

AGENDA TO ACHIEVE GENDER-EQUITY IN EDUCATION

by Ellen Vargyas

The dramatic improvement of our nation's education system must be a key priority for the next four years. Nothing less is required if we are to enable all Americans to achieve economic self-sufficiency and develop the skills and abilities necessary to take us into the twenty-first century on a world class basis. As questions of educational reform are addressed it is essential that steps to assure educational equity for girls and women -- along with equity for all individuals -- are a key part of the agenda.

While equity must be introduced into educational programs and activities across the board, we propose that the new Administration begin by considering the following recommendations in connection with three specific education program areas: the reauthorization of the Elementary and Secondary Education Act, the Department of Education's Office for Civil Rights, and the National Service program.

I. THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT

The Elementary and Secondary Education Act (ESEA) is the principal federal law which pertains to and provides funds for elementary and secondary education across the country. This Act will be reauthorized by Congress in 1993 and thus provides an excellent vehicle for immediately addressing considerations of educational equity. We propose an eight point gender-equity agenda

for the ESEA Reauthorization.

A. Women's Educational Equity Act and Office of Gender Equity in the Department of Education. The Women's Educational Equity Act (WEEA) program was established in 1974 to promote the letter and spirit of Title IX of the Education Amendments of 1972, the primary federal law prohibiting sex discrimination in education. WEEA has funded research, development and dissemination of curricular and analytic materials, training programs, and other initiatives to promote equity in education. In recent years, WEEA has been targeted for elimination; it has survived the past two administrations in barely skeletal form. It is of critical importance to assure that WEEA once again has sufficient resources and support to undertake its important mission. At the same time, the experience of the past eighteen years should be applied to fine tune WEEA and, more generally, the Department of Education's role in assuring educational equity.

To that end, we propose a new Office of Gender Equity in the Department of Education which will report directly to the Secretary. Its purposes will be to: 1) house WEEA; 2) coordinate gender equity efforts in educational programs and activities both within the Department and in the government more broadly; 3) provide technical assistance to educators and educational institutions and otherwise promote and evaluate the implementation of gender-equity initiatives in education. WEEA itself must be funded at a level adequate to implement its mandate. Moreover, it should place an increased emphasis on the dissemination of research

and model curricular materials, as well as the provision of assistance to enable school districts to implement programs and activities designed to eliminate discrimination and achieve educational equity.

B. Drop-out Prevention. It is well documented that young women drop out of school at almost the same rate as young men, but often do so for different reasons.¹ Research shows that approximately half of female drop-outs are either pregnant or parents.² A significant number of additional female drop-outs become pregnant shortly after dropping out.³ Studies also show that the majority of teens who give birth are not high school graduates.⁴ Indeed, teen mothers complete fewer years of schooling and are less likely to graduate than are their non-mother peers.⁵ Clearly, pregnancy and parenting are directly and deleteriously associated with the failure of educational attainment. This failure directly correlates with substantial problems faced by young mothers in achieving economic self-sufficiency for themselves and their families.⁶

In spite of this, however, drop-out programs and related programs for at-risk youth rarely address the particular problems faced by pregnant and parenting young women. An informal study of programs funded by the School Dropout Demonstration Assistance Act of 1988, Title VI, Part A of the ESEA, shows only a small percentage which specifically address this population. More broad-based studies confirm that both drop-out prevention programs and

programs to re-enroll drop-outs shortchange pregnant and parenting students.⁷ We can no longer afford to ignore these young women.

We recommend that strategies to keep pregnant and parenting students in school -- and to bring back to school those who have dropped out -- must be front and center priorities for drop-out programs reauthorized by the ESEA. Strategies which should be considered include, for young women still in school: (1) the coordination and provision of health and social services, at school-based facilities if possible, that are necessary to enable pregnant and parenting students to stay in school; (2) the use of case managers and advocates to assist young women to access school and community-based services; and (3) the review of school policies and practices to assure that they accommodate the needs of pregnant and parenting students. In order to reach pregnant and parenting students who have already dropped out, special outreach efforts must be developed. These typically will focus on the health care and social service delivery systems as effective ways to reach young mothers and mothers-to-be.

C. School-Based Services. Many students, particularly disadvantaged, pregnant and parenting students, need school-based health and social services to enable them to take advantage of an educational program. We strongly endorse proposals to provide health care, child care, and other social services provided at school-based facilities. Such services will complement the strategies discussed above to assure that drop-out programs properly serve pregnant and parenting students. However, they are

not an alternative to such efforts. Many students who are neither pregnant nor parenting will benefit from school-based services. Moreover, these services are not a substitute for the need for advocates and case-managers to assist students still in school to negotiate the system effectively nor for the very important outreach efforts to pregnant and parenting students who have already dropped out. Useful models for school-based services programs are found in legislation introduced in the past Congress by Senator Kennedy⁸ and Representative Lowey.⁹

D. Sexual Harassment and Assault. The widespread nature and devastating impact of sexual harassment and assault in our nation's schools¹⁰ is a matter of the highest national concern. Unfortunately these issues have largely been absent from proposals to make our schools safe and secure places to learn. Initiatives targeting sexual harassment and abuse must be integral parts of such programs. Moreover, as discussed below in more detail in connection with recommendations regarding civil rights enforcement, the Office for Civil Rights in the Department of Education must develop -- and enforce -- guidelines regarding sexual harassment in education.

E. Teacher Training Programs. One of the most effective means of eliminating inequitable practices in education is training for teachers, other school staff, and parents. Research shows that the content and quantity of teachers' interactions with female students are all too often inequitable.¹¹ Training for teachers and parents can help them identify and change the unexamined practices that

create gender inequities. Such programs should be funded through the ESEA.

F. Math and Science Programs. Women and girls continue to be underrepresented in advanced math and science courses.¹² If we are to achieve the national education goal of becoming world leaders in math and science, we can no longer afford to ignore half of our population. Math and science programs, including those supported by the Eisenhower Math and Science Education Act, must take positive and concrete steps through targeted teacher training and recruitment and the development of programs designed to meet the needs of women and girls, to assure that all students receive rigorous and comprehensive training in math and science.

G. Assessment. Assessment, often in the form of standardized testing, has assumed a heightened role in discussions of educational reform. It is thus a matter of substantial importance that Congress take positive steps to assure that tests are not used in a discriminatory manner.

Available research demonstrates that many test uses are gender-biased. That is to say, despite their image of objectivity and reliability, many test scores provide different information depending on the sex of the test taker. For example, the Scholastic Aptitude Test (SAT) is validated as a predictor of first year college grades. However, while female college freshman get higher grades than their male counterparts, they receive lower SAT scores. The SAT overpredicts male performance and underpredicts female performance. Moreover, research demonstrates similar

problems with a variety of other tests, including two tests widely used in connection with secondary school vocational education programs, the Armed Services Vocational Aptitude Battery and the Differential Aptitude Test. Other test uses provide little, if any, information of value at all. For example, the SAT is only validated for the prediction of first year college grades. It is used, however, for a wide variety of other purposes.¹³

We recommend that the ESEA reauthorization explicitly provide that only those uses of standardized tests which are demonstrated to be valid and non-discriminatory may be permitted in our nation's elementary and secondary schools.

H. Data Collection. There are substantial gaps in research regarding gender issues in education which severely impede the ability to develop effective solutions to demonstrated problems. We know, for example, that a disproportionate number of participants in special education programs are boys, but we do not know why or how that has happened.¹⁴ Substantial work needs to be done to more fully understand the reasons leading young women to drop out of school and what works to keep them in school. We suffer from a similar lack of information in determining the reasons underlying the relatively low participation of females in math and science programs, as well as understanding why females achieve lower scores, on average, on standardized tests than do their male peers.

In addition, because data is only rarely cross-tabulated by race or national origin and sex, we are at a great disadvantage in understanding the particular problems facing girls and women of color. By way of example, available data shows that girls and women of color are the lowest scorers on standardized tests, but virtually no research has been conducted to understand this extremely disturbing phenomenon.¹⁵ Without such information, the development of effective solutions is virtually impossible.

We recommend that wherever feasible data which is collected should be cross-tabulated by race or national origin and sex. In addition, we must place a high priority on conducting research regarding gender issues in education, including, for example, the reasons underlying female drop-out rates, the low participation of girls and women in math, science, and technical programs, and the reasons why females consistently score lower than their male peers on many assessment instruments.

II. CIVIL RIGHTS ENFORCEMENT

One of the most disturbing legacies of the past twelve years stems from the federal government's virtual abdication of its responsibility to enforce the civil rights laws. The Department of Education's Office for Civil Rights (OCR), which is charged with the enforcement of, among other civil rights laws, Title IX of the Education Amendments of 1972, is a prime example of the problem. Indeed, during the Reagan-Bush years, OCR did not institute enforcement proceedings on a single Title IX case, either through

agency defunding or referral to the Department of Justice. Instead, where it found a possible violation of the law, it contented itself with negotiating weak conciliation agreements with offending institutions and then typically failing to monitor whether the institution actually implemented the assurances it had provided. Oftentimes, the assurances were simply ignored. The result was entirely predictable: because administrative enforcement has been so weak, education institutions have paid scant attention to the non-discrimination requirements of Title IX and other civil rights statutes.

We recommend that the Department of Education and OCR take the following steps to assure the proper enforcement of Title IX:

- The Department of Education and the Office for Civil Rights must clearly announce in all available forums that they are back in the business of civil rights enforcement and that education institutions will ignore the requirements of Title IX -- as well as other civil rights laws -- at their own risk.

- OCR must abandon its practice of closing complaints based on the "assurances" of institutions that they will come into compliance and then failing to enforce rigorously such assurances. While conciliation is, of course, an important function of the office, agreements made by institutions are only as good as the efforts to assure that such agreements are implemented. Moreover, OCR should seek to obtain the strongest possible conciliation agreements and end its practice of closing cases based on

representations by the education institutions under investigation that they will take minimal steps towards compliance.

- OCR must institute enforcement proceedings in appropriate cases either through the Department of Education's defunding process or by referral to the Department of Justice. To implement this recommendation, OCR and the Department of Justice, through its Civil Rights Division, must develop a cooperative working relationship to facilitate effective investigations and referrals. The agencies must, in particular, develop strategies to take advantage of the recent Supreme Court decision in Franklin v. Gwinnett County, 112 S.Ct. 1028 (1992) which provides for a monetary damages remedy in cases of intentional discrimination in violation of Title IX as well as the other federal funding statutes, Title VI, Section 504 and the Age Discrimination Act.

The total absence of enforcement proceedings in recent years has sent a powerful signal to the education community that discrimination is not a matter to be taken seriously. A targeted enforcement program which effectively uses the tools provided by Franklin will eradicate that image and put civil rights enforcement back on the front burner of education institutions across the country.

- OCR has never developed formal policy guidance on two important issues of sex discrimination in education: sexual harassment and the discriminatory use of testing. The development of such guidance must be of the highest priority for OCR.

1. Sexual Harassment: In the same decision which established a damages remedy under Title IX, the Supreme Court in Franklin v. Gwinnett County Public Schools, 112 S.Ct. 1028 (1992), also clarified that Title IX prohibits the full range of sexual harassment in education. Because the case law regarding this subject in the educational context is only at a most preliminary stage of development, there are many important outstanding questions regarding the rights and obligations of institutions, employees and students regarding sexual harassment. Guidance from OCR would have a salutary effect in assisting all members of the education community to understand better and combat this pernicious form of discrimination. OCR should use as a reference point the EEOC Guidelines on Sexual Harassment¹⁶ and the case law which has developed regarding sexual harassment in employment, but it should adjust these principles to accommodate the often different context of education, particularly regarding faculty or staff harassment of students and student to student harassment.¹⁷

2. Discrimination in Standardized Testing: Problems of discrimination in testing are becoming increasingly urgent with the ever-increasing interest in testing as an instrument of educational reform.¹⁸ While the EEOC has long administered the Uniform Guidelines on Employee Selection¹⁹ which give employers detailed guidance in developing and administering non-discriminatory employment tests, such guidance is singularly lacking in connection with educational test uses. Similar guidance, adapted for educational testing, would do much to assure that increased

reliance on testing in education does not simply become a proxy for discrimination.

- Finally, although OCR has jurisdiction over the laws prohibiting discrimination in education on the basis of sex, race, national origin, disability, and age, it has never addressed the very serious problems of multiple discrimination facing, for example, girls and women of color or girls and women with disabilities. A model for analyzing such discrimination has been developed in the courts under Title VII.²⁰ This model should be adapted by OCR to expand the effectiveness of its civil rights enforcement efforts for women of color, women with disabilities and older women.

III. NATIONAL SERVICE

In 1990, Congress passed the National and Community Service Act, which provides funding for community service programs, including youth corps, offering education and job training along with service opportunities, educational "service-learning" programs tied to school and college curricula, and model national service programs offering scholarships in exchange for a certain number of hours of service. President-elect Clinton proposes to expand this system through a National Service Trust Fund, which would provide college loan forgiveness to those who serve for two years.

This proposal could have important benefits for girls and women. It has the potential to expand access to higher education, provide job training in non-traditional fields, offer an

alternative to traditional classroom education, and provide needed services to low-income women and their families. We also expect that participants will, as a result of their experience, understand better and become advocates for those they serve.

However, we also caution that the new Administration must ensure that any national service legislation not displace paid workers (especially as low-wage service employees, mainly women, are those whose jobs are most vulnerable) or replace existing professionally provided services with volunteer assistance; reduce access to higher education by eliminating existing financial aid grant programs; or neglect to provide sufficient support services, such as child care, that will enable women to participate.

Therefore, we recommend that:

- The new proposal build on the existing National and Community Service Act and Domestic Volunteer Service Act, which provide safeguards against displacement of paid employees, duplication of existing services, and discrimination based on sex and other factors.

- To ensure that low-income individuals are able to participate, that child care and other supportive services are provided to service-participants and that federal benefits (such as AFDC) are not reduced based on receipt of loan forgiveness, scholarships, stipends, or other benefits provided to individuals participating in national service programs.

- Loan forgiveness or scholarships provided through the Trust Fund should be available to students at community colleges as well as four-year-colleges and to part-time students.

- Youth corps and other programs designed for non-college bound youth should be included in the National Service Trust and particular efforts be made to ensure equitable participation of young women, particularly in programs involving non-traditional work.

- Recruitment and training materials for volunteers should explicitly encourage young women to expand the volunteer opportunities they consider and accept.

- Any service provided be conducted under the supervision of trained professional staff and with the consent of the local community. Assistance should be given to those supervising the program to assure that female participants are provided with opportunities to serve in nontraditional areas, and women that do not face barriers based on gender in their service.

- Heavy reliance upon military personnel to staff the programs should be discouraged, given existing problems within the military in the treatment of women, including sexual harassment.

- In addition to supporting service by college graduates, the proposal provide additional funding for service by elementary and secondary school students and youth who are not college bound.

- The design of service opportunities should include programs which have as their purpose assistance to women and girls

to overcome barriers which they face in achieving full and equitable participation.

The National Women's Law Center is a non-profit organization that has been working since 1972 to advance and protect women's legal rights. The Center focuses on major policy areas of importance to women and their families including child support, employment, education, reproductive rights and health, child and adult dependent care, public assistance, tax reform, and social security- with special attention given to the concerns of low-income women.

ENDNOTES

1. Earle and Roach, Female Dropouts: A New Perspective, National Association of State Boards of Education (1989) at 5-6.
2. McGee and Blank, A Stitch In Time: Helping Young Mothers Complete High School, The Academy for Educational Development (1989) at 20, citing Upchurch and McCarthy, "The Effects of the Timing of a First Birth on High School Completion" (Paper presented at the annual meeting of the Population Association of America, Baltimore, Mar. 30-Apr. 1, 1989); U.S. Department of Education, Office for Civil Rights, Teenage Pregnancy and Parenthood Issues under Title IX of the Education Amendments of 1972 (July, 1991) at 3.
3. McGee and Blank at 20.
4. The Center for Population Options, Teenage Pregnancy and Too-Early Childbearing: Public Costs, Personal Consequences, (6th ed. 1992) at 10; McGee and Blank at 20, citing National Center for Health Statistics, "Advance Report of Final Natality Statistics, 1986, Monthly Vital Statistics Report, Table 22 (Washington D.C., Department of Health and Human Services).
5. McGee and Blank at 18; U.S. Department of Education at 3-4.
6. Earle and Roach, Female Dropouts: A New Perspective, The National Association of State Boards of Education (1989) at 3 (noting that 49% of families living in poverty are headed by a female dropout).
7. McGee and Blank at 33.
8. S. 3088 (102d Cong.).
9. H.R. 812 (102d Cong.).
10. See, e.g., "Sexual Harassment: Research and Resources, A Report-In-Progress, November, 1991" National Council for Research On Women; Wishnietsky, "Reported and Unreported Teacher-Student Sexual Harassment," Journal of Educational Research, Jan.-Feb. 1991 at 164; American Association of University Women, How Schools Shortchange Girls (1992) at 73 [hereinafter, AAUW report].
11. AAUW Report at 68-70.
12. AAUW Report at 26-30; Earle and Roach at 9-10.

13. For a more detailed discussion of these issues, see Connor and Vargyas, "The Legal Implications of Gender Bias in Standardized Testing," 7 Berkeley Women's Law Journal 13-89 (1992).
14. AAUW Report at 19-20; Eleanor Linn, "Tracking and Gender", 3 Equity Coalition for Race, Gender and National Origin, no.1 (Autumn, 1992) at 14.
15. Connor and Vargyas at 63-64.
16. 29 C.F.R. § 1604.11 (1980).
17. The EEOC Guidelines are directly applicable to harassment within the employment relationship and should simply be applied to education institutions for such purpose.
18. See, generally, Connor and Vargyas.
19. 29 C.F.R. Part 1607 (1978).
20. See, e.g., Jefferies v. Harris County Community Action Association, 615 F.2d 1025 (5th Cir. 1980); Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987); Connor and Vargyas at 63-67.

ENFORCEMENT OF THE RIGHTS OF PERSONS WITH DISABILITIES
DURING THE SECOND HALF OF THE BUSH ADMINISTRATION
by Bonnie Milstein

I. OVERVIEW

The Bush Administration has devoted considerably greater resources to disability discrimination issues than it has to discrimination based on race, color, national origin, sex or religion. However, as the following chapters reveal, this devotion has yielded more results in some federal agencies than in others and, as in all civil rights areas, it has been insufficient to effectuate lasting change in the lives of people with disabilities in too many cases.

People with disabilities scored their biggest civil rights gains in Congress, with the passage of the Americans with Disabilities Act¹. The law and its regulations would not have been written in their current form without the support of the Administration. The chapter on employment provisions of Title I and the EEOC's efforts to enforce those provisions demonstrate the Commission's need to continue the technical assistance, public education and enforcement programs that it has begun.

The discussion of the Federal Communication Commission's (FCC) and the Department of Justice's efforts to address communications barriers under the ADA raises serious questions. The FCC in particular seems unwilling to acknowledge its responsibilities to ensure that the telecommunications industry -- and the FCC itself -- address the needs of people with speech and hearing disabilities. Unfortunately, the FCC's delay in setting rates, its failure to

consider communication disabilities in its regulation of new technological developments, and its refusal to make it's own ADA regulations available on tape or in Braille suggest either indifference or hostility towards the enforcement of its own statutory mandates.

Like the FCC, HUD's record of enforcing the rights of people with disabilities is mixed. While its responsibilities reach back to the enactment of Section 504 of the Rehabilitation Act in 1993², it took HUD until 1988 to issue implementing regulations³. Having failed to staff the Section 504 office adequately, HUD, abolished the office entirely in the past 2 years, and, without adequate training, assigned 504 enforcement responsibilities to investigators responsible for Fair Housing Act cases.

On the other hand, HUD did succeed in issuing Fair Housing Act regulations within six months of that law's passage. The agency has also been working, more or less successfully, with both the Department of Justice and with local and private fair housing enforcement agencies to publicize the expanded coverage of the Fair Housing Amendments Act of 1988 and to enforce its provisions on behalf of people with disabilities.

Probably the most distressing of the following reports is that of the Department of Justice's continuing failure to enforce the Civil Rights of Institutionalized Persons' Act (CRIPA)⁴. Not only has the Department continued to delay investigations and refused to file lawsuits, but it has adopted a new method for avoiding enforceable court decrees by initiating private, out-of-court

"agreements" with state and local defendants. The Department has also persisted in refusing to litigate the most promising of all remedies to date -- the development of community residences and community resources for people who continue to be institutionalized unnecessarily.

II. RECOMMENDATIONS

For people with mental and physical disabilities who seek independence, rights protection includes both freedom from abuse and neglect and access to the essential components of community living such as housing, employment, transportation and access to public and commercial facilities. In addition to the following chapters' recommendations for changes in specific agencies, certain changes must be made in the way that all government agencies function before we will see consistent improvement in the ability of people with disabilities to secure their civil rights.

1. Both the ADA and Section 504 of the Rehabilitation Act address disability discrimination by federal agencies and federally conducted programs as well as all state, county and local government offices. Apart from civil rights offices in those agencies, officials are generally unaware of their responsibilities under the ADA and Section 504 and of how to implement them. Even when they are made aware of their obligations, they sometimes stubbornly and illegally continue to discriminate because they fail to acknowledge the systemic change that the disability rights laws require in the policies, practices, and actions of their agencies.

For example, in conducting its benefits programs, the Social Security Administration fails to make its application process useable by people with mental disabilities. A lawsuit is currently pending in the 9th Circuit, J.L. v. S.S.A., in which the plaintiffs proved that because of the complex and exhausting application process, many people who, because of their poverty and their disabilities are entitled to social security benefits, are unable to qualify for them. (In a related suit against the Los Angeles general assistance program, the judge called the county's similar practices "barbaric.") Similarly, in her chapter on communication rights, Karen Peltz Strauss explains that the SSA had to be sued because of its refusal to provide sign language interpreters and telephone access for deaf beneficiaries.

We therefore recommend that the Department of Justice, pursuant to its coordination and review authority under both Section 504 and the ADA, conduct a vigorous education and training program of all federal, state and local agencies about the rights of people with disabilities. As they were required to do under Section 504, all public agencies are also required by the ADA to conduct self-evaluations of their programs. In most cases, when agencies did conduct self-evaluations, they focused solely on physical access, visual impairment and hearing impairment issues - and then only in the narrowest ways. Very few, if any, public agencies evaluated the impact of their programs and policies on people with physical or mental disabilities. Nor did many agencies consult with people with disabilities or their advocates, as the

Section 504 regulations required, to help them identify the ways in which the agency's programs resulted in denials of benefits, services, and access to people who, for example, were unable to use telephones or to drive cars, people who have limited intellectual ability, and people who require intermittent hospitalization. As a result, federal, state and local agencies continue to discriminate in derogation of the law. An active education program would both raise the level of consciousness of agency officials and avoid needless litigation.

In conjunction with the Department of Justice training, the agencies themselves must ensure that all agency personnel - not just those working in civil rights offices - understand their responsibilities to implement Section 504 and the ADA. Thus, for example, those who, like the Health Care Finance Administration of the U.S. Department of Health and Human Services which approves all state Medicaid plans, should include in their licensing and approval decisions a written analysis of whether the proposal meets the requirements of all of the disability rights laws. Further, the Department of Justice should advise federal agencies of their authority and responsibility to ensure that no federal action supports or perpetuates discrimination against any member of a protected class.

2. Our second recommendation rests on the belief that discrimination against people with disabilities is fed by stereotypes and generalizations that are largely unquestioned in our society. Thus, people who have psychiatric diagnoses, for

example, are assumed to be dangerous, people with hearing impairments are assumed to be ignorant, and people who are blind are assumed to have lives of little value.

The Administration has the ability and the responsibility to change public perception of people with disabilities. Pursuant to the general authority of the ADA, we recommend that the White House conduct a nation-wide media campaign whose goal it is to address the rampant stigmatization of and discrimination against people with disabilities.

3. Our final recommendation concerns the lack of expertise in federal and state governments about mental illness. As a reflection of the problem, neither the Department of Justice or the EEOC included more than brief references to the rights of people with mental disabilities in their technical assistance materials and their regulations. The Department of Justice, like the EEOC can and should correct these omissions by hiring staff who are knowledgeable about the rights of people with mental disabilities, by working more closely with staff of the newly created Substance Abuse and Mental Health Services Administration of the Department of Health and Human Services as well as with consumer organizations. While reasonable accommodations for people with mental illness are not as obvious as they are in many cases for people with physical disabilities, they are not mysterious, they are necessary, and agency staff must be conversant in them in order to fulfill their enforcement obligations.

1. Americans with Disabilities Act of 1990, Pub.L. No. 101-336, 104 Stat. 327, codified at 42 U.S.C. Sec. 12101 (1991).
2. 29 U.S.C. 794
3. 53 Fed. Reg. 20216 (6-2-88), codified at 24 C.F.R. Part 8.
4. 42 U.S.C. Sec. 1997.

REPORT AND RECOMMENDATIONS
ON IMPLEMENTING AND ENFORCING TITLE I
OF THE AMERICANS WITH DISABILITIES ACT

by

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AMERICANS WITH DISABILITIES ACT -- TITLE I

"The ADA can be the vehicle that, once and for all, brings persons with disabilities into the mainstream of American life. We must all make a personal commitment to take up the challenge of the ADA and turn its grand promises into reality."

-- John L. Wodatch, U.S. Dept. of Justice, "ADA: What It Says," Worklife, vol.3, no. 3 (Fall 1990)

I. ADA Title I: Overview

On July 26, 1990, President George Bush signed into law the Americans With Disabilities Act ("ADA" or "the Act")^{1/}, a far-reaching piece of civil rights legislation designed to eliminate discrimination faced by Americans with physical and mental handicaps, in employment, communications, public accommodations, and transportation. Title I of the ADA prohibits employers from basing hiring, compensation, and advancement decisions upon consideration of disabilities that may "substantially limit" a major life activity, such as seeing, walking, thinking or breathing, but that do not prevent job applicants or employees from fulfilling the essential functions of a job, either with or without some "reasonable accommodation" of their disabilities by an employer.

Of the 14 million working-age Americans with disabilities, presently only 30 percent are employed, although "(1)abor specialists estimate that millions more could be brought into the workplace with only limited adjustments."^{2/} Title I supports

this assessment by (1) recognizing the significant contributions that persons with disabilities can make to the nation's business; (2) attempting to provide such individuals with a fair chance at productive lives; and (3) seeking to "assure that people with disabilities have access to the mainstream of American life."^{3/}

II. Scope of Title I Rights and Duties

Title I presently applies to all employers with over 25 employees, and on July 26, 1994, will cover all employers with 15 employees or more. Its provisions protect persons who currently have a physical or mental impairment substantially limiting a major life function, persons with a history of such impairment, and persons who are regarded as having such an impairment.^{4/} In addition to usual prohibitions on discrimination against such persons, the Act requires employers to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee," where to do so would not "impose and undue hardship" on their operations.^{5/} Similarly, employers may not use qualification standards, tests or criteria which tend to screen out disabled individuals or classes, without demonstrating that the standard is "job-related for the position in question and . . . consistent with business necessity(.)"^{6/}

Title I extends to persons with disabilities the employment rights and remedies already enjoyed by women and various minorities under the Civil Rights Acts of 1964, 42 U.S.C. § 2000e-2 (1992), and by employees of entities receiving federal contracts or financial assistance, under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1992). The provisions do not preempt state laws which provide equivalent or greater protections in the workplace to persons with disabilities. The Act adopts the enforcement mechanisms of Title VII, assigning responsibility for assisting and enforcing compliance with Title I to the Equal Employment Opportunity Commission ("EEOC").^{7/} The ADA requires coordinated enforcement and interpretation of its provisions with those of the Rehabilitation Act.^{8/}

In assessing the likely impact of Title I, many have identified tangible gains to the business community and the economy as a whole, which may accrue from widespread implementation of the Act. Individual businesses can recruit from among a new pool of skilled and unskilled workers characterized by low rates of absenteeism and job turnover.^{9/} The economy as a whole will benefit as gainfully employed persons with disabilities substitute taxable income for income support payments, and contribute their creativity and energy to the national workforce.^{10/} While the ADA has been called an

"unabashed venture into social engineering and Government intervention into the private economy,"^{11/} it nonetheless has enjoyed support among pro-business Congressman and the outgoing Republican Administration.^{12/}

Bringing businesses and persons with disabilities together successfully will require widespread and continuous communication regarding the scope of employee rights and employer responsibilities under the law. Close monitoring of the implementation of key provisions of the Act, coupled with aggressive enforcement, are also needed to protect the newly enacted civil rights of persons with disabilities. The Administration should strongly support efforts in all of these areas. Specifically, this Report suggests that the Administration pursue the following measures, each of which is discussed more fully below:

- * Work closely with Congress to ensure sufficient funding for implementation and enforcement of Title I
- * Continue and expand efforts to provide technical assistance to employers on complying with the Act's requirements, including coordination of EEOC efforts with those of other governmental and private organizations providing advice on Title I

- * Focus early updates of technical assistance on issues not yet fully explored in the materials, such as implementing Title I with respect to persons with mental impairments
- * Examine and incorporate recent data on the changing relationship between employers and persons with disabilities, and on the disabled community generally, into implementation and enforcement efforts
- * Profile case studies of positive employment relationships involving persons with disabilities, including successful accommodation of physical and mental disabilities
- * Encourage use and exploration of alternative dispute resolution mechanisms in resolving conflicts under Title I
- * Incorporate achievement of Title I's objectives into economic and social policymaking in priority areas such as worker education and training, health care reform, and legal reform

III. Information Gathering And Dissemination

Effective implementation of the ADA requires sufficient access to necessary information by the Act's two constituencies -- businesses and persons with disabilities. To comply with the ADA's requirements, employers need to meaningfully evaluate the qualifications of persons with disabilities for given jobs, and to assess creatively methods of reasonable accommodation. To do so, employers need to know and appreciate (1) the nature of various disabilities; (2) the necessity and cost of accommodating such disabilities; and (3) accommodation measures which have proven successful.

The depth of these informational needs is revealed by several polls and empirical studies on employment of the disabled, which suggest that many assumptions concerning the productivity of disabled workers, and the cost of accommodating them when necessary, are false. For example, the Job Accommodation Network, an adjunct of the President's Committee on Employment of People with Disabilities and an international consulting organization on accommodating persons with disabilities in the workplace, has found from studies that 31 percent of accommodations suggested for various disabilities cost employers nothing, 19 percent cost \$50 or less, and 70 percent cost under \$500.^{13/}

Similarly, in order to identify and protect their rights under the Act and to effectively integrate into the workforce, persons with disabilities need to know what duties the law imposes on employers. Additionally, the ADA obliges disabled applicants and employees in the first instance to request reasonable accommodation by employers. To facilitate smooth, cooperative, and relatively low-cost incorporation into the workplace, persons with disabilities should receive and contribute to information on successful employment and accommodation of disabled persons in various jobs. Persons with disabilities thus need information on the types of accommodations which may facilitate their performance of particular jobs.

Debunking myths surrounding employment of persons with disabilities, and facilitating dialogue on successfully incorporating and accommodating those persons within the workplace, presents a "communications challenge" to the Administration and the EEOC.^{14/} The EEOC has acknowledged this challenge, stating that it "believes that the majority of employers wish to comply voluntarily with the ADA, and will do so if guidance and technical assistance are provided."^{15/}

To this end, the EEOC has provided several resources to help clarify for employers, applicants and workers the scope of the rights and duties established by Title I. The agency maintains a toll free number that employers may call with

questions. Together with the Department of Justice (which is responsible for implementing Titles II and III of the ADA, concerning public services and public accommodations operated by private entities respectively), the agency has issued an ADA Handbook of Interpretive Guidance on each regulation implementing Title I.^{16/} The Guidance identifies terms and concepts expressed in the ADA which should be interpreted with reference to the case law developed under the Civil Rights Act of 1964 and the Rehabilitation Act of 1973; offers explanatory examples; and discusses the type of evidence required to prove various elements of a charge or defense.

The EEOC has also issued a Technical Assistance manual on Title I compliance.^{17/} The manual offers further discussion and examples of compliance with and violation of the Act, and treats certain issues, such as the mechanics of resolving a Title I dispute, the graduated schedule of available monetary relief, and the relationship of the ADA to worker's compensation claims, that are not discussed within the Interpretive Guidance. The manual provides explicit and specific advice on some issues, such as listing questions concerning disabilities which employers cannot ask on job application forms. In contrast, the manual contains relatively little discussion and few examples of Title I implementation with respect to persons with mental disabilities. Moreover, much of the manual's discussion is broad and cannot

substitute for ongoing, direct advice to employers and persons with disabilities confronting specific challenges in the workplace.

The EEOC Technical Assistance Manual is intended to be updated periodically, "with supplements as the Commission develops further policy guidance and identifies additional resources."^{18/} The agency should focus early updates on exploring more fully compliance issues relating to mental impairment, as well as any issues encountered broadly by employers and not already addressed.

To identify such issues, the EEOC should maintain ongoing communications with the many other governmental and nongovernmental organizations offering technical assistance on ADA compliance. Both federal and state agencies provide such assistance. The National Institute on Disability and Rehabilitation Research (NIDRR) operating with funds separately appropriated by Congress, has established ten regional advisory offices, or Regional Disability and Business Technical Assistance Centers ("DBTACs"), that offer such advice. These offices have been deluged with requests for advice from business since before Title I took effect.^{19/} The President's Committee on Employment of People with Disabilities and the Job Accommodation Network have also undertaken to provide ongoing technical assistance on

ADA compliance, and to disseminate further contacts for compliance advice to businesses.

Several private trade and research organizations have undertaken to study employment of persons with disabilities.^{20/} Additionally, legal advocates for persons with physical and mental impairments are providing advice on how to identify and challenge discrimination under the ADA.^{21/} The EEOC has provided in its ADA Handbook a resource list of private organizations offering advice on Title I. The agency should maintain ongoing communications with such organizations to identify and address recurring employment and compliance issues raised by employers and persons with disabilities. This will enhance the consistent interpretation and implementation of Title I.

Likewise, the agency should incorporate into its implementation efforts, independent research studies on the changing profile of the disabled community and corresponding employment implications. Prior to the Act's passage, Louis Harris and Associates conducted polls of both employers and persons with disabilities, to gather information on various issues related to employing the disabled. Currently, the Annenberg Washington Program of the University of Michigan is sponsoring ongoing empirical analyses of employment relationships between Oklahoma businesses and their employees with mental retardation.^{22/} The research documents and examines behavior,

attitudes and needs of persons with mental disabilities, as well as "employer attitudes, myths and concerns" regarding employment of persons with disabilities.^{23/} According to research director and Annenberg Fellow Peter David Blanck, such studies are crucial to the effective implementation of the ADA in light of the rapidly changing nature of the employment relationship between businesses and persons with disabilities.^{24/}

The Annenberg Washington Program, in conjunction with Project Access, a corporate consortium examining job accommodation issues, has also begun a case study of Sears Roebuck Company's experience in hiring persons with disabilities. Sears is the nation's first and foremost employer of persons with disabilities, beginning its efforts in 1949 and employing over 20,000 persons with disabilities to date.^{25/} Mr. Blanck suggests profiling such case studies in order to encourage employers to become more proactive in complying with Title I, and to enhance positive perceptions of economic integration under the Act.^{26/}

The Administration should utilize private research findings to support official efforts in providing technical assistance and enforcing Title I. Correspondingly, the Administration should support such research and seek to identify ways in which official sources of compliance information can complement and facilitate the efforts of private organizations.

IV. Litigation and Alternative Dispute Resolution

Critics of the ADA have prophesied a tremendous wave of litigation over such issues as whether a particular accommodation is reasonable or would impose "undue hardship," whether a given task is an "essential function" of a job, and so on.^{27/} The Civil Rights Act of 1991 arguably made litigating alleged discrimination under the ADA more attractive, by providing for compensatory and punitive damages as well as back pay, reinstatement and other forms of injunctive relief, where an employee or applicant proves discriminatory intent or lack of a good faith effort by an employer to make reasonable accommodation.^{28/}

Between July 26 and the end of August, 248 complaints alleging discrimination under the ADA were filed with the agency.^{29/} By September 15, that number had risen to 450; and by the end of October 1992, the number of complaints involving employment discrimination based on mental impairment alone was 1,226.^{30/} The agency has estimated a total of 12,000 ADA-related complaints for fiscal 1993, comprising one-fifth of its total case load. It has further estimated a delay of ten months in initiating, and up to two years in completing, investigations of claims filed currently.^{31/}

On November 6, the agency filed its first lawsuit under Title I, against AIC Security Investigations, Ltd., a Chicago-based security guard company. The suit has been brought on behalf of the company's executive director, and alleges that he was illegally dismissed after being diagnosed with terminal brain cancer.^{32/} No further action apparently has been taken to date.

Anticipation of a considerable increase in civil rights claims and possible litigation arising under the ADA, has prompted debate and concern over the level of funding provided to the EEOC to enforce the Act. President Bush requested a budget increase for the EEOC from \$210 million to \$245 million for fiscal 1993. Congress rejected this request this summer, approving \$8 million and \$2 million increases in the House and Senate respectively. On September 21, 1992, EEOC Chairman Evan J. Kemp Jr. called an emergency meeting of the Commission, stating that the agency was "on the brink of peril" and that without the budget and staffing increases requested by the outgoing administration, the agency would not have the resources to adequately enforce the ADA.^{33/} Final funding for the EEOC was approved at \$222 million.^{34/}

The Administration should work with Congress to assure appropriate funding for ADA implementation. Otherwise, the Act's goal of eliminating discrimination in the workplace against

persons with disabilities will remain unfulfilled. To enforce Title I in the most efficient and constructive manner, the EEOC has emphasized the provision of adequate technical assistance, in order to preempt disputes arising from misunderstandings regarding the scope of those provisions.^{35/} Furthermore, section 513 of the ADA encourages the use of alternative dispute resolution to resolve conflicts quickly and cooperatively.^{36/} While the EEOC has acknowledged that "(s)ome litigation is inevitable" under Title I, it has repeatedly endorsed the use of ADR, and has initiated a pilot program involving 75 disparate treatment claims in each of four cities -- Washington, D.C., New Orleans, Houston and Philadelphia. Under the program, the agency will delay investigation of the claims for sixty days, during which period a private contractor will attempt mediation between the parties.

In addition to evaluating the results of this program, the agency should consider ADR models used in civil rights disputes at the state and local level. One such example has emerged in Wyoming, where the state government and the Wyoming Protection and Advocacy System negotiated a creative settlement to a class action suit brought by a public residential facility for persons with mental retardation. The suit demanded in part the establishment of integrated services for persons with mental impairments.^{37/} The settlement agreement created a framework for

providing such services, and a Compliance Advisory Board to assist in ongoing compliance with the agreement. The Board uses ADR methods such as factfinding, mediation and informal arbitration to resolve disputes with a minimum of cost and discord.^{38/} The Board's decisions are ultimately appealable to the federal district court which has retained jurisdiction over the case.^{39/}

The EEOC should experiment with ADR methods, including those used successfully under Title VII and the Rehabilitation Act, to find the most constructive means of resolving disputes under and promoting the objectives of the ADA.

V. Incorporating ADA Implementation with the Administration's Policy Agenda

The objectives of Title I--to recognize and promote the productivity and dignity of the disabled community, and to incorporate that community within American economic and social life--dovetail with key economic and social policies emphasized by President-elect Clinton throughout the campaign. The Clinton Administration should couple a strong commitment to ADA implementation and enforcement with its policies for overall workforce revitalization. This will reinforce images of persons with disabilities as integral members of the American economy and society, notions which both motivated and are reflected in the

Act. Additionally, it will underscore the increased flexibility in work arrangements that many Americans generally have begun to seek and expect.^{40/}

Similarly, President-elect Clinton has identified health insurance reform as a top priority of his Administration. Assessing the insurance and medical needs of workers with disabilities, and the proper role of employers in meeting those needs, should be an integral part of the Administration's insurance policy planning. The ADA permits employers to continue offering benefits plans, including self-insured schemes, which contain pre-existing condition clauses or which limit coverage for certain procedures and treatments, provided that such limitations apply to all employees equally.^{41/} However, the Act prohibits the invocation of existing state and federal insurance laws establishing and regulating such schemes "as a subterfuge to evade the purpose of the ADA."^{42/} The Administration should evaluate the experience of employers and employees under these provisions over time, both to develop and to assess conformance with the Administration's overall insurance reform objectives.

Finally, creative and alternative resolution of disputes arising under Title I and the other provisions of the ADA, may provide effective models for litigation reform both regarding civil rights issues and generally.

In short, implementing the ADA presents the Administration with an opportunity to demonstrate both its commitment to equalizing employment opportunities for persons with disabilities, and its broader commitment to the revitalization of the American economy and society. The Administration should firmly embrace this opportunity.

END NOTES

- 1/ Americans with Disabilities Act of 1990, Pub.L. No. 101-336, 104 Stat. 327, codified at 42 U.S.C. § 12101 et. seq. (1991) (hereinafter "ADA" or "the Act").
- 2/ Myerson, "Companies Prepare for New Law on Disabled," New York Times, sec. 1, p. 35, col. (July 25, 1992).
- 3/ "Major Shift Likely as Law Bans Bias Toward Disabled," New York Times, sec. 1, pg. 1, col. 6 (July 19, 1992).
- 4/ 42 U.S.C. § 12102(2).
- 5/ Id. § 12112(b)(5).
- 6/ Id. § 12112(b)(6).
- 7/ Id. § 12117(a).
- 8/ Id. §§ 12117(b), 12201(a).
- 9/ See Worklife, Vol. 3, No. 3 (Fall 1990), at 11.
- 10/ See 42 U.S.C. § 12101(a)(9) (finding that discrimination against disabled persons "costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity"); Silverstein, "I Will Never Forget the Joy," Worklife, vol. 3, no. 3 (Fall 1990) ("Ending discrimination will have the direct impact of reducing the Federal government's expenditure of \$57 billion annually on disability benefits and programs that are premised on dependency of the individual with a disability. It will also have the immediate effect of making people with disabilities into consumers and taxpayers."); President's Committee on Employment of People With Disabilities, Facts About Disability (March 1992) (social welfare payments to unemployed persons with disabilities in 1986 estimated at \$169.4 billion).
- 11/ "Major Shift Likely as Law Bans Bias Toward Disabled," New York Times, sec. 1, pg. 1, col. 6 (July 19, 1992).
- 12/ See Pianin & McAllister, "Administrative Spending Freeze Voted," Washington Post, p. A21, cols. 1-3 (July 29, 1992); Thornburgh, "Firmly committed to Enforce ADA," Worklife Vol. 3 No. 3 (Fall 1990).

(Footnote continued from previous page)

- 13/ President's Committee on Employment of People With Disabilities, Fact Sheet On: The Americans With Disabilities Act, Public Law 101-336 (January 1992); Peter David Blanck, "The Emerging Work Force: Empirical Study of the Americans With Disabilities Act," 16 Journal of Corporation Law 693, 698, 778-779 (Summer 1991) (hereinafter "Emerging Work Force").
- 14/ See Peter David Blanck, "The Americans With Disabilities Act: The Communications Challenge," a White Paper of the Annenberg Washington Program (prepublication copy) (1992) (hereinafter "White Paper").
- 15/ Equal Employment Opportunity Commission, A Technical Assistance on the Employment Provisions (Title I) of the Americans With Disabilities Act, Explanation of Key Legal Requirements, BNA Daily Labor Report, at 1 (Jan. 28, 1992) (hereinafter "Technical Assistance Manual").
- 16/ See Equal Employment Opportunity Commission and U.S. Department of Justice, Americans with Disabilities Act Handbook (October 1991), (hereinafter "ADA Handbook").
- 17/ See supra note 14.
- 18/ Technical Assistance Manual, supra note 14, at 1.
- 19/ "Uncovering a Huge, Hidden Community; Disabilities Act Reveals More Impaired Workers--and Worry Among Employers," Washington Post, p. H1, H5 cols.1-3 (Nov. 22, 1992).
- 20/ The EEOC has provided a list of such organizations, and a brief description of their operations, in its ADA Handbook. See "Resource List," ADA Handbook, supra note 15.
- 21/ For example, the Mental Health Law Project, a national nonprofit legal-advocacy organization, has issued an ADA Handbook which discusses, in a question-and-answer format, rights and remedies under Title I for persons with mental impairments and lists EEOC District and Area contacts. See Mental Health Law Project, Mental Health Consumers in the Workplace: How the Americans with Disabilities Act Protects You Against Employment Discrimination (July 1992).

(Footnote continued from previous page)

- 22/ Blanck, "The Emerging Work Force" at 695-96. This article is the second in a series presenting findings and analysis emerging from the studies. See Peter David Blank, "Empirical Study of the Employment Provisions of the Americans with Disabilities Act. Methods, preliminary findings and implications," 22 N.M.L. Rev. (forthcoming 1992).
- 23/ White Paper, at 10.
- 24/ Id. at 9.
- 25/ Id. at 24.
- 26/ Id. at 23 - 24.
- 27/ E.g., Baxter, "Disability Act to Foster Landslide of Lawsuits," sec. A, p. 17, col. 2 (Sept. 15, 1992); Wall Street Journal.
- 28/ See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, codified at 42 U.S.C. § 1981a(a)(2)(b) (1992), §1977(a)(2), (b).
- 29/ Spayd, "Trouble in the Workplace at EEOC," Washington Post, p. A19, cols. 1-3 (Sept. 22, 1992).
- 30/ See "Commission ADA Charge Experience: Mental Illness," created by the Mental Health Law Project (November 23, 1992).
- 31/ Spayd, "Trouble in the Workplace at EEOC," Washington Post, p. A19, cols. 1-3 (Sept. 22, 1992).
- 32/ Lewin, "U.S., in Job Case, Files First Lawsuit Under New Disabilities Law," New York Times, sec. 1, p. 7, col. 1 (Nov. 7, 1992).

- 33/ Chairman's Introduction, Emergency Commission Meeting, U.S. Equal Employment Opportunity Commission (Sept. 21, 1992), at 3.
- 34/ Current Developments, BNA Daily Labor Report, December 19, 1992, at 2.
- 35/ E.g., Technical Assistance Manual, supra note 14, Equal Employment Opportunity Commission, The Americans With Disabilities Act: Your Responsibilities As An Employer (1991), at 8-9.
- 36/ Section 513 of the ADA provides:
- (w)here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this Act.
- 42 U.S.C. § 12212 (1992).
- 37/ White Paper, at 20.
- 38/ Id. at 21.
- 39/ Id. at 22.
- 40/ See "At Work: Data on Disabilities, True and False," New York Times, sec. 3, p. 23, col. 3 (July 19, 1992).
- 41/ 42 U.S.C. § 12201(c) (1992).
- 42/ Id.

Federal Enforcement of the Right to Effective Communication:
Civil Rights of Persons Who are Deaf and Hard of Hearing

by Karen Peltz Strauss

I. Introduction

Notwithstanding the large number of individuals with sensory impairments, it has been the experience of disability advocates that there is a general lack of knowledge and awareness about how best to address the communication needs of these individuals. Since the enactment of the Architectural Barriers Act of 1968, the concept of "accessibility" has focused primarily on removal of architectural barriers, with little attention being paid to the removal of communication barriers for individuals with hearing, vision or speech impairments. Passage of the Americans with Disabilities Act (ADA) is beginning to change this some, for the Act places specific requirements on businesses, local governments, and employers to provide effective communication to these individuals. Additionally, for the first time, the ADA sets forth a federal mandate for an alternative form of telephone access for individuals who cannot use conventional voice telephones.

Although many entities covered by the ADA are beginning to understand their new nondiscrimination obligations, unfortunately, education of and compliance by programs and activities covered under the Rehabilitation Act of 1973 continues to be painfully slow, and in many cases, nonexistent. It is to this Act which this paper briefly turns first.

II. Section 504 of the Rehabilitation Act of 1973

Although Congress directed an end to discriminatory practices against individuals who are deaf and hard of hearing by federally conducted and federally assisted programs as long ago as 1973,¹ nearly twenty years later, many of these programs have little knowledge about the need or methods used to eliminate communication barriers. Violations by both federally conducted and federally assisted programs and activities continue, in many cases, unabated, and the past four years have shown little activity by the federal government to put an end to these infractions. Examples will serve to illustrate this point.

A. Federally Assisted Programs

Section 504 of the Rehabilitation Act prohibits the use of federal funds in programs that discriminate on the basis of disability. This law placed an obligation on each federal agency to promulgate regulations prohibiting discrimination in the programs and activities to which it provided federal aid. Regulations issued by the U.S. Department of Health and Human Services (HHS), for example, prohibit discrimination on the basis of disability in health, welfare, or social service recipients.² Among other things, HHS rules mandate hospitals and other health care recipients with more than 15 employees to provide auxiliary aids and services, including interpreters, to persons with hearing loss when such aids and services are necessary to provide effective communication to these individuals.³ In addition, health care providers are required to provide notice to patients

and other participants concerning their rights to these auxiliary aids.⁴

Notwithstanding HHS' rules on Section 504, hundreds of complaints continue to flood HHS' Offices for Civil Rights detailing the repeated failures and sometimes outright refusals of health care providers to provide interpreters and notice about the right to interpreter services to deaf and hard of hearing individuals.⁵ Efforts to convince the Bush Administration to take a more active stance on this matter have continually proved fruitless. Indeed, although empowered to aggressively enforce Section 504, the Administration has been fairly passive in requiring compliance with this federal legislation.

HHS' Office for Civil Rights (OCR) has two principal methods at its disposal to secure compliance with its Section 504 regulations: (1) investigation and resolution of individual complaints and (2) compliance reviews. Upon request, OCR has, in fact, investigated and resolved a significant number of complaints filed against health care providers over the past several years. Unfortunately, individual complaints are time consuming. Additionally, more often than not, by the time an individual's complaint is investigated and resolved, the individual who filed the complaint no longer needs the auxiliary aids and services requested because he or she has concluded the course of health care treatment.⁶ Most importantly, however, continued noncompliance by so vast a number of federally assisted health care facilities has proven the inefficacy of achieving

overall compliance through the investigation of complaints.

The failure of these federally assisted providers to comply with Section 504 has prompted individuals with hearing loss, tired of having rights which were promised them since 1973 denied, to request HHS to exercise its authority to conduct periodic compliance reviews of health care providers throughout the country. HHS itself has recognized the critical need for compliance reviews. In its own memorandum, accompanying a September 1991 letter from HHS' Principal Deputy General Counsel to the National Association of the Deaf Legal Defense Fund, OCR noted:

To enforce the nondiscrimination laws effectively, OCR must do more than investigate complaints. Complaints may not raise many of the serious problems of discrimination that exist. Many people do not know their rights or won't file complaints because they fear retaliation.

Therefore, OCR monitors health care institutions and social service agencies to make sure they are complying with the civil rights laws. Compliance reviews are conducted to determine whether services are being provided without discrimination to the public.

Although the above statements reflect some recognition of the problem at hand, OCR has repeatedly rejected consumer requests to conduct compliance reviews over the past four years, citing insufficient agency resources. Consequently, deaf and hard of hearing consumers have continued to go without notice to and receipt of their civil rights under Section 504 on a daily basis.

B. Federally conducted programs

Section 504 also prohibits discrimination on the basis of

disability in programs and activities which are actually conducted by the federal government. For individuals with hearing loss, this means that the federal government must provide the necessary auxiliary aids or accommodations to ensure equal participation in the government's programs. Unfortunately, both the Reagan and the Bush Administrations served as their own worst examples of how to provide effective communication for these individuals.

Although Congress directed each of the federal agencies to promulgate regulations prohibiting discrimination in their own federally conducted programs as long ago as 1978, a decade or more passed before most federal agencies issued their rules. For example, the Central Intelligence Agency's rules were published on September 1, 1992, fourteen years after Section 504 was amended to cover federally conducted programs.⁷ Other federal agencies still have yet to promulgate regulations covering their programs and activities.

One agency whose failure to act was particularly egregious was the Social Security Administration (SSA). The nature and substance of SSA's programs require that agency to have contacts with individuals with disabilities on a daily basis. Yet a federal lawsuit against HHS in 1987 was required before that agency finally agreed to promulgate Section 504 regulations for SSA's federally conducted programs.⁸ This lawsuit came about because of SSA's repeated failure to provide sign language interpreters for deaf beneficiaries, coupled with its refusal to

provide equal telephone access to these individuals.

Unfortunately, while the lawsuit did succeed in requiring the agency to issue Section 504 regulations, compliance with those rules remains fairly poor. A toll-free TTY number provided for individuals with hearing loss is virtually always busy, and deaf clients in various parts of the country continue to report that interpreters are not always provided upon request.

III. The Americans with Disabilities Act

A. Effective Communication: Auxiliary Aids and Services

The Americans with Disabilities Act (ADA) arrived with a considerable amount of pomp and circumstance. The signing ceremony alone was attended by thousands of individuals with disabilities, and media attention on the legislation has been considerable. The Bush Administration too, while opposing some important provisions prior to the legislation's enactment, promulgated regulations implementing the ADA in a very timely fashion, in considerable contrast to its lackadaisical attitude with regard to the Rehabilitation Act.

The lives of deaf and hard of hearing Americans will be greatly impacted by the ADA's provisions. To begin with, although federally assisted employers were already covered under Section 504, Title I of the ADA will extend this coverage to most private employers, requiring such employers to make reasonable accommodations in their workplaces for their employees' disabilities.⁹ The EEOC has issued fairly comprehensive

guidelines to implement Title I, which will hopefully increase, by a considerable measure, job opportunities for individuals who are deaf and hard of hearing.¹⁰

Title II of the ADA prohibits local and state governments from discriminating against qualified individuals with disabilities in their services, programs, and activities.¹¹ The scope of Title II is broad. Among the local governmental services to which it applies are: state and local courts, local legislatures and executive agencies, social service agencies, school systems, motor vehicle departments, prisons, public hospitals, libraries, and state operated airports. Title II's prohibitions also extend to private contractors of public entities, such as state park inns, concession stands, and private non-profit counseling agencies.¹²

Under Title II, a local governmental agency may not exclude or provide unequal treatment to individuals who are deaf or hard of hearing in its programs or employment.¹³ Additionally, a public entity must remove architectural, communication, and transportation barriers from its programs unless doing so would cause an undue financial or administrative burden or would result in a fundamental alteration in the nature of its program or service. Toward this end, Title II requires a public entity to ensure that communication with its applicants and participants who have hearing loss is as effective as its communications with other members of the public.¹⁴ The Department of Justice's list of auxiliary aids and services designed to achieve effective

communication for this population is quite extensive:

qualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDDs), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments.¹⁵

The analysis to the Department of Justice's (DOJ's) regulations go even further to offer specific guidance on the circumstances in which sign language interpreters may be necessary. Specifically, factors to be considered include the context in which the communication is taking place, the number of people involved, and the importance of the communication.¹⁶ Moreover, for the first time, the Department of Justice' rules offer a definition of a qualified interpreter, i.e., one who is "able to interpret effectively, accurately and impartially both receptively and expressively, using any necessary specialized vocabulary".¹⁷ The need for this definition was critical, given the many times that entities covered under Section 504 of the Rehabilitation Act had attempted to use family members, friends, or employees who did not have sufficient signing skills, as interpreters. Indeed, in the preamble to its ADA regulations, DOJ specifically warned that family members, even if proficient in sign language, may not be appropriate as interpreters because of their emotional or personal involvement or because of the deaf individual's need for privacy.¹⁸ In determining the proper auxiliary aid or service, DOJ directs

public entities to give primary consideration to the request of the individual with the disabilities who will know best their communication needs.¹⁹

Title III of the ADA prohibits discrimination on the basis of disability in places of public accommodation.²⁰ Title III, too, has exceptionally broad scope, covering retail establishments, professional service providers, places of education and recreation, places of lodging and food, and virtually all other places to which the public is invited. Like Title II, Title III requires that covered entities provide auxiliary aids and services to individuals who are deaf and hard of hearing in order to achieve effective communication in services offered to the community. Unlike Title II, however, the preamble to Title III states that public accommodations need not, in choosing the auxiliary aid or service, give primary consideration to the expressed choice of the individual with a disability. This position was sorely contested by disability rights activists. The discrepancy between Title II and Title III on this point was a significant concession to business interests that fall under Title III's coverage. Indeed, DOJ ignored recommendations of both the House and the Senate on this point:

The Committee recognizes that people with disabilities may have a lifetime of experience identifying ways to accomplish tasks differently in many different circumstances. Frequently therefore, the person with a disability will know exactly what accommodation he or she will need to perform successfully . . .²¹

As Congress confirmed, an individual with a disability has considerable knowledge and background in the type of auxiliary

aid or service which will best provide that person with effective communication in a given situation. Placing this choice in the hands of a public accommodation that is inexperienced with the needs of individuals who are deaf or hard of hearing makes little sense and can only lead to confrontation when the selected aid or service fails to achieve its intended purpose. Unfortunately, no amount of persuading could convince the Bush Administration on this issue; DOJ steadfastly refused to give priority to the individual's choice when regulating private businesses.²²

The Department's final rules also failed to adhere to the suggestions of the deaf and hard of hearing communities in the area of telephone access. Most telephone services provided by state and local governments and places of public accommodation will be accessible to deaf and hard of hearing persons through the relay systems required by Title IV of the ADA. Relay services are designed to bridge the telephone gap between individuals who use TTYS²³ and individuals who use conventional voice telephones. A TTY is a device with a keyboard which is used to send and receive graphic messages over the telephone lines. These messages are received on the visual display or printer of the TTY receiving them. TTYS have enabled deaf, hard of hearing, and speech impaired individuals who cannot use voice telephones to communicate over the telephone lines.

To use a relay system, the caller using the TTY places a call to the relay center, which is then answered by a relay operator, also known as a communications assistant (CA). The CA

then dials the requested voice number and acts as a go-between for the two parties, speaking the TTY user's typewritten messages to the voice party and typing the oral conversation from the voice party to the TTY user. This process can also be performed in reverse, when a voice telephone user initiates the call.

Unfortunately, there are certain types of telephone services which remain virtually inaccessible to relay systems.

Specifically, because relay services depend upon individuals to convey conversations to TTY users, these services cannot operate quickly enough to transmit recorded messages or to complete calls that use interactive telephone systems. These systems, commonly used by banks, government offices, and other institutions, offer telephone prompts to which callers must respond in a matter of seconds, a matter of time which is far too short for the CA to respond through a relay service. Interactive telephone systems are appearing with increasing frequency in local governments and places of public accommodations. Because they generally remain inaccessible to relay systems, individuals with hearing loss urged DOJ to require covered entities that distribute information through these systems to offer an alternative form of telephone access -- e.g. a direct TTY line or a live operator option -- for TTY users. DOJ's response was to skirt the issue entirely.

Rather than mandate alternative access, the Department issued a brief statement suggesting that the Federal Communication Commission (FCC) address this problem in its rulemaking under Title IV of the ADA. This response was given although DOJ had

been made well aware that the failure of businesses to offer alternative forms of telephone access was a problem which the FCC's rules governing relay could not resolve.

B. Telecommunications

When former President Reagan took office in 1981, he promised to drastically reduce the regulatory role of the FCC. He set about that task quickly, eliminating, in his first term, obligations of television and radio stations to submit program logs, requirements of broadcasters to ascertain community needs for their programming, and reducing to a postcard, submissions to the FCC for television and radio license renewals. This emphasis on deregulation overflowed well into the Bush years. Consequently, when Title IV of the ADA was introduced as part of the ADA, neither the White House nor the FCC offered enthusiastic support for its passage. Fortunately, however, the Administration did not actively oppose enactment of Title IV, and the Title became law, requiring all local and long distance telephone companies to provide telecommunications relay services across the nation by July 26, 1993.

Before the development of relay services, deaf, hard of hearing, and speech impaired persons who used TTYs were only able to have conversations with other individuals who had TTYs. Consequently, these individuals were remarkably limited in the range of individuals and businesses to whom they were able to place telephone calls. In order to remedy this situation, even

prior to the ADA, a few states and voluntary organizations had begun to develop relay services around the country. However, for the most part, these services were underfunded and understaffed and offered a second class telephone service for deaf, hard of hearing, and speech impaired individuals.

Title IV of the ADA was intended to reverse this trend, by requiring relay services across the nation that would satisfy minimum standards of quality and effectiveness. Moreover, in large part, Title IV was designed to enable deaf and hard of hearing individuals to exercise the civil rights promised them by other sections of the ADA.²⁴ For example, Titles II and III of the ADA require places of public accommodation and state and local governments to ensure that their telephone services are accessible to deaf, hard of hearing, and speech impaired individuals. More often than not, TTY users will be able to use relay services to access these telephone lines. Similarly, because relay services enable deaf individuals to call virtually anyone, at any time, employers covered by Title I can no longer reject these individuals for jobs or promotions that require telephone access.

1. Publication of ADA Rules

With passage of the ADA, the FCC found itself in the position of having to set some fairly stringent guidelines on all of the nation's telephone companies to ensure high quality relay services, a task to which the agency had been unaccustomed in the

recent past. To aid this process, over seventy consumer organizations representing individuals who were deaf, hard of hearing, and speech impaired across the country, submitted lengthy comments to the FCC's proposed rules on Title IV.²⁵ Unlike prior FCC regulations affecting the telecommunications access needs of individuals with disabilities,²⁶ the FCC's final rules on relay services, issued on July 26, 1991,²⁷ were in fact fairly comprehensive. For the first time in recent history, the FCC went beyond the exact language of the enabling legislation and, in fact, incorporated many of the suggestions which had been submitted in the consumer comments.

Unfortunately, some of the FCC's actions did not conform to the requests of individuals with disabilities. To begin with, the final rules were never published in their entirety in the Federal Register. It has typically been the practice of the FCC to publish only brief notices about its rulemakings in the Federal Register, and to require interested parties to obtain full length copies of its orders from a local commercial copy center or legal reporters to which communications law firms typically subscribe. For the ADA rules, however, consumers urged the Commission to make an exception to this routine practice. Because the ADA is to have such a profound effect on the entire American public, consumers urged that an especially strong effort should be made to make these rules available to as wide a segment of the American population as possible through publication in the Federal Register. Consumers noted that all other agencies that

had issued ADA regulations had in fact published those rules in their entirety in the Federal Register.

While the Commission ultimately agreed to provide free copies to individuals who knew enough to request them of Commission staff, it steadfastly refused to publish its ADA rules, citing budgetary restraints. Similarly, requests to put the rules in accessible formats, including braille and tapes were rejected as too costly.²⁸ This was extraordinarily frustrating for individuals with disabilities who found themselves denied access to information by an agency that had been commissioned to expand such access. The refusal of the FCC to make its final rules easily accessible has had the effect of limiting access to these rules by the very individuals who will be largely affected by their implementation.

2. Functional Equivalency

Title IV of the ADA requires telephone companies to provide relay services for TTY users that are "functionally equivalent" to telephone services available to individuals who are able to use conventional telephone services.²⁹ The FCC's regulations set forth minimum guidelines for relay service providers to meet this functionally equivalency standard. Thus, the rules require relay services to operate 24 hours/day, seven days/week, prohibit limits on the length, content, or number of relayed calls, and require CAs to be familiar with the communication needs and cultures of individuals who are deaf, hard of hearing, and speech impaired. In addition, the rules ensure total confidentiality of

relayed conversations, disallow the imposition of extra charges on relay users for their use of relay services, and prohibit CAs from intentionally altering the content of relayed conversations.

While addressing many important relay issues in its final document, the FCC evaded resolution of one issue which the deaf community maintains is at the heart of a functionally equivalent relay service: a requirement for a minimum typing speed for all CAs. Because much of a relayed conversation is typed by CAs to TTY users, a swift typing speed is critical to the efficient flow of information during a relayed conversation. Where typing speeds are slow, delays result, causing frustration for both hearing and deaf consumers. This, it has been shown, results in a general reluctance on the part of employers and businesses to use relay services.

In its final rules, the FCC refused to set a minimum typing speed for relay service providers, ignoring the pleas of TTY user communities. The consequence has been that CA typing speeds vary throughout the country, and while one may be lucky enough to secure a prompt and efficient CA in the relay services of one state, another state may employ CAs whose typing speeds are sluggish and ineffective.

A second area which continues to trouble consumers is the FCC's inordinately long delay in deciding the most appropriate method to recover interstate relay service costs. Although the FCC requested additional comment on this issue as early as July of 1991, when it first issued its final regulations on Title IV,

one and a half years later, the Commission has still not resolved this matter. As a result, at least one third of the states continue to refuse to provide incoming and outgoing interstate relay service; most of these state have further indicated that they will not offer this service until the FCC issues its ruling on the appropriate cost recovery method. Pleas by consumers to the FCC to issue its decision on interstate relay funding over the past eighteen months have gone on to no avail.

3. Enforcement and Technical Assistance

Individuals who depend on telecommunications relay services also have serious concerns about the extent to which the FCC intends to enforce its relay regulations. While, as noted, many of the regulations are designed to ensure high quality relay services, the nonregulatory environment of the Reagan-Bush years has left consumers with disabilities fearful that the FCC will not perform substantial monitoring to ensure compliance with its own rules. When confronted on this issue, the Commission has repeatedly cited budgetary restraints that will force the agency to limit the extent to which it can monitor the actual provision of relay services around the country.

Concerns over enforcement have prompted consumers to request the FCC to establish a formal federal advisory committee on relay services. Congress too, had recognized that the specialized nature of relay services necessitates direct and ongoing input from the communities these services are intended to serve.³⁰

While the FCC has agreed to meet with consumers on an informal basis when so requested, the recommendation for a formal advisory committee has been rejected outright by the FCC of the Bush Administration, without much explanation.

Also of considerable concern is the failure of the FCC to provide any nationwide training or technical assistance on Title IV. Unlike the Department of Justice and other agencies charged with implementing the ADA, the FCC has neither requested nor received any federal funds to administer ADA technical assistance for this Title. The consequence has been that businesses, employers, and other entities throughout the country remain unaware of the existence or functions of a relay service. Lack of knowledge about these services continues to frustrate the general purpose and goals of the Title IV, to fully integrate deaf, hard of hearing, and speech impaired individuals in the social and economic mainstream of American life. Indeed, unaware of their purpose and function, businesses and employers remain hesitant to use relay services at all in their everyday activities.

4. State Certification of Relay Services

While the ADA places the obligation to provide relay services on telephone carriers, states are permitted to develop their own relay programs, and may receive certification to operate and enforce these programs from the FCC. The FCC may certify a state relay program only if the program is in

compliance with the FCC's minimum relay standards and if the state provides adequate procedures and remedies for its enforcement.³¹ Between October 1, and December 31, 1992, nearly all fifty of the nation's states submitted requests for certification to the FCC. Almost all of these requests were deficient in one or more areas.³² The FCC now has the task of reviewing the documentation submitted by each state and determining whether such documentation reflects a relay service program that fully complies with the Commission's rules. Once a state is certified, consumers in that state will be required to have their complaints investigated and resolved by local administrative bodies, in place of the FCC. Because the certification process does remove the FCC from the role of direct enforcer of Title IV, it is critical that the incoming Clinton Administration grant certification only to those states that fully satisfy the Commission's requirements for high quality relay services.

5. Future Telecommunications Developments

Prior to the ADA, the FCC had done little to address the telecommunications needs of individuals with disabilities.³³ Even Title IV of the ADA is only a small piece in the giant puzzle of telecommunications. The 1990s are bringing with it major advancements in telecommunications products and services designed to enhance the exchange of information over wire services nationwide. Yet unlike the Architectural and

Transportation Barriers Board which ensures physical accessibility in building construction and design, there is no component of the FCC that has a parallel purpose of ensuring that advances in telecommunications network design and services are accessible to individuals with disabilities. If addressed in the developmental stages of telecommunications design and manufacture, the costs of providing access for these persons can be a mere fraction of the overall costs of producing new telecommunications services and equipment for the general population. If, however, the needs of these populations are ignored at the outset, the costs of retrofitting the networks to meet their needs may, at a later date be considered excessive by companies controlling those networks. Efforts have been made to alert the FCC of the importance of addressing disability access needs at the outset. However, by and large these efforts have been ignored by the FCC of the Bush Administration.

One example helps to illustrate this point. During the past year, the FCC issued a request for comments on a new type of video service called video dialtone. This technology will allow viewers, with a telephone call, to call up videos on their television screens upon demand. In comments to the FCC, consumers with disabilities raised concerns that modifications to this new service may be necessary to make it accessible to individuals with sensory impairments. These comments were virtually ignored in the FCC's final order on video dialtone.

IV. Conclusion and Recommendation

Vigorous enforcement of federal laws requiring communication accessibility will be critical to guaranteeing the civil rights of deaf and hard of hearing individuals in the upcoming Clinton Administration. In order to achieve effective communication by entities covered under the ADA and other nondiscrimination laws, the following recommendations are offered:

1. Additional time, money, and staff will be needed for federal agencies in the Clinton Administration to adequately enforce compliance with programs and activities covered by the Rehabilitation Act of 1973. With these additional resources, agencies should exercise their authority to conduct regular compliance reviews of covered entities across the country. Additionally, federal agencies, especially those whose contacts with individuals with disabilities is extensive, should open dialogues with disability advocates to target areas in special need of enforcement.
2. The new Attorney General should exercise a commitment to vigorously enforce the Americans with Disabilities Act. Toward this end, DOJ should hire sufficient staff to promptly resolve complaints filed under Titles II and III (as well as other federal nondiscrimination laws for which DOJ is primarily responsible).
3. Agencies that have not heretofore issued Section 504 regulations covering their programs and activities should initiate rulemaking proceedings to do so at once.

4. The FCC should set up an internal committee to review all regulatory developments that will directly or indirectly affect telecommunications access for individuals with disabilities. To accomplish this objective, the FCC needs first, to hire additional staff with experience in disability issues, and second, to establish an ongoing formal advisory committee to receive regular input from disability advocates on the telecommunication needs, including the relay service needs, of individuals with disabilities.

5. The FCC should request adequate funding to conduct technical assistance on Title IV of the ADA across the nation, and to monitor, on an ongoing basis, compliance with its telecommunications relay service rules.

6. The FCC and DOJ should coordinate efforts to resolve the problem of ensuring telecommunications access for TTY users to businesses and governments that rely on interactive telephone services.

1. Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended.

2. 45 CFR § 84.52(a)

3. 45 CFR §84.52(d).

4. 45 CFR §84.52(b).

5. The National Center for Law and Deafness alone received more than fifty such complaints in a four year period.

6. This is even more true in programs administered by other federal agencies, such as the Department of Justice, where a backlog of cases has caused extensive delays in processing complaints.

7. 57 Fed. Reg. 39604, et. seq.

8. Greene et al. v. Bowen, Civ. Act. No. 87-2219.

9. 42 U.S.C. §12111 et. seq.
10. cite to reg.
11. 42 U.S.C. §12131 et. seq. Subtitle A of Title II, prohibiting discrimination in the programs of public entities, went into effect on January 26, 1992.
12. 28 C.F.R. §35.130(b).
13. 56 Fed. Reg. 35694 et. seq. (July 26, 1991), to be codified at 28 C.F.R. Part 35.
14. 28 C.F.R. §35.160 (a).
15. 28 C.F.R. §35.104.
16. 56 Fed. Reg. 35712 (July 26, 1991).
17. 28 C.F.R. §35.104.
18. cite
19. 28 C.F.R. §35.160(b)(2).
20. 42 U.S.C. §12181 et. seq.
21. S. Rep 116 (101st Cong., 1st Sess.) at 34 (Aug. 30, 1989); H. Rep. 485, Pt. 2, 101st Cong., 2d Sess. at 65-66 (May 15, 1990).
22. cite.
23. TTYs, also known as teletypewriters, are also abbreviated as TDDs (telecommunications devices for the deaf) or TTs (text telephones).
24. cite to Milbank article for examples.
25. In the Matter of Telecommunications Services for Hearing-Impaired and Speech-Impaired Individuals, and the Americans with Disabilities Act of 1990, Notice of Proposed Rulemaking, 55 Fed. Reg. 50037 (December 4, 1990).
26. cite to HAC and to others
27. cite.
28. The other federal agencies that promulgated regulations implementing the ADA issued those regulations in accessible formats.

29. The "functionally equivalent" requirement is found in the ADA's definition of "telecommunications relay services". 47 U.S.C. §225(a)(1). This requirement in turn stems from the overall obligation of the FCC to provide universal and affordable telephone service to all Americans.

30. In its Report on the ADA, the Senate Labor and Human Resources committee explained that "given the unique and specialized needs of the population that will be utilizing telecommunications relay services, the FCC should pay particular attention to input from representatives of the hearing and speech impaired community. It is recommended that this input be obtained in a formal manner such as through an advisory committee that would represent not only telecommunications relay service consumers but also carriers and other interested parties. S. Rep. No. 116 (101st Cong., 2nd Sess. at 81) (emphasis added).

31. Cite to L. Rev. p.594 for more info.

32. give examples - e.g. inadequate enforcement, insufficient publicity, confidentiality.

33. cite to examples.

RIGHTS OF INSTITUTIONALIZED PERSONS WITH DISABILITIES

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I. INTRODUCTION

Over twelve years after the passage of the Civil Rights of Institutionalized Persons Act¹ ("CRIPA"), the Justice Department continues to enforce the statute in a lackluster manner, resulting in the continued confinement of persons with mental disabilities in substandard, abusive institutions that fail to provide their residents with necessary habilitation and treatment. In previous reports,² the Citizens' Commission has documented, among other things, the Department's inordinate delay in investigating and remedying harmful institutional conditions; its failure to bring a sufficient number of lawsuits under the statute; its preference for weak, virtually identical consent decrees that fail to address a broad range of institutional problems and pursue only the narrowest remedies available; its unjustified changes of position or withdrawal in key pre-CRIPA cases; and its isolation from important advocacy groups in the field, including federally-sponsored groups. Regrettably, the picture has not improved in the last two years. If anything, the situation is bleaker, in that recently the Department apparently has concluded that almost any court-ordered relief, even pursuant to a consent decree, is inappropriate. The new Administration has a golden opportunity to revive enforcement in this critical area and, in conjunction with aggressive enforcement of the Americans With Disabilities Act of 1990³

("ADA"), assure all citizens with disabilities that their rights will be respected and enforced.

II. ENFORCEMENT OF THE RIGHTS OF INSTITUTIONALIZED PERSONS WITH DISABILITIES THROUGH CRIPA

Advocates for people with disabilities hailed the passage of CRIPA in 1980 as ushering in a new period of active protection of the rights of institutionalized persons with disabilities.⁴ Unfortunately, as noted in the Commission's prior reports, the promise was not fulfilled.

The Special Litigation Section, within the Justice Department's Civil Rights Division, is charged with enforcing CRIPA. Between September 30, 1989 (the date for the last data available as of the time of the Lost Opportunities Report) and September 30, 1991,⁵ the Section initiated only eight new investigations in mental health, mental retardation, and nursing home facilities. Other investigations were continuing, with some demonstrating the previously-observed pattern of lengthy delay.⁶ Pursuant to 42 U.S.C. § 1997b of CRIPA, the Department sent "findings" letters to approximately twelve facilities during this period. It filed five consent decrees (contemporaneously with or shortly after filing complaints), three in mental health cases and two in mental retardation cases. The Department also pursued compliance matters in some of its consent decree cases.

During this period, the Department filed no new cases other than the consent decree cases, though subsequently, in January and February 1992, it filed three new mental retardation cases.⁷ These cases all are currently in the discovery stage, with trials

expected this summer if no settlements are forthcoming. With the exception of these latest cases, the occasional compliance motions, and the United States v. Oregon case discussed below, the Department is not actively litigating any CRIPA cases in the mental disability area.

Numbers, of course, cannot tell the entire story. For example, if the consent decrees were extensive agreements addressing the broad range of institutional harms and necessary relief that have become essential components of most institutional reform litigation, the number of decrees entered would not be unimpressive. However, as noted in previous reports,⁸ most of the Justice Department's agreements do not come close to fitting this description. Moreover, although the filing of three new cases in early 1992 might suggest a commendable burst of activity, a review of the cases demonstrates the inordinate delay in the Department's activities. In one case, United States v. Illinois, over six years elapsed between the initiation of the investigation into conditions at the Howe Developmental Center and the filing of the complaint.⁹ In United States v. Pennsylvania, a case concerning the Ebensburg Center, the time lapse was five and one-half years.¹⁰ Only in United States v. Tennessee did the Department move relatively expeditiously, filing suit one and one-half years after initiating the investigation.¹¹

In each of these cases, and in almost all of the consent decrees it has entered, the Justice Department has arbitrarily declared certain rights and remedies off limits. Thus, while the

Department will sue over an institution's failure to provide individualized training and behavioral programming to the extent such failure results in unreasonable risks to residents' personal safety and undue bodily restraint,¹² it will not challenge the institution's failure to maintain residents' self-care skills or to implement the decisions of professionals recommending community placement.¹³ The Department also continues to virtually ignore statutory causes of action in its CRIPA complaints.¹⁴ In the rare instances in which the Department's efforts can be compared to other findings regarding the same institutions in suits brought by private parties, the limited nature of the relief sought by the Department is striking.¹⁵

The unduly restrictive standards for relief that the Justice Department implements in its CRIPA cases not only limit the results obtained but also contribute to the extensive delay in processing investigations and cases. When the available relief is so limited, state and local officials have an easier time making improvements that undercut the remaining issues in the case. The Special Litigation Section is then left with the choice of litigating a relatively weak case; terminating the investigation altogether; or keeping the investigation open in case conditions deteriorate again or the policy is changed to allow the pursuit of more extensive relief. A Justice Department leadership serious about enforcing CRIPA fully could avoid this aspect of the delay problem by aggressively pursuing relief as broad as possible to address identified constitutional and statutory deficiencies, and by not

engaging in excessive and frequently unproductive review of attorneys' work product.

Until recently, the Justice Department's policy of CRIPA enforcement leaned heavily on consent decrees in those relatively few cases it prosecuted beyond the investigation stage. As problematic as the consent decrees are, they at least are enforceable as court orders, with the possibility of further court-ordered relief or contempt sanctions if the defendants fail to comply with the terms of the decree. Now, however, the Department has retreated still further in its enforcement efforts by no longer seeking court-enforceable agreements. The new policy, apparently pressed on the Special Litigation Section by the Deputy Assistant Attorney General responsible for overseeing the "disability law" sections,¹⁶ has resulted in the entry of no new consent decrees since the end of Fiscal Year 1991. Under current policy, agreements with state or local officials should be private settlements entered without court approval. If there is a later disagreement between the parties--which, given the history of institutional reform litigation, is quite likely even when the parties agree on the basic parameters of relief--a complaining party may be able to petition a court for enforcement of the agreement or contract but it would be the first time the court would be exposed to any knowledge about the underlying circumstances of the case. At best, compliance would be more difficult to obtain. At worst, it will become virtually impossible to enforce these already weak agreements.

The difficulties of achieving compliance in institutional reform cases are challenging enough without the added impediment of a questionably-enforceable agreement. In United States v. Oregon,¹⁷ a case against the Fairview Training Center, the Department's admirable efforts to enforce the consent decree have been stymied at least temporarily by a trial court ruling that effectively vitiates the consent decree in the case. Oregon had represented one of the few bright spots in the Department's enforcement of CRIPA.¹⁸ Among other things, the consent decree provided for an advisory expert panel and was at least rhetorically more sympathetic to community placement of inappropriately confined individuals. After finding numerous compliance problems, the Department filed a motion for contempt and further relief on May 31, 1991.¹⁹ In the motion, in addition to seeking to hold the defendants in contempt, the Department sought an expanded role for the expert panel and increased community placements as a remedy for unconstitutional conditions of confinement. The district court denied the United States's motion, concluding that the defendants' non-compliance with the decree did not justify a finding of contempt or other relief unless the United States could demonstrate that each claimed item of non-compliance was independently constitutionally required under the Youngberg v. Romeo²⁰ case. According to the trial court, the consent decree only committed the defendants to engage in a process by which professional judgment would be exercised in treatment decisions. The United States has appealed this decision, which is still pending before the Court of

Appeals for the Ninth Circuit. While the trial court's decision fails to take into account recognized standards for enforcing consent decrees, and thus appears plainly incorrect, it represents a not completely illogical reading of a consent decree that seems at times to embrace process over substance.²¹ The experience at a minimum ought to make the Justice Department exceedingly careful in its negotiation of agreements with state and local officials. Eschewing court enforcement will only make the enforcement problems more intractable.

Moreover, from a public policy standpoint, the Department's policy of not seeking court-enforceable agreements has serious negative consequences. The Justice Department cannot view litigation as a private party would, free to enter into private (and possibly unpublicized) agreements at its whim. It is a public agency responsible for enforcing the rights of its most vulnerable citizens. To the extent the new policy makes it more difficult to publicize deleterious institutional conditions, enforcement is hindered, and people in institutions suffer needlessly.

The previous Citizens' Commission reports have noted that there are changes in the CRIPA statute that would facilitate more expeditious investigation and, where necessary, litigation to end abusive institutional practices.²² Neither Congress nor the Bush Administration has pursued these or other possible amendments to the statute.²³ Indeed, since Senator (now Governor) Lowell Weicker (R-CT) left the Senate, Congress has shown little interest in CRIPA. The last oversight hearings were held in 1985. It is long

since time for Congress to hold new oversight hearings on CRIPA, both to document the current state of the Department's enforcement efforts and to explore fully the desirability of any statutory changes.

III. THE DEPARTMENT'S ACTIVITIES IN NON-CRIPA CASES

Although many of the Justice Department's pre-CRIPA cases have receded with the passage of time, one of the cases that has not is the landmark case of Wyatt v. King, formerly styled Wyatt v. Stickney.²⁴ The Justice Department's recent withdrawal from Wyatt comes at a particularly inopportune time.

Wyatt is the landmark right-to-treatment and right-to-habilitation case, decided originally by Judge Frank Johnson, Jr., in 1972, and the subject of numerous compliance hearings and reviews over the years since then. The Justice Department was appointed as litigating amicus curiae in 1971 and played an active and crucial role in Wyatt until 1982, when it changed its pro-plaintiff position and agreed with the defendants on a proposed settlement of the case.²⁵ Because plaintiffs did not accept the proposed settlement, the case proceeded, with the plaintiffs and defendants finally agreeing to a detailed consent decree in 1986 that, among other things, provided for extensive community placement and the creation of a review panel. Though far less active, the Department remained in the case.

Recently, the defendants sought to overturn the 1986 decree on the basis that it went beyond constitutional requirements. The district court denied the motion and the defendants appealed, with

the appeal now pending before the Court of Appeals for the Eleventh Circuit. In the meantime, the defendants filed a motion in the trial court seeking a finding of compliance with the 1986 decree and 1972 standards, as well as modification of some key standards. A hearing on defendants' motion is scheduled in the near future. Subsequent to the filing of defendants' motion, the Justice Department filed a motion to withdraw from the case. The trial court granted the motion reluctantly, indicating it would "welcome a request by the United States in the future to renew its participation in this litigation."²⁶

While the Department's change in position in 1982 seriously undercut the legitimacy of its role in Wyatt, its continued presence in the litigation allowed it to play a more productive role if the occasion arose or its policies changed. Furthermore, withdrawal from the case that began the Department's efforts to vindicate the rights of institutionalized persons with disabilities has crucial symbolic importance. One of the first things a new Administration could do to send the message that it intends to reassert itself as an advocate for such persons is to take the district court up on its invitation and seek once again to participate in the historic Wyatt litigation.

IV. THE JUSTICE DEPARTMENT'S RELATIONS WITH PRIVATE PLAINTIFFS, ADVOCACY GROUPS, AND OTHER ENTITIES

As noted in Lost Opportunities, one of the critical failures of the Reagan Justice Department in the institutional litigation area was its complete estrangement from federally-funded Protection and Advocacy groups and other advocates for people with

disabilities. While there was some hope at the time of the Lost Opportunities report that the estrangement might be ending,²⁷ the Department remains extremely isolated from these essential groups. The Department's refusal to use its intervention authority to become involved in existing private cases, its previously-expressed hostility to private groups seeking to intervene in its cases,²⁸ and its retreat from the frontiers of institutional reform litigation, have combined to remove it from any meaningful contact with advocacy groups. In conjunction with the Department's unreasonably restricted conception of institutional harm and available relief, this isolation makes Justice Department attorneys not as knowledgeable as they should be about the latest developments in the mental disability field. As the new Administration prepares to take office, one of the first things it must do is re-establish those critical links with established advocacy groups.

Within the Civil Rights Division itself, coordination is also critical between the Special Litigation Section and other entities involved in enforcing the rights of persons with disabilities. For example, Title II of the ADA, which addresses the programs and services offered in public entities such as state and local institutions covered by CRIPA, provides a potentially powerful tool for challenging discriminatory provision of services and can be an important component of relief in CRIPA cases.²⁹ But as long as the Justice Department avoids asserting statutory causes of action in its CRIPA cases, the potential of Title II in institutional

litigation will be unrealized. In one recent case, Special Litigation Section attorneys made preliminary inquiries concerning the possibility of making a Title II claim in one of their cases. Because the Division has divided responsibility for enforcing most of the ADA between two other sections, the problems of coordination proved excessively daunting and the Section decided not to pursue the ADA claims. Clearly, coordination within the Civil Rights Division itself must become more efficient so that all appropriate claims can be made and litigated.

V. CONCLUSION AND RECOMMENDATIONS

The Department's role in enforcing CRIPA remains unacceptably limited. To enforce CRIPA as Congress initially intended--aggressively, using litigation as necessary to persuade recalcitrant state and local officials of the need to reform their institutions--the new Administration must appoint people in key leadership positions within the Civil Rights Division who are committed to full enforcement of the constitutional rights of people in institutions. The current Division structure, in which the disability-oriented sections report to one Deputy Assistant Attorney General, provides an excellent opportunity for such leadership. This Deputy Assistant Attorney General would also be in a position to coordinate enforcement efforts between the Special Litigation Section and other sections responsible for enforcing ADA.

As noted in Lost Opportunities,³⁰ so little has changed with respect to the Justice Department's enforcement of CRIPA that it

remains appropriate to restate again, in essence, the recommendations for action that originally appeared in One Nation. Those recommendations, with appropriate changes to reflect recent developments (new recommendations are labeled "NEW," revised recommendations "REVISED"), are as follows:

1. The new Administration's assistant attorney general for civil rights must commit him or herself to full and effective enforcement of CRIPA and to a generous interpretation of the constitutional and statutory rights of institutionalized persons with mental disabilities.
2. The new Administration's assistant attorney general for civil rights must commit him or herself to the use of litigation under CRIPA where necessary to vindicate the rights of institutionalized persons with mental disabilities.
3. The new Administration must appoint a person as deputy assistant attorney general over disability issues who is knowledgeable about such issues and committed to full enforcement of the rights of people with disabilities, including those who are institutionalized. In consultation with the leadership of the Special Litigation Section, the new deputy assistant attorney general must streamline considerably the Department's procedures for approving CRIPA investigations, findings letters, proposed consent decrees, and authorizations to file suit. Most critically, the new Administration must reverse the policy of foregoing court-approved agreements under CRIPA. NEW RECOMMENDATION.
4. CRIPA should be amended in various respects to make it easier

for the Justice Department to investigate and, if necessary, sue immediately to enjoin institutional conditions that are imminently life-threatening. The statute also should be amended to clarify that other federal agencies that provide funding to institutions should take into account the findings generated by the Justice Department's CRIPA investigations. The Administration should consider ways, including amendments to CRIPA, that would enhance the involvement of persons with mental disabilities and their advocates in the CRIPA negotiation and implementation processes. Finally, Congress and the Administration should consider carefully whether CRIPA should be amended to contain an explicit recognition of the availability of community placement relief in appropriate cases. REVISED RECOMMENDATION.

5. To develop an adequate record of the Justice Department's CRIPA enforcement activities, Congress should convene oversight hearings at the earliest possible opportunity. NEW RECOMMENDATION.

6. As soon as possible, the new Administration should file a motion to re-enter the historic Wyatt v. King litigation at both the trial and appellate levels. NEW RECOMMENDATION.

7. The Justice Department must rediscover its links with public interest groups and other advocates for people with mental disabilities. To facilitate its own enforcement activities, the Justice Department must re-consider its policy against intervention in appropriate private civil rights actions seeking to remedy unconstitutional institutional conditions. Further, the Department should reconsider its opposition to intervention efforts into CRIPA

litigation by private groups. CRIPA should be amended to require the Justice Department to consult with private plaintiffs in intervention cases.

8. Finally, the Department of Justice must re-enter the dialogue with courts, advocates, and others over the nature and extent of the rights of institutionalized persons with mental disabilities. The Department should be involved in appellate litigation that seeks to expand these rights, rather than seeking to contract them as it so often did during the last twelve years. In particular, the Department must reconsider its policy of eschewing community placement as a possible remedy for unconstitutional conditions. Re-training of staff attorneys and other professionals in the Special Litigation Section should be provided so that these individuals can be brought up to speed quickly regarding the many developments in the mental disability field that have occurred without the Justice Department's participation during the last twelve years. REVISED RECOMMENDATION.

ENDNOTES

1. 42 U.S.C. § 1997 et seq.

2. Robert Dinerstein, "Rights of Institutionalized Disabled Persons," Chapter XXII, in Citizens' Commission on Civil Rights, One Nation, Indivisible: The Civil Rights Challenge for the 1990s 388 (R. Govan & W. Taylor eds. 1989) (hereinafter cited as "One Nation"); Robert Dinerstein, "Rights of Institutionalized Persons With Disabilities," Chapter XXII, in Citizens' Commission on Civil Rights, Lost Opportunities: The Civil Rights Record of the Bush Administration - Mid-Term 177 (S. Liss & W. Taylor eds. 1991) (hereinafter cited as "Lost Opportunities").

3. 42 U.S.C. § 12101 et seq.

4. See One Nation, at 391.

5. The latest available report on the Department's activities under CRIPA is "Attorney General's Report on The Civil Rights of Institutionalized Persons Act, Fiscal Year 1991 (hereinafter cited as "FY 1991 CRIPA Report")," covering the period from October 1, 1990, to September 30, 1991. The Department has not yet prepared its report for fiscal year 1992, which ended September 30, 1992. Based on informal discussions with Special Litigation Section personnel, the Department's activities have not changed significantly since September 30, 1991, with the exceptions noted in this chapter. In addition to the 1991 CRIPA Report, this chapter relies on "Attorney General's Report on the Civil Rights of Institutionalized Persons Act, Fiscal Year 1990 (hereinafter cited as "FY 1990 CRIPA Report") and "Activity Under Civil Rights of Institutionalized Persons Act By Type of Facility," September 30, 1992 (hereinafter cited as "CRIPA Docket") for its discussion of CRIPA activities. The author's version of the latter document, however, had information on pending investigations redacted. Unless otherwise noted, all information in the paragraph in the text is from the two most recent CRIPA reports and the CRIPA Docket.

6. For example, in Fiscal Year 1991, the Justice Department sent Maryland state officials a letter of findings regarding the Great Oaks Center, an institution for people with mental retardation. FY 1991 CRIPA Report, at 5. The Department initiated this investigation on November 18, 1986. FY 1987 CRIPA Report, at 10. Under CRIPA the Attorney General must send the findings letter to appropriate state or local officials no sooner than 49 days before suit is filed. 42 U.S.C. § 1997b. In the twelve years of CRIPA enforcement, the Department has never come close to running afoul of this deadline.

7. The cases are: United States v. Tennessee, C.A. No. 92-2062HA (W.D. Tenn., filed January 21, 1992) (regarding Arlington Developmental Center); United States v. Illinois, C.A. No. 92-C

0694 (N.D. Ill., filed January 28, 1992) (regarding Howe Developmental Center); and United States v. Pennsylvania, C.A. No. 92-33 (W.D. Pa., filed February 10, 1992) (regarding Ebensburg Center).

8. See One Nation, at 401, and Lost Opportunities, at 178-79.

9. See CRIPA Docket, at 13.

10. Id. See also FY 1989 CRIPA Report, at 5 (reporting that Department sent initial findings letter in November 1987 but, in response to state's claims of improvements, conducted new expert tours in 1989); FY 1990 CRIPA Report, at 4 (reporting that Department sent second findings letter during Fiscal Year 1990).

11. See CRIPA Docket, at 13.

12. See, e.g., United States v. Illinois, Complaint at 3, Para. 15.

13. The former position is that articulated by Justice Blackmun in his concurrence in Youngberg v. Romeo, 457 U.S. 307, 325 (1982) (Blackmun, J., concurring). Numerous courts have adopted the Blackmun concurrence (joined by Justices Brennan and O'Connor) in cases concerning institutionalized persons with disabilities. See, e.g., One Nation, at 396 & 616 n. 55, and, most recently, Jackson v. Fort Stanton Hosp. & Training School, 757 F. Supp. 1243, 1309-10 (D.N.M. 1990), rev'd in part on other grounds, 964 F.2d 980 (10th Cir. 1992). Indeed, the author of this chapter is unaware of any court that has failed to adopt the Blackmun concurrence. For cases directing community placement relief even after the Youngberg case, see cases cited in One Nation, at 616 n. 57; see also Thomas S. v. Flaherty, 699 F. Supp. 1178 (W.D.N.C. 1988), aff'd 902 F. 2d 250 (4th Cir.), cert. denied, 111 S. Ct. 373 (1990), and Jackson v. Fort Stanton Hosp., 757 F. Supp. at 1311-13.

14. An exception is in United States v. Tennessee, where the Department included in the complaint, Complaint, Pars. 1 & 21, a claim under the Education of the Handicapped Act (sic) (Congress amended the statute in 1990 to rename it the Individuals with Disabilities Education Act), apparently because the trial attorney then assigned to the case had an education law background and pressed the claim aggressively with her superiors.

15. Compare the narrow relief the Justice Department sought in its case against Fort Stanton State Hospital and Training School (discussed in One Nation, at 620 n.107, and Lost Opportunities, at 241 n.9) and in the Las Lunas case (discussed in Lost Opportunities, at 180 & 241 nn.46-47) with that discussed in Jackson v. Fort Stanton Hosp. & Training School, 757 F. Supp. 1243, which concerns both institutions. See also One Nation, at 398-99 (discussing similar issue in Oklahoma institutions).

16. That is, the Special Litigation Section; the Coordination and Review Section, which writes ADA regulations, coordinates government-wide enforcement of Title II of the ADA, and investigates Title II complaints; and the new Public Access Section, responsible, among other things, for litigating Title II cases, investigating and litigating cases under Title III of the ADA, and providing ADA technical assistance.

17. United States v. Oregon, No. 86-961-LE (D. Or., April 14, 1989) (consent decree).

18. See Lost Opportunities, at 178 & 241, nn. 12-22.

19. See Brief for the United States as Appellant, United States v. Oregon, No. 91-36321 (9th Cir.), at 6.

20. Youngberg v. Romeo, 457 U.S. 307 (1982).

21. See the criticisms of the Oregon consent decree in Lost Opportunities, 178 & 241, nn. 12-16. See also id. at 178-79 & 242, nn. 28-33, for a similar enforcement problem that arose in another CRIPA case settled by consent decree, United States v. Commonwealth of Massachusetts, 890 F. 2d 507 (1st Cir. 1989).

22. See Lost Opportunities, at 177, 180 & 240 n.5; One Nation, at 410-11 & 624 nn. 169-174.

23. One possible additional amendment to CRIPA would be to clarify that the Justice Department is entitled to seek community placement relief in its institutional cases where appropriate. While such a change is not strictly necessary, it would emphasize Congress's belief, expressed in numerous statutes, that community-based care is often the most appropriate setting for individuals with disabilities.

24. There are numerous opinions in the Wyatt case, many of which are unreported. The crucial initial orders appear at 344 F. Supp. 373 (M.D. Ala. 1972) (mental health case) and 344 F. Supp. 387 (M.D. Ala. 1972) (mental retardation case), aff'd in relevant part, reserved in part sub nom. Wyatt v. Aderholt, 503 F. 2d 1305 (5th Cir. 1974).

25. See the extensive discussion in One Nation, at 394-95 & 614 nn. 38-45.

26. Quoted in Memorandum from Len Rubinstein (Executive Director, Mental Health Law Project) to Justice Department Transition, December 8, 1992, at 2.

27. See Lost Opportunities, at 179-80.

28. See One Nation, at 400, 405-06.

29. For an interesting discussion of the broad scope of relief potentially available under Title II, see Timothy M. Cook, The Americans With Disabilities Act: The Move To Integration, 64 Temple L. Rev. 393 (1991).

30. See Lost Opportunities, at 180.

Race and the Death Penalty: A Double Standard of Justice

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I. Introduction

This nation's struggle for civil rights has been and continues to be a struggle aimed at replacing legal barriers to equality with the legal tools necessary to make equality under the law a reality. The legal institution of slavery was not ended altogether, until the thirteenth and fourteenth amendments were passed to repudiate the notion enshrined in the original constitution: that African Americans were only 3/5th of a human being. It took the enormous grassroots effort of the civil rights movement of the sixties to begin to make this new equality a reality in employment, housing and voting rights.

Although legal inequality in the civil as well as criminal justice institutions worked together to oppress African Americans in the early days of our nation's history, the civil rights movement made its greatest inroads in employment, housing and voting rights and in the area of public accommodations. The focus and progress in these areas has, however, obscured the shocking lack of progress toward equality in the criminal justice system. This nation's system of capital punishment, in particular, operates as if the civil rights advancements of the sixties had never taken place.

A Historical Perspective

As was true for so many institutions in our society, the criminal justice system once operated explicitly and legally based on racial considerations. Also, as was true in the case of voting, employment, housing and public accommodations, legal distinctions based on race were necessary to maintain and support first the institution of slavery and later the separate but unequal status of African Americans in the United States.

As Chief Justice Roger Taney wrote for the majority of the Supreme Court in the Dred Scott v. Sanford,¹ decision where the Court declined to rule that African Americans were persons within the meaning of the Constitution:

[A]t the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted, [blacks] had no rights that the white man was bound to respect.²

Before the Civil War many southern states maintained separate slave codes that governed the activities of most African Americans. The determination of whether a crime carried the punishment of death was made on the basis of the race of the

defendant. For example, in Virginia in the 1830's an African American could be executed for 70 crimes while whites could only face execution for 5 crimes.³ In 1848 Virginia passed a law that required a death sentence for any crime committed by an African American that was punished by a term of imprisonment of three or more years for their white counterparts. In some states the race of the victim, was a legal consideration in determining whether the ultimate punishment would be death. Certain crimes carried death as a punishment if the victim was white and the defendant was black and less severe penalties for other racial combinations.⁴

By the time of the Civil War, in some states such as Georgia, a dual system of crime and punishment was well entrenched. The State Criminal Code in Georgia contained a separate section for "Slaves and Free Persons of Color." That Code, provided for instance, an automatic death sentence for murder by African Americans, while anyone else might receive a life sentence if the conviction was based solely on circumstantial evidence or the jury so recommended.⁵ The code made rape of a white woman by an African American a capital offense. While the rape of a black woman was punishable by fine or imprisonment at the discretion of the court.⁶

After the adoption of the 13th and 14th amendments which officially ended slavery and made these types of legal distinctions unlawful, the race, particularly the race of the victim continued to be openly viewed as a consideration in determining the ultimate punishment for homicide.

A black person convicted of murdering another black was likely to be treated leniently by the courts, particularly if he had a respected white person to speak on his behalf... The murder of a white by a black, however, was perceived by whites as an assault upon their whole caste... The response to blacks who were convicted of killing whites was intended not only to punish individual offenders, but also to keep other blacks "in their places." The law was used as a powerful means of intimidation.⁷

Of the 3,859 people executed between 1930, when the federal government began keeping records, and 1967, 54% of those executed or 2,066 were African Americans.⁸ Of the 455 executions for rape during that same period, 405 of the defendants executed were African Americans.⁹ No cases are known in which a white man was executed for the rape of an African American woman.¹⁰

Unfortunately, our modern day system of capital punishment continues to operate in much the same way as it operated before the Civil War.

II. Capital Punishment in the United States: Reinforcing a Double Standard of Justice:

To date 38 jurisdictions including the U.S. Military and the Federal Government have death penalty statutes. There are currently over 2,600 people on death row. Since Gary Gilmore's execution in 1977 there have been a total of 189 executions. In 1992 there have been 31 executions-- more than any other year in the modern era of capital punishment. The states of Texas, Florida, Louisiana, Virginia and Georgia lead the nation in carrying out more executions.

On the federal level, the Congress has moved more narrowly than the states to revive capital punishment after the Supreme Court decision in the Furman case. Congress has enacted legislation that purports to pass constitutional muster to authorize the death penalty for drug related murder, under the Anti-Drug Abuse Act of 1988 and for peacetime espionage by military personnel under the Uniform Code of Military Justice. There is one person under a sentence of death under the 1988 Anti-Drug Abuse Act.

In 1972, the U.S. Supreme Court ruled in the landmark case of Furman v. Georgia, 408 U.S. 238 (1972) that death penalty statutes then existing in 37 states were invalid because they created a substantial risk that the death penalty would be imposed in an unconstitutionally arbitrary manner. In 1976 the Supreme Court approved a series of revised state death penalty statutes that were designed to guide the discretion of the sentencing body. In holding that these revised statutes appeared to pass constitutional muster, the Court explicitly left open the question of whether these new "guided discretion statutes" in fact eliminated the risk of unconstitutional death sentences because of arbitrariness and discrimination.¹¹

Several Justices expressed concern about the risk of racial bias which appeared to create pronounced disparities in death sentences. Justice William O. Douglas wrote in Furman:

"In a nation committed to equal protection of the laws there is no permissible "caste" aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, lacking in political clout, or if he is a member of a suspect or unpopular minority, saving those who by social position may be in a more protected position."

Justice Thurgood Marshall also observed that out of a total of 3,859 people who had been executed since 1930, 2,066 were black and 1,751 were white. He noted that during this period 455 men were executed for rape of whom 405 were black.

After the Supreme Court decision in the Furman case, the state of Georgia and others redesigned their death statutes in an attempt to accommodate the Court's concerns. In 1976, the Supreme Court approved a series of death penalty statutes from Georgia, Florida and Texas and the so called "modern era" of capital punishment began. Gary Gilmore was the first person executed in the modern era of capital punishment. He was killed by a firing squad in the state of Utah in 1977.

Despite some improvement in the degree of racial discrimination faced by capital defendants since the Supreme Court decision in Furman v. Georgia, there is still reason to believe that in some jurisdictions and for some crimes, the defendant's race is a determining factor--especially if the victim is white.

In July 1991, a study released by the Death Penalty Information Center and the Southern Christian Leadership Conference found that in Georgia's Chattahoochee Judicial Circuit, district attorneys sought death almost exclusively in cases where the victim was white. This proved to be true even though a majority, 65% of all homicide victims in that judicial circuit were black. The report went on to say that, "more than half of the black men sentenced to death were tried by all white juries--after the district attorney used his discretion to remove every black potential juror."

A 1990 Report from the General Accounting Office confirmed findings of discrimination in the use of capital punishment when it concluded that studies showed "a pattern of evidence indicating racial disparities in the charging, sentencing and imposition of the death penalty..." In 82% of the studies reviewed by the GAO the race of victim was found to influence the likelihood of being charged with a capital murder or receiving the death penalty.

Detailed studies have documented racial disparities in sentencing in Colorado¹², New Jersey¹³, Kentucky¹⁴, North Carolina¹⁵ and Texas¹⁶. Overall in Louisiana a death sentence is twice as likely if the victim is white than if the victim is black.¹⁷ In Florida, the odds of a death sentence are over 3 times higher for defendants suspected of killing whites than for defendants suspected of killing blacks.¹⁸ A study in Arkansas found that defendants in a case involving a white victim are more than three and one half times more likely to receive the death penalty.¹⁹ In Illinois²⁰ 4 times as likely. In Oklahoma²¹, 4.3 times as likely. In Mississippi²², defendants in white victim cases are more than 5 times more likely to be sentenced to death than defendants convicted in the murders of black victims. In Maryland²³, defendants convicted in white victim cases are 7.3 times more likely to be condemned to death.

The reality behind the statistics is a dual system of justice that treats crimes against white victims as inherently more serious than crimes against African American victims or other people of color. In human terms it may mean, as the Chattahoochee Report documented, that while prosecutors routinely remained in contact with the surviving family members of white victims, the surviving family members of African American victims were treated with indifference, hostility and often contempt.

Moreover, the dual standard of justice for victims and criminal defendants is a reflection of a criminal justice system, that at least in some parts of the country, continues to deny African Americans and other people of color their legitimate place as part of the decision making process. In one Alabama death penalty case for example, twenty-six qualified African Americans were excluded from jury service in a case involving an African American defendant, after the prosecutor ranked potential jurors as "strong", "medium", "weak" and "black"²⁴ In another case from Georgia, state courts went along with a prosecutor's decision to exclude ten potential African American jurors when he articulated reasons for excluding them such as "he appears to have the intelligence of a fence post"; "he looked a little slow" or "he looked like the [black] defendant".²⁵ The virtual exclusion of people of color from critical points in the decision-making process in capital cases accounts for a large part of the disparity in sentencing that we see.

Racial discrimination by prosecutors in selecting those defendants who will face death as a punishment, is another way in which discrimination infects death penalty cases. One elected District Attorney of the Ocmulgee Judicial Circuit in Georgia, sought death in twenty-eight cases-- in twenty-two of which the defendant was an African American.²⁶

The McCleskey Case

In 1972, the U.S. Supreme Court ruled in the landmark case of Furman v. Georgia, 408 U.S. 238 (1972) that death penalty statutes then existing in 37 states were invalid because they created a substantial risk that the death penalty would be imposed in an unconstitutionally arbitrary manner. In 1976 the Supreme Court approved a series of revised state death penalty statutes that were designed to guide the discretion of the sentencing body. In holding that these revised statutes appeared to pass constitutional muster, the Court explicitly left open the question of whether these new "guided discretion statutes" in fact eliminated the risk of unconstitutional death sentences because of arbitrariness and discrimination.²⁷

Despite the "guided discretion statutes" there is overwhelming evidence that arbitrariness and discrimination continues to infect capital sentencing. In some states it appears that race is the single most important factor in determining who will be sentenced to die and who will receive a punishment other than

death. In Georgia, studies have found that blacks accused of killing whites are 7 times more likely to receive the death penalty than whites who have killed blacks.²⁸ Overall those accused of crimes against white victims are more likely to receive death as punishment than a prison term as compared to those whose victims are black. Research in other states over the past 15 years reveals the same pattern, with its unmistakable conclusion that race considerations permeate decisions of life and death in trial courts throughout this country. This modern pattern of death sentencing mirrors the separate and unequal standard of justice that existed legally before the fourteenth amendment was enacted.

On April 22, 1987 the Supreme Court decided, the most important capital punishment case to come before it in a decade, McCleskey v. Kemp²⁹. In that case, Warren McCleskey, an African American man sentenced to die for the murder of a white police officer, challenged the validity of his Georgia death sentence under the equal protection clause of the fourteenth amendment and the eighth amendment of the Constitution. He based his claim on substantial evidence that race, as much or more than any single legitimate sentencing factor, influenced the decision to sentence him to death. He said, in effect, that were it not for my race and the race of victim, I would not have been sentenced to death.

In support of his claim, he presented a study by Professor David Baldus of the University of Iowa of over 2,500 homicide cases in Georgia. That study, which controlled for 230 variables that should explain why some received the death penalty and others didn't, found that a person accused of killing a white victim, was more than four times more likely to be sentenced to death than a person accused of killing a black person. Although fewer than 40 percent of Georgia's homicide cases involved white victims, 87 percent of all cases in which a death sentence was imposed involved white victims.

While the Court did not dispute the evidence,³⁰ it held that Warren McCleskey was not entitled to relief under the eighth or fourteenth amendments unless he could prove that a particular judge, juror or prosecutor had selected him for death because of his race or the race of his victim.

This difficult standard of proof virtually ensures that most death sentences that result from system-wide bias will not be remedied. Only in rare cases when the defendant can prove bias in the minds of a prosecutor, a judge or a juror would a capital defendant or his or her victim be protected against race discrimination. In light of the McCleskey decision all real prospects for curbing one of the most egregious aspects of the current capital system rest not with the courts but with public opinion and with the legislatures³¹.

III. Solutions and Recommendations

The utility of the death penalty as a means of addressing the problem of violent crime and homicide is questionable at best. However, it is clear that its continued presence as a part of our criminal justice system drains resources from those solutions which have proven to be more effective.³² One solution, given the dubious value of capital punishment and the moral dilemma that continued bias in its application poses, is to abandon it altogether in favor of alternative methods of punishment. At a minimum, for as long as this institution remains with us, we must insist that it conform to the simple principle of equality before the law.

1. 60 U.S. 393, 407 (1857).

2. In The Matter of Color, Race and the American Legal Process: The Colonial Period 6 (1978), A. Leon Higginbotham, Jr. (citing 60 U.S. 393, 407 (1857)).

3. Race and Capital Punishment: An Overview of the Issues, 25 Crime and Social Justice 94-113 (1986), Michael Radelet and Margaret Vandiver.

4. Id

5. McClesky v Kemp 481 U.S. 297,329 (1987) (Brennan dissenting).

6. Id.

7. Radelet and Vandiver, Race and Capital Punishment 97-98.
Citing Raymond Blaine Fosdick, American Police Systems, (Montclair, N.J.: Patterson Smith) (1969)

8. Id. at 98

9. Id

10. Id. Indeed the troubling evidence of racial discrimination in the use of the death penalty as punishment for rape was one of the considerations when the Court ruled in Coker v. Georgia, 433 U.S.584 (1977), that imposing the death penalty for rape violated the eighth amendment prohibition against cruel and unusual punishment. See also 481 U.S. 279 at 332 (1987) (Brennan dissenting).

11. Gregg v. Georgia, 428 U.S. 153 at 195 n.46 (1976).

12. D. Baldus, G. Woodworth & C. Pulaski, Arbitrariness and Discrimination in Colorado's Post-Furman Capital Charging and Sentencing Process: A Preliminary Report (1986)

13. Beinen, Weiner, Denno, Allison & Mills. The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion 21 RUTGERS L. REV. 27, 226 (1988)
14. Vito & Keil, Capital Sentencing in Kentucky: An Analysis of the Factors Influencing Decision Making in the Post- Gregg Period, 79 J. CRIM. L. & CRIMINOLOGY 483 (1988)
15. B. Nakell & K Hardy, Arbitrariness of the Death Penalty 146 (1987)
16. Henderson & Taylor, Dallas Rate of Convictions in Black Victim Crimes, Dallas Times Herald, Nov. 17, 1985, at A-17.
17. D. Baldus, C. Pulaski, Jr. & G. Woodworth, Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts XV STETSON L. REV. 164 (1986)
18. Radelet & Pierce, Choosing Those Who Will Die: Race and the Death Penalty in Florida. 43 Florida Law Review 28 (January 1991)
19. Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 STAN. L. REV. 27, 78,96 (1984)
20. Id
21. Id.
22. Id.
23. Id.
24. R. Tabak, Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing ? 785 N.Y.U. REVIEW OF LAW & SOCIAL CHANGE (1990-1991)
25. Id.
26. Id. This same DA was found to have written a memorandum describing how jury commissioners could under-represent African American citizens on jury rolls and avoid detection. A federal district court found that the memorandum "was intentionally designed to under-represent black people and woman on grand and traverse juries" Id. Amadeo v. Zant, 486 U.S. 214 at 218. (1988). See also, Radelet & Pierce, Race and Prosecutorial Discretion in Homicide Cases, 19 LAW & SOCIETY REVIEW 587 (1985)
27. Gregg v. Georgia, 428 U.S. 153 at 195 n.46 (1976).
28. See McCleskey v Kemp, 481 U.S. 279, (1987).

29. 481 U.S. 279 (1987)

30. It assumed for the purpose of deciding the constitutional question, that the evidence presented by McCleskey was correct.

31. In fact the Supreme Court, while declining to grant relief in McCleskey stated that arguments about the persistent pattern of racially discriminatory sentencing are "better presented to the legislative bodies"

32. From the very beginning, death penalty cases are more expensive than other criminal cases. In California, capital trials are six times more expensive than other murder trials. In Texas, a single death penalty case costs the taxpayers an average of \$2.3 million-- three times the cost of imprisoning someone in a single cell at the highest security level of 40 years. In Florida, each execution costs \$3.2 million.

The current state of the economy has forced cutbacks in criminal justice systems around the country in critical areas. All too often states that have the death penalty are finding that they must choose between an expensive death penalty trial and execution in a handful of cases and important law enforcement resources in other areas. For example, the state of New Jersey was forced to lay off more than 500 police officers in 1991 at a time when it was implementing a death penalty statute that would cost an estimated \$16 million per year. In Florida, a budget cut of \$45 million for the Department of Corrections forced the early release of 3,000 prisoners. Ironically, by 1988 Florida had spent \$57 million to execute 18 people. The state of Illinois does not have the money to open its newly constructed prisons and yet it has the fourth largest death row in the country. See e.g., Death Penalty Information Center, Millions Misspent: What Politicians Don't Say About the High Cost of the Death Penalty (October 1992).

LATINO CIVIL RIGHTS GOALS FOR THE 1990S AND BEYOND

By Raul Yzaguirre, Charles Kamasaki, and Claire Gonzales

I. INTRODUCTION

Latinos occupy a unique and ambiguous place in the civil rights community. On the one hand, the 22.35 million Hispanics in the United States counted in the 1990 Census, and the millions not counted, are a protected class under federal civil rights legislation based on national origin.¹ On the other hand, the authors argue that, for most Hispanics, the civil rights enforcement system is ineffective and largely irrelevant.

As demonstrated below, Hispanics experience the same manifestations of discrimination suffered by African Americans, persons with disabilities, the aged, and all women. Hispanics, therefore, share with these other protected classes a profound interest in strengthening the enforcement of the nation's civil rights laws.

There are, however, many differences between Hispanics and most other large protected groups with respect to civil rights enforcement. While the manifestations of discrimination may be similar for all groups, the motivation for discrimination against Hispanics is based not only on skin color and other physical attributes, but also on characteristics associated with national origin or ethnicity such as surname, language, speech accent, and culture. Hispanics are also subject to certain forms of discrimination that are not directed at many of the other protected groups such as language discrimination manifested in "English-Only" laws and the inequitable effects of immigration laws.

Unlike the experiences of African Americans and women -- and more recently persons with disabilities -- the need for and lack of civil rights enforcement on behalf of Hispanics is almost unknown to policy makers, the general public, and, unfortunately, many civil rights professionals. Thus, the Hispanic community's experiences with unlawful discrimination and the system designed to combat such discrimination are simultaneously the same as and different from those of other large protected groups.

The purpose of this brief article is to describe the experiences of Hispanics with respect to the civil rights enforcement system; analyze some of the reasons for the system's failure to adequately serve Hispanics; suggest some modest, achievable goals that can help ameliorate the problems Hispanics face with regard to civil rights; and to explain how and why it is in the national interest for the incoming administration to translate these goals into tangible programs and policies.

II. THE CIVIL RIGHTS SYSTEM: AN HISPANIC PERSPECTIVE

A. Evidence of Discrimination

Assessing discrimination experienced by Hispanics is no longer dependent on anecdotes.² In recent years, a large and growing body of social science evidence has developed that documents with some precision the scope and degree of discrimination experienced by Hispanics in the employment and housing markets. This evidence is of three basic types:

- Surveys and polls that measure the attitudes of the general public and specific segments of the public toward Hispanics and other minority groups;
- Controlled "audits," in which the treatment of closely matched pairs of Latino and Anglo (white, non-Hispanic) homeseekers or job applicants can be compared and differential treatment determined; and
- Quantitative market research, which uses residual techniques to estimate the extent to which disparities in earnings or employment between Latinos and Anglos can be explained by discrimination.

While each of these techniques has some flaws, and although no single methodology can determine with great accuracy the precise level of discrimination experienced by any protected class, the weight of the evidence, when taken together, is quite compelling. This evidence is discussed below.

1. Public Attitudes

Although most people prefer to believe that blatant prejudice and bigotry are all but extinct in present American society, recent public opinion polling data indicate otherwise. For example:

- A December 1990 study by the National Opinion Research Center (NORC) examined public opinions and perceptions of six major American cultural groups -- Whites, Jews, Blacks, Asian Americans, Hispanic Americans, and Southern Whites. Of the six characteristics measured (wealth, work ethic, violence, intelligence, dependency and patriotism), Hispanics were rated last on three and next to last on three. Over 80% of those surveyed rated Hispanics, together with Blacks, lower than Whites on one or more of the six characteristics.³
- A 1989 NORC poll asked respondents to rate the "social standing" of various ethnic groups. Of the 58 groups listed, the two largest Latino subgroups -- Mexicans and Puerto Ricans -- were ranked 49th and 54th, respectively. Both

"Negroes" and a fictitious group ("Wisians") were ranked above Mexicans and Puerto Ricans.⁴

- A 1989 study by the Urban Poverty and Family Structure Project at the University of Chicago analyzed the manner in which employers' perceptions of race and ethnicity affect hiring decisions. The study, based on interviews with 185 Chicago-area employers, found that 70% of those surveyed made distinctions among employees and potential employees based on race or ethnicity. Being Hispanic or Black, according to the employers, was perceived as being "lower class," while being White meant "middle class." The study confirmed the tendency of employers to generalize about the meaning of ethnicity and race, and to rely on these generalizations in their hiring practices.⁵

These studies indicate that the most powerful motivations for unlawful discrimination -- personal prejudice, intolerance of diversity, and reliance on negative stereotypes -- continue to permeate much of American society. As demonstrated below, these attitudes and opinions often lead to actions that have the effect of unlawful discrimination.

2. Housing and Hiring "Audits"

The use of "audits" or "tests" is a well-established methodology for uncovering housing discrimination. An audit is a survey technique in which a member of a minority group and an Anglo -- who have been carefully matched, trained, and assigned roles to ensure that they present equal qualifications -- successively visit a landlord or realtor to inquire about housing. After the visit, each auditor completes a survey form which documents how he or she was treated. Because the auditors have equal qualifications, systematic unfavorable treatment of minority auditors is considered to be evidence of discrimination.⁶

A number of independent testing studies in the late 1970s through the mid-1980s, in seven different housing markets, found substantial, statistically significant, levels of unlawful housing discrimination against Hispanics.⁷ In one widely-cited 1979 audit in Dallas, 42% of dark-skinned Mexican Americans and 16% of light-skinned Mexican Americans were given false information on the availability of rental housing. The chance of a dark-skinned Mexican American experiencing at least one instance of discrimination in a typical housing search was 96% -- a virtual statistical certainty; the probability of light-skinned Mexican Americans experiencing such discrimination was about 65%.⁸

In 1989, the Housing Discrimination Study (HDS) of the Department of Housing and Urban Development (HUD) carried out nearly 3,800 audits in 25 metropolitan areas. According to the HDS, Hispanic home buyers and renters experience discriminatory treatment in about 50% of their encounters with real estate agents and landlords.⁹ If these

data are a true reflection of the scope of housing discrimination against Hispanics nationwide, then it appears that the average Latino will almost certainly encounter at least one incident of housing discrimination in a typical housing search.

The auditing technique has also begun to be used in an employment context. Although hiring audit methodology is more complicated and less well-developed than the well-established housing audit,¹⁰ at least two major hiring audits involving Hispanics has been reported. In 1989, under a contract with the U.S. General Accounting Office, the Urban Institute conducted 360 hiring audits in San Diego and Chicago using pairs of Latino and Anglo testers. The testers, who were closely matched on principal attributes that could legitimately affect the hiring decision, applied for the same position in-person. The study found that:

- Anglo applicants received 33% more interviews and 52% more job offers than the equally-qualified Hispanic job applicants; and
- 31% of the Hispanic applicants encountered unfavorable treatment in the hiring process, compared to only 11% of the Anglo applicants.¹¹

A 1992 study by the Fair Employment Council of Greater Washington, Inc., which conducted 468 tests in which matched pairs of Latino and Anglo applicants responded to advertised job openings in the Washington, D.C., metropolitan area by telephone and mail, reported similar results. The study found that Latino jobseekers encounter discrimination 22.4% of the time.¹²

The audit technique provides powerful, empirical, "real world" evidence of discrimination in housing and employment against Latinos, under carefully controlled conditions. These and other data demonstrate that the negative perceptions and stereotypes of Hispanics and other minorities held by much of the American public are translated into actions that have the effect of unlawful discrimination. As suggested below, labor and housing market research can provide some basis for estimating the scope of such unlawful discrimination against Latinos in the United States.

3. Labor and Housing Market Research

Numerous independent studies have found that, even after controlling for variables known to affect employment and earnings, such as age, occupation and educational attainment, a significant proportion of the employment and earnings "gap" between Latinos and Anglos appears to be attributable to employment discrimination. Analysis of the results of three independent studies of the disparity in earnings and income between Hispanics and Anglos during the 1980s reveals remarkably consistent findings:

- The percentage of the earnings gap between Hispanic males and Anglo attributable to employment discrimination falls within a 10%-18% range;

- The percentage of the Hispanic female-Anglo male wage gap attributable to job bias falls within a 30%-40% range.¹³

When considered as a group, these studies provide compelling evidence of severe, persistent employment discrimination against Latinos over the last decade, despite the fact that the studies relied on a number of different data bases and used somewhat different methodologies.¹⁴ Based on the findings of these studies, the National Council of La Raza (NCLR) conservatively estimates that the cost to the Hispanic community due to lost wages attributable to employment discrimination is about \$11.7 billion annually.¹⁵

4. Other Evidence of Discrimination

Additionally, considerable job discrimination has resulted from the employer sanctions provisions of the Immigration Reform and Control Act of 1986 (IRCA). IRCA imposes penalties on employers who knowingly hire undocumented aliens. According to a 1990 General Accounting Office (GAO) study, an estimated 10% of employers surveyed reported discrimination against employees or job applicants solely on the basis of national origin characteristics, an estimated 5% had begun a practice of refusing to hire persons based on "foreign" appearance or speech accent, and an estimated 8% required only "foreign-looking" or "foreign-sounding" persons to comply with IRCA's verification requirements, all in clear violation of the law.¹⁶ The GAO study is only one of nearly a dozen reports and studies that have found a widespread pattern of employment discrimination as a result of IRCA.¹⁷

Finally, there is substantial evidence of discrimination against Hispanics in education, which is inextricably linked to both employment and housing. Recently released findings of a study commissioned by the National School Boards Association indicate that 80% of Hispanic students in the South and Northeast, 71% in the West, and 52% in the Midwest attend schools that are predominantly minority. Hispanics are now far more likely than blacks to attend segregated schools. In addition, a recent GAO report found that many of the nation's school districts continue to engage in "within-school" discrimination, e.g., student assignment policies and other practices that result in the "excessive isolation of Hispanics and other minorities."¹⁸

Given this evidence of discrimination against a fast-growing group that will soon become the nation's largest minority, one might expect that the nation's civil rights enforcement system would have responded by either fully incorporating Hispanics into existing programs or establishing new, vigorous initiatives specifically targeted to Hispanics. Unfortunately, as shall be demonstrated below, the opposite has occurred.

B. Federal Enforcement Activities

The largest and most important of the nation's civil rights enforcement agencies is the Equal Employment Opportunity Commission (EEOC). Hispanics have long argued that their community does not benefit equitably from the EEOC's enforcement activities. In an

internal EEOC report issued in 1983, "Equal Employment Opportunity Commission and Hispanics: An Analysis of the Equal Employment Opportunity Commission's Services to Hispanics in the United States," an EEOC-appointed task force unanimously confirmed this widely-held belief. The study found that Hispanics were either unaware of the EEOC's enforcement authority or had a negative perception of, or lack of trust for, the agency and its service to Hispanics. The task force report found that EEOC's record of hiring Hispanics was very poor, and that the EEOC had made little effort to improve its presence or reputation in the Hispanic community.¹⁹

Moreover, the task force found that during the late 1970s and early 1980s, at a time when the proportion of Hispanics increased from less than 3% of the labor force to almost 6%, and when the EEOC's caseload increased by 76.5%, the proportion of the caseload involving Hispanics dropped from an average of almost 8% for the 1974-1980 period to less than 5% in 1982. In addition, once charges from Hispanics were filed, they more likely to be closed without remedy to the charging party than were charges from other groups. Finally, the 1983 study noted that of the EEOC's self-reported "significant litigation" from 1972 to 1982, there were no cases listed in which the issue of national origin discrimination was litigated on behalf of Hispanics as the sole or primary issue, Hispanics were the primary class represented, or Hispanics were the only individuals represented in a "pattern or practice" case.²⁰

Based on its own statistical analysis of the EEOC's performance since the 1983 study, NCLR found a relative *decrease* in the quantity and quality of service provided to Hispanics by the EEOC. For example:

- Hispanic charges alleging discrimination based on national origin account for only 4.2% of the EEOC's caseload for the six-year period from FY 1985 through FY 1990. By comparison, charges from blacks alleging discrimination based on race, and from persons alleging discrimination based on gender and age, respectively, made up 31.6%, 21.5%, and 17.9% of the total caseload. The percentage of charges from Anglos alleging "reverse discrimination"-- 2.5% -- was nearly as high as those from Hispanics alleging national origin discrimination.
- In FY 1985, 45% of all Hispanic charges were closed without remedy to the charging party. By 1990, that figure had climbed to 73% of all Hispanic charge closures. While non-Hispanic no-remedy closures also increased during this period, they were always lower than Hispanic no-remedy closures.
- Over the FY 1985-90 period, lawsuits including a charge of national origin discrimination against Hispanics were only 2.15% of the EEOC's caseload. Lawsuits including charges of discrimination based on sex (female), age and race (black) made up 29.39%, 23.27% and 16.92%, respectively, of the EEOC's caseload.

- Hispanics consistently receive smaller average monetary awards in lawsuits litigated by the EEOC. For example, in 1989, in EEOC lawsuits involving a single plaintiff or beneficiary, Hispanics received an average monetary award of \$4,750, compared to average awards of \$18,409 for suits alleging age discrimination, \$13,502 for suits based on racial discrimination against blacks, and \$15,601 for suits involving gender discrimination.
- A number of major class cases, defined here as those with 25 or more beneficiaries of monetary relief, were resolved by the Commission between 1987 and 1990. Such lawsuits are believed to have a major deterrent effect, particularly if they result in severe penalties against the employer and are widely publicized. Of the 48 such case resolutions reported by the EEOC's Office of General Counsel, 21 were on behalf of victims of gender discrimination, 18 were on behalf of persons alleging age discrimination, and nine were on behalf of Blacks discriminated against on the basis of race; none involved Hispanics.²¹

This situation appears to have been reflected in other agencies as well. The Office of Fair Housing and Equal Opportunity (FHEO) of the Department of Housing and Urban Development is charged with the principal responsibility for enforcing Title VIII of the Civil Rights Act, which prohibits discrimination in housing on the basis of race, sex, national origin, religion, ethnicity, familial status, or disability. Although there are significant differences between FHEO's and EEOC's enforcement procedures, both systems are complaint-based and follow the same general guidelines.²²

Like the EEOC, FHEO has been criticized by Latino advocates for its historical failure to equitably serve the Hispanic community. Over much of the 1980s, for example, according to an NCLR analysis of HUD data, Hispanic complaints alleging housing discrimination ranged from 5.4% to 7.2% of total charges, and exceeded 7% in only one year. By way of comparison, over this same period, there were about 11 complaints of housing discrimination from Blacks for each Latino charge. This 11:1 ratio cannot be explained by demographic factors (the Black population is only about one-third larger than the Latino population and discrimination rates appear comparable).²³

Since the passage of the Fair Housing Amendments Act, which added families with children and persons with disabilities as protected classes, the proportion of Hispanic complaints within the HUD/FHEO caseload has declined further.²⁴ In 1990, one Justice Department official admitted to NCLR that not a single Hispanic housing discrimination case was included in the Department's litigation caseload.

With respect to educational civil rights system's response to the growing segregation of and discrimination against Hispanic students over the 1980s, the GAO found in a 1991 report that the Department of Education's Office of Civil Rights (OCR) performance has been inadequate. For example, there was a decrease in OCR-initiated compliance reviews

related to within-school discrimination from FY 1983 to FY 1990. Moreover, OCR's new National Enforcement Strategy, announced in 1991, includes three "high priority" educational equity issues for postsecondary education; they all deal exclusively with race or gender, despite the fact that Hispanics have lower college attendance and graduation rates and blacks or whites.²⁵

Thus, despite the large and growing body of evidence documenting discrimination against Hispanics, the nation's civil rights enforcement system has failed to respond effectively. Establishing both the political climate and will, and providing the resources needed, to protect the civil rights of Hispanic Americans is a major challenge to the civil rights community and to the new administration. Some proposals for meeting that challenge are listed below.

III. CIVIL RIGHTS GOALS OF HISPANICS IN THE 1990S

A. Facing Facts

For Latinos, the civil rights enforcement system is almost wholly ineffective. Most Hispanics who experience discrimination have trouble gaining basic access to the system. Of those fortunate enough to get inside, the overwhelming majority of Latino cases are thrown out or left unattended. The lucky few that remain are less likely than others to have their claims aggressively investigated or to be represented in court by the responsible federal agency. And finally, even those Latinos who prevail in court are compensated at lower levels than are other groups.

It is difficult to avoid the conclusion that the civil rights system is itself engaging in differential, negative treatment of Latinos. Indeed, if the civil rights enforcement system applied the same "disparate impact" standard to itself that it uses to judge employers, realtors, and schools, it would be forced to find itself guilty of discrimination against the Hispanic community. There is no question about the facts: Hispanics experience enormous discrimination while federal civil rights agencies do little or nothing about it.

Although Hispanic civil rights organizations have tried for more than a decade to bring the problem to the attention of policy makers and others in the civil rights community, little real progress has been made in addressing the situation. The continued failure to recognize and remedy the civil rights enforcement system's failure to serve Hispanics equitably is both wrong and unwise. It is wrong because the fundamental principles on which the civil rights laws are based require equitable treatment of all protected groups, including Hispanics and other less-well-represented groups.

It is unwise because it unnecessarily risks losing the support of the civil rights community's fastest-growing constituency. This is not just a theoretical danger. At least one prominent conservative Hispanic activist has argued forcefully that Hispanics do not benefit from a civil rights approach to public policy.²⁶ This argument has credibility because

Hispanics' support for the civil rights laws and enforcement system is based at least in part on the perception that Hispanics will benefit substantially from the system at some point in the near future. But no community -- whatever its ideals or political philosophy -- can or should support a policy or program against its own interests. If the civil rights enforcement system is not able to accommodate Hispanics' interests, it cannot reasonably expect Hispanics' support.²⁷

B. Some Modest Goals

Once the system faces the facts, the authors believe that tangible and productive change is possible. Over the long term, the authors envision a civil rights enforcement system in which Hispanics are welcomed as both policy makers, enforcement personnel, and constituents; a system which delivers equitable levels of service to Hispanics; and one which undertakes special initiatives to address issues of special concern to Hispanics. While such a system will probably take some time to be fully developed, a few modest, but meaningful goals, may be achieved in the interim.

- The incoming administration should announce as earlier as possible that all federal agencies will be required to comply strictly with applicable affirmative action plans (including special minority recruiting programs where appropriate) to assure that the federal workforce truly reflects the diversity of American society.

As a specific goal, federal civil rights enforcement agencies should be encouraged to make all reasonable efforts to employ a percentage of Hispanics at all levels of the agency, including policy makers, that corresponds to the proportion of Hispanics in the labor force. Most protected groups, except Hispanics, are substantially over-represented in civil rights enforcement agencies. It is not unreasonable to suggest that such agencies should be able to make significant progress toward employing Hispanics at a level equal to their proportion of the work force (projected to be about 10% by the year 2000).

- The new administration should adopt a policy requiring all civil rights agencies to set enforcement goals to enable them to more equitably serve *all* protected groups. This is particularly important because of the explosive growth in minority communities such as Hispanics and Asian Americans and the related increase in racial/ethnic tensions. Federal civil rights agencies must be committed to reaching out to and serving all protected communities.

In implementing this policy, one goal should be that the proportion of charges in civil rights agency caseloads alleging national origin discrimination from Hispanics be doubled. In most cases, even a doubling of complaints from Hispanics will not ensure equitable service to Hispanics, since Hispanics comprise perhaps 15%-20% of the universe of protected classes. However, the initiation of vigorous outreach and

public education programs, combined with prompt, effective service, should enable such agencies to double the proportion of their caseloads involving Hispanics.

Another related goal should be that Hispanic charges and complaints of discrimination receive the same level and quality of attention as received by other groups. Similarly, monetary awards and other remedies to Hispanics found to have experienced employment and other forms of prohibited discrimination should be of the same magnitude as those received by other groups. While recognizing that charge closure rates and average monetary awards are subject to substantial case-to-case and year-to-year variation, the pertinent data reveal disparities that cannot be explained by routine fluctuations. It is not unreasonable to ask that indicators of the "quality" of services provided to Hispanics be the same as those of other groups.

- The new administration should actively support the full funding and implementation of the Serrano Amendment (Section 111) of the Civil Rights Act of 1991, which mandates an EEOC education and outreach program to historically underserved communities such as Hispanics, Asian Americans, and Native Americans. This should serve as a model program for other civil rights agencies with records of underservice to protected groups.
- The new administration should urge the immediate repeal of employer sanctions under IRCA and should support vigorous enforcement of IRCA's anti-discrimination provisions.
- The new administration should submit budgets for federal civil rights enforcement agencies at or above FY 1980 levels, in real terms. There is little question that civil rights agency budgets at all levels of government were either reduced or remained stagnant during the 1980s, at a time when such agencies' responsibilities were expanded to cover new protected classes. Ensuring adequate and equitable levels of services to Hispanics and other underserved communities would be greatly facilitated by the restoration of such agencies' budgets to at least FY 1980 levels; where new protected classes have been covered, budgets should be increased above FY 1980 levels proportionately.

Additionally, a related and equally important civil rights goal for the new administration should be a serious commitment to the political empowerment of Hispanics and other underserved language-minority communities. By enabling language minorities to participate effectively in the political process, their equitable representation is better ensured, which should result in greater understanding of and attention to their civil rights concerns. One immediate way to achieve this goal is through affirmative monitoring of compliance with and the strict enforcement of both Section 4(f) and Section 203 (Bilingual Elections) of the Voting Rights Act of 1965, as amended by the Voting Rights Language Assistance Act of 1992. Furthermore, the new administration should make it clear that it is firmly committed

to the protection of the rights of language minorities and should staunchly oppose any legislative efforts of the "English Only" movement to undermine those rights.

Finally, there is another dimension to the problem which requires action by the Hispanic community itself. The data demonstrate that Hispanics who experience discrimination are reluctant to file complaints with the appropriate agencies. In some cases, Hispanics may simply lack the knowledge that discrimination has taken place, or may be unaware of how to seek redress. In other cases, Hispanics may have a well-founded mistrust of or lack of confidence in the capacity or willingness of the relevant civil rights agency to effectively address the discriminatory act(s). In any event, the authors recognize that Hispanic organizations and the community they represent have an obligation to increase Hispanics' knowledge and awareness of the civil rights enforcement system. For that reason, new outreach and public education programs designed to increase the Hispanic community's awareness of civil rights laws and remedies for discrimination, such as those recently initiated by Hispanic civil rights organizations like the National Council of La Raza, should be a high priority for the Hispanic community.

C. Conclusion

It is clear that Hispanics experience enormous levels of discrimination in the work force, in the housing market, and in the educational system. It is equally clear that the nation's civil rights enforcement system has yet to effectively address such discrimination. For Hispanics in the United States, some of whom who marched with Martin Luther King, others who launched their own civil rights movement in the Southwest in the early 1900s, and others who have long supported the quest for equality for all Americans, this situation is untenable.

In the short-term, this means that the process of working together to achieve Hispanics' civil rights goals may be uncomfortable for those interesting in improving the civil rights enforcement system. But acknowledging and addressing the neglect of Hispanics within the civil rights enforcement system is not just a moral imperative, it is also a political reality for those who are committed to the cause of civil rights. Hispanics now constitute approximately 9% of the total U.S. population, and about 36% of the nation's minority population. Over the last decade the Hispanic population grew eight times as fast as the non-Hispanic population; most demographers agree that Hispanics will become the largest ethnic minority in the U.S. around the turn of the century.²⁸ Along with that rapid population growth will come increased economic and political power. It is therefore in the enlightened self-interest of both the incoming administration and the civil rights community as a whole to commit to full integration of Hispanic concerns into the operations of the civil rights enforcement system.

If, by working together, the Clinton administration, Hispanic organizations, and other civil rights institutions can help to achieve Hispanics' civil rights goals for this decade, then the result will be beneficial for the entire civil rights community and all Americans.

ENDNOTES

1. The principal federal civil rights statutes are Titles VI, VII, and VIII of the Civil Rights Act of 1964, as amended; these laws prohibit discrimination in the delivery of federal financial assistance, employment, and housing, respectively. The Voting Rights Act of 1965 includes several procedures designed to prohibit discrimination against language minorities in the electoral process. Discrimination against Hispanics is also prohibited by a series of federal Executive Orders, state laws, and municipal ordinances. This article focuses primarily on Hispanic experiences with respect to discrimination in employment and, to a lesser extent, housing; these are arguably the two most important of the civil rights protections because they relate to the most basic human needs (income and shelter), have received the greatest attention by social scientists and the press, and are also the issues to which the term "civil rights" is most commonly applied.
2. There is, however, much historical and anecdotal information about discrimination against Hispanics in the United States; for a list of citations, see Gonzales, Claire, *The Empty Promise: Civil Rights Enforcement and Hispanics*, Summary Report, Washington, D.C.: National Council of La Raza, July 1991.
3. Smith, Tom W., "Ethnic Images," General Social Survey Topical Report No. 19, National Opinion Research Center, Chicago, Illinois: University of Chicago, December 1990.
4. The 1989 General Social Survey by the National Opinion Research Center, Chicago, University of Chicago, as reported in Tom W. Smith, *Working Papers on Contemporary Anti-Semitism: What Do Americans Think About Jews?*, American Jewish Committee, New York, New York, December 1991.
5. Kirschenman, Joleen, and Kathryn M. Neckerman, "'We'd Love to Hire Them, But...': The Meaning of Race for Employers," Christopher Jencks and Paul Peterson, eds., *The Urban Underclass*, Washington, D.C.: The Brookings Institution, 1991.
6. There is a considerable body of literature describing housing auditing techniques. See, for example, Yinger, John, *Housing Discrimination Study: Incidence of Discrimination and Variation in Discriminatory Behavior*, Washington, D.C.: U.S. Department of Housing and Urban Development, October 1991. In addition, the U.S. Supreme Court has ruled that testers have legal "standing" to sue for and collect damages from landlord and real estate agents found to have engaged in discriminatory conduct. Results from housing audits are routinely accepted in the federal courts as evidence in housing discrimination lawsuits.

7. The cities in which these studies were conducted are Dallas, Texas (1979); Denver, Colorado (1982); Boston, Massachusetts (1981); Phoenix, Arizona (1986); Houston, Texas (1973); San Jose, California (1978); Washington, D.C. (1987). These studies are described and cited in Dolbeare, Cushing, and Judy Canales, *The Hispanic Housing Crisis*, Washington, D.C.: National Council of La Raza, July 1988.
8. U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *Discrimination Against Chicanos in the Dallas Rental Housing Market*, Washington, D.C., 1979.
9. Turner, Margery Austin, Raymond Struyk and John Yinger, *Housing Discrimination Study: Synthesis*, Washington, D.C.: U.S. Department of Housing and Urban Development, Office of Policy Development and Research, August 1991.
10. It is widely recognized that the hiring decision is more complex than the decision to sell or rent a housing unit. Employers can and should legitimately weigh a complicated mix of characteristics of job applicants that are more difficult to control for than those characteristics of legitimate importance to landlords and real estate agents.
11. The study is reported in U.S. General Accounting Office, *Immigration Reform: Employer Sanctions and the Question of Discrimination*, Washington, D.C., March 1990.
12. Bendick, Mark, Charles Jackson, Victor Reinoso, and Laura Hodges, "Discrimination Against Latino Job Applicants: A Controlled Experiment," Washington, D.C.: Fair Employment Council of Greater Washington, Inc., April 1992.
13. The three studies analyzed include: Verdugo, Naomi, "The Effects of Discrimination on the Earnings of Hispanic Workers," Washington, D.C.: National Council of La Raza, July 1982; James, Franklin J., "The Lack of Hispanic Economic Progress During the 1970s," University of Colorado at Denver, paper delivered at the North American Meetings of the Regional Science Association, November 9, 1984; and Carnoy, Martin, Hugh Daley and Raul Hinojosa Ojeda, *Latinos in a Changing U.S. Economy: Comparative Perspectives on the Labor Market Since 1939*, Inter-University Program for Latino Research, New York: Research Foundation of the City University of New York, 1990. See also, U.S. Commission on Civil Rights, *Unemployment and Underemployment of Blacks, Hispanics and Women*, Washington, D.C., November 1982.
14. Some of the studies control for region of the country, others do not. Some control for a single broad measure of educational attainment, others use multiple variables. Some studies control for occupation by using an industry breakdown (e.g., agriculture, mining, retail trade), while another cites occupational categories (e.g., white collar, blue collar). One study controls for marital status, the others do not.

The fact that the studies' findings appear to be reasonably consistent despite this diversity of variables and data bases suggests that the findings of discrimination cannot be attributed to statistical quirks or methodological flaws.

15. Multiplying the estimated percentage of the total wage gap attributable to discrimination (about 20%, combined male and female) by the total Anglo-Hispanic wage gap in 1988 (\$12,146, according to the Current Population Survey) produces an estimated wage loss due to discrimination of approximately \$11.7 billion.
16. *Immigration Reform, op. cit.*
17. These studies and reports are cited in Munoz, Cecilia, *Unfinished Business: The Immigration Reform and Control Act of 1986*, Washington, D.C.: National Council of La Raza, December 1990.
18. These studies are described in *The State of Hispanic America 1991: An Overview*, Washington, D.C.: National Council of La Raza, February 1992. For other data on segregation and educational attainment of Hispanic students, see De La Rosa, Denise, and Carlyle Maw, *Hispanic Education: A Statistical Portrait 1990*, Washington, D.C.: National Council of La Raza, October 1990.
19. U.S. Equal Employment Opportunity Commission Task Force, *Equal Employment Opportunity Commission and Hispanics: An Analysis of the Equal Employment Opportunity Commission's Services to Hispanics in the United States*, Washington, D.C., December 2, 1983. See also, *Empty Promise, op. cit.* (Summary Report).
20. *Ibid.*
21. Gonzales, Claire, *The Empty Promise: Civil Rights Enforcement and Hispanics*, Final Report, forthcoming January 1993.
22. For a more detailed description of FHEO's responsibilities and enforcement procedures, see, Cubillos, Herminia, "Fair Housing and Latinos," Washington, D.C.: National Council of La Raza, January 1988.
23. *Ibid.* See also, Kamasaki, Charles, Testimony on the Fair Housing Amendments Act, *House Hearings*, Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, June 26, 1986.
24. Data from the Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, reported in Kamasaki, Charles, Testimony on the Fair Housing Amendments Act (H.R. 4119), *House Hearings*, Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, June 26, 1986.
25. *State of Hispanic America, op. cit.*

26. See Chavez, Linda, *Out of the Barrio: Toward a New Politics of Hispanic Assimilation*, New York: Basic Books, 1991.
27. See text of the statement of Raul Yzaguirre at the Annual Dinner of the Leadership Conference on Civil Rights, reprinted in *Agenda*, Volume 9, Number 2, Second Quarter, 1990, (Newsletter of the National Council of La Raza). There is also considerable danger that the failure to serve Latinos more equitably with respect to civil rights could exacerbate Black-Hispanic tensions. The possible erosion of Latino community support for a traditional civil rights agenda -- the one issue over which Blacks and Hispanics have historically agreed on -- would take place at about the same time that Hispanics become the nation's largest minority. The authors believe that a serious split between the nation's two largest ethnic minorities would be a severe blow to race relations in the United States. For a lengthier discussion of some of these issues, see Kamasaki, Charles and Raul Yzaguirre, "Black-Hispanic Tensions: One Perspective," prepared for delivery at the 1991 Annual Meeting of the American Political Science Association, Washington, D.C., September 1991.
28. Census data reported in *State of Hispanic America*, *op. cit.*

**ASIAN PACIFIC AMERICAN
CIVIL RIGHTS ISSUES FOR THE 1990'S**
by Daphne Kwok

I. Background

Asian Pacific Americans (APA) civil rights? Do APAs have civil rights issues of concern? Many would say no. For instance, in the January 3, 1993 "Parade" magazine article, "The First Time I Experienced Bigotry," by Ponchitta Pierce, 15 people of diverse backgrounds were interviewed about their experiences but not one was APA. This misperception that APAs are neither affected by discrimination nor denied the basic rights accorded all U.S. citizens must be arrested immediately. One of the greatest obstacles to overcome when addressing APA civil rights, is the "Model Minority Myth" that cripples the APA community. APAs have had to combat and defend their rights ever since the first Asian immigrants landed in America in the early 1800's.

Even in 1993 APAs consistently have to remind policy makers, politicians, and the civil rights community that equal rights and equal justice of APAs must be protected as they are for every other American citizen. APAs are not immune to employment discrimination, educational inequity, racism, and hate crimes. Even though some APAs are more "American" (already fourth generation like Kristi Yamaguchi, U.S. Olympic Gold medalist figure skater) than European Americans, they are still perceived as "foreigners."

A. Model Minority Myth

The primary factor, besides outright racism, that plays a major role in the APA community being an invisible player in the civil rights arena is that APAs are stereotyped as the "Model Minority." APAs have also been referred to as the "Superminority" in a May 1987 **Newsweek** article and as the "Model Citizen" in an October 1990 **Los Angeles Times** article.

What is the "Model Minority" stereotype and why is it destructive? The Model Minority myth describes APAs as:

- * hard working
- * highly educated
- * wealthy
- * successful in careers
- * unaffected by social ills i.e. school dropouts, drugs, gangs, AIDS, dysfunctional families, mental illness
- * polite and never questioning authority
- * passive

This negative mold is an insidious one because many APAs do not fall into this category and, therefore, their needs are unperceived and unaddressed. The sweeping generalizations of the "Model Minority" do not consider the social, economic, and ethnic diversity of the APA body. Each group experiences its own difficulties and problems depending upon their length of stay in the U.S., conditions upon their immigration to the U.S., cultural differences, and education levels.

The media has focused much attention on the "successful" Asian Americans, such as the Southeast Asian refugee who survived a war

and came to the U.S. with no English skills to become valedictorian of a high school class. Over the years, numerous cover stories in magazines like **Time** and stories on the nightly news have highlighted to the general public Asian American success stories. There are rarely, if any, stories about the dark side of the Asian American experience. For example, the Hmong people face considerable obstacles once in this country because, unlike the U.S., their society does not have a written language. Consequently, the Hmong have one of the highest illiteracy and poverty rates among the APAs.

B. Population

To be able to fully comprehend the role that APAs play in the social fabric of the U.S. one must first understand population and immigration patterns of APAs.

From 1980 to 1990, the Asian Pacific Islander (API) population has exploded numerically not at an overwhelming or threatening level, but is a burgeoning statistic in percentage terms. According to the 1990 U.S. Census Bureau data, the dramatic **percentage increase** of the API population since 1980 is 107.8 percent, the largest percentage increase for any group. In the last decade, the overall API percentage of the U.S. population increased from 1.5% to 2.9%. The API community is concentrated in seven states: California, New York, Hawaii, Texas, Illinois, New Jersey, and Washington. Forty-eight percent of Asian Pacific Islanders in the U.S. live in Hawaii and California.

The population increase within the last two decades stems from the repeal of restrictive and discriminatory immigration laws that were in effect until 1952 when the McCarran-Walter Act ended the ban on Asian immigration. The United States' first law to restrict immigration based on race was the Chinese Exclusion Law, passed in 1882. Only after 1952 were Asians allowed naturalization rights. But it was not really until 1965, only 28 years ago, when the 20,000 immigration visa per country system allowed Asians to immigrate to the U.S. on an equal basis with all other nationalities.

Therefore, it is only in recent history that Asian Americans have been able to be naturalized and able to participate in the immigration process just like non-Asians. Increased Asian immigration has also resulted from Asian American citizens and permanent residents utilizing the second and fifth preference categories for immigration visas. The second preference category is for spouses and unmarried children of permanent residents, and the fifth preference category is for brothers and sisters of permanent residents. These two categories are heavily used by the Asian American population to reunify families, as the family unit is of top value in Asian cultures.

For most Americans, the immigration history of Asians is not known; yet, it is a vital piece of knowledge necessary to dispel the seeds for racial tension. Unfamiliarity and misperceptions about Asians and their presence in the U.S. can easily lead to the view that APAs are taking over the U.S. As APAs are readily

identifiable by their physical features, they have become an easy target for unpopular sentiment.

C. Diversity

The APA population is not just a uniform mass. On the contrary, APA ethnic groups are innumerable. For example, the APA community listed in the census categories, which are by no means comprehensive, consists of 25 different ethnic groups: Chinese, Filipino, Japanese, Asian Indian, Korean, Vietnamese, Cambodian, Hmong, Laotian, Thai, Bangladeshi, Burmese, Indonesian, Malayan, Okinawan, Pakistani, Sri Lankan, Hawaiian, Samoan, Guamanian, Tongan, Tahitian, Northern Mariana Islander, Palauan, and Fijian.

The issue of diversity is often overlooked when policies are made pertaining to the APA community. Most people perceive the APA community as one monolithic entity rather than the mosaic weave that it really is.

D. Socio-Economic

One of the most common misperceptions about APAs is that they are all in the upper income tax bracket. An unknown fact is that more APAs are found in low-status, low-income occupations than whites. "In 1970, for example, fully 25% of all gainfully employed Chinese men in the United States were cooks, waiters, busboys, dishwashers, and janitors."¹ Another misperception is that APAs are all employed. Unfortunately, the low APA unemployment rate disguises the high underemployment.

Similarly, although poverty is not commonly a trait associated with APAs, according to the 1990 census 14.1% of the APAs live in

poverty compared to only 9.8% of the white population.²

II. Asian Americans at the Civil Rights Table

An example of the negative effects of the "Model Minority" stereotype is the myth that Asian Americans are not affected by discrimination and civil rights issues; therefore, they do not need assistance or need to be a player in such matters. A 1991 Wall Street Journal/ NBC News Reader's Poll found the majority of American voters did not think that Asian Americans are discriminated against in the U.S.

A. L.A. Riots

Most recently the L.A. riots are a glaring example of the need for all community members to be involved in the process of rebuilding, healing, discussing, planning, and preventing future racial acts.

Too many times Asian Americans are left out of discussions as they are perceived as both unaffected and as non-entities. When President George Bush called a meeting with African American community leaders shortly after the riots, it was natural for outsiders to surmise that the meeting was to discuss the L.A. riots. The meeting was described by the media as a "civil rights meeting" in which a member of the Hispanic community was able to attend only because he requested to do so but in which no Asian Americans were at the table. If this was indeed a meeting to dispel racial tension, the President, the leader of the Nation, should undoubtedly have recognized the need for all groups to participate. Perhaps it was assumed that Asian Americans could

rebuild their losses and take care of themselves since they are all industrious and hard working.

B. Wards Cove

A more blatant example of APAs being left out from joining the negotiators at the table is the exemption of 2,000 APAs from the Civil Rights Act of 1991.

III. 1990's Civil Rights Issues

A. "Justice for Wards Cove Workers Act"

One of the top legislative priorities for the APA community is the passage of the "Justice for Wards Cove Workers Act". The legislation would remove Section 402(b) of the Civil Rights Act of 1991 which exempts the 2,000 plaintiffs in the Wards Cove Packing Co. v. Atonio employment discrimination case, from coverage by the Act. These 2,000 Americans are APA cannery employees who worked and lived in segregated conditions at the Wards Cove salmon cannery operations and were suppressed to menial jobs.

Section 402(b), which "exempts any disparate impact case for which a complaint was filed before March 1, 1975 and for which an initial decision was rendered after October 30, 1983" was purposely introduced into the Act by Senator Frank Murkowski (R-AK) who stated, "to the best of my knowledge, Wards Cove Packing Co. v. Atonio is the only case that falls within this classification."³ Wards Cove is the only employer in the U.S. not subject to the Civil Rights Act of 1991.

The successful passage of Section 402(b) resulted from the politicking conducted during last minute negotiations. Proponents

of the Act in the Senate supposedly needed two more votes in order to ensure an override of an expected presidential veto since President Bush had vetoed the Civil Rights Act of 1990. Senators Frank Murkowski and Ted Stevens of Alaska promised to provide the necessary two votes for final passage of the Act if the Murkowski amendment was accepted.

The "Justice for Wards Cove Workers Act" has come to symbolize the epitome of special interest legislation for not only the APA community but also the broader community. The compromise by Congress has stirred up the APA community to voice their disgust at the action and has mobilized APAs from all over the country to work to pass the bill. Ironically, the Wards Cove case was part of the primary impetus to pass a new civil rights bill.

B. Hate Crimes

1. Racial Tension

The APA community faces an ironic and unique set of circumstances that cause prejudice against them. Asian Americans are subject not only to xenophobia based on the color of their skin and distinctive appearance but also to the backlash against their perceived success. Discrimination against Asian Americans stems from the disproportionate attention placed upon the achievements of a few as depicted by the Model Minority stereotype.

How has this attention resulted in increased racial tension? Asian Americans are now being pitted against other racial minorities, primarily African Americans and Hispanic Americans. The Model Minority group is being used by some people as the

dividing instrument to drive a wedge between Asian Americans and African Americans and Hispanic Americans. The perpetuated image asserts that Asians Americans are excelling on their own without any public assistance, so why can't other groups follow the Asians' lead? This divisive tactic must not be tolerated. The historical background and struggles of each minority group and their continuing struggles must not be used against each other.

2. Anti-Asian Violence

Ten years ago the infamous Vincent Chin murder in Detroit, Michigan awoke the Asian American community to the reality of racial bigotry and the violent form that it can take. Ever since the beating death of Vincent Chin a host of innocent APAs have also fallen victim to senseless deaths simply due to their "yellow" skin. The assault weapons have ranged from verbal attacks to baseball bats, and from fists to boots. With racially motivated anger and rage, these weapons have extinguished the lives of innocent APAs.

The epitome of a bias related crime occurred last August in the suburban city of Coral Springs, Florida. A young 18-year old Vietnamese American youth was beaten to death by a mob of white youth simply because of his ethnic heritage. The social comment on the situation can best be symbolized by the crowd of onlookers who viewed the beating for entertainment. No one offered to help the victim.

The U.S. Commission on Civil Rights identified several factors that contribute to racial intimidation and violence:

1. racial integration of neighborhoods leading to "move-in violence";
2. deep-seated racial hatred played upon by organized hate groups;
3. economic competition among racial and ethnic groups;
4. insensitive media coverage of minority groups; and
5. poor police response to hate crimes.⁴

3. Prosecution of Hate Crimes

Local law enforcement officers must be trained to recognize and classify crimes as hate crimes. A crime against an Asian American warrants no less attention than any other hate crime. Local communities need to urge their law enforcement agencies to provide the time and resources for diversity training.

4. Hate Crimes Statistics Act of 1990

With the passage of the Hate Crimes Statistics Act of 1990, critical nationwide data will now be recorded. The act calls for the Attorney General to collect and publish annual national data on "the incidence of criminal acts that manifest prejudice based on race, religion, homosexuality or heterosexuality, ethnicity, or such other characteristics as the Attorney General considers appropriate."⁵

The 1991 preliminary set of data was released at the end of 1992, with a more comprehensive report planned for the spring of

1993. Of 4,755 hate crimes reported in 1991, approximately 6% of the cases or 287 were against APAs. Unfortunately the data is not complete or standardized because the collection of statistics is voluntary.

The APA community has not only been serving as a resource for local law enforcement agencies, but has also encouraged them to include in their training hate crime training sessions and to collect hate crime data. In order to have a successful implementation of the legislation, the following actions need to be aggressively pursued:

1. improved outreach to susceptible communities to encourage hate crime victims to recognize and report hate crimes. APAs are often reluctant to report crimes to the authorities due to their distrust of government officials in their homelands;
2. improved police training so that officers on the beat can identify hate crimes; and
3. the formation of new police units that specialize in identifying, investigating, and reporting hate crimes, as well as guiding community outreach and police training efforts.⁶

C. Education

1. Primary and Secondary Educational Opportunities

Education has always been and will always be highly valued within the APA community. The high matriculation rates among many APA communities from high school is a clear indication of the

emphasis APA families place on education. According to the 1990 Census, 80 percent of the adult APA population (ages 25 and older) had completed high school, the same figure as recorded for non-Hispanic whites. On the other hand, for many of the more recent immigrant communities, such as the Southeast Asian communities, passing from grade to grade is an uphill battle due to language barriers, adjustment to a new life, and living below the poverty line. For example, over 75 percent of Southeast Asian students in San Diego City Public Schools now live below the poverty line.⁷ The obstacles that these students face are numerous.

With the demographics of the APA community rapidly changing and large concentrations of APAs settling in specific areas, a profile of school districts develops, such as that of Fresno, California, where 80 percent of the APA students are Limited English Proficient.⁸ For these recently arrived immigrant children, limited services for the bilingual community have hampered their attainment of an education, despite Title VI of the Civil Rights Act of 1964. With the plethora of Asian languages spoken in the school systems, the issue now for Asian LEP students is whether the bilingual method of teaching is now addressing the diversity of Asian languages in the classroom.

2. Higher Education

Two of the main issues in higher education of concern to the APA community are: minority scholarships and the use of alleged Asian American admissions caps.

a. Minority Scholarships

The "Model Minority" myth reappears in the discussion on minority scholarships. The perception is that APAs are economically well off and do not need financial assistance. On the contrary, many APA students are dependent upon financial assistance. According to the 1990 Census 14.1 percent of the APA community is below the poverty line in comparison to 9.8 percent of the white population.

With the rapidly-increasing costs of higher education, students from the disadvantaged APA communities will never be able to overcome the financial obstacles to break out of the cycle of poverty. Unfortunately, the U.S. Department of Education has initially ruled that minority scholarships that are exclusively for minority students infringe upon the equal educational opportunity of non-minority students. The issue is being further debated and analyzed in the Department. The ruling is once again an assault on equal educational opportunities affecting only racial minorities since "race exclusive" scholarships have been targeted. In a letter dated March 9, 1992 to Assistant Secretary of Education for Civil Rights Michael Williams, U.S. Commission on Civil Rights Chairman Arthur Fletcher stated, "With minorities still suffering the effects of extensive discrimination, cultural bias, and economic disadvantage, the Federal Government must remain resolute in its commitment to overcoming the effects of conditions which resulted in limiting participation by minorities in education."

b. College Admissions Policies

For those APA students who go on to higher education, gaining admission to institutions with high percentages of APAs has become a struggle. The alleged discriminatory policies of highly selective universities against APAs has become the focus of OCR investigations. The allegations stem from the assertion that colleges and universities with large APA populations are discriminating against APA applicants by placing a ceiling on the number of APA admitted students. Also involved is the issue of whether the Asian American applicants are less likely to be accepted at top universities even though they have comparable qualifications.

Because the immigration tides are swelling and the number of APAs of college age is increasing, institutions of higher education are naturally seeing a rise in APA applications.

A related issue to the college admission investigations has been repeated attempts by Congressman Dana Rohrabacher (R-CA) to single out the unfair use of Asian American quotas in the college admissions process. Congressman Rohrabacher wants Asian Americans to get their fair shake in the process but does not equally advocate for the needs of the other disenfranchised groups. On March 26, 1992 Congress opposed a Rohrabacher amendment that would have pitted Asian Americans against minority brothers and sisters, who also suffer the same injustices in the admissions process. APAs are not the only race to be affected by racial discrimination in higher education, and singling out APAs in the discussion is

extremely divisive. Congressman Rohrabacher's actions, if successful, would have further exacerbated racial tensions between the minority groups.

D. Police Relations

1992 has been a year of prosecutions for police misconduct from the Simi Valley trials of the Los Angeles Police Officers accused of beating Rodney King to the Detroit trial of a senior officer in the beating death of Malice Green. For most of America, police brutality is simply a black/white or brown/white picture. That an APA can also be a victim of police brutality is not even considered.

Unfortunately, all too often APAs are the victims of police brutality especially due to the language barrier and the lack of police diversity/sensitivity training. The California Attorney General's Asian and Pacific Islander Advisory Committee observed that when Asian Americans are victims, "communication barriers between the police and the victim can create major problems. One of the most commonly repeated experiences is one in which the perpetrator is allowed to go free and the victim is arrested."⁹

In addition to problems of communication, cultural differences in the perception of law enforcement officials is another barrier. Coming from countries where police are the arms of brutal military/dictatorial regimes, many APAs now fear those who are supposed to protect them. In attempting to educate and gain the trust of APAs, it does not help when police round up Asian youths and take photographs of them without permission for "mug files" to

identify Asian gang members.

E. Employment Discrimination

Employment discrimination affects not only women, African Americans, Hispanic Americans, Native Americans, and people with disabilities, but also affects the "super achieving" APAs. The hard working, conscientious, intelligent APAs have been blocked at the gateways of management and CEO levels. The negative stereotypes of APAs--passivity, slyness, poor communication skills, limited English proficiency, lack of managerial skills, inability to work as team players, and technical training--stand in the way of employment advancement.

1. Glass Ceiling

The glass ceiling which bars qualified members of the APA community from rightfully advancing up the employment ladder has been proven to exist. According to a Korn/Ferry International survey of top level executives in Fortune 500 companies, only 0.3 percent of senior executives in the United States are of Asian descent.¹⁰ This 0.3 percent statistic is out of approximately 3 percent of the total APA population in the U.S. as reported on the 1990 census. APAs tend to be clustered around the technical and financial levels and rarely advance to even the managerial level. Ignorance and bias against APAs must be eradicated in all industries before rightful advancement will occur.

2. Language Rights

With the burgeoning first generation of APAs in the workforce, it is natural that a great number of employees speak English as a

second language. While perhaps fluent in English, these employees often speak with a heavy accent and may revert back to their native languages when speaking with colleagues or family. As a result of the diverse workforce, tolerance and understanding must become part of the American work ethic. Unfortunately, many Americans are not sympathetic to immigrants or their language abilities/inabilities.

a. Accent Discrimination

While employment discrimination based upon one's accent is illegal and violates a person's civil rights, cases are emerging through the court system in which a person is denied a job or a promotion strictly because of one's accent. Title VII of the Civil Rights Act of 1964 prohibits discrimination based on national origin except when one's accent significantly impairs one's ability to effectively do the job. Society reveres European accents such as those of the British, French, and Italians, while looking down upon Asian accents.

b. English-only

Another form of discrimination in the workplace which is becoming more and more common is English-only rules in the workplace. The Equal Employment Opportunity Commission (EEOC) has stated that English-only policies are illegal when they are applied differently to members of different national origin groups.¹¹ English-only policies, when implemented without any business necessity, are an affront to bilingual speakers. The wave of English-only policies has risen with the increase of non-native English speakers entering the workforce. Because of immigration

patterns over the last decade, the U.S. workforce is becoming more APA and Hispanic.

c. Immigration Reform & Control Act

When Congress passed the Immigration Reform and Control Act of 1986 in order to stem the influx of illegal immigration into the U.S., rampant concern was expressed that the regulations requiring employers to verify work authorization of all employees would cause discrimination. APAs have become the victims of IRCA related employment discrimination as employers have become hesitant to hire "foreign" looking individuals.

A 1990 General Accounting Office report stated, "The employer survey results are sufficient to conclude that a widespread pattern of discrimination has resulted against eligible workers...We estimate 227,000 employers in our survey reported that they began a practice of not hiring foreign-appearing or foreign-sounding job applicants."¹²

APAs already have to overcome the "Model Minority" stereotype and now are also burdened by the "foreigner" stereotype.

F. Health Issues

1. Access

The national issue of access to health care is also a primary issue of concern of APAs. Multilingual health care workers are needed to break down the language and cultural barriers that prevent APAs from receiving adequate and appropriate health care. Many of the recent immigrants need not only medical attention but also mental health care, an often ignored area that does not fit

the "Model Minority" image.

2. Data

Data collection is always an issue for the APA community. In all arenas, APA statistics are rarely collected. APAs are usually lumped together with "whites" or "others." In order for the community to be assisted and to be able to affect policy, data must be available. Data collected for the APAs needs to be broken down into the various ethnic groups to be most effective. Lumping APA data will limit its usefulness since the diversity and individual backgrounds of the various ethnic groups play an important role in understanding and combatting their various health issues.

G. Voting Rights

APAs' right to vote will continue to be one that must be monitored and protected. As the number of Asians who are naturalized and who qualify for voting rights increases, the greater the need becomes to remain vigilant in protecting those rights. APAs still suffer barriers to the simple task of voting--i.e., misinformation about polling areas or harassment at polling stations.

With the passage of the Voting Rights Improvement Act of 1992 which reauthorized Section 203 of the Voting Rights Act (providing bilingual assistance), newly covered districts should now be monitored for providing the language assistance in a timely and effective manner. Eight counties (Alameda, CA; Los Angeles, CA; San Francisco, CA; Orange, CA; Honolulu, HI; Brooklyn, NY; Queens, NY; and New York, NY) are now required to provide ballots, voter

education and registration materials in Asian languages.

H. Domestic Violence

As instances of domestic violence against women in the U.S. continue to rise, so too are increasing numbers of APA women affected by society's lack of attention to spousal abuse. As an even more invisible sector of the already oft-overlooked APA community, APA women are not receiving the advocacy and services that they should. Shelters available to battered women are inadequate, and those that are capable of providing culturally sensitive guidance to APAs are rarer still. As a result, those who seek assistance find far too few places that are able to both recognize and address their needs.

Due to incomplete and inconclusive statistics on domestic violence, particularly as classified by race or ethnicity, the problem of spousal abuse of APA women is believed to be significantly underreported. Not many LEP women are aware of shelters and public agencies that may provide assistance, and fewer still have the knowledge, not to mention the necessary time and language skills needed, to obtain a court-issued restraining order. In addition, cultural attitudes often prevent APAs from making their plight public; as marital problems are considered a personal issue, admitting to them could cause being ostracized from the community. For women with limited English skills who rely on others with similar cultural backgrounds for companionship and survival, such a decision would have extremely detrimental consequences.

IV. Recommendations

1. The Administration should urge Congress to immediately pass the "Justice for Wards Cove Workers Act" to provide the 2,000 Asian Pacific American plaintiffs in the Wards Cove Packing Co. v. Atonio employment discrimination case coverage under the Civil Rights Act of 1991.

2. The Administration should consciously include the welfare of the APA community in every aspect of civil rights legislation and policies and recognize that the APA community is in need of services provided to all U.S. citizens.

3. Full federal funding is necessary to fully implement the U.S. Department of Justice's Community Relations Service 1-800-347-HATE line. Multi-lingual capability for the hotline is crucial to be fully effective in a multi-cultural society.

4. The Administration should strongly support the full implementation of the Hate Crimes Statistics Act by providing adequate funding for the training of local law enforcement officials and mandating the collection of standardized hate crime data at all levels.

5. The Office for Civil Rights (OCR) in the Department of Education should step up its enforcement of Title VI's Lau requirements for instruction for LEP students.

6. The rights of language-minority workers need to be protected through increased educational efforts to educate employers and the public about the rights of language-minority workers.

7. With the Immigration Reform and Control Act employer sanctions provisions still in effect,

a) Congress should adequately fund the Office of Special Counsel to provide:

1. multi-lingual assistance for the information hotline.
2. additional outreach efforts to educate employers and employees about IRCA's anti-discrimination provisions.
3. adequate staffing for the enforcement of the anti-discrimination provisions of IRCA.

b) simplify employer's work authorization verification process.

c) request a future GAO study to determine the extent of remaining discrimination.

8. The Department of Health and Human Services should raise the priority given to increasing the number of trained health care professionals who have the linguistic and cultural skills to serve the Asian Pacific American communities.

9. The Administration should continue to support the Asian Pacific Islander race/ethnicity breakout categories in the Census.

10. The U.S. Department of Justice must monitor the compliance of jurisdictions under coverage of Section 203 of the Voting Rights Act of 1965.

V. Summary

The civil rights issues addressed in this paper represent just a fraction of the areas where APAs are denied equal access, equal opportunity, and equal justice. APAs are full-fledged Americans protected under the U.S. Constitution and Bill of Rights. As the nation grows and the complexion of America is forever changing, it is imperative that the fastest growing population percentage-wise--the Asian Pacific Americans--be an integral and active player and benefactor of civil rights legislation.

All levels of American society need to recognize that APA inclusion in all policies and programs is vital. The government and the nation's leaders need to set an example by working on inclusive and non-discriminatory policies. Politicians and public officials need to condemn actions of their colleagues who engage in prejudicial behavior.

When we speak of civil rights, we must be unequivocally certain that the civil rights of every single person in the U.S. are indeed protected by colorblind laws.

ENDNOTES

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The Hate Crime Challenge

by Susan Armsby

I. Introduction

Hate crimes are incendiary political messages. They are bold, ugly polemics against the political and social acceptance of fellow human beings. The term "hate crime" has gained currency in the past several years to describe the criminal victimization of someone because of his or her race, religion, ethnicity or sexual orientation.

There is good news too; a growing commitment to rejecting prejudice and bigotry, at whomever it is directed. For many, there is no acceptable victim of hate, no attack justified just because someone is "different." Two Japanese-American members of Congress, Representatives Norman Mineta and Robert Matsui recently demonstrated this commitment when they wrote "An Open Letter to the Japanese American Community" urging opposition to anti-gay ballot initiatives in Oregon and Colorado:

Our successful fight to redress the injustice of our evacuation and internment during the Second World War had two purposes: to gain official recognition that our rights as Americans were violated and, equally important, to ensure that such a gross violation of civil liberties should never happen again in this country.

As history's witnesses to the damage such measures can do, Americans of Japanese ancestry cannot afford to ignore the implications of [the Oregon and Colorado initiatives]. If they are adopted, a group of our fellow citizens will once again be declared less than fully American and their rights attacked as a matter of official, government policy.¹

In the two years since the publication of Lost Opportunities: The Civil Rights Record of the Bush Administration Mid-Term, which included a review of the passage of the Hate Crime Statistics Act of 1990 (P.L. 101-275), much work has been undertaken to improve the training provided law enforcement officials in hate crime, modernize the role of the Department of Justice's Community Relations Service in responding to communities suffering hate crime and craft federal legislation to address hate crime beyond data collection. But there remains much to be done to eliminate the private practice of bigotry.

II. Implementation of the Hate Crime Statistics Act

In 1990, Attorney General Richard Thornburg made a important decision: he assigned the Uniform Crime Reporting (UCR) section of the Federal Bureau of Investigation -- not the National Crime

Survey of the Bureau of Justice Statistics -- the responsibility for implementing the data collection requirements of the Hate Crime Statistics Act (HCSA). The HCSA directs the Department of Justice to collect and publish data on crime which manifests evidence of prejudice based on race, religion, sexual orientation and ethnicity. Thornburg's simple administrative delegation has had a significant policy impact on how hate crime is dealt with by law enforcement officials.

The National Crime Survey asks individual Americans whether they have been victims of crime during the past year. A question about hate crime could have been easily included. By collecting hate crime data through the UCR, however, law enforcement personnel must be trained to identify a hate crime, report it accurately, and treat the victims appropriately. Training the 16,000 law enforcement agencies that report crime data to the UCR has been no easy task and remains unfinished.

The FBI expects that the first statistically valid, nationwide picture of hate crime will not be available until 1994. UCR plans to release annual hate crime data reports as well as analyses on various facets of hate crime. Although the implementation of the HCSA has gotten off to a slow start, the UCR is strongly committed to the endeavor and considers hate crime data collection to be a permanent part of the UCR program.

To date, the only published UCR HCSA data was released in March 1992 and demonstrated the slow program start up in the states: 38% were participating, 8% were participating partially and 54% were not participating at all.² In 1991 and 1992, UCR held 16 regional seminars for 1744 law enforcement personnel from all 50 states and Washington, DC. That figure includes law enforcement personnel from every city with a population over 100,000 -- which covers 77% of the U.S. population.³ However, 141 of 316 jurisdictions that have received training have not begun reporting.

The primary cause of the limited reporting appears to be fiscal restraints that limit state and local law enforcement training. During a recession, training is often one of the first expenses eliminated and law enforcement cut training along with other professions. Congress did not allocate additional funds to the UCR to provide the training necessary to implement the HCSA so it has focused on reaching the police trainers, who are expected to then conduct their own training. It will take several years for the training to reach every beat cop. In the meantime, work is being done to integrate hate crime training into the curriculum of the Federal Law Enforcement Training Centers and the FBI's Quantico academy.

Two messages need to be emphasized to law enforcement: not only will hate crime data collection and reporting not be an

overwhelming task, it is a promising avenue for improving police-community relations. UCR chief Harper Wilson and HCSA advocates agree that coming up with the official number of hate crimes every year is not what's important -- it's the process of doing so that is. That's why the 16 regional training seminars included representatives of community groups so they could learn about the law, the local police's responsibility in enforcing it, have a chance to tell the police about their communities, and initiate a relationship that should be mutually beneficial. Feedback from community groups has already identified hate crime victim assistance as a needed addition to hate crime training. As police come to understand the impact of hate crime on the victim and the community, and as the communities see police responding sensitively and effectively -- and even pro-actively -- to hate crime, security and justice will be strengthened.

Computer technology also plays a role in the slow implementation of the HCSA. Crime reporting nationally is undergoing a transition from a summary based (where multiple crimes occur in one incident but only the most severe is reported) to an incident based (where each crime is reported) system. The summary, or SRS, system captures far less data than the incident, or NIBRS, system does and the NIBRS system is fully computerized. Because reporting to the UCR is voluntary, UCR does not control the reporting format and accepts hate crime data in a total of 6 different submission medium.⁴ Wilson strongly supports eventual nationwide reporting through NIBRS but cannot set a deadline for compliance.

It's been a mixed bag in states with their own hate crime data collection laws. Certainly one benefit is that those states are most likely to provide training at the state-level for hate crime law enforcement. One of the factors in passing the HCSA was to make available valid, comparable data to assess regional and national trends. States with hate crime data collection laws, however, define hate crime differently (often excluding sexual orientation or including numerous other characteristics) so comparison remains inexact. Even though the HCSA defines hate crime on the basis of race, religion, sexual orientation and ethnicity, states are not required to submit their data in those and only those categories.

The FBI and other organizations jointly wrote a resource book -- yet unpublished -- to help states establish a hate crime reporting process. The resource book also reviews 1990 data from states with hate crime reporting programs -- 4,600 hate crimes in 11 states -- and concludes that the most frequently reported hate crimes were motivated by racial and anti-Semitic bias. The most frequent hate crime scenario involves a black victim being attacked by white males at the victim's home.⁵

The UCR is fully aware of these difficulties in providing

adequate training and standardizing reporting technology and data elements. While neither satisfied nor sanguine, the UCR staff believes the program is on the right track and the problems are ultimately solvable.

III. Community Relations Service

The statutory mandate of the Community Relations Service (CRS) is outdated and has been interpreted over time to require CRS to act in a discriminatory manner.

CRS was created by Title X of the Civil Rights Act of 1964 and used by the Johnson administration to ease the implementation of the Great Society programs by providing mediation and conciliation services. Its mandate, to deal with community-wide difficulties based on race, color and national origin, was uncontroversial until the passage of the HCSA. It took 5 years for the HCSA to pass, just long enough to form a consensus around the definition of a hate crime and the great importance of ensuring that hate crime would be dealt with in an all inclusive manner.⁶ CRS began attracting criticism when it launched activities outside its mediation and conciliation functions -- hate crime data collection and training. For the last two years, CRS consistently opposed efforts to effect administrative or legislative changes to its work on hate crime.

CRS Director Grace Flores Hughes first demonstrated CRS's short-sighted approach to hate crime at a 1990 news conference when she announced a toll free number (1-800-347-HATE). She drew laughter when distinguishing who could call the hotline (those with a racial or ethnic basis of complaint) and who couldn't (everyone else). A reporter asked, "So if you're a gay person, and there's violence in your community against you, you can't call. Or if you call, they won't take your call." Hughes responded, "They -- that's right. It would have to be someone like the FBI, perhaps. We don't -- I have to stay within my mandate."⁷ Public outcry and a letter from HCSA sponsor Senator Paul Simon (D-IL) convinced Attorney General Thornburg to direct CRS to take hotline calls reporting every type of hate crime. CRS remained adamant, however, that it would not provide any assistance to callers reporting anti-gay or anti-religious hate crime. Each call within CRS's mandate is referred to CRS regional staff for possible casework activity.

Shortly after the passage of the HCSA, the FY91 appropriations conference report for the Departments of Commerce, State and Justice directed CRS to designate \$400,000 to a private entity to "combat and respond to prejudice and bigotry-related crime." Although conference report language is not legally binding, CRS undertook two time-consuming projects to be able to comply with the congressional language: gaining grant-making authority and receiving redirected Department of Justice funds. Several

organizations active in the anti-hate crime field, including the American Jewish Committee (AJC), Anti-Defamation League (ADL), National Gay & Lesbian Task Force (NGLTF) and People For the American Way (PFAW), urged CRS to take note that the report language made no reference to limiting the grant to hate crime based on race, color and national origin and to develop an RFP based on the broader HCSA definition. Instead, CRS choose to offer the grant exclusive of anti-gay and religiously-motivated hate crime even though one of the specified activities was to "identify minimum common data elements that agencies that collect data on hate incidents can use for development of a joint annual report on hate incidents."⁸

Aware that CRS was purposefully not offering its services when anti-gay or anti-religious hate crime create community conflict and that CRS went to some effort to comply with the FY91 Commerce, State and Justice appropriations conference report, members of the FY92 conference committee wrote: "The conferees expect the CRS to continue its role in combatting and responding to hate crimes. In addition, the conferees expect CRS to respond to hate crimes as defined by the Hate Crime Statistics Act." Representative Nancy Pelosi (D-CA) reiterated this congressional directive in a letter to Attorney General Barr and the anti-hate crime coalition met with CRS leadership to urge compliance. Apparently, CRS changed its perspective on taking the action necessary to comply with conference report language between 1991 and 1992 because the FY92 directive was rejected by CRS General Counsel Linda Martin-Crawford: "[N]either the FY 1992 Appropriations Act nor the Conference Report alter CRS jurisdiction."⁹

Concerned about CRS's uneven role in responding to hate crime, the House Subcommittee on Civil and Constitutional Rights expanded its 1992 oversight hearing to take testimony from the AJC, ADL, NGLTF and PFAW. The organizations expressed dismay over the hotline, grant, conference reports as well as the inconsistent Department of Justice approach to hate crime (the FBI, Office For Victims of Crime and the Bureau of Justice Assistance define them as based on race, religion, sexual orientation and ethnicity whereas CRS defines them as based on race, color and national origin); over CRS's determination that one type of anti-religious bigotry (anti-Semitism) could be covered under race or national origin, leaving all other religious denominations outside CRS jurisdiction; and over a CRS publication entitled "Avoiding Racial Conflict: A Guide for Municipalities" that suggested municipalities pass hate crime ordinances based on CRS's narrow definition. The organizations urged CRS to proceed with administrative remedies to ensure that all its hate crime education, outreach and training be consistent with the terms of the HCSA.

The \$400,000 grant erupted in controversy among the anti-hate

crime coalition during the spring of 1992. CRS had entered into a cooperative agreement with the National Institute Against Prejudice and Violence (NIAPV) to conduct the grant's projects. CRS/NIAPV convened a meeting in April of experts and newcomers to the field to discuss hate crime data collection. During the meeting participants made it abundantly clear to CRS and NIAPV that the exclusion of hate crime based on religion and sexual orientation from the scope of the project was unacceptable and jeopardized the future participation of key organizations in the project.¹⁰ NIAPV found itself in an awkward position because it has had a long-standing commitment to including religion and sexual orientation in its work on hate violence. The coalition met with CRS's new Acting Director William Lucas in July and urged him to salvage the project from ruin. Lucas took no action and the project suspended further activities.

In the fall of 1992, Rep. Pelosi kept congressional pressure on CRS by proceeding once again with report language for the FY93 appropriations conference report. This time, CRS and the coalition signed off on the language that directed CRS to be consistent with the HCSA regarding hate crime education, outreach and training but does not require CRS to expand its mediation and conciliation services.

Efforts to change the CRS statute were put on hold, pending the outcome of the presidential election.

IV. Where Hate Crime Is Happening

Reports of hate crime incidents and trends continue to make their way into newspaper copy across the country. Los Angeles County records showed a 22% increase in hate crime in 1991.¹¹ The ADL's 1991 "Audit of Anti-Semitic Incidents" included a record total for the most serious anti-Semitic crimes of vandalism, arson, bombings and cemetery desecration and the highest number of anti-Semitic incidents reported on college campuses.¹² The National Gay & Lesbian Task Force found that 1,822 anti-gay hate crimes were reported to agencies in just 5 major cities in 1991.¹³ The Southern Poverty Law Center reported in 1992 a record number of white supremacy groups: 346.¹⁴ The U.S. Commission on Civil Rights issues a report concluding that Asian Americans are often victims of hate crime.¹⁵ Police in Salem, Massachusetts marked the 300th anniversary of the witch trials by investigating hate crimes against local witches, including harassment and the attempted abduction of a black cat.¹⁶ A black family, trying to escape racial discrimination in the Chicago rental housing market, bought a suburban home only to have the front porch torched.¹⁷

The U. S. Conference of Mayors, the National Association of Attorneys General, the National Sheriffs' Association, the International Association of Chiefs of Police and the Fraternal

Order of Police reacted by passing resolutions highlighting the devastating impact of hate crime and urging support for the UCR's data collection efforts. There's no doubt the problem is real, and that leaders want to do something about hate crime. Leadership, newsprint, reports and resolutions are essential elements of the solution. What's been missing are large-scale educational programs to develop the skills needed to prevent hate crime and comprehensive programs to deal with perpetrators when they do commit hate crime. The California Commission on the Prevention of Hate Violence endorsed these essential components of future anti-hate crime efforts:

Target counseling and, where appropriate, alternative sentencing programs must be developed for youthful hate crime offenders because we know that just as bigotry is learned, it can be unlearned; and

Teachers must be given the tools -- in terms of both training and curriculum -- they need to work effectively with ... highly diverse student population and raise students' awareness of issues of bias and tolerance[.]¹⁸

A. Juvenile Hate Crime

Preliminary data show that teenagers and young adults commit most of the hate crime.¹⁹ That young people exhibit such cynicism and contempt, instead of idealism and tolerance, is particularly disturbing. In 1992, Congress took steps to address the problem.

Representative Nita Lowey (D-NY) and Senator Herb Kohl (D-WI) offered amendments to the Juvenile Justice and Delinquency Prevention Act reauthorization (H.R. 5194) to be able to understand who these young haters are and to design effective education and sentencing programs within the juvenile justice system to turn them around. Amendments were crafted to (1) learn more about young hate crime perpetrators than is currently available through the HCSA: age, sex, race, ethnicity, education level, locality and family income; the characteristics of the types of hate crime they commit, including the law enforcement proceedings against such juveniles; and the characteristics of their victims, including their familiarity with the perpetrator, and (2) establish or support programs to prevent or reduce the incidence of hate crime by juveniles, including model programs that help the perpetrator understand his own prejudices and the impact they have on the victim and community and sentencing programs that are designed specifically for juveniles that provide alternatives to incarceration.²⁰ As amended, the reauthorization easily passed.

The information and model programs developed through the reauthorization could be of significant value in learning how to diffuse the warped allure of hatred and scapegoating.

B. Elementary and Secondary Education

The late Representative Ted Weiss (D-NY) drafted legislation, the Hate Crimes Program Prevention Act of 1992, to provide assistance to a limited number of communities directly affected by hate crime. The bill would make grants to local educational agencies and community-based nonprofit agencies to develop educational programs to prevent or reduce the incidence of hate crime and teach conflict resolution skills. Rep. Weiss never intended it to be a free-standing education bill, but rather believed that it should be included in an omnibus education package. He considered introducing it as an amendment to the Neighborhood Schools Improvement Act, S. 2, but decided to wait for a more viable legislative vehicle, the Elementary and Secondary Education Act reauthorization in 1993.

The status of educational programs across the country that teach children about their own role in promoting diversity is unclear. Many state and local education agencies have some type of program as do community-based organizations, but call it many different things (i.e., multiculturalism, teaching tolerance, diversity education), have different purposes and are not evaluated well.²¹ But some excellent programs do exist, such as the New York City program that teaches conflict resolution skills and the Southern Poverty Law Center's biannual magazine, Teaching Tolerance, reports on the few programs scattered throughout the United States.

The Elementary and Secondary Education Act reauthorization of 1993 remains a choice legislative vehicle for short-term and long-term programs. Short-term programs such as Rep. Weiss envisioned must be paired with the long-term integration of anti-prejudice programs in administrative priorities, teacher training, curriculum development, service learning and capacity building.

V. Punishing Hate Crime

To many, the law appears to be unsettled regarding the constitutional punishment of hate crime. The Supreme Court's 1992 ruling in R.A.V. v. City of St. Paul²² on hate speech was quickly followed by the Wisconsin and Ohio Supreme Courts' overturning laws on hate crime.²³ The debate over hate crime sanctions implicates the very existence of legal sanctions against discriminatory conduct.

A. R.A.V.

The Supreme Court ruled unanimously that a St. Paul, Minnesota statute making it a crime to erect a symbol that aroused "anger, alarm or resentment" based on race, color, creed, religion or

gender is unconstitutional. The reasoning of the Court, however, was not unanimous. Justice Scalia, writing for the majority, found primarily that the St. Paul law impermissibly requires content-based and viewpoint-based discrimination. The majority articulated a refinement of First Amendment protection within traditionally unprotected speech; government may not regulate disfavored topics in statutes against "fighting words."²⁴ Concurring only in the judgment, Justice White harshly criticized the majority's rationale and found the law overbroad because "anger, alarm or resentment" do not trigger the "fighting words" standard for proscribable speech.²⁵ Justice White closed by writing prophetically, "The decision ... will surely confuse the lower courts."

The distinction between sanctions for hate speech -- solely at issue in R.A.V. -- and hate crime -- conduct already punishable yet motivated by prejudice and not addressed by R.A.V. -- indeed confused many. Forty-six states the District of Columbia have hate crime statutes on their books. The day after R.A.V. was announced, the Wisconsin Supreme Court cited it when overturning a state sentencing enhancement statute for crimes committed "because of the race, religion, color, disability, sexual orientation, national origin or ancestry" of the victim. The Washington Post declared, "The Supreme Court yesterday unanimously struck down a St. Paul, Minn., hate crimes law, casting in doubt on the constitutionality of scores of other state and local laws..."²⁶ And shortly thereafter in Chicago, the Police Superintendent, U.S. Attorney, Cook County State's Attorney and other law enforcement officials took the unusual step of calling a press conference to quell the public confusion over R.A.V. stressing that there was no "window of opportunity for bigots."²⁷ After the ADL reported to the FBI that some of their regional offices were told that local police officers were not taking hate crime reports because of R.A.V.,²⁸ the UCR wrote to all its 16,000 reporting agencies in August assuring them that the decision "has no impact upon the Federal Hate Crime Statistics Act. [Hate crimes] and their bias motivation are reportable..."²⁹ Then Ohio overturned its hate crime sentencing enhancement law and Oregon upheld its.³⁰

Cases on hate crime laws are currently pending at the appellate level in California, Florida, New Jersey, Michigan Vermont and Washington state. The Supreme Court re-entered the debate over hate crime by granting certiorari in the Wisconsin in mid-December. Should the Court find the Wisconsin law unconstitutional, legislators throughout the country will be stripped of a valuable tool in their efforts to create a non-discriminatory society.

B. Hate Crime Sentencing Enhancement Act of 1992

Representative Charles Schumer (D-NY), a leading proponent of

anti-hate crime measures and chairman of the House Subcommittee on Crime and Criminal Justice, introduced H.R. 4797 shortly before the R.A.V. decision directing the U.S. Sentencing Commission to promulgate guidelines enhancing the sentence for federal crimes "in which the defendant's conduct was motivated by hatred, bias, or prejudice, based on the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of another individual or group of individuals."

At a Subcommittee hearing addressing the impact of R.A.V. on the Hate Crime Sentencing Enhancement Act (HCSEA) in July, Schumer heard contradictory opinions that focused on whether the motivation or intent to commit hate crime is speech protected by the First Amendment. Opponents argued that speech and motivation are not severable and that because of the great latitude allowed judges during sentencing, protected speech would invariably be punished.³¹ Supporters, who included Harvard Law Professor Laurence Tribe and First Amendment specialist Floyd Abrams countered that motive has long been a factor in determining whether a crime has been committed and, if so, what punishment is appropriate. Abrams cited another recent unanimous Supreme Court decision, Dawson v. Delaware, regarding bias that found that "the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs are protected by the First Amendment."³²

Tribe placed the discussion over the HCSEA squarely within the context of general civil rights protections: if legislatures were prohibited from regulating discriminatory conduct, then "an enormous body of anti-discrimination law, both state and federal, would be unconstitutional." The Civil Rights Act of 1964, the Fair Housing Act and the Ku Klux Klan Act and others provide sanctions for discrimination based certain personal characteristics and have been upheld under strict scrutiny jurisprudence. He went on to commend the dissenting opinion in the Wisconsin hate crime decision that asked: "How can the Constitution not protect discrimination in the selection of a victim for discriminatory hiring, firing, or promotional practices, and at the same time protect discrimination in the selection of a victim for criminal activity?"³³

Improvements to the HCSEA were offered, such as making the sentencing enhancement permissible, not mandatory; expressly linking the bias motivation to the specific crime under indictment; and providing further direction to the Sentencing Commission regarding due process protections. Without any amendments, the House of Representatives passed the HCSEA in October. The Senate adjourned before taking any action -- Senator Helms having placed a hold on the bill.

VI. Anti-gay initiatives in Oregon and Colorado

Hate crimes are political expressions. One hate crime in particular played an important role in defeating a state constitutional amendment.

As mentioned above, on the November 1992 ballots in Oregon and Colorado were amendments to the respective state's constitutions that would prohibit civil rights protections on the basis of sexual orientation. The legitimizing of discrimination against lesbians and gay men was up for popular vote. In Oregon when the "No on 9" (the coalition opposing the anti-gay amendment) office was ransacked, and files and equipment stolen in May, many thought it was par for the course in a contentious political campaign. But when a gay man and a lesbian died when their Salem home was fire bombed, it shocked the state. The police reported it as a hate crime, the culmination of a series of physical assaults and harassment.³⁴

News of the hate crime spread throughout the state, driving home the message that anti-gay bias is not benign. State law enforcement officials told a legislative committee shortly before the election that hate crime was on the rise and the controversy over Amendment 9 probably fueled the increase.³⁵ Portland police chief Tom Potter told the committee that fear over Amendment 9 had led gay men and lesbians to buy firearms to protect themselves. "It has created a real climate of fear in our community, and I'm quite concerned about that," Potter said.³⁶ The tension over the fire bombing lingered, and Amendment 9 lost, 56-44%.

Public concern over anti-gay hate crime did not materialize in Colorado, where the anti-gay amendment passed, 53-47%. Plans to boycott the "hate state," as Colorado has been so dubbed, have kept the issue contentious. A Denver hate crime monitoring group reported in mid-December a threefold increase since the amendment's passage.³⁷

VII. Conclusion

Hate crime is not, of course, an exclusively American phenomenon. During the past two years in Germany, neo-Nazis and skinheads terrorized countless thousands of people because of their ethnicity or religion and were responsible for 3,400 acts of violence.³⁸ Sixteen ethnic Turks have been killed thus far in 1992, including the fire-bombing death of a grandmother, her niece and granddaughter.³⁹ But, as in America, bigotry has been met by rallies in several German cities calling for tolerance and an end to economic scapegoating.

Community outrage at hate crime must be augmented by affirmatively teaching people how to live together, accepting -- if not appreciating -- differences. Hate crime cannot be

tabulated, legislated or sentenced out of existence. Those processes help, but the key to ending prejudice lives within each of us.

Endnotes:

1. October 15, 1992
2. UCR State By State Hate Crime Implementation Status Report, March 1992
3. Testimony of G. Norman Christensen, Assistant Director of the Criminal Justice Information Services Division, FBI, before the Senate Subcommittee on the Constitution regarding oversight of the Hate Crime Statistics Act, August 5, 1992
4. op. cit.
5. Testimony of Jack McDevitt of the Center For Applied Social Research, Northeastern University, before the Senate Subcommittee on the Constitution regarding oversight of the Hate Crime Statistics Act, August 5, 1992
6. Senator Jesse Helms (R-NC) and Representative William Dannemeyer were unsuccessful in removing anti-gay hate crime from the HCSA.
7. News conference of April 30, 1990
8. Federal Register, June 13, 1991
9. Letter of March 11, 1992
10. The following organizations wrote to NIAPV and CRS reiterating misgivings over the project's exclusion of anti-gay and anti-religious hate crime on May 29, 1992: People For the American Way, National Gay & Lesbian Task Force, Center for Democratic Renewal, Anti-Defamation League, American-Arab Anti-Discrimination Committee, Japanese American Citizens League, National Council of La Raza, General Board of Church and Society of the United Methodist Church, Southern Poverty Law Center and Committee Against Anti-Asian Violence.
11. Stephanie Chavez, "Hate Crimes Against Muslims Condemned." Los Angeles Times, 3/26/92
12. ADL testimony before the House Subcommittee on Civil and Constitutional Rights regarding CRS, 3/26/92

13. National Gay & Lesbian Task Force, "Anti-Gay Violence, Victimization and Defamation in 1991."
14. Mark Mayfield, "Hate groups increase - so do their crimes." USA Today, 2/20/92
15. Celia W. Dugger, "U.S. Study Says Asian-Americans Face Widespread Discrimination," New York Times, 2/29/92
16. John Larrabee, "300 years after trials, more tribulation for witches." USA Today, 7/27/92
17. Alex Kotlowitz, "How Regular Folks in Berwyn, Ill., Tried To Fight Prejudice." Wall Street Journal, 6/3/92
18. Press statement by California Lt. Governor Leo McCarthy, 6/15/92
19. Abt Associates Inc., "The Response of the Criminal Justice System to Bias Crime: An Exploratory Review.: 10/7/87 and Anti-Defamation League, "Audit of Anti-Semitic Incidents in 1991."
20. Congressional Record, 10/7/92, S. 17265
21. Unpublished research by People For the American Way, 1992
22. 112 S. Ct. 2538 (1992)
23. State v. Mitchell, 169 Wisc. 2d 153, N.W. 2d 807 (1992) and State v. Wyant, 64 Ohio St. 3d 566, 597 N.E. 2d 450 (1992)
24. 112 S. Ct. 2538 (1992) at 8
25. For a fuller analysis of R.A.V., see John B. Orenstein and Michael J. Wahoske, "Court Strikes Hate Crime Law." Municipal Attorney, July/August 1992, vol. 33 no. 4 and Professor Rodney A. Smolla, testimony before the House Subcommittee on Crime and Criminal Justice, July 29, 1992, regarding the "Hate Crime Sentencing Enhancement Act of 1992."
26. Ruth Marcus, "Supreme Court Overturns Law Barring Hate Crimes; Free Speech Ruling Seen as Far-Reaching." Washington Post, 6/23/92
27. Michael Sandberg, "No Window of Opportunity for Bigots," ADL On the Frontline, 9/92
28. *ibid.*
29. Uniform Crime Reporting Newsletter, August 1992

30. 28 State v. Plowman, 314 Ore. 157, ___ P.2d ___, 1992

30. Robert S. Peck, legislative counsel of the American Civil Liberties Union, correctly pointed out that "multiple flaws" in the sentencing process (evidentiary hearings are not required, hearsay evidence and illegally seized evidence are admissible and the standard of proof required is 'reasonable doubt,' not 'clear and convincing') are not "conducive to respecting peoples' First Amendment rights." pages 9-11

32. 112 S. Ct. 1093 (1992) The Court vacated and remanded a death sentence because the defendant's bias motivation was not relevant to the crime.

33. Testimony of Laurence Tribe before the House Subcommittee on Crime and Criminal Justice, July 29, 1992. p. 3-4

34. Diana Elliot, "Neighbors say beating led to fatal fire." Salem Statesman Journal, 9/30/92

35. Nancy McCarthy, "Rise in hate crimes worries police." Portland Oregonian, 10/27/92

36. *ibid.*

37. Associated Press, "New Ground Zero group launches campaign against Amendment 2." Boulder Daily Camera, 12/12/92

38. Daniel Benjamin, "Cracking Down On the Right." Time, 12/14/92

39. *ibid.*

REVITALIZING THE LEGAL SERVICES CORPORATION

By Alan W. Houseman and Linda E. Perle

The Legal Services Corporation (LSC) furnishes financial assistance to programs that provide civil legal services to the poor. A substantial percentage of the clients who are eligible for LSC supported legal services are people of color, and the overwhelming majority of eligible clients are poor women, many of whom are single mothers of young children. Many of the problems that legal services advocates face on behalf of their clients on a daily basis result from the intersection of race and poverty in our society, and have serious implications for the future success of civil rights enforcement. A healthy and aggressive civil legal services program is an essential element in the struggle to achieve civil rights and equal justice for all.

We recommend that the Clinton Administration immediately nominate, and send to the Senate for confirmation, eleven individuals to serve on the Legal Services Corporation (LSC) Board. The eleven members should:

- Be truly bi-partisan;
- Include at least two clients who are eligible for legal services under LSC guidelines, who have experience with civil legal services, and who are representatives of organizations of poor people;
- Include attorneys who have experience with the delivery of civil legal services for the poor;
- Include attorneys who have actively participated in the organized bar;
- All be committed to the principles that the poor should have full access under law to effective, high quality legal services and that LSC should be free from political control, as well as to the principles of Section 1001 of the LSC Act [42 U.S.C. §2996]; and
- Reflect racial, gender, ethnic and cultural diversity.

Under section 1004(a) of the Legal Services Corporation Act as amended [42 U.S. C. §2996c(a)], the President has the authority to appoint all eleven voting members of the LSC Board, subject to confirmation by the Senate. In order to protect the legal services program from political control, the Act requires that no more than six board members be from the same political party and none of the members may be full time employees of the federal government. A majority of the Board must be lawyers, but the Board must also include eligible clients and be "generally

representative of the organized bar, attorneys providing legal assistance to eligible clients, and the general public." The LSC Board sets policy for the Corporation and selects the LSC President who, in turn, hires the staff that administers the program.

A new Board is vitally important in order to reestablish the integrity and stature of the Corporation with the Congress, the Bar, the public, and the legal services community. Since 1982, LSC has been governed by a series of Boards consisting of recess appointees or confirmed holdover board members, a majority of whom have been, at best, indifferent to the legal needs of the poor or, at worst, openly hostile to the program under their control and committed to its demise. The actions of the LSC staff have been generally reflective of the views of the Board and have resulted in severe new burdens and restrictions on the legal services community already suffering from too many clients and too few resources. It is a testament to the commitment, inner strength and vision of that community that it has survived the last decade.

The current board consists of one vacancy and ten recess appointees. Unless they resign or are replaced, their appointments expire at the end of the first session of the 103rd Congress, sometime in late 1993. We urge the new Administration to move as quickly as possible to nominate eleven new LSC Board members so that the confirmation process can begin before the Senate Labor and Human Resources Committee and the new Board can assume its role as champion of legal services for the poor.

We recommend that the Clinton Administration support a substantial increase in funding for the Legal Services Corporation for FY 1994. **We would urge a minimum of \$525 million.**

Although the LSC budget is submitted directly to Congress and is not a part of the President's budget, section 1005(e)(2) of the LSC Act provides that the Office of Management and Budget is to review and submit comments upon the annual LSC budget request, [42 U.S.C. §2996d(e)(2)].

When the new administration submits its budget request to Congress, we urge it to include a recommendation that LSC be funded at a level that is at least as high as the budget mark requested by the current LSC Board of Bush recess appointees. That Board requested a mark of \$525 million for FY 1993. [Susan, we expect the FY 1994 mark to be similar; we may have the actual figure by the time these recommendations are finalized.] The current appropriation for FY 1993 is \$357 million.

Although an appropriation of \$525 million represents a substantial increase in funding, when adjusted for inflation it

would not even restore the legal services program to the level of funding that was achieved in FY 1981. That year LSC funding reached the modest goal of "minimum access"-- two lawyers for every 10,000 poor people, representing only 4.7% of the number of lawyers available to serve the general public. Funding for LSC was cut by 25 per cent the following year and remained static or increased only minimally for the balance of the decade. To bring funding back to the minimum access level would require a budget mark of more than \$821 million in current dollars.

The need for substantially increased funding is clear:

- The number of poor people increased by almost 16% between 1980 and 1990, according to the 1990 Census.
- Since 1990, many more families have fallen below the poverty line as the recession deepened, often bringing with them a host of new legal problems, many of which were not previously faced by legal services advocates.
- State and national studies consistently demonstrate that only 15 to 20% of the legal needs of the poor are met with current available resources from all sources.

A budget recommendation of a minimum of \$525 million would demonstrate that the Administration is committed to investing at least a small share of the nation's resources in ensuring that access to justice is available to those least able to afford legal assistance. Especially in light of recent events in Los Angeles and elsewhere, adequate support for legal services is essential if we hope to reaffirm the faith of the poor in the government's capacity and commitment to ensuring justice and improving opportunities for the poor.

We recommend that the new Administration actively support an affirmative reauthorization bill for legal services that:

- Helps restore the integrity and proper functions of the Legal Services Corporation;
- Maintains and strengthens local control over program operations and activities;
- Protects the ability of legal services lawyers to represent financially eligible clients in all appropriate forums and to provide the full range of legal services in civil matters that are available to clients who can afford to pay for their legal services;
- Imposes no restrictions on the use of funds provided by non-LSC sources, while ensuring accountability for the use of LSC funds to Congress, the public and the client

community; and

- Preserves and improves the legal services delivery system to ensure that the program is fully responsive to the most pressing legal needs of the poor.

The Legal Services Corporation was last reauthorized in 1977. That authorization expired in 1980. Since that time there have been numerous unsuccessful efforts to enact a new authorization for the legal services program. In the absence of authorizing legislation, Congress was forced to address numerous substantive legal services issues through the appropriations process, imposing numerous restrictions and qualifications on the Legal Services Corporation itself, as well as the programs that it funds.

During the last session of Congress, the House adopted a reauthorization bill that addressed many of the issues that had faced the program since 1980 and made numerous changes in the approach to legal services delivery. While not a perfect bill, HR 2039 represented a substantial improvement over the current legislative hodgepodge. The Senate Committee on Labor and Human Resources approved a similar bill, S 2870, but given the press of other business at the end of the session and a veto threat from the Bush Administration, the full Senate did not take up the bill before adjournment.

Congress is likely to reconsider a new reauthorization for LSC early in the next session. The Administration should demonstrate its commitment to the continuation of an independent Legal Services program by making it clear that it will support Congressional efforts to reauthorize LSC under the conditions noted in our recommendation, and that it will sign the bill as soon as it is passed.

JUDICIAL NOMINATIONS:
REFLECTIONS ON THE PAST; SUGGESTIONS FOR THE FUTURE

by Elliot M. Mincberg and David A. Wollin

I. INTRODUCTION

During the past four years, President George Bush established a record of selecting judges for the federal bench that largely mirrored that of President Ronald Reagan. Like his predecessor, President Bush used his authority under Article II of the Constitution primarily to nominate candidates who were seen as committed to supporting a conservative ideological agenda.¹ This has resulted in serious erosion of civil rights protections in the federal courts.²

The Bush Administration also failed to select nominees reflecting the great diversity of American society. By and large, Bush's nominees tended to be Republican, white, male and wealthy.³ Overall, less than 11 percent of President Bush's appointees were minorities.⁴ In fact, the number of African-Americans now serving in the federal judiciary is lower than when President Reagan took office in 1981.⁵

A diverse judiciary is important, as Senior Judge A. Leon Higginbotham has written, to ensure that litigants "benefit from the experience of those whose backgrounds reflect the breadth of the American experience."⁶ Diversity also ensures that the federal judiciary is respected by many segments of American society. Thus, "pluralism is a sine qua non in building a court that is both substantively excellent and respected by the general population."⁷ The Bush Administration's record of nominating

minority judges fell far short of achieving these important goals.

While President Bush had a significant impact in shaping the federal judiciary, he left behind a large number of vacancies. Approximately 100 openings now exist in the federal courts, representing about 12 percent of the entire federal bench.⁸ When President-elect Clinton takes office in January 1993, he will have a major opportunity to shape the federal bench in a profoundly different direction than that of his Republican predecessors. Indeed, because of attrition due to retirements and death, President-elect Clinton can expect to fill a yearly average of 40 to 50 vacancies.⁹

The importance of President-elect Clinton's authority to nominate candidates for the federal bench cannot be understated. The federal courts play a prominent and vital role in the enforcement of civil rights for minorities, the poor and the disenfranchised. President-elect Clinton will have an extraordinary opportunity to help restore the role of the federal judiciary in safeguarding the civil rights of all Americans.

This chapter assesses the Bush Administration's record on nominating judges for the federal bench. First, it describes the procedures that the Bush Administration used to select candidates for judicial vacancies. Second, the chapter reviews President Bush's record in making nominations and focuses on several of his most controversial recent nominees. Finally, the chapter offers

several recommendations that the incoming Clinton Administration can implement to help promote excellence, diversity and commitment to equal justice in the federal judiciary.

II. THE BUSH ADMINISTRATION'S NOMINATION PROCEDURES

President Bush used his power under Article II to nominate judges who, for the most part, were young and conservative.¹⁰ The judicial selection process was designed and implemented to produce candidates who met those criteria.

A. Selection of Candidates

1. District Courts

President Bush primarily followed the historical practice of "senatorial courtesy" in selecting candidates for federal district court judgeships.¹¹ Under this procedure, the senior Republican senator from the state with a judicial vacancy prepared a list of three candidates for the position. If a vacancy occurred in a state that had no Republican senator, the ranking Republican in the House of Representatives generally made the selection. The Justice Department then generally selected one of the three individuals to be investigated and presented to the President. In some instances, particular Republican Senators successfully insisted that they be able to select only one name for a district court vacancy.

2. Courts of Appeals

The Bush Administration played a more active role in selecting candidates for the courts of appeals.¹² President

Bush placed much of the power of selecting candidates for these positions in the hands of White House counsel C. Boyden Gray and Attorney General Richard Thornburgh (and, after his departure, Attorney General William Barr).¹³ These individuals, along with a small cadre of aides, were determined to continue the shift in the circuit courts toward a more conservative direction.¹⁴ One such White House aide was Lee Liberman, a former law clerk to Supreme Court Justice Antonin Scalia and a cofounder of the conservative Federalist Society.¹⁵ She assumed a significant role in ensuring that candidates demonstrated "ideological purity."¹⁶

3. Supreme Court

During his tenure, President Bush appointed two Justices to the Supreme Court -- David Souter and Clarence Thomas. The same White House and Department of Justice officials who were involved in choosing circuit court nominees conducted the processing that led to the selection of Souter and Thomas.

B. Investigation And Interviews

1. The Justice Department

Bush Administration officials conducted investigations to determine each candidate's "desirability" as a Bush nominee.¹⁷ The emphasis was on candidates who were young and very conservative.¹⁸ A candidate selected for the federal bench could expect to be extensively interviewed at the Justice Department by various officials, such as Solicitor General Kenneth W. Starr.¹⁹ The purpose of the interviews was to gain firsthand

knowledge of a candidate's judicial philosophy and intellectual ability.²⁰ Bush Administration officials maintained that candidates were not asked how they would decide particular cases or issues, such as the right to abortion.²¹ Justice Department officials did review a candidate's judicial record if one existed.²²

The White House counsel's office also was heavily involved in the screening process and had a significant influence in determining who was nominated.²³ Assistant White House counsel Lee Liberman analyzed candidates' judicial opinions and philosophies.²⁴ The Bush White House also continued in operation the President's Committee on Federal Judicial Selection, which was first started under President Reagan.²⁵ Liberman and Murray Dickman, former assistant to the Attorney General, were members.²⁶ Barbara Drake, Deputy Assistant Attorney General, later replaced Dickman. The Committee met periodically to discuss pending candidates.²⁷

In selecting Supreme Court nominees, other Bush Administration officials also were involved in the process, including John H. Sununu, the former White House Chief of Staff.²⁸ Senator Warren Rudman, Republican from New Hampshire, played a crucial role in the nomination of David Souter.²⁹

Ultimately, Gray briefed and consulted with the President on judicial nominations.³⁰ For Supreme Court finalists, the candidates were summoned to meet with President Bush, who made the final selection.³¹ The Bush Administration was relatively

slow in nominating candidates to fill judicial vacancies. President Bush took an average of more than a year to submit nominations for vacant seats.³² The backlog was created in part as a result of delay in filling 85 new judgeships created by legislation in December 1990.³³ The delay was further exacerbated by Clarence Thomas's confirmation battle for a Supreme Court seat.³⁴ By the end of the 102nd Congress, 43 vacancies remained on the federal bench for which no nominations had been made by the Administration.³⁵

2. American Bar Association

The American Bar Association's Standing Committee on the Federal Judiciary traditionally has reviewed and rated the qualifications of candidates for the federal bench. While the ABA Committee has no constitutional or statutory standing in the judicial selection process, it has sought to provide an impartial evaluation of candidates' professional qualifications.³⁶ The ABA Committee's procedures are structured to ascertain the views of a candidate's peers as to his or her professional competence, judicial temperament and integrity.³⁷ A member of the Committee conducts an investigation in the judicial circuit in which the vacancy exists.³⁸ A large number of confidential interviews with a broad spectrum of individuals are conducted to evaluate the prospective nominee's professional qualifications.³⁹ Then, the nominee is interviewed in depth, the substance of any adverse information is disclosed, and the candidate is given an opportunity to respond in full.⁴⁰ If a candidate raises concerns

about the fairness of the investigation, a second Committee member is assigned to reinvestigate and report to the Committee.⁴¹

The ABA Committee came under intense criticism from conservative quarters during the Reagan Administration and the attacks continued under President Bush.⁴² Conservatives charged that the ABA had engaged in a "charade of neutrality."⁴³ In effect, conservatives claimed that the ABA Committee was hindering a Republican president's prerogative to reshape the federal judiciary to reflect his own political agenda.

The ABA's role in evaluating judicial candidates came under particular scrutiny at the outset of the Bush Administration when Attorney General Thornburgh asked the ABA not to consider a nominee's political and ideological philosophy as part of the ratings process.⁴⁴ The ABA maintained that a candidate's philosophy was considered only as it related to his or her professional qualifications, such as judicial temperament, competence and integrity.⁴⁵ When the ABA refused to revise its guidelines, the Attorney General indicated that he would not consult with the ABA committee about judicial nominees.⁴⁶ After negotiations, the ABA revised its guidelines to avoid any reference to a candidate's political or ideological philosophy.⁴⁷ The ABA role in evaluating judicial candidates then resumed, but some observers believe its voice was largely muted by Administration threats to exclude it from the process.⁴⁸

III. PRESIDENT BUSH'S RECORD OF JUDICIAL NOMINATIONS

During the last four years, President Bush made 194 appointments to the federal bench: two to the Supreme Court, 42 to the courts of appeals, and 150 to the district courts.⁴⁹ President Bush's appointees were predominantly Republican, white, male and wealthy.⁵⁰ Several were very controversial, but no one more so than President Bush's second nominee to the Supreme Court, Clarence Thomas.

A. The Overall Record

President Bush generally employed a conservative ideological profile in choosing nominees for the federal bench. Many of these nominees were Republican judges or had held posts in the Reagan or Bush Administrations.⁵¹ Indeed, nearly half of all Bush's circuit court nominees -- 24 of 53 -- were first named to the bench by President Reagan.⁵² Another eight served as high-level officials in the Reagan Administration.⁵³ Three additional nominees were district judges appointed by Bush.⁵⁴ These candidates were part of an available pool of nominees whose conservative views were well known and whose elevation generally posed little or no political risk or controversy.⁵⁵

At the same time, the Bush Administration had a poor record of appointing minorities to the bench.⁵⁶ Of all Bush's appointees, only 11 were African-Americans.⁵⁷ Only two of his 49 circuit court judges were black -- Clarence Thomas and Timothy Lewis.⁵⁸ The President appointed only one Asian-American to the bench, and fewer Hispanics than either Presidents Reagan or

Carter.⁵⁹

Overall, less than 11 percent of President Bush's nominees were minorities.⁶⁰ Bush's record is particularly disappointing in light of the fact that the pool of qualified minority candidates greatly increased over the last decade.⁶¹ As of 1989, African-American, Hispanic and Asian lawyers totaled 51,000.⁶²

President Bush's failure to appoint minorities to the federal bench resulted in a decrease in the number of blacks serving in the judiciary since 1981.⁶³ This dismal fact prompted Senior Judge A. Leon Higginbotham to write in July 1992 that "African-American judges have been turned into an endangered species, soon to become extinct."⁶⁴ Likewise, Hispanic representation increased only incrementally, and Asian American representation has been described as "snail-like."⁶⁵

President Bush also appointed a greater percentage of millionaires to the federal bench than either Presidents Reagan or Carter.⁶⁶ One-third of the Bush judges were millionaires.⁶⁷ In 1992 alone, seven of the 11 judges appointed to sit on the courts of appeals were millionaires.⁶⁸ Almost three-fourths of Bush's appointees reported a net worth of over \$500,000.⁶⁹ Yet many of Bush's nominees had done little or no pro bono work.⁷⁰

A bright spot in the Bush record was the number of women he appointed to the federal bench. President Bush increased the appointment of women over that of President Reagan.⁷¹ Overall, he appointed 36 women to the federal judiciary, representing 18.5 percent of his appointments.⁷² It has been suggested, however,

that much of this emphasis on appointing women may have resulted from the Clarence Thomas confirmation battle.⁷³

As of today, Reagan and Bush judges account for almost seventy percent of the federal judiciary (or 509 of the 737 judges now sitting in the federal bench).⁷⁴ This is in sharp contrast to the period prior to 1981, in which the judiciary was split 60 to 40 percent between appointees by Democratic and Republican Presidents.⁷⁵ Reagan-Bush judges dominate the appellate courts, holding majorities in 11 of the 13 circuit courts and pluralities on the remaining two.⁷⁶ At the district court level, these judges account for 69 percent of the active bench.⁷⁷

Despite the overwhelming number of Reagan-Bush appointees on the federal bench, President Bush missed an opportunity to add even more. He left behind some 100 vacancies to the federal bench.⁷⁸ Fifty-three judicial nominations were pending when Congress adjourned in October 1992.⁷⁹

B. Controversial Bush Nominees

A number of President Bush's nominations were particularly controversial. Several of these (David Souter, Kenneth Ryskamp and Vaughn R. Walker) occurred in the first two years of his Administration and were discussed in the 1991 Citizens' Committee Report.⁸⁰ Over the last two years, particularly controversial nominees have included Clarence Thomas, Edward Carnes and Francis Keating.

1. Clarence Thomas

Clarence Thomas, the former chair of the Equal Employment Opportunity Commission and a member of the influential United States Court of Appeals for the District of Columbia Circuit, was nominated by President Bush for the seat on the Supreme Court vacated by Justice Thurgood Marshall.⁸¹ Thomas encountered immediate opposition from civil rights groups. He also received the lowest ABA rating ever of any Supreme Court nominee. The majority of the ABA Committee gave Thomas a "qualified" rating; a minority voted him "unqualified"; and one member abstained.⁸²

On September 10, 1991, the Senate Judiciary Committee held eight days of hearings, five of which included Thomas himself testifying on a variety of issues. Thomas was questioned closely on his record while at the EEOC and his views on a variety of civil rights and constitutional issues. In particular, Thomas was accused of jeopardizing thousands of age-discrimination cases at the EEOC by delaying prosecution. Ultimately, the Judiciary Committee deadlocked at 7 to 7 and sent the nomination to the full Senate without a recommendation.

Two days before the scheduled vote on Thomas's nomination, several news organizations disclosed that Oklahoma law professor Anita Hill had charged that Clarence Thomas, her boss while at the EEOC, sexually harassed her. In light of the allegations, the Senate postponed the floor vote and the Committee reexamined the professor's charges. During three days of televised hearings that riveted the nation's attention, Thomas and Hill presented

their testimony. Hill told the Committee of Thomas's sexual advances and harassment; Thomas denied Hill's allegations and accused the all-white Senate of conducting a "high-tech lynching."⁸³

On October 15, 1991, after an all-day debate, during which President Bush brought heavy pressure on wavering Senators, the Senate confirmed Thomas by a vote of 52 to 48.⁸⁴ Eleven Democrats joined 41 of 43 Republicans in voting for Thomas.⁸⁵ Thomas received the largest number of negative votes ever by a successful Supreme Court nominee.⁸⁶

2. Edward E. Carnes

Another Bush nominee over the last several years who generated significant controversy was Edward E. Carnes. He was nominated in 1992 to fill the seat on the United States Court of Appeals for the Eleventh Circuit previously filled by Judge Frank Johnson. Most of Carnes's legal career had been spent as chief of the capital litigation unit in the Alabama Attorney General's office.

Carnes encountered significant opposition, focused primarily on concerns about his sensitivity to problems of racial discrimination in the criminal justice system. Many civil rights groups and leaders, such as Coretta Scott King, the Reverend Joseph Lowery, the NAACP and NAACP Legal Defense and Education Fund, the Southern Center for Human Rights, the National Black Caucus of State Legislators, and the Leadership Conference on Civil Rights, opposed the nomination.

Opponents argued that Carnes and his office had displayed insensitivity to racial bias by vigorously defending verdicts in capital cases where African-Americans had been excluded from juries. For example, when questioned by the Senate Judiciary Committee about one such case, Jefferson v. State -- in which the prosecutor used 26 peremptory strikes to remove all African-Americans from the jury in three trials, and actually divided the jury list into four categories, "strong," "medium," "weak" and "black," -- Mr. Carnes testified that this racial exclusion of blacks from juries did not necessarily violate "fundamental fairness."⁸⁷ The Atlanta Constitution concluded that Mr. Carnes "possesses an extremely limited range of experience for so important a job" and has "turned a singularly blind eye toward evidence of racial bias and constitutional violations in the criminal justice system."⁸⁸ Supporters (including Morris Dees of the Southern Poverty Law Center) countered that Mr. Carnes had simply been performing his job when defending verdicts in capital cases, and that he had demonstrated sensitivity towards issues of racial prejudice and discrimination.

In May 1992, the Senate Judiciary Committee approved the Carnes nomination by a split vote of 10 to 4. Controversy continued as the nomination reached the Senate floor, but Carnes was approved by the full Senate by a vote of 62 to 36.⁸⁹

3. Francis A. Keating, II

Controversy also ensued concerning the nomination of Francis A. Keating, II, to the United States Court of Appeals for the Tenth Circuit. Keating had served as general counsel to the Department of Housing and Urban Development for several years under the Bush Administration. In that capacity, he had been involved in a number of policy decisions and other activities which, according to several Senators, raised serious questions about his interpretation and understanding of fair housing laws and his willingness to enforce them properly.

For example, Keating had issued an extremely restrictive policy in February 1991 concerning discrimination against families with children, which would have effectively allowed landlords to exclude a family of four from a two bedroom apartment, despite the Fair Housing Act's prohibition on bias against families. Although Keating later changed the policy after protest, several Senators were troubled by the fact that Keating stated that the policy reflected his legal judgment and conclusion after reviewing a significant number of fair housing cases, even though the Department of Justice opposed such restrictive standards. Keating also changed HUD policy for reviewing the disposition of fair housing complaints, adopting a policy that provided for a second look only in cases where lower level officials found discrimination to exist and thus arguably tilting HUD decisionmaking in favor of landlords. Keating had also been involved in a no-notice eviction policy for some public

housing tenants, later declared unconstitutional, and had excoriated critics of the program as having been "bamboozled by the civil liberties community."⁹⁰

Keating apologized to the Senate Judiciary Committee for the vehemence of such past remarks, but his answers to questions at his July 22, 1992 hearing and to subsequent written questions raised more concerns. For example, although Keating testified that the Department of Justice and not HUD had created the no-notice eviction program, the parties to the later litigation had stipulated, and the Court of Appeals specifically found, that HUD had created the program. Keating communicated to the Committee that his restrictive occupancy policy was based on many housing codes containing such policies, including Fulton County, Georgia, but he was unable to identify any such codes in response to follow-up written questions, and research revealed that no such policy existed in Fulton County.⁹¹ Officials of several civil rights groups also charged that Keating had made troubling statements about fair housing, including a statement at one meeting that his job was to protect "good Christian landlords," which Keating denied.⁹²

Although the Senate Judiciary Committee had tentatively scheduled a vote on Keating's nomination towards the end of the 102nd Congress, additional Committee members expressed concern, suggesting that there were insufficient votes to approve the nomination. No formal vote was taken, and the nomination was not approved.⁹³

IV. RECOMMENDATIONS

As the Clinton Administration begins, there is a significant opportunity to increase the quality and diversity of the federal judiciary and its commitment to equal justice. Particularly in light of the problems that have occurred over the past four years, we offer the following recommendations in this area:

A. Establish And Implement Expeditiously The Process For Selecting Judicial Nominees

The Bush Administration moved relatively slowly to implement a procedure for selecting judicial nominees, and problems of delay continued throughout his term. As a result, even by the close of the 102nd Congress, President Bush never submitted nominations for 43 court vacancies, and more than 100 vacancies remained on the federal bench.⁹⁴ Fifty-one of these vacancies have been classified by the Administrative Office of the United States Courts as "judicial emergencies," or vacancies pending for over 18 months that materially harm courts and litigants.⁹⁵ Even more vacancies are expected in 1993.

Accordingly, it is very important that the new Administration structure and implement expeditiously a process for selecting judicial nominees. This will involve a number of parties, including the White House, the Justice Department, the FBI, the ABA, individual Senators, and the Senate Judiciary Committee. In particular, the respective roles of the Justice Department, White House counsel and individual Senators in selecting nominees should be decided and implemented in a way that avoids some of the bottlenecks that have sometimes occurred

under the Bush Administration.

- B. Ensure That The Selection Process, Both Within The Clinton Administration And Among Individual Senators, Includes Effective Outreach To Promote Greater Diversity On The Federal Bench

As discussed above, the Bush Administration's efforts to select minorities for the federal bench met with at best limited success. President-elect Clinton has publicly stated his interest in improving the diversity of the federal bench, and this should be an important priority both for the Administration and for individual Senators in recommending nominees.

Several alternative methods are available to accomplish this goal. Some individual Senators have already indicated their interest in establishing merit commissions, including diverse representatives of local bar groups and others, to help select and recommend nominees. Administration officials focusing on the courts can consult systematically with such sources as state and regional bar organizations, minority and women's bar groups, and legal services and civil rights organizations to obtain suggested names. The importance of this objective should be communicated to everyone involved in the process, from Justice Department officials to individual Senators.

- C. Establish And Implement Criteria For Judicial Selection Emphasizing Excellence, Integrity, Diversity, and Commitment To Equal Justice

President-elect Clinton has previously stated that in selecting nominees, he would appoint "only men and women of unquestioned intellect, judicial temperament, broad experience,

and a demonstrated concern for, and commitment to, the individual rights protected by our Constitution, including the right to privacy."⁹⁶ Such criteria should truly guide all individuals involved in the selection process. Indeed, the Administration may want to consider articulating such criteria publicly, in order to communicate clearly to the public and to Senators and officials of both parties the high standards to be used in this area.

We recommend the following criteria for the selection of federal judges:

1. 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.

2. 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.

3. A nominee should have a 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.

4. 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.

5. 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.

6. A nominee should be in compliance with the Senate Judiciary Committee's resolution against membership in discriminatory clubs as of January 1, 1991.

7. 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.

D. Develop More Effective Consultative Relationships
Between The Senate And The Administration

Even though a very small number of Bush Administration nominees have been rejected by the Senate, problems developed in the relationship. For example, there was little or no consultation with the Senate in advance concerning many appellate and Supreme Court nominees. At one point, in response to its concerns relating to "leaks" during the Clarence Thomas nomination, the Administration severely limited Senate access to FBI reports on nominees, bringing the confirmation process to a virtual halt until the situation was resolved.⁹⁷

With a Democratic President and Democratic-controlled Senate, such problems should diminish substantially. Both the Administration and the Senate, however, should make affirmative

efforts to improve the process, including expediting the confirmation procedure and providing more consultation and genuine "advice" as part of "advice and consent." Senators of both parties should be encouraged to participate in constructive and effective relationships.

V. CONCLUSION

After twelve years of Republican efforts to pack the federal courts with conservative judges, President-elect Clinton has an extraordinary opportunity to reverse that trend and to select judges who are committed to equal justice under law. With some 100 vacancies on the federal bench, the Clinton Administration can begin to achieve this goal in relatively short order. The federal bench must be representative of, and responsive to, all segments of society -- not merely the elite and the well-connected. It must be a place to which all Americans can look as their best hope for achieving equality and fundamental justice. If President-elect Clinton is able to restore the federal courts to their historic and proper role as protectors of individual liberty, the federal judiciary will be one of his most enduring and important legacies.

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3. Alliance for Justice, Judicial Selection Project Annual Report 1992, The Federal Courts at a Crossroads (hereinafter "Alliance Report"), at 3-6; Lost Opportunities, supra note 1, at 187.

4. Alliance Report, supra note 3, at 3.

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10. People for the American Way Action Fund, Federal Judicial Nominees in the 102nd Congress and The Bush Administration: Still White, Male, and Wealthy (hereinafter "PFAW Report"), at 5; Mauro, supra note 2, at 20; Lewis, supra note 1, at A13; The Bush Judges, Wash. Post, Feb. 9, 1991, at A20.

11. Lost Opportunities, supra note 1, at 185.

12. Lewis, supra note 1, at A13; Lost Opportunities, supra note 1, at 186. In the District of Columbia, the Bush Administration reserved the prerogative to select candidates for both the federal district court and the court of appeals. The Bush Administration looked outside the District to fill many of these federal positions. Torry, Democrats Start Jockeying for Judgeships, Wash. Post Business, Dec. 7, 1992, at 5. According to D.C. Delegate Eleanor Holmes Norton, President Bush used the federal bench in the District as "nationwide patronage" for the Republican party. Id.

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14. Gerhardt, Models to Learn From: Good, Bad, and Ugly, Legal Times, Nov. 9, 1992, at 38; Lost Opportunities, supra note 1, at 186.
15. Assault on Liberty, supra note 1, at 9-10; Honorable Roger J. Miner, Advice and Consent in Theory and Practice, 41 Am. U. L. Rev. 1075, 1081 (1992); Moore, The White House Lawyer Nobody Knows, National Journal, June 8, 1991, at 1357.
16. Miner, supra note 15, at 1081. See also Gerhardt, supra note 14, at 38.
17. Lost Opportunities, supra note 1, at 186.
18. Gerhardt, supra note 14, at 38; Lewis, supra note 1, at A13; The Bush Judges, supra note 10, at A20.
19. Goldman, The Bush imprint on the judiciary: carrying on a tradition, 74 Judicature 294, 296-97 (April-May 1991); Lost Opportunities, supra note 1, at 185.
20. Goldman, supra note 19, at 297.
21. Id.
22. Id.
23. Miner, supra note 15, at 1081-82; Goldman, supra note 20, at 297.
24. Miner, supra note 15, at 1081-82; Gerhardt, supra note 14, at 38; Lewis, supra note 1, at A13; Moore, supra note 15, at 1357; Goldman, supra note 19, at 297.
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34. Id.
35. PFAW Report, supra note 10, at 1.
36. Tyler, In Defense of the ABA's Role in Rating Nominees, Legal Times, Nov. 9, 1992, at 37.
37. Id. at 27.
38. Id.
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40. Id.
41. Id.
42. Lewis, ABA Under Fire For Role on Bench, N.Y. Times, May 8, 1990.
43. See, e.g., Fein, Let's Lower the ABA From Its Pedestal, Legal Times, Sept. 14, 1992, at 28.
44. Goldman, supra note 19, at 295; Lost Opportunities, supra note 1, at 186.
45. Goldman, supra note 19, at 295.
46. Id.
47. Id.; Lost Opportunities, supra note 1, at 186.
48. Miner, supra note 15, at 1082; Aron, Grass-Roots Power and Judicial Selection, Chicago Tribune, May 8, 1991, at 27; Lost Opportunities, supra note 1, at 186.
49. Alliance Report, supra note 3, at 3. The report notes that this number is slightly inflated due to reappointments: David Souter and Clarence Thomas were first appointed to circuit courts before taking seats on the Supreme Court; Michael Boudin, Norman Stahl and

Timothy Lewis were elevated from the district bench. As a result, Bush named a total of 189 judges. Id.

50. Id. at 2-6; PFAW Report, supra note 10, at 4.

51. Alliance Report, supra note 3, at 3. See also PFAW Report, supra note 10, at 4; Bush Treads Well-Worn Path in Building Federal Bench, Cong. Q. Wkly. Rep., Jan. 18, 1992, at 111 (hereinafter "CQ Weekly Report"); The Bush Judges, supra note 10, at A20.

52. Alliance Report, supra note 3, at 3.

53. Id.

54. Id.

55. CQ Weekly Report, supra note 51, at 111; Marcus, supra note 1, at A1.

56. Alliance Report, supra note 3, at 4-5; PFAW Report, supra note 10, at 1-3; Judicial Diversity: Reagan and Bush Have Appointed Far Too Few Blacks, Detroit Free Press, July 11, 1992, at 8A.

57. Alliance Report, supra note 3, at 4. The number of minorities nominated for the federal bench improved in the last two years of Bush's Administration as compared to the first two. PFAW Report, supra note 10, at 2.

58. Alliance Report, supra note 3, at 3.

59. Id.

60. Id.

61. Id.

62. Id.

63. Id. at 4.

64. Higginbotham, supra note 6, at A21.

65. Alliance Report, supra note 3, at 4.

66. Id. at 6; PFAW Report, supra note 10, at 3.

67. Alliance Report, supra note 3, at 6.

68. Id.

69. Id.
70. Id. at 7.
71. Id. at 5-6; PFAW Report, supra note 10, at 3.
72. Alliance Report, supra note 3, at 5.
73. Id. Almost one-third of President Bush's female appointees -- 11 of 36 -- were nominated in the seven-month period following Clarence Thomas's confirmation hearings. Id.
74. Id. at 1.
75. Id.
76. Id. at 2.
77. Id.
78. Id. at 1.
79. Id. at 3.
80. See Lost Opportunities, supra note 1, at 187-89.
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84. Id.
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91. Id.
92. Nominee for Judgeship Defends Rights Record, Wash. Post, July 23, 1992.
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95. Administrative Office, The Third Branch (Nov. 1992) at 5.
96. ABA Journal (Oct. 1992) at 57.
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REPORT ON THE U.S. CIVIL RIGHTS
COMMISSION DURING THE
BUSH ADMINISTRATION

By

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I. INTRODUCTION

Established under the Civil Rights Act of 1957 and re-established under the Civil Rights Act of 1983, the United States Commission on Civil Rights was designed to be an independent, bipartisan, fact-finding agency. The Commission is lead by eight commissioners, each serving a six year term. No more than four commissioners can be affiliated with any one political party. The President appoints four commissioners, while the President Pro Tempore of the Senate and the Speaker of the House each appoint two commissioners. The President designates the Commission's chairperson and vice chairperson as well as the Commission's staff director who is responsible for day to day operations.

Although it has no rulemaking or enforcement powers, the Commission was extremely influential during the 1960's and 1970's. "[T]he [C]ommission was in the forefront of fashioning the nation's civil rights agenda; its reports were often cited by policy-makers and Supreme Court rulings."^{1/} Through its reports and recommendations, the Commission served as America's conscience and helped remedy decades of civil injustice.

The Reagan Administration emasculated the Commission. "The Commission was wracked by allegations of mismanagement, spending irregularities and inaction. Reagan's appointees were accused of hewing a conservative party line and eviscerating the [C]ommission's authority."^{2/} Concerns arose about the Commission's independence from the executive branch.

The Bush Administration could have let the Commission die a quiet death. Instead, the President and Congress re-energized the Commission and gave it the opportunity to restore its image and effectiveness.

II. THE BUSH YEARS

A. Early Controversy

President Bush inherited a Civil Rights Commission in turmoil. Not only had the Reagan appointees reduced the Commission to a forum for partisan bickering, but then Chairperson William Barclay Allen was surrounded by controversy.^{3/} In the wake of controversy, Allen ultimately resigned as chairperson while retaining his seat on the Commission. Murray Friedman, the Commission's vice chairperson, assumed the responsibilities of acting chairperson. At that time, Friedman's term and the Commission itself were nearing expiration.

B. Reauthorization - November 1989

On November 28, 1989, two days before the Commission's expiration date, Congress approved the Civil Rights Commission Reauthorization Act of 1989. Encouraged by President Bush's endorsement of the Civil Rights Commission, the Senate and House resolved their partisan differences after months of hearings and

debate. The compromise legislation involved extending the Commission's authorization for twenty-two months.

The reauthorization was deemed a "probation period" and not a reward for recent accomplishments (or the lack thereof).^{4/} Representative Edwards noted that "[b]y adopting this compromise, the Commission will have the opportunity to once again become strong, independent, credible, and effective. . . . The Commission has the opportunity to regain its respectability by conducting public hearings and issuing reports on major civil rights issues that affect our nation, instead of shooting personal opinions from the collective hip."^{5/} Democrats and Republicans alike agreed that the Commission's future remained uncertain.

C. New Appointees

During the Bush Administration, the terms of four of the eight commissioners expired in the last two months of 1989. This development created an opportunity to revitalize the Commission through new appointments. Under the terms of the Commission's charter, the President was to appoint two commissioners and designate the chairperson and vice chairperson while the Speaker of the House and the President Pro Tempore of the Senate were each to appoint one commissioner. President Bush acted quickly and generally received kudos for his appointments.

President Bush first appointed Arthur A. Fletcher as Chairperson of the Commission. Fletcher, a Republican, had a long and distinguished political career.^{6/} Fletcher was perhaps best known for his authorship of the Revised Philadelphia Plan -- the first affirmative action program, targeting Philadelphia area construction contractors doing business with the federal government.

President Bush named Charles Pei Wang, a Democrat, his second appointee and the Commission's new Vice Chairperson. Wang, a former member of the New York State Advisory Committee to the Commission, is President of China Institute of America, Inc., an organization dedicated to educate the public about Chinese culture.

Bush's final appointment was Wilfredo J. Gonzalez as the Commission's new staff director. As staff director, Gonzalez would be responsible for the Commission's daily operations. Prior to appointment, Gonzalez served in a variety of administrative positions.^{7/}

The two congressional appointees were equally qualified. Carl Anderson^{8/}, a Republican, was appointed by the House Minority Leader Robert Michel. Senator Robert Dole filled the final seat by naming Russell Redenbaugh^{9/}, an Independent, commissioner.

With the host of new and diverse appointees, the Commission was poised to take action and disassociate itself from past problems.^{10/}

D. Twenty-Two Month Performance

Armed with high expectations and renewed zeal, the Fletcher-led Commission embarked on a journey to reestablish itself as the conscience of the nation. The Commission's broad ranging agenda addressed racial and ethnic tensions in American communities. Although the Commission made positive strides during the twenty-two month reauthorization period, their production was lacking.^{11/}

In the Fall of 1991, the House Commission on the Judiciary reviewed the Commission's performance since reauthorization. Representative Hyde gave the Commission his qualified support: "[T]he record of the Commission . . . [during the past twenty-two months] is less than stellar . . . [I]t appears that, as a whole, the Commission is unable to focus its energy and resources on the completion of specific projects within its congressional mandate."^{12/} While Hyde was encouraged by the Commission's efforts to rehabilitate its reputation, he emphasized the Commission's need to reestablish its fact-finding focus.^{13/}

Fletcher's review of the Commission's accomplishments during the twenty-two month reauthorization period differed

substantially. Fletcher emphasized that "the Commission expends a considerable amount of its resources on activities that do not produce a direct and immediate payoff in terms of published works, but which are essential to our mandate."^{14/} Fletcher stressed the importance of these activities in reestablishing the Commission's leadership role in shaping the nation's civil rights agenda.

Fletcher also acknowledged the Commission's mandate to conduct studies and produce reports. He noted the following recently completed projects: (i) Report of the United States Commission on Civil Rights on the Civil Rights Act of 1990 (July, 1991) -- in which the Commission analyzed the proposed legislation and recommended modifications. Despite Administration opposition and subsequent veto, the Commission urged President Bush to sign the bill; (ii) Report on the Indian Civil Rights Act (August 1991) -- the Commission concluded that the government has never provided sufficient resources to support the implementation of the Indian Civil Rights Act, emphasizing inadequate funding of the effective yet overburdened tribal court system; and (iii) the Commission staff completed a number of staff reports examining such topics as the economic status of African-American women, bigotry and violence on American college campuses, and racial and religious bigotry in America. Fletcher listed a host of other projects currently underway.^{15/}

Fletcher argued that insufficient resources limited the Commission's productivity. If adequately funded, the Commission could issue an annual report to the President and Congress on the status of civil rights in America, hold numerous briefings/hearings throughout the nation focusing on inflamed situations resulting from racial and ethnic tensions, and continuously monitor civil rights enforcement at most federal agencies.^{16/} In Fletcher's opinion, his agency had successfully refocused its efforts but the Commission needed more funding and time to meet congressional expectations.

In response to Congressional concern over the dearth of Commission hearings, Fletcher commented that briefings have been utilized as a cost-saving alternative. Although the Commission cannot exercise its subpoena powers over individuals at briefings, in Fletcher's view they produce similar fact-finding results. The Commission utilized the briefing approach in Denver. Addressing the expansion of the Denver Airport in June 1991, the Commission investigated minority contracting in response to complaints that minorities and women were unfairly losing out in the contracting process.^{17/}

Despite the Commission's improved performance during the twenty-two month reauthorization period, even some commissioners acknowledged that the agency was still struggling to return to its former stature. Commissioner Mary Frances Berry stated that

"our work has been diffuse to date . . . We have done a lot of little projects -- bits and pieces, really. As far as a systematic agenda to do something about the most pressing civil rights problems in the country, there is a sense we haven't put shoulder to the wheel."^{18/}

For the most part, the Commission's critics were satisfied that the Commission had reestablished its independence from the Administration. Whereas during the Reagan years the Commission appeared to be a Presidential puppet, the Fletcher-led Commission asserted its independence to a large degree. In particular, the Commission was at odds with President Bush over the proposed Civil Rights Act of 1990. Fletcher refuted administration claims that the legislation would produce quotas. Despite President Bush's ultimate veto, Fletcher's pleas drew national attention.

The Commission, and Fletcher in particular, were not free of criticism regarding their independence from the Administration, however. The Commission did not produce a report analyzing the Civil Rights Act of 1991. Critics surmised that long-time Bush friend Fletcher was "encouraged" by the Administration to refrain from criticizing the legislation. Although Fletcher and the Commission ultimately endorsed the Civil Rights Act of 1991, the Commission could have more actively contributed to the enactment process. While Congress and Administration officials bickered over the consequences of

certain provisions, little empirical data was offered to bolster their respective claims. The Commission failed to formally analyze the legislation and thus missed an opportunity to fulfill its statutory role as fact-finder.^{19/}

E. Reauthorization in 1991

As the Commission's twenty-two month reauthorization period drew to an end, the Senate, House, and Administration reexamined the Commission's performance to determine its fate. The Senate was generally pleased with the Commission's progress and urged strengthening its powers.^{20/} The House was less encouraged by the Commission's performance but tentatively endorsed reauthorization.^{21/} The Administration was the most enthusiastic and supported the broadest reauthorization plan.^{22/}

The Commission's position as expressed by Chairperson Fletcher was that it could only return to prominence with appropriate Congressional and Administration endorsements. This translated into a twenty-five year reauthorization and full funding at \$10.8 million per year.^{23/}

Fletcher's ultimate concern was increased funding for the Commission. The Commission's staff shrank to seventy-seven from nearly three hundred in the 1980's while the budget decreased over forty percent. Fletcher cautioned that "[t]here is no way we are going to monitor agency after agency with a Mickey Mouse

organization like we have now . . . I don't mind being put on a short lease. But I give . . . [Congress] a counter proposal: fully staff us; give us \$10.5 million to \$11 million over the next three years. At the end of that time, if we haven't done our jobs, put us out of our misery."^{24/}

The Senate responded to the Houses bill on October 28, 1991, by passing an amendment to the House bill. The Senate proposed a three year extension and appropriation of \$7.2 million for 1992. Future authorizations of appropriations would be required for fiscal years 1993 and 1994 enabling Congress to review the Commission's progress and performance and increase funding if appropriate. Furthermore, the amendment authorized appropriation of \$1.2 million for 1992 to facilitate the Commission's relocation of its Washington, D.C., office from its current building which was in violation of fire safety codes. Finally, the Senate amendment required the Commission to submit an annual report addressing "Federal civil rights enforcement efforts in the United States."^{25/}

On November 5, 1991, the House concurred on the Senate amendment. Representative Brooks summarized the effect of the amended bill: "While authorization does not require the agency to cut programs or staff, it prevents the Commission from expanding without first fulfilling its statutory mission to investigate discrimination. . . . These provisions oblige the

agency to allocate its resources wisely and, I trust, will secure the Commission's return to its factfinding mission."^{26/} Representative Edwards warned that if the Commission failed to perform adequately, it should be prepared to cease operations after 1994.^{27/}

F. Commission's Performance Since Reauthorization in 1991

Encouraged by a three year reauthorization but troubled by the limited funding, the Commission hoped to continue its revitalization process. During fiscal year 1992, the Commission focused its attentions in two major areas: (1) projects and hearings addressing racial and ethnic tensions across the nation; and (2) monitoring and evaluating federal civil rights efforts.

The racial and ethnic tensions project was slated to last three to five years. The Commission sought to focus national attention on the state of race and ethnic relations, the causes of worsening racial and ethnic tensions, and the need to find solutions to what has aptly been deemed "our national tragedy."^{28/}

The Commission held a number of hearings in fiscal year 1992 examining racial and ethnic tensions across the nation. In January 1992 the Commission held statutory hearings in the Mt. Pleasant area of the District of Columbia where there had been three days of violence in May 1991. Through the hearings, the

Commission sought to address the underlying issues of alleged discrimination and unequal treatment in the District of Columbia with special emphasis on the concerns of the Latino Community.^{29/} The Commission adopted a report in November 1992 detailing the results of its hearings.^{30/}

A second non-statutory hearing was held in Washington, D.C. in May, 1992, focusing on racial and ethnic tensions from a national perspective. Witnesses testified on such topics as hate incidents, multiculturalism, socioeconomic factors, financial and banking industry practices, and the Community Reinvestment Act.^{31/}

In June 1992, the Commission held a third hearing in Chicago. This statutory fact-finding hearing addressed such topics as minority access to housing and mortgage credit, minority access to credit and business development, police-community relations, access to education, access to health care, and employment and training.^{32/}

In addition to the Commission's considerable efforts surrounding the racial and ethnic tensions project, the Commission has been active in other civil rights arenas. The Commission made a concerted effort to increase its written output and reassert its monitoring function.

After receiving Congressional criticism in the past for its dearth of written reports, the Commission was almost prolific in 1992. The Commission's major report was entitled "Civil Rights Issues Facing Asian Americans in the 1990's" (February 1992). Based on two years of research, the report is a comprehensive analysis of the civil rights problems besetting the rapidly growing Asian American population. The report also outlines specific recommendations for action intended to alleviate the problems identified.

In addition, the Commission completed a federal civil rights enforcement report (satisfying the Commission's mandatory enforcement report per year) in September examining the Fair Housing Assistance Program and the certification status of State and local agencies under the Fair Housing Amendments Act of 1988. The report, "Prospects and Impact of Losing State and Local Agencies from the Federal Fair Housing System," also evaluates the posture of those State and local human relations/rights agencies that desire to be substantially equivalent under the FHAA of 1988.^{33/}

The final Commission report of the year, "The Validity of Testing Education and Employment," was approved by the commissioners in November. In response to efforts to remove racial, ethnic and gender bias from testing, this report details

research results and opinions of experts concerning appropriate methods of test development.^{34/}

The Commission has also increased its monitoring efforts. First, arising out of its briefing and investigation at the Denver International Airport in 1991, the Commission has monitored the performance of the Departments of Transportation and Labor in enforcing Title VI of the Civil Rights Act of 1964 and the DOT's Disadvantaged Business Enterprise program. A report summarizing the Commission's findings is scheduled for publication in early 1993. In light of the Denver Airport experience, the Commission intends to monitor federally assisted transportation projects nationwide.^{35/}

In addition to the above efforts, the Commission has monitored the implementation of the Civil Rights Act of 1991 and the implementation of its own recommendations presented in "The Indian Civil Rights Act" report in 1991. Finally, the Commission has analyzed and commented on the Department of Education's recent decision to limit minority-targeted scholarships as reflected in the department's proposed policy guidance.^{36/}

The Commission has several projects currently underway. Among these projects, the Commission is examining the portrayal of women and minorities in the media and analyzing the

socioeconomic status of and labor discrimination against Hispanics.

Supplementing its traditional reporting and monitoring efforts, the Commission has enhanced its complaints referral and monitoring capabilities. The Commission receives approximately three hundred written and telephone complaints per month from people nationwide. The recently installed "800" and TDD telephone services allow the Commission to serve all complaints at a minimal cost. Moreover, the Commission has expanded its information referral service to include state and local government agencies and private organizations, as well as federal agencies.^{37/}

Moreover, the Commission has attempted to repair damaged relations with civil rights groups and with Congress.^{38/} These efforts stand in contrast to the Commission's near isolation in the 1980's.

G. Plans for Fiscal Year 1993

The Commission intends to continue to work towards reestablishment of its former stature in 1993. The Commission will continue its long term project exploring racial and ethnic tensions with additional hearings. Hearings are currently scheduled for June 1993 in Los Angeles and tentatively scheduled for Miami, New York, and Memphis in late 1993 or 1994. The scope

of the future hearings will depend on available funding. Potential topics to be examined include education, housing, crime, employment and entrepreneurship opportunities, the impact of governmental fiscal and budget issues, and the role of local news media.^{39/}

Furthermore, the Commission has several reports planned. If funding allows, the Commission proposes to address some or all of the following: the allocation of human and financial resources for 14 Executive Department and 27 Federal agencies' Offices of Civil Rights and/or Equal Opportunity; agency complaint responsiveness and their alternative dispute resolution programs; civil rights enforcement activities of the Equal Employment Opportunity Commission, the Labor Department's Office of Federal Contract Compliance Programs, the Department of Justice's Civil Rights Division, and the Department of Health and Human Services; and agency implementation of the Americans with Disabilities Act.^{40/}

III. BUDGET WOES

As is clear from the above discussion, adequate funding is essential. Although encouraged by the Commission's performance in 1992, Congress limited the increase in the Commission's 1993 appropriation to cost of living and inflation. As a result, the Commission's staff will not grow and previously planned program

efforts will be scaled back in scope, deferred to 1994, or cancelled. Increased appropriations would permit the Commission to significantly expand its ability to monitor, evaluate, and report on the effectiveness of Federal civil rights enforcement efforts. Staff Director Wilfredo Gonzalez estimates that the Commission requires an \$18-20 million appropriation in order to return to full strength and satisfy congressional demands.^{41/} Further, Commissioner Redenbaugh notes that the limited budget enables the Commission's critics "to complain that we are not doing enough while ensuring that we can't do more."^{42/}

Some think the Commission's budget woes are overstated. In addition to Congress, at least one commissioner believes the Commission can get more bang for its buck. Commissioner Berry agrees that the Commission should receive an increased appropriation based on its recent performance improvements, but she contends that the Commission must increase productivity. Research and analysis efforts have not reached the levels of efficiency which a tight national budget requires of all agencies.^{43/}

IV. RECOMMENDATIONS

"Discrimination still pervades most sectors of society and all geographic areas. While blatant discrimination, the absolute and open denial of opportunity so pervasive in the past, has

lessened over the years, we find in its place subtler forms of discrimination . . . just as illegal but harder to detect . . . and harder to prosecute."^{44/}

President-elect Clinton has the opportunity to help the nation remedy civil rights abuses by shaping the Commission's future both directly and indirectly. Although President Clinton may not get the opportunity to appoint a new Commissioner until 1995,^{45/} in the interim he can and should change the Commission's leadership by naming a new chairperson, vice-chairperson, and staff director. In filling these posts, the President would need approval of a majority of the commissioners as required by the Commission's charter.^{46/}

Some argue that a fresh and more aggressive leadership is needed to raise the Commission to the next level of revitalization. Appointing new leadership -- a new chairperson, vice chairperson, and staff director -- could reinvigorate the Commission and sharpen its focus. New leadership might move the Commission to explore important civil rights issues the current Commission has left unexamined such as focusing attention on resolving the educational inequality in our public school system.

President Clinton can also affect the Commission's future by urging Congress to increase its appropriations. During the past four years, Congress and the Administration appeared to be

positioning themselves to take credit for the Commission's resurgence. The resultant standoff limited the potential revitalization and left the Commission as the "underfunded casualty."^{47/} Now, with both a Democratic Congress and Administration, both bodies can amicably coordinate the revitalization of the Commission.

The Commission, for its part, must continue its return to its pre-Regan stature to justify any increased funding. The agency has been more active in its reporting, monitoring, and hearing efforts, but it can improve further. In particular, the Commission needs to be more aggressive in dealing with issues on a timely basis. For instance, the Commission is aware of Administrative and Congressional proposals early in the formulation process. The Commission should act quickly and analyze such proposals before they are fully formed so that it can ensure that civil rights interests are protected.^{48/}

Even with continued Commission resurgence, when the current reauthorization is up, there must be a full scale substantive review of the Commission. We need to ask ourselves whether the Commission is adequate to the exigencies of civil rights and the government's role. We need to address such questions as: what are the pressing civil rights issues; whether the Commission's role should be expanded or revised; and what precisely should be the Commission's function? Any new reauthorization law should

contain provisions which will help the Commission to focus on clearly identified objectives with the involvement of both the President and the Congress.^{49/}

Now as much as ever, the United States Commission on Civil Rights is needed to serve an important advisory function to Congress and the President. To accomplish its statutory mandate, two crucial elements are required: (i) the Commission must be committed to asserting its independence in fulfilling its fact-finding mandate; and (ii) Congress and the Administration must be committed to enabling the Commission to perform its designed function. Unless these two critical prerequisites to success are satisfied, the Commission will be unable to effectively assist in remedying the host of civil rights inequities that plague our nation.

A strong, independent United States Commission on Civil Rights can make an important contribution to monitoring federal civil rights enforcement and can help shape the future direction of federal policy that seeks to provide equal opportunity for all Americans. The President should seek legislation to revamp the Commission's structure to ensure its independence, and should seek sufficient funding for the Commission to accomplish its mission.

- 1/ Anne Kornhauser, The Silent 'Conscience'; Civil Rights Commission is Hardly in Evidence, Legal Times, July 1, 1991, at 1.
- 2/ Chet Lunner, Civil Rights Commission: 'Too Important to Die', Gannett News Service, June 12, 1991.
- 3/ For instance, Chairperson Allen was criticized by civil rights groups and rebuked by the Commission itself for his October 1989 speech entitled "Blacks? Animals? Homosexuals? What is a Minority?" In the speech, Allen argued that despite past efforts to accord each of these groups special status, no group should receive such a preference. See Protest is Held at Site of Rights Chief's Talk, N.Y. Times, Oct. 8, 1989, at 31.
- 4/ 135 Cong. Rec. H8920 (daily ed. Nov. 17, 1989).
- 5/ Id. at H8919.
- 6/ Fletcher served as assistant secretary of labor to President Nixon, as deputy presidential assistant for urban affairs under President Ford, and as executive director of the United Negro College Fund in the early 1970's.
- 7/ Gonzalez served as associate director of Equal Opportunity and Civil Rights in the State Department, country director of the Peace Corps in Ghana, West Africa, and associate administrator for minority small business and capital ownership development at the United States Small Business Administration.
- 8/ Anderson is dean, vice president and professor of family law at the North American campus of the Pontifical John Paul II Institute for Studies on Marriage and Family. Anderson also serves as Vice President for Public Policy for the Knights of Columbus.
- 9/ Redenbaugh is a partner and director of the investment management firm of Cook & Bieler, Inc., in Philadelphia. Blinded at age seventeen in an accident, Redenbaugh was the first disabled person to serve on the Commission.

- 10/ For a more thorough discussion of the Commission's failings prior to the new appointments, see Citizens' Commission on Civil Rights, Lost Opportunities: The Civil Rights Record of the Bush Administration Mid-Term (1991), at 181.
- 11/ 137 Cong. Rec. H7089 (Sept. 30, 1991). The Commission also received similar criticism from other quarters. See Kornhauser, supra note 1.
- 12/ 137 Cong. Rec. H7089 (Sept. 30, 1991).
- 13/ 137 Cong. Rec. H9163 (Nov. 5, 1991).
- 14/ Reauthorization of the U.S. Commission on Civil Rights: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102 Cong., 1st Sess. 15 (July 25, 1991) (testimony of Arthur Fletcher). Among the Commission's essential activities Fletcher listed the following: (i) regional office staff aggressively monitored the situation in Los Angeles after the Rodney King beating incident for potential civil rights violations; (ii) in response to the type of "race baiting" ads that plagued a 1990 Senatorial campaign, the Commission sent a letter to the President, Congress and Governors urging them to avoid those kinds of destructive tactics in future campaigns as they only increase racial tension; (iii) Commission staff met with representatives of the Office of Civil Rights of the Department of Education to discuss policy changes regarding scholarships for ethnic minorities, and as a result, sent a letter to the President on January 23, 1991, expressing concern over the changes; (iv) Commission staff worked with the Social Security Administration to develop their data in such a way as to facilitate the monitoring of minority and immigrant economic status; and (v) Commissioners met with Cabinet Secretaries to express concern regarding civil rights issues that touch their respective Department's jurisdictions. Id. at 13-16.
- 15/ Id. at 17-23.
- 16/ Id. at 23-24.
- 17/ The Commission published a summary report analyzing the Denver Airport briefing in July 1992. See, U.S. Commission on Civil Rights, Constructing Denver's New Airport: Are Minorities and Women Benefitting (1992).

- 18/ Steven A. Holmes, With Glory of Past Only a Memory, Rights Panel Searches For New Role, N.Y. Times, Oct. 10, 1991, at B16.
- 19/ Kornhauser, supra note 1.
- 20/ The Subcommittee on the Constitution of the Senate Committee on the Judiciary chaired by Senator Simon proposed extending the Commission's life for four years. The bill did not specify the Commission's appropriation over the four years. Aimed at insuring at least a minimum level of tangible productivity, the bill required the Commission to submit at least one report annually on civil rights or any subject under the Commission's jurisdiction. See 137 Cong. Rec. S13,732 (daily ed. Sept. 25, 1991).
- 21/ The Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary proposed reauthorizing the Commission for two years with a \$6 million appropriation each year. The House believed that the reduced funding would be sufficient to support the Commission's factfinding efforts, yet prevent unnecessary expansion. See 137 Cong. Rec. H7089 (daily ed. Sept. 30, 1991).
- 22/ The Administration favored a ten year reauthorization period and funding at \$10.8 million per year.
- 23/ Fletcher justified the twenty-five year extension request by arguing for staff continuity which he felt was necessary to successfully monitor, analyze, and report on civil rights issues. The Commission's staff should not be disrupted by anxiety over their and the Commission's future every few years. See Reauthorization of the U.S. Commission on Civil Rights: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 102nd Cong., 1st Sess. 57-60 (June 12, 1991) (statement of Arthur Fletcher).
- 24/ Holmes, supra note 18.
- 25/ 137 Cong. Rec. S15,307 (daily ed. Oct. 28, 1991).
- 26/ 137 Cong. Rec. H9161 (daily ed. Nov. 5, 1991).
- 27/ Id. at H9163.

- 28/ Hearings, supra note 23, at 60.
- 29/ Among the issues addressed were allegations of discriminatory hiring practices by the D.C. government, inadequate services provided to the Latino Community by city and federal governments, as well as the isolation and exclusion that results from high poverty levels and high school dropout rates, and the lack of access to educational, health, and social services.
- 30/ The report sets forth the results of the hearings and makes specific recommendations aimed at remedying the existing conditions. As of this writing, the Commission's report was approved by the commissioners yet unavailable to the public.
- 31/ U.S. Commission on Civil Rights, Accomplishments for Fiscal Year 1992 (1992), at 12. The data generated during this hearing will be used in the reports of the other hearings and in the final comprehensive report of the racial and ethnic tensions project.
- 32/ The report analyzing the Chicago hearing is tentatively scheduled for publication in the Fall of 1993.
- 33/ U.S. Commission on Civil Rights, supra note 31, at 10. Supplementing its fair housing certification report, the Commission is currently researching a second fair housing report to assess the implementation of the Fair Housing Act by government and private agencies, and the act's impact on housing discrimination.
- 34/ Id. at 14.
- 35/ Id. at 11.
- 36/ In a letter to the Department of Education, the Commission argued that "This policy stance is inconsistent with prior interpretations of the department and runs counter to well-established formulations for affirmative action. See Commission Letter Supports Minority-Targeted Scholarships, U.S. Newswire, March 10, 1992 (quoting U.S. Commission on Civil Rights Letter to Department of Education).
- 37/ U.S. Commission on Civil Rights, supra note 31, at 10.

- 38/ Telephone Interview with Wilfredo J. Gonzalez, Staff Director of the U.S. Commission on Civil Rights (Nov. 30, 1992). Staff Director Gonzalez noted the increased communications between the Commission and representatives of the NAACP and La Raza. Furthermore, Gonzalez commented on the stronger relationships with the offices of Representatives Edwards and Senators Simon, Hatch, and Dole.
- 39/ U.S. Commission on Civil Rights, Plans for FY 93 (1992), at 26.
- 40/ Id. at 24-25.
- 41/ Telephone Interview with Wilfredo Gonzalez, supra note 38. Recall that Mr. Fletcher indicated that \$11 million per year would be adequate. Without attempting to reconcile this wide disparity in estimates, it seems clear that the present funding is inadequate.
- 42/ Russell G. Redenbaugh, Civil Rights What the Commission Has Accomplished, Washington Post, Oct. 11, 1991, at A26.
- 43/ Telephone interview with Commissioner Mary Frances Berry, Commissioner of the U.S. Commission on Civil Rights (Nov. 25, 1992).
- 44/ Reauthorization of the U.S. Commission on Civil Rights: Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 102nd Cong., 1st Sess. 56 (June 12, 1991) (statement of Arthur Fletcher).
- 45/ The terms of presidential appointees William Barclay Allen and Esther Gonzalez-Arroyo Buckley end in December 1992 enabling President Bush to fill these positions before he leaves office. The terms of the two other presidential appointees, Arthur Fletcher and Charles Pei Wong, do not expire until late 1995.
- 46/ Displacing Fletcher or Wong as chairperson and vice chairperson respectively would remove these commissioners from their leadership posts but not from their seats on the Commission.
- 47/ Telephone Interview with Wilfredo J. Gonzalez, supra note 38.
- 48/ Telephone Interview with Mary Frances Berry, supra note 43.
- 49/ Id.

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Race and the Death Penalty: A Double Standard of Justice

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Latino Civil Rights Goals for the 1990's and Beyond

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Asian Pacific Americans: Civil Rights Issues for the 1990's

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**Report on the U.S. Civil Rights Commission During the
Bush Administration**

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