16/92
Georgia	
Congressional (1)	1/21/92
Congressional (2)	3/20/92
Senate (1)	1/21/92
Senate (2)	3/20/92
House (1)	1/21/92
House (2)	3/20/92
House (3)	3/29/92
Louisiana	
Senate	6/28/91
House	7/15/91
Mississippi	
Senate (1)	7/2/91
Senate (2)	3/30/92
House	7/2/92
New Mexico	
Senate	12/10/91
New York*	
Assembly	6/24/92
North Carolina*	
Congress	12/18/91
Senate	12/18/91
House	12/18/91
Texas	
Senate	3/9/92
House	11/12/91
Virginia	
House	7/16/91

* States only partially covered by Section 5.

Source: U.S. Department of Justice, Voting Section

If additional majority black, Hispanic, or other minority districts could have been drawn without violating the state's neutral redistricting criteria, the submitting jurisdiction was required to explain its failure to create these additional majority minority. If those explanations were not convincing, the Department objected to the plan under Section 5, generally on the grounds that the submitting jurisdiction failed to show that plan did not have a discriminatory purpose and/or that the plan violated Section 2.[26]

The Justice Department's role in redistricting during 1991-92 has prompted some critics to suggest that political motivation behind these Justice Department Section 5 objections. In this round of redistricting, the Republican National Committee and some state Republican Party organizations assisted minority groups and sided with minorities in a number of redistricting challenges in the hope of increasing the number of Republican seats, particularly in Congress. Their strategy was that concentrating minority voters into heavily black and Hispanic districts would remove enough minority Democrats from adjoining districts to make those districts more Republican. Some have contended that in objecting to so many redistricting plans, and thus requiring states to devise additional majority minority districts, Dunne was acting in a partisan capacity to serve the interests of the Republican party.[27]

Dunne has denied this charge, and there is no direct evidence that in his Section 5 objections Dunne was doing

anything more than what the Voting Rights Act requires. Without being a party to Dunne's deliberations, it is difficult to know all the factors that may have gone into his decision-making. Nonetheless, there are a number of factors that contradict the Republican-conspiracy thesis behind these Section 5 objections.

First, there is no doubt that the changes in the Voting Rights Act's legal standards since 1982 required the Justice Department to apply--and the states to meet--a very strict standard of nondiscrimination in this round of redistricting. This is particularly true regarding the new Section 2 results test. The courts have held that when factors are present that show that at-large voting or a redistricting plan denies minority voters an equal opportunity to elect candidates of their choice, particularly when racially polarized voting regularly results in the defeat of minority-preferred candidates, the state or locality's failure to create additional majority minority districts where they can be created violates Section 2.[28] Justice Department regulations require the Department to object to new redistricting plans that violate Section 2.[29]

Second, in every instance in which a Section 5 objection was lodged, national civil rights organizations, minority state legislators, and/or local minority groups and leaders contended that the submitted plan failed to meet Voting Rights Act standards and requested Dunne to object. This is not to say that civil rights groups and minority groups controlled the process. There were instances in which Dunne was requested to object to

particular districts in which he did not object. Nonetheless, Dunne's objections generally were in response to complaints from civil rights and minority groups that the redistricting plan diluted minority voting strength.

At the same time, there were districts which state Republican organizations thought were discriminatory against Republicans to which Dunne did not object. For example, the Virginia Republican Party attacked the state's House of Delegates redistricting plan as a partisan gerrymander against Republicans. However, Dunne strictly limited his Section 5 objection to the plan to an area encompassing Richmond and three adjoining counties where the proposed district lines minimized black voting strength.[30]

Third, most of the new majority black and Hispanic congressional districts were created, not in response to Section 5 objections, but by Democratically-controlled state legislatures. In fact, Dunne objected to only three congressional redistricting plans from Alabama, Georgia, and North Carolina, which resulted in the creation of only two additional majority black districts out of a total of 15. The Alabama objection did not produce any new majority black districts; the district court in the state redistricting lawsuit ordered a plan into effect that contained only one majority black district--the same number as in the legislature's plan.[31] Dunne's Section 5 objections required the Georgia legislature to create a third majority black congressional district and the

North Carolina legislature to create a second majority black district for a total of only one additional majority black district in each of those two states.

Moreover, the creation of these 15 new majority black districts and 8 new majority Hispanic districts nationwide did not harm the Democratic party as much as some had expected. Early in the redistricting process some Republicans projected a gain at least 35 to 40 seats in the House of Representatives from redistricting, including the creation of new majority minority districts, a figure later reduced, prior to the 1992 elections, to 15 to 20 seats.[32] In fact, Republicans gained only 10 seats in the House, and according to press reports only two white Democrats possibly were defeated as a result of the creation of new majority minority districts.[33]

B. Problems in Section 5 Enforcement

Redistricting plans in four covered states completely escaped Justice Department review because these plans were ordered into effect by federal district courts in Voting Rights Act lawsuits. This loophole in Section 5 coverage presents a serious issue that should be addressed.

The Supreme Court ruled in 1971 in Connor v. Johnson,[34] without any discussion of the issue, that court-ordered redistricting plans were not subject to the Section 5 preclearance requirement and did not have to be submitted for Justice Department review. The apparent basis of the ruling was to avoid conflicts between an Executive Branch agency, the

Justice Department, and the Judicial Branch. If court-ordered plans had to be submitted for Justice Department review, and the Justice Department objected to the plan, it would, in effect, be reversing the district court's decision as well as depriving the district court of the authority to carry out its order.

This ruling creates a serious loophole in the Voting Rights Act's Section 5 preclearance requirement when federal courts, in picking among various proposed redistricting plans to adopt, apply legal standards that are less strict than those the Justice Department would apply, and the court adopts a plan with fewer majority minority districts than other available alternatives.

This problem arose in 1992 in four states covered in whole or in part by the Section 5 preclearance requirement. Federal court lawsuits were filed seeking court-ordered congressional redistricting plans in Alabama and Florida, a court-ordered state legislative redistricting plan in Texas, and both congressional and state legislative plans in South Carolina.

In each of these cases, the federal courts adopted remedial plans that failed to create majority black or Hispanic districts wherever possible, and, except possibly for the Florida plan, if they had been submitted to the Justice Department they would probably have drawn Section 5 objections.[35] The Alabama court-ordered plan created only one new majority black congressional district. When the state legislature subsequently adopted a congressional redistricting plan, the Justice Department objected to it because it created only one majority black district when

two were possible.[36] Although the reasoning of Justice Department's Section 5 objection to the legislature's plan was equally applicable to the court plan, the district court stuck with its one-black-district plan and it went into effect without Section 5 review.

In Texas, the district court adopted a state Senate plan that contained fewer winnable Hispanic majority districts than an alternative plan that had been agreed to by Mexican-American plaintiffs and the state in settlement of a state court redistricting lawsuit. When this settlement plan was subsequently adopted by the legislature and submitted for Section 5 review, it was approved by the Justice Department. However, the court-ordered plan, which was ordered into effect for the legislative elections and which had fewer winnable Hispanic districts, was never submitted for Section 5 review.[37]

In South Carolina, the district court's redistricting plan for the state legislature created fewer majority black districts than alternative plans, yet it went into effect without any Section 5 review by the Justice Department.

These unsubmitted court-ordered plans failed to protect minority voting rights to the extent possible. This Section 5 loophole also poses the danger of providing states and local jurisdictions that want to minimize the number of majority minority districts with an incentive to seek court-ordered plans, rather than adopt a plan of their own that would be subject to Justice Department review.

The Justice Department has not adopted any strategy to close this serious loophole in Section 5. In fact, in one state--Texas--the Justice Department in effect helped expand this loophole by blocking the legislative plan--which it previously had approved--from going into effect. As the Texas lawsuit developed, the federal court and the state legislature both adopted state Senate redistricting plans, and the legislature's plan had more winnable majority Hispanic districts than the court's plan. The Justice Department in November, 1991, gave Section 5 approval to the legislature's plan, which was substantively identical to a plan reached in settlement of a state court lawsuit.

Normally, a legislature's plan automatically supersedes any existing court-ordered plan. But in the Texas case, the federal district court, without having the legislature's plan officially before it, without holding a hearing on the issue, and without making any detailed findings of a Voting Rights Act violation, issued a one-line ruling that the legislature's plan violated Section 2.[38] The Justice Department, without any independent examination whether the legislature's plan passed muster under Section 5, then objected to the legislature's plan--which it had previously approved--solely on the basis of the district court's one-line ruling, thus allowing the court-ordered plan to go into effect for the 1992 legislative elections without Section 5 review.[39]

In addition, the Civil Rights Division's Voting Section does

not have any systemic program for detecting voting law changes that have been implemented without being submitted for Section 5 review. Nor does the Voting Section have a regular procedure for following up on Section 5 objections after an objection is lodged to ensure that objected-to changes are not implemented or to require the submitting jurisdiction expeditiously to remedy the violation.

The lack of any such systemic programs is shown in the low number of Section 5 enforcement lawsuits filed by the Voting Section to enjoin implementation of unprecleared changes and objected-to changes. During the four years of the Bush Administration, the Voting Section, which with 37 attorneys is the largest section in the Civil Rights Division, filed only six new Section 5 enforcement lawsuits, and in 1992 the Voting Section filed only one such lawsuit.[40] Particularly troubled is the Voting Section's failure, discussed infra, to follow up on Section 5 objections to county redistricting plans to remedy the discrimination which gave rise to the Section 5 objection.

IV. Justice Department Section 2 Enforcement

A. Lack of a Vigorous Litigation Program

Section 2 of the Voting Rights Act, which prohibits any voting practice that "results" in discrimination, today is the principal vehicle for lawsuits challenging racially discriminatory voting practices. These include discriminatory at-large election systems, redistricting plans, electoral rules, voter registration procedures, and other practices that dilute or

minimize minority voting strength. Section 2 applies nationwide and is used to challenge voting practices to which Section 5 does not apply, either because they were adopted before the effective date of Section 5 or because the jurisdiction is not within the geographical coverage of Section 5.

The Reagan Administration, with William Bradford Reynolds as Assistant Attorney General, was noted for hostility to Section 2 and its languid approach to Section 2 litigation.[41] A review of Section 2 litigation for the last four years indicates that the Bush Administration has been even less aggressive than its predecessor in challenging discriminatory voting practices under Section 2. Although the Bush Administration Justice Department has been willing to object to discriminatory plans under Section 5, in objecting the Justice Department plays only a passive role. On the other hand, when it comes to enforcing the Voting Rights Act by filing affirmative Section 2 lawsuits to win court orders against discriminatory voting systems, this requires the Department to exercise initiative, and here it falls markedly short.

This enforcement default has the most serious implications, since the Voting Rights Act itself gives primary enforcement responsibility to the Attorney General and the Justice Department. It means that many discriminatory voting practices go unchallenged and discriminatory jurisdictions can continue to dilute minority voting strength without Justice Department litigation.

To be sure, the Bush Administration Justice Department has since January, 1989, filed and prosecuted several highly visible and important Section 2 lawsuits. The Voting Section, at great expense, successfully challenged racial gerrymandering of county supervisors' districts in Los Angeles County in United States v. City of Los Angeles, a lawsuit that resulted in the election of the first Hispanic county supervisor in Los Angeles County in modern times. Similarly, the Voting Section filed a new lawsuit challenging Georgia's majority vote/election runoff requirement in United States v. Georgia. Further, Dunne personally handled the oral argument in the U.S. Court of Appeals for the Fifth Circuit in LULAC v. Clements, contending that discriminatory at-large judicial elections are covered by Section 2. Although the Fifth Circuit rejected Dunne's position by a vote of 13 to 1, the Supreme Court subsequently reversed the Fifth Circuit's ruling.[42]

Nonetheless, looking at the total number of Section 2 lawsuits filed, as shown in table 2, over the four years of the Bush Administration the Justice Department has actually filed fewer new Section 2 lawsuits per year than were filed by the Reagan Administration or than in any corresponding four-year period of the Reagan Administration. From 1989 to 1992, the Justice Department has filed a total of only seven new Section 2 cases, or only 1.75 per year, while during the prior eight years the Department filed 31 new Section 2 cases, for an average of 3.87 per year. This means that overall William Bradford Reynolds, who opposed the Section 2 results test and tried to

undermine it on numerous occasions, actually filed new Section 2 cases at more than twice the rate of the Bush Administration.

Table 2. New Section 2 Cases Filed by the Department of Justice During the Reagan and Bush Administrations.

Reagan Administration

Year	No. of New Sec. 2 Cases Filed
1983	4
1984	4
1985	5
1986	5
1987	11
1988	2
Bush Administration	
1989	1
1990	3
1991	2
1992	1

Source: U.S. Department of Justice statistics

During these four years the Voting Section's resources have not diminished; in fact they have grown. The Voting Section now has a total of 37 attorneys, making it one of the largest subject-matter sections in the Civil Rights Division. Even accounting for the fact that much of the section's staff and resources have been devoted to reviewing Section 5 submissions, especially redistricting plans submitted during 1991 and 1992, this low rate of new Section 2 filings translates into an average of only 0.19 Section 2 cases per attorney for the four-year period. Adding on the six substantive Section 5 enforcement cases filed since January, 1989, this produces an average of 0.35 substantive racial discrimination enforcement cases per attorney for the four-year period, as compared with an average of 1.7 substantive cases per attorney for the Reagan Administration.[43]

The lack of Justice Department Section 2 litigation cannot be explained by any significant decline in discriminatory voting practices vulnerable to litigation. When the Bush Administration's filings are compared with new Section 2 cases filed by private groups, the opposite appears to be true. During all of 1992 the Voting Section, with 37 attorneys, filed only 1 new Section 2 lawsuit. By comparison, during 1992 the Southern Regional Office of the American Civil Liberties Foundation in Atlanta, with 4 voting rights attorneys, filed 11 new Section 2 cases; the national NAACP, with 8 attorneys, filed 9 new cases; and the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law in Washington, with only 3 voting rights

attorneys, filed 5 new cases.

There is clearly a need for more Justice Department Section 2 litigation. One of the areas in which the Department has been particularly reluctant to act has been in following up Section 5 objections to local redistricting plans. During 1991 and 1992, the Department objected to 24 Mississippi county redistricting plans for racial discrimination. Section 5 objections prevent the county from implementing the objected-to plan, but they do not necessarily require the county to adopt a new plan to remedy the Section 5 objection. Frequently, this requires a lawsuit seeking a court order to force the county to adopt a new, nondiscriminatory plan.

Following the Justice Department Section 5 objections, many Mississippi counties simply dug in their heals, refused to adopt new plans, and announced their intention to use their old, unconstitutionally-malapportioned plans devised in the 1980s in the 1991 county elections. The Justice Department could have sued each of these counties that refused to adopt new plans for violating Section 2 of the Voting Rights Act. In each case, the Department objected to the new plans because they diluted black voting strength and without justification failed to create new majority black districts in areas where it was possible to do so. This, the Department determined, violated Section 5.

But the old plans, upon which the new plans were modelled, also diluted black voting strength in similar fashion and therefore had the same discriminatory defects as the objected-to

plans. In each of these cases, on the basis of the 1982 Voting Rights Act amendments and the Supreme Court's decision in Thornburg v. Gingles, the Justice Department could have made a valid claim that the existing plans violated Section 2, and that each of these counties was required to devise new, nondiscriminatory plans with additional majority black districts.[44]

Of these 24 Mississippi counties, the Justice Department filed a Section 2 lawsuit in only one, Walthall County, which has a relatively low black population percentage.[45] The result of Justice Department inaction is that private organizations and private litigants must bear the burden of filing Section 2 county redistricting lawsuits to remedy the violations that the Justice Department found to exist in its Section 5 objections, but has neglected to filed lawsuits to remedy.

Similarly, in Louisiana the Justice Department in 1991 and 1992 objected to redistricting plans in 16 parishes (counties). In 1991, when the parish government elections were scheduled to be held, a number of parishes simply suspended parish elections, either because the Justice Department had objected to their 1991 redistricting plans, or because Justice Department Section 5 review had not been completed and no ruling had been announced by the time of the scheduled elections. The Justice Department has failed to file any Louisiana lawsuits to compel these parishes to adopt new plans and to hold their postponed elections.

The reasons why the Bush Administration Justice Department

has not filed more Section 2 lawsuits are difficult to determine without direct access to internal deliberations. Nonetheless, one can make some inferences concerning this question. One problem is that the leadership of the Civil Rights Division, while not--unlike Reynolds--blocking the filing of any important lawsuits proposed by the Voting Section staff, has not vigorously insisted on a higher level of Section 2 enforcement litigation. The Division appears to have taken an increasingly cautious approach to Section 2 litigation, not filing cases if there is any reason not to do so and filing only those cases in which success is all but guaranteed, to the point of virtual paralysis. In addition, this low level of litigation activity creates a disincentive on the part of Voting Section staff to recommend many new cases for filing. Perhaps the infusion of new personnel, including attorneys with extensive litigation experience, will remedy this default.

B. Undermining the Section 2 Results Test

From its enactment, the Reagan Administration attempted to undermine the legal efficacy of the Section 2 results test. One major element of this opposition was the Justice Department's Supreme Court brief in Thornburg v. Gingles, which supported North Carolina's claims and sought to limit the protections of Section 2 and to reverse the district court's ruling that at-large legislative elections violated the Voting Rights Act.[46] The Supreme Court rejected the Justice Department's position and upheld the district court's ruling that the challenged plan

violated Section 2.

The Bush Administration's record has been more mixed. In a number of instances the Justice Department has supported Section 2 coverage and has recommended that the Supreme Court decline to review lower court decisions finding a Section 2 violation. However, in Supreme Court briefs the Justice Department has attempted to undermine the Court's landmark ruling in Thornburg v. Gingles by distorting the Court's ruling in a way that would make it more difficult for minority voter plaintiffs to prove a Section 2 violation. This legal revisionism not only has the potential for undermining numerous lawsuits filed by black, Hispanic, and other minority plaintiffs throughout the country, but also makes it harder for the Justice Department itself to prevail in Section 2 lawsuits.

The issue is: What specifically does the Section 2 statutory language and legislative history require plaintiffs to prove to establish a violation? The statutory language of the 1982 amendment to Section 2 prohibits any voting practice "which results in a denial or abridgement of the right . . . to vote on account of race or color,"[47] but does not define the elements of proof necessary to establish a violation. Section 2 states that a violation is established if "based on the totality of circumstances," the proof shows that minorities do not have an equal opportunity to elect representatives of their choice; provides that the number of minorities elected to office "is one circumstances which may be considered;" and disavows any right to

proportional representation.[48]

The Senate Judiciary Committee report accompanying the Senate bill stated that the committee's intent was to restore the legal standard that prevailed prior to the Supreme Court's decision in City of Mobile v. Bolden and listed seven "typical factors" and two "additional factors" that could be used to prove a violation.[49] However, the Senate report endorsed a "functional" approach and stated that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other."[50]

In the Thornburg v. Gingles decision, a majority of five Justices in an opinion by Justice William J. Brennan interpreted the statutory language and legislative history of Section 2 to require proof of three critical elements to prove a violation: (1) whether a majority black, Hispanic, or other minority district can be created; (2) whether minority voters are "politically cohesive," that is, whether minorities bloc vote for particular candidates; and (3) whether minority-preferred candidates are usually defeated by white bloc voting. The other elements listed in the Senate committee report, the majority ruled, were "supportive of, but not essential to, a minority voter's 2 claim."[51]

A minority of four justices, in a concurring opinion by Justice Sandra Day O'Connor joined by Chief Justice Burger and Justices Powell and Rehnquist, disagreed that minority electoral success or failure should be "the linchpin of vote dilution

claims." She contended that courts should "consider all relevant factors" bearing on whether minorities have less opportunity to elect candidates of their choice, including factors not listed either in the statute or in the legislative history, such as the extent of minorities' political influence outside the electoral process, a factor taken from the Court's ruling on political gerrymandering claims in Davis v. Bandemer.[52]

For minority voters challenging discriminatory voting systems, the Gingles majority's three-part test is simpler, more objective, more directly relevant to minority vote dilution claims, and easier to prove than Justice O'Connor's standard. Whether or not there is racially polarized voting and whether or not minority-preferred candidates usually are defeated can be determined by a statistical analysis of the election returns (although expert witnesses from both sides frequently dispute the method of analysis and the results). Similarly, whether a majority black, Hispanic, or other minority district can be created can be determined from the census data. Under this standard minority voters have been successful in striking down discriminatory electoral systems and redistricting plans in most of the Section 2 lawsuits filed.

Justice O'Connor's proposed legal standard is much more amorphous and subjective and fails to provide trial courts with any definitive guidance on what factors are the most important or what weight they should be given. In effect, Justice O'Connor's interpretation gives the district judges broad and almost

unlimited discretion to decide voting rights cases based on their own personal predelictions, with very little likelihood of reversal on appeal because there are no objective legal standards by which the district judges' rulings can be adjudged legally erroneous. To the extent that Justice O'Connor's proposed standard tracks the Davis v. Bandemer standard for adjudicating political gerrymandering claims, it is of no help to minority voters because that standard is so amorphous and undefined that no political gerrymandering claims have been found to satisfy it.

Further, Justice O'Connor's interpretation jeopardizes minority voting rights claims because it creates the risk that even if plaintiffs are successful in proving all three Gingles factors--and show that the challenged election system denies minority voters an equal opportunity to elect their preferred candidates because of white bloc voting--plaintiffs might still lose if the court determines that some other factor outweighs their Gingles proof.

Most of the federal courts of appeals have accepted Justice Brennan's Gingles opinion as controlling and, in significant instances, have applied it to reverse district court decisions erroneously rejecting Section 2 claims. Generally these courts have ruled that if minority voter plaintiffs satisfy the Gingles three-part standard, they should prevail whether or not other any of the other Senate report factors are present.[53]

However, for the past four years, the Solicitor General in

his Supreme Court briefs filed on behalf of the United States has refused to recognize the Gingles majority opinion and its three-part test as controlling. He has disregarded the majority opinion's ruling that, apart from the three essential factors, the other Senate report factors are "supportive of, but not essential to" a Section 2 claim and has generally espoused Justice O'Connor's amorphous, anything-is-relevant analysis. According to his interpretation, the three Gingles factors are merely "prerequisites" or "preconditions" to proving a Section 2 claim, and after they have been proven the court may consider any "other relevant factors" to determine whether Section 2 is violated.[54]

This is a remarkable position for the Solicitor General to take, not only because it makes Section 2 cases--including Justice Department cases--more difficult to win, but also because it means that the Solicitor General unilaterally has determined that a Supreme Court decision that has not been overruled is no longer controlling law in voting rights litigation, and that the position of a minority of Justices, which was not accepted by the majority, is now the law. This striking departure from the usual rule that Supreme Court decisions are the law until they are overruled or reinterpreted suggests that the Solicitor General's office remains politicized, and that the positions it takes in cases may continue to be tailored to conform to the political, social, and ideological views of the administration.[55]

The Solicitor General's position already has had an adverse

impact in two cases challenging at-large judicial elections for dilution of black and Hispanic voting strength. In Chisom v. Roemer and Houston Lawyers' Association v. Attorney General of Texas, the Supreme Court overruled an adverse Fifth Circuit decision and held that Section 2 covered judicial elections.[56] Although the question of what proof is required to establish a Section 2 violation was not presented, the Solicitor General's briefs gratuitously contended that courts should give weight to a state's "strong, nondiscriminatory reasons" for at-large voting as part of the "totality of the circumstances" in determining a Section 2 violation.[57]

This position fundamentally contradicts the legislative purpose of Congress in enacting Section 2, which was to prohibit racially discriminatory voting practices that result in discrimination, regardless of the motivation or reasons behind those practices.[58]

Nonetheless, the Court in dicta that does not constitute a Court ruling seemed to accept the Solicitor General's position and suggested that

> the State's interest in maintaining an electoral system--in this case, Texas' interest in maintaining the link between a district judge's jurisdiction and the area of residency of his or her voters--is a legitimate factor to be considered by courts among the "totality of circumstances" in determining whether a § 2 violation has occurred.[59]

Although the Court warned that this state interest is "merely one factor to be considered" and that "that interest does not automatically, and in every case, outweigh proof of racial vote

dilution," the Court's discussion does admit the possibility that in some cases lower courts could properly hold that even if plaintiffs prove that at-large voting dilutes minority voting strength, this proof may be outweighed by a state's interest in maintaining at-large elections.

The Supreme Court looks to the Solicitor General for guidance, particularly in interpreting statutes which the Justice Department is charged with enforcing. The new Solicitor General should return to the holding of the majority of the Court in the Gingles decision, and consider the majority ruling controlling authority unless and until overruled or revised by the Supreme Court.

V. Discriminatory Vote Fraud Prosecutions

Since 1984 the Justice Department has pursued criminal investigations and prosecutions that, minority leaders have charged, have singled out minority voters and political activists in a discriminatory manner, have harassed and intimidated minority voters, and have had a chilling effect on minority voting and campaigns for office.

The basis of these complaints is that in a number of significant cases the Justice Department has targeted minorities for extensive investigations and criminal prosecutions--some of which were dropped after protests from minority leaders or resulted in acquittals. At the same time, the Department has largely ignored minority voters' complaints of unlawful manipulation of the electoral process by whites, including

complaints against Republican "ballot security" programs in Alabama, Louisiana, New Jersey, North Carolina, and Texas, and allegations of voting irregularities on behalf of white candidates, especially in the South.[60]

In the first of these prosecutions, the Justice Department prosecuted three prominent, long-time Alabama civil rights activists, Albert and Evelyn Turner and Spencer Hogue, Jr., for alleged irregularities in assisting black voters who cast absentee ballots in Perry County, a poor, majority-black, Black-Belt Alabama county. The investigation and prosecutions were directed by the local U.S. Attorney for the Southern District of Alabama in Mobile, Jefferson B. Sessions, III, whose nomination for U.S. district judge subsequently was rejected by the Senate amid charges that Sessions was racially prejudiced against black people.

Albert Turner charged that the federal prosecutions were part of a politically-inspired "witchhunt" designed to blunt effective black leadership one year before the 1986 statewide elections, when elections were held for nearly every state and local office. "When all is said and done, this is a concerted effort to keep blacks from getting elected," Turner contended. Justice Department officials denied the charges. Although the Turners and Hogue were charged with 29 counts of criminal violations, they were acquitted on all counts.[61]

In some instances, however, the Justice Department has been able to obtain convictions. In another Alabama criminal

prosecution in 1985, two black political activists, Spiver Gordon and Frederick Douglas Daniels, and three other black citizens were convicted by majority-white juries in separate proceedings of casting unlawful votes for nursing home residents.[62]

In northern California, the U.S. attorney engaged in a dragnet-type criminal investigation of voters who exercised their right, secured by the Voting Rights Act itself, to request ballots in Spanish or Chinese. The U.S. attorney, Joseph P. Russoniello, sent letters to state district attorneys in nine counties requesting them to send him the names of recently-registered foreign-born voters who requested bilingual ballots. He stated that the purpose of this investigation was to gather names to submit to the U.S. Immigration and Naturalization Service (INS) to verify whether the voters were citizens and to determine whether there was any basis for prosecuting groups or individuals who may have registered ineligible voters. Russoniello stated that he had targeted Spanish and Chinese-speaking voters because there had been recent voter registration drives to register those groups.

California Secretary of State March Fong Eu and other minority leaders in California severely criticized this tactic because it singled out voters of Hispanic and Chinese heritage for investigation, and they expressed concern that it might have a chilling effect on bilingual minority voters' right to register and vote. Voters targeted by Russoniello's investigation filed a lawsuit challenging it, and the U.S. attorney dropped the

investigation when it failed to produce any evidence of fraudulent registrations.[63]

This policy of targeting minority political activists and minority voters, begun in the Reagan Administration, was carried over into the Bush Administration. In the most recent series of alleged vote-fraud prosecutions against minority citizens, FBI agents interrogated dozens of black voters in a two-year investigation concerning voting in a 1990 municipal election in Helena, Arkansas, located in majority-black, rural Phillips County in the Mississippi River delta. Black turnout was up in that election because a federal district court had just approved a new legislative redistricting plan that created ten new majority black legislative districts.[64]

Local black political leaders alleged that the investigation had a chilling effect on black political participation in eastern Arkansas. Linda Whitfield, who ran for circuit clerk in 1992 and was a campaign worker for black candidates in 1990, told the New York Times: "We had people who refused to sign petitions for black candidates to get on the ballot this time around [1992] because of these charges from two years ago. They have the impression that we led them to do something illegal, and that's going to hurt turnout." Another black political activist, state Representative Jimmie Wilson, complained that the indictments had unfairly cloaked legitimate political activism, especially efforts to promote absentee voting, in an aura of criminality. Justice Department officials in Washington denied any political

or racial motivation.[65]

The FBI investigation was started on the basis of complaints from state Republican Party officials who sent poll watchers to monitor the Helena elections. However, state prosecutors and the U.S. Attorney for the Eastern District of Arkansas refused to bring any criminal prosecutions, concluding that there was insufficient evidence of criminal conduct. Despite the refusal of local prosecutors to bring criminal charges, the Public Integrity Section of the Justice Department's Criminal Division in Washington obtained indictments against several black candidates and their campaign workers for allegedly forging signatures and falsifying absentee ballots in the Helena municipal election. A black mayoral candidate, Theortres Parham, and a black deputy registrar, Thomas Charles Johnson, in September, 1992 were acquitted of 18 counts of vote fraud but were found guilty of one count of conspiring to commit vote fraud.[66]

The complaints against these Justice Department vote-fraud criminal investigations and prosecutions raise serious issues. Each of these investigations targeted minority political activists or voters, and minority political leaders contend that they had an intimidating effect and discouraged minority political participation. Critics of these prosecutions say that numerous complaints of election irregularities by whites have been lodged with the Justice Department, including complaints against Republican "ballot security" programs involving

harassment and intimidation of minority voters in at least five states, but no criminal prosecutions have resulted.[67]

VI. Conclusions

During the past 10 years, Congress and the Supreme Court have taken steps to strengthen minority voting rights protections, but the Justice Department has been out of step with these developments, and even has resisted them. In resisting and attempting to undermine these developments, the Justice Department has stood in the way of progress in granting full political equality to America's historically-disfranchised minority citizens.

The promises of Bush Administration officials that they would not repeat the mistakes of the past and would be vigorous in voting rights enforcement were only partially fulfilled. Certainly, the Bush Administration Justice Department blocked implementation of numerous discriminatory congressional and state legislative redistricting plans, which contributed to an increase in the number of black and Hispanic legislators. The Administration also supported extension of the bilingual assistance provisions of the Voting Rights Act, supported minority voters' claims in the Supreme Court that at-large judicial elections are covered by Section 2, and filed several significant Section 2 lawsuits challenging discriminatory redistricting plans and voting practices.

However, these successes are tarnished by the Administration's unjustified opposition to the motor-voter

registration bill and the Presley/Rojas override bill, by its lack of interest in enforcing Section 2 through a vigorous litigation program, by its efforts to undermine the Supreme Court's landmark Thornburg v. Gingles decision, and by its discriminatory and selective investigations and prosecutions of minority political activists and voters.

President Clinton's victory and his opportunity for house-cleaning in the Justice Department provides an opening to reassess the policies of his predecessor administration and to take effective corrective action.

VII. Recommendations

1. The Clinton Administration should give its full support and work for passage of the motor voter registration bill, which opens up access to the voter registration process for federal elections and removes discriminatory barriers that have hampered minorities.

2. The Clinton Administration also should support the Presley/Rojas override bill that restricts state and local government actions that diminish the authority of minority elected officials, and that permits successful plaintiffs in voting rights cases to recover their expert witness expenses as part of costs.

3. The Assistant Attorney General in charge of the Civil Rights Division should remove existing barriers to approval of new Voting Rights Act litigation, and should increase the number of affirmative Section 2 lawsuits and Section 5 enforcement lawsuits to ensure vigorous Justice Department enforcement of the

Voting Rights Act's protections. The Department should adopt procedures to follow up closely on Section 5 objections, including objections to state and local redistricting plans, and to file lawsuits promptly if the jurisdiction fails within a reasonable time to remedy the objected-to discrimination.

4. The Justice Department should adopt policies, and seek legislation if necessary, to limit the extent to which jurisdictions covered by Section 5 may implement court-ordered redistricting plans without Justice Department review to determine whether the plans meet Section 5 standards of nondiscrimination.

5. The Solicitor General should reverse the Bush Administration's policy of advocating positions in Supreme Court briefs that undermine Section 2 enforcement and contradict the Supreme Court's majority decision in Thornburg v. Gingles. The Solicitor General should support the three-part Gingles test, which has enabled minority voters through Section 2 litigation to strike down numerous discriminatory voting practices throughout the country.

6. The Justice Department should review its policies and practices concerning vote-fraud prosecutions to ensure that minority activists and voters are not selectively targeted for unwarranted criminal prosecutions, while complaints against white groups and activists go unredressed.

1. The author gratefully acknowledges the assistance of Brenda Wright, Jacqueline Berrien, James Halpert, Kawana Mason, and Susan Batchelor of the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law in Washington, Laughlin McDonald, director of the Southern Regional Office of the ACLU in Atlanta, and attorney Edward Still of Birmingham, Alabama, in the preparation of this chapter.

2. 478 U.S. 30 (1986).

3. 42 U.S.C. § 1973.

4. 42 U.S.C. § 1973c.

5. See Frank R. Parker, "Voting Rights Enforcement in the Reagan Administration," pp. 365-66, ch. 21 in Report of the Citizens' Commission on Civil Rights, One Nation, Indivisible: The Civil Rights Challenge for the 1990s (Washington: Citizens Commission on Civil Rights, 1989).

6. See, e.g., Mississippi State Chapter, Operation PUSH v. Mabus, 932 F.2d 400 (5th Cir. 1991) (dual registration and restrictions on time and place of registration result in lower black voter registration rates).

7. Adam Clymer, "Election Turnout Highest Since '68," New York Times, Dec. 17, 1992, p. B16.

8. Richard Sammon, "Negotiators Steer Motor-Voter Back on Track in Senate," Congressional Quarterly Weekly Report, May 16, 1992, p. 1336; Elizabeth A. Palmer, "'Motor Voter' Drive Succeeds, But Promised Veto Awaits," Congressional Quarterly Weekly Report, June 20, 1992, p. 1795.

9. "Democrats, Perot Criticize Bush for 'Motor Voter' Veto," Congressional Quarterly Weekly Report, July 4, 1992, p. 1983.

10. 112 S.Ct. 820 (1992).

11. 490 U.S. 1001 (1989).

12. Editorial, "The Runaway Supreme Court," New York Times, Feb. 2, 1992, p. A16.

13. Editorial, "The Reach of the Voting Rights Act," Washington Post, Feb. 12, 1992, p. A22.

14. "Judiciary Committee Endorses Voting Rights Measures," Congressional Quarterly Weekly Report, June 6, 1992, p. 1609.

15. In West Virginia University Hospitals v. Casey, 111 S.Ct. 1138 (1991), the Supreme Court reversed a long-standing practice and ruled that successful plaintiffs in civil rights and other cases, in which recovery of attorneys' fees and litigation expenses from the defendants is authorized by statute, could not recover their expert witness expenses. In most voting rights cases today, expert witness testimony is critical to the success of the case, and expert witness expenses generally constitute the largest single litigation expense. The Court's ruling, as a practical matter, severely restricts access to the courts for victims of voting discrimination.

16. Letter from W. Lee Rawls, Assistant Attorney General, Office of Legislative Affairs, to Hon. Henry J. Hyde, June 4, 1992.

17. For example, in 1991 Mississippi became the twenty-seventh state to adopt mail-in voter registration. The Mississippi statute also makes voter registration forms available at driver's license examining stations and other government facilities.

18. "Bilingual Voting Bill Clears," Congressional Quarterly Weekly Report, August 8, 1992, p. 2367; Kitty Dumas, "Bilingual Voting Help Extended After Partisan Scrap in House," Congressional Quarterly Weekly Report, July 25, 1992, p. 2179.

19. The states covered by the Section 5 preclearance requirement are: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, New Mexico, South Carolina, Texas, and Virginia, and parts of California (four counties), Florida (five counties), Michigan (parts of two counties), New Hampshire (parts of seven counties), New York (Manhattan, Brooklyn, and the Bronx), North Carolina (forty counties), and South Dakota (two counties). New Mexico, which was not included in the statutory coverage formula, is covered because of a 1984 court order entered pursuant to Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c), in Sanchez v. Anaya, Civil No. 82-0067 (D.N.Mex. December 17, 1984).

20. The statute vests the power to lodge Section 5 objections with the Attorney General. The Attorney General has delegated this power to the Assistant Attorney General in charge of the Civil Rights Division. Section 5 objections frequently are referred to as Attorney General objections or Justice Department objections, but the objections are made by the Assistant Attorney General.

21. See Parker, "Voting Rights Enforcement in the Reagan Administration," pp. 374-81.

22. Before the 1992 elections, although black citizens constitute 12 percent of the population, black representatives comprised only 6 percent of the U.S. House of Representatives (none of the 100 U.S. senators were black). Similarly, although Hispanics constitute 9 percent of the population, they were only 2.5 percent of the U.S. House of Representatives. These statistics count voting members only.

Similarly, before legislative elections in 1991 and 1992, four Southern states--Louisiana, Mississippi, South Carolina, and Virginia--had disparities of 10 percentage points or more between the black percentage of each state's voting age population and the percent black of each state legislature.

23. Joint Center for Political and Economic Studies, chart, "Black State Legislators: Aftermath of 1992" (1992).

24. The Supreme Court in Gingles held that to prove a Section 2 violation, plaintiffs had to prove (1) that a majority minority district could be created; (2) that minorities were politically cohesive, that is, they voted for the same candidates; and (3) that minority-preferred candidates usually were defeated by white bloc voting. This meant that if there was was racially polarized voting in any jurisdiction (e.g., minorities voting for minority candidates; whites voting for white candidates; minority candidates losing in white majority districts), then the failure to create majority minority districts where they could be created constituted a Section 2 violation.

25. The Justice Department's Section 5 regulations allow a Section 5 objection "to prevent a clear violation of amended Section 2." Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.55(b) (1987).

26. This analysis is based on a review of the Justice Department's Section 5 objections to congressional and state legislative redistricting plans for the past two years. For examples of the application of these criteria, see Section 5 objection letter from John R. Dunne to Samuel B. Nunez, President of the Louisiana Senate, June 28, 1991 (Senate districts); Section 5 objection letter from Dunne to Jimmy N. Dimos, Speaker of the Louisiana House of Representatives, July 15, 1991 (House districts); Section 5 objection letter from Dunne to Hainon A. Miller, Chair of the Mississippi Senate Elections Committee, July 2, 1991 (Senate and House districts); and Section 5 objection letter from Dunne to Tiare B. Smiley, North Carolina Special Deputy Attorney General, Dec. 18, 1991 (Congressional, Senate, and House districts);

27. See, e.g., Jay Mathews, "Color-Coded Congressmen," Newsweek, Sept. 21, 1992, pp. 67-68; Richard Wolf, "Mapmakers Focus Minority Voting Power," USA Today, May 11, 1992, p. 11A; Richard E. Cohen, "Voting Rights Act Could Haunt Democrats," National Journal, Jan. 4, 1992, p. 36; Stuart Taylor, "Voting By Race," American Lawyer,

June, 1991, pp. 50-51.

28. See Thornburg v. Gingles, 478 U.S. 30 (1986); Jeffers v. Clinton, 730 F. Supp. 196 (E.D. Ark. 1989) (three-judge court), aff'd mem., 111 S.Ct. 662 (1991).

29. 28 C.F.R. § 51.55(b).

30. Section 5 objection letter from Dunne to K. Marshall Cook, Virginia Deputy Attorney General, July 16, 1991.

31. Wesch v. Hunt, 785 F. Supp. 1491 (S.D. Ala. 1992) (three-judge court), appeal pending, No. 91-1991 (filed June 5, 1992), 61 U.S.L.W. 3017.

32. Adam Clymer, "G.O.P. Hopeful of Big Gains, Sees Its Chances Fade," New York Times, Nov. 2, 1992, p. A16.

33. The Washington Post reported that as a result of redistricting Democratic Rep. Ben Erdreich of Alabama last to Republic Spencer Bachus and Democratic Rep. Richard Ray of Georgia lost to Republican Mac Collins. Helen Dewar and Kenneth J. Cooper, "Democrats Keep Hold on Both Houses," Washington Post, Nov. 4, 1992, pp. A1, A28.

34. 402 U.S. 690 (1971).

35. Wesch v. Hunt, 785 F. Supp. 1491 (S.D. Ala. 1992) (three-judge court), appeal pending, No. 91-1992 (filed June 5, 1992), 61 U.S.L.W. 3017 (Alabama); Burton v. Shaheen, 793 F. Supp. 1329 (D.S.C. 1992) (three-judge court), appeals pending, Nos. 92-155, 92-219 (filed July 21 and 31, 1992), 61 U.S.L.W. 3083, 3112 (South Carolina); Terrazas v. Slagle, Civil No. 91-CA-426 (N.D. Tex. Dec. 24, 1991 and Jan. 10, 1992), aff'd mem., 61 U.S.L.W. 3253 (Oct. 5, 1992) (Texas).

The district court in the Florida redistricting lawsuit adopted a plan creating three new majority black congressional districts, the first new majority black congressional districts in Florida since Reconstruction. A fourth majority black district could have been created, but this would have required other majority black districts to be reconfigured and may have given black voters greater than proportional representation. Litigation continues in this case on challenges to the number of minority districts in the House and Senate plans in the Dade County (Miami) area. DeGrandy v. Wetherell, 794 F. Supp. 1076 (N.D. Fla. 1992) (three-judge court), appeals pending, Nos. 92-519, 92-593 (filed Sept. 22 and 19, 1992), 61 U.S.L.W. 3340, 3373.

36. Section 5 objection letter from Dunne to Jimmy Evans, Alabama Attorney General, March 27, 1992.

37. The district court-ordered plan took effect for the 1992 elections because the Justice Department subsequently objected to the legislature's plan, as discussed infra.

38. Terrazas v. Slagle, supra.

39. Section 5 objection letter from John R. Dunne, Assistant Attorney General, to John Hannah, Jr., Texas Secretary of State, March 9, 1992.

40. Voting Section, table, "Voting Section Cases in which the United States' Participation Began since January 20, 1989," Oct. 5, 1992.

41. Parker, "Voting Rights Enforcement in the Reagan Administration," pp. 367-68.

42. Parker, "Voting Rights Enforcement in the Bush Administration: The First Two Years," pp. 144-45, ch. 16 in Report of the Citizens' Commission on Civil Rights, Lost Opportunities: The Civil Rights Record of the Bush Administration Mid-Term (Washington: Citizens' Commission on Civil Rights, 1991). The Fifth Circuit's decision in LULAC v. Clements, holding that at-large judicial elections are not covered by Section 2, was reversed by the Supreme Court in Houston Lawyers' Association v. Attorney General, 111 S.Ct. 2376 (1991).

43. Parker, "Voting Rights Enforcement in the Reagan Administration, " pp. 367-38.

44. The fact that the Justice Department had precleared these plans in the early 1980s is no bar to Justice Department lawsuits now. The law is settled that Section 5 preclearance does not preclude a subsequent challenge under Section 2, Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984) (three-judge court), aff'd in relevant part sub nom. Thornburg v. Gingles, 478 U.S. 30 (1986), and, besides, the Department could validly argue that the legal standards had changed since those plans were approved.

45. United States v. Walthall County (S.D. Miss. filed Nov. 4, 1991).

46. Parker, "Voting Rights Enforcement in the Reagan Administration," pp. 369-70.

47. 42 U.S.C. § 1973(a).

48. 42 U.S.C. § 1973(b).

49. See Parker, "Voting Rights Enforcement in the Reagan Administration," pp. 365-66. The seven factors listed in the Senate report were: (1) History of official discrimination; (2) racially polarized voting; (3) discriminatory voting practices or

procedures; (4) discrimination in slating candidates; (5) socioeconomic disparities between whites and minorities; (6) racial campaigning; and (7) number of minorities elected to office. The two additional factors that the Senate report said "in some cases have had probative value" are unresponsiveness of elected officials to minority needs and whether the state's policy underlying the challenged voting practice is "tenuous." S. Rep. No. 97-417, 97th Cong., 2d Sess. 28-29 (1982).

50. Id.

51. 478 U.S. at 49-51 and 48 n. 15.

52. 478 U.S. at 93, 97-100. See Davis v. Bandemer, 478 U.S. 109 (1986).

53. Concerned Citizens v. Hardee County Board, 906 F.2d 524 (11th Cir. 1990); Collins v. City of Norfolk, 883 F.2d 1232 (4th Cir. 1989), cert. denied, 490 U.S. 1068 (1990); Gomez v. City of Watsonville, 863 F.2d 1407 (9th Cir. 1988), cert. denied, 489 U.S. 1080 (1989). The Fifth Circuit has ruled that the three Gingles factors are preconditions to establishing a Section 2 claim, but that they are not sufficient and other factors also should be considered, East Jefferson Coaltion v. Parish of Jefferson, 926 F.2d 487, 491 (5th Cir. 1991), and the Eleventh Circuit, in an en banc decision, was evenly divided on this issue, Solomon v. Liberty County, 899 F.2d 1012 (11th Cir. 1990) (en banc), cert. denied, 111 S.Ct. 670 (1991).

54. Brief for the United States as Amicus Curiae Supporting Appellants, p. 8, Growe v. Emison, No. 91-1420 (October Term, 1991) (filed May 29, 1992).

55. Lincoln Caplan, "Solicitor (Too) General," Washington Post, Jan. 5, 1993, p. C5.

56. Chisom v. Roemer, 111 S.Ct. 2354 (1991); Houston Lawyers' Association v. Attorney General of Texas, 111 S.Ct. 2376 (1991).

57. Brief for the United States, pp. 17-28, Houston Lawyers' Association v. Attorney General of Texas, 111 S.Ct. 2376 (1991); Brief for the United States, pp. 34-36, Chisom v. Roemer, 111 S.Ct. 2354 (1991).

58. See S. Rep. No. 97-417, supra, pp. 27-30.

59. Houston Lawyers' Association, 111 S.Ct. at 2380.

60. See Smith v. Meese, 821 F.2d 1484 (11th Cir. 1987); Olagues v. Russoniello, 797 F.2d 1511 (9th Cir. 1986), vac'd and remanded as moot, 484 U.S. 806 (1987); Hearing on Civil Rights Implications of Federal Voting Fraud Prosecutions Before the Subcommittee on Civil

and Constitutional Rights of the House Committee on the Judiciary, 99th Cong., 1st Sess (1986); Bode, "Ballot Bollix," New Republic, July 15 and 22, 1985, pp. 21, 23; Tullos, "Not-So-Simple-Justice," Southern Changes, May-June, 1985, p. 10.

61. Jon Nordheimer, "Blacks Question U.S. Motives in Vote Fraud Trial," New York Times, June 17, 1985, p. 12. Smith v. Meese, supra.

62. United States v. Gordon, 817 F.2d 1538 (11th Cir. 1987); United States v. Underwood, 617 F. Supp. 713 (N.D. Ala. 1985).

63. Olagues v. Russoniello, supra.

64. Ronald Smothers, "Blacks Say G.O.P. Ballot Challenges Are Tactic to Harass Minority Voters," New York Times, Oct. 25, 1992, p. 20.

65. Id.

66. Id.

67. See Smith v. Meese, supra; Hearing on Civil Rights Implications of Federal Voting Fraud Prosecutions, supra.