

# EEOC News Clips

*for*  
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# Leading the News

## Affirmative Action

### CLINTON ANNOUNCES RESULTS OF REVIEW, VOWS SUPPORT FOR FEDERAL PROGRAMS

Reaffirming his support for affirmative action, President Clinton July 19 announced the results of a five-month-long White House study of federal programs and vowed to continue supporting those efforts within his administration.

"The job is not done. . . We should reaffirm the principle of affirmative action and fix the practices," Clinton told an enthusiastic gathering of civil rights activists, administration officials, and others in a speech at the National Archives. "We should have a simple slogan: mend it, but don't end it."

"Affirmative action is an effort to develop a systematic approach to open the doors of education, employment and business development opportunities to qualified individuals who happen to be members of groups that have experienced longstanding and persistent discrimination," the president said.

In a directive to federal agencies, Clinton ordered officials to review existing programs for evidence of quotas, preferences for unqualified individuals, reverse discrimination, or continuation after their purpose has been achieved. Referring to guidance issued by the Department of Justice last month (125 DLR AA-1, E-1, 6/29/95), he also instructed officials to review programs under the stricter standards set out in the U.S. Supreme Court's *Adarand* decision.

*Where inclusion and antidiscrimination cannot be achieved without specific reliance on group membership, . . . the Federal Government will continue to support lawful consideration of race, ethnicity and gender under programs that are flexible, realistic, subject to reevaluation, and fair,' the memo to agencies states.*

"In every instance, we will seek reasonable ways to achieve the objectives of inclusion and antidiscrimination without specific reliance on group membership," the president stated in his directive. "But where our legitimate objectives cannot be achieved through such means, the federal government will

continue to support lawful consideration of race, ethnicity, and gender under programs that are flexible, realistic, subject to reevaluation, and fair."

In a new initiative, the president also announced that he was asking Vice President Al Gore to lead a Community Empowerment Board to develop a set-aside program targeting federal contracts to small companies located in economically depressed communities. Those contracts would be awarded regardless of the race or sex of the owner and would be designed as a "supplement" to existing affirmative action programs, Clinton explained in his speech. "We want to make our procurement system more responsive to people in those areas who need help," he said.

### High Grade, Minor Changes At OFCCP

Along with the presidential directive, the White House released a 96-page report, summarizing the results of the affirmative action review (See *Special Supplement* accompanying this issue). The report, prepared under the direction of White House advisers George Stephanopoulos and Christopher Edley Jr., reviewed the history of affirmative action and its specific application to government programs at the Labor Department's Office of Federal Contract Compliance Programs, in the military, in federal procurement, and in education.

Despite Clinton's earlier expressed goal of eliminating those programs that do not work, however,

### Policy Principles For Agencies

President Clinton's memo to federal agency heads states that as part of the administration's policy principles any program must be eliminated or reformed if it:

- creates a quota;
- creates preferences for unqualified individuals;
- creates reverse discrimination; or
- continues even after its equal opportunity purposes have been achieved.

A BNA Graphic

none of the programs—including those with explicit set-asides—will immediately get scrapped as a result of that review.

“What you see is a strong endorsement of the programs as a whole,” explained Christopher Edley, at a briefing following the release of the report. The fact that none of the existing programs was eliminated “does not mean it was not a thorough review,” he said, adding that no governmentwide analysis of the programs had been done before.

In the area of employment, the White House report gave high marks to the executive order program administered by the Labor Department’s Office of Federal Contract Compliance Programs. Characterizing the program as “valuable, effective, and fair,” the report recommended only minor changes in OFCCP operations.

“The empirical literature indicates that affirmative action generally, and specifically the OFCCP Executive Order program, does create opportunity,” the report said. “OFCCP enforcement was scaled back during the 1980s. Nonetheless, there is reason to believe that it continues to have a positive and significant impact on remedying discrimination in the workplace.”

The study concluded that the federal government’s leadership proved “a critical factor” in getting private employers to change their own personnel practices. And the report called for the president to take the following steps:

- Instruct the Labor Department to implement plans to reduce the employer paperwork burden associated with the program and to “reward successful companies by targeting enforcement on problem firms.”

- Direct the labor secretary to make changes in OFCCP guidelines and technical assistance materials “to underscore and reinforce current law and policy regarding nondiscrimination, the illegality of quotas, the enforcement focus on ‘good faith efforts,’ and the relationship of equal opportunity to legitimate qualifications.”

- Direct the labor secretary to explore ways to collaborate with private sector leaders “to promote best practices in providing equal employment opportunity.”

#### Procurement: Tightening The Tests

While the report did not call for the elimination of the minority contracting set-aside program called into question in *Adarand*, it addressed the need to end abuses in the current operation of procurement programs directed toward minority and female-owned businesses.

Specifically, the report recommended tightening the economic disadvantage test, enforcing the requirements for “graduation” of protected firms into mainstream competition, enforcing stringent safeguards against “fronts and pass-throughs” seeking to take advantage of minority business set-asides, and establishing measures to reduce regional and industry concentration in order to prevent excessive use of protected programs in specific areas.

In accordance with *Adarand*, the report said, federal agencies should “develop guidelines for measuring when minority and women entrepreneurs have achieved a full measure of equal opportunity to participate in the economic mainstream, making sunset of the programs appropriate.”

(The White House report on affirmative action appears in the Special Supplement accompanying this report.)

—By Nancy Montwieler

#### Affirmative Action

#### CLINTON’S SPEECH DRAWS FIRE FROM GOP; ACCOLADES FROM CIVIL RIGHTS, LABOR GROUPS

President Clinton’s defense of affirmative action programs prompted accolades from a spectrum of civil rights, labor, and women’s groups, but outrage from opponents of affirmative action on Capitol Hill, including several Republican presidential hopefuls.

Republican members from both chambers of Congress reacted to the president’s remarks by vowing to end “preference” programs, including pledges from Sen. Phil Gramm (R-Texas) and Rep. Gary Franks (R-Conn) who announced they would introduce legislation to prohibit race- or gender-based preferences in the awarding of all federal contracts.

During a press conference on Capitol Hill, Gramm said he agreed with “90 percent” of Clinton’s speech, but believed that the American people are opposed to quotas and set-asides because they “give one group of Americans preferences” over others and disregard merit in hiring, promotions, and letting government contracts.

Gramm, who has pledged to abolish affirmative action programs if elected president, said he plans to offer an amendment to appropriations measures next week in the Senate that would ban set-asides in government contracting. Franks said he plans to offer an amendment to the Defense Department appropriations bill that would bar race- or gender-based preferences in the award of all government contracts.

Franks said his amendment is supported by the House Republican leadership, including House Speaker Newt Gingrich (R-Ga), and predicted that it will pass the House by a sizeable margin with some Democratic support.

Similar legislation is in the offing from Rep. Charles T. Canady (R-Fla), who in a statement reiterated his intentions to introduce a bill that would prevent the federal government from using preferences based on race, color, ethnic origin, or gender. Canady, who chairs the House Judiciary Subcommittee on the Constitution, slammed the president's position on affirmative action, which Canady said "constitutes an endorsement of the status quo."

Senate Majority Leader Bob Dole (R-Kan) also sharply criticized the president. "Instead of clarity, the president has chosen confusion," Dole said. "This is not a difficult decision: discrimination is wrong," Dole said. "And preferential treatment is wrong too." Like Gramm, Dole has made ending affirmative action programs an integral part of his campaign for the GOP presidential nomination.

#### Others Hail President's Speech

While Republicans blasted the president's remarks, civil rights, labor, women's groups, and representatives of management lauded Clinton's stance on affirmative action.

"It was clear at the beginning that the administration could have gone either way on the issue," said Barbara Arnwine, executive director of the Lawyers Committee for Civil Rights, after Clinton's speech. "But the review really made a difference." Arnwine characterized the president's remarks as "moving" and a sweeping endorsement of affirmative action. "I'm much more concerned over what's going on in the House now," she said.

Ralph Neas, former director of the Leadership Conference on Civil Rights, said that Clinton's remarks should give a boost to affirmative action in the eyes of the public. "Polls consistently show that a majority of Americans believe in affirmative action," he said. "The president's remarks underscore what it is and what it is not."

Nancy Kreiter, research director of Women Employed, a Chicago-based advocacy group, said the president "hit a home run" with the speech, applauding the president for giving unequivocal support for affirmative action. She told BNA the president accurately described how affirmative action is fair, is necessary, and is working.

The National Committee on Pay Equity said it was "very pleased that the president has recognized that affirmative action is just as much an economic justice issue as it is one of social justice," according

to the committee's executive director Susan Bianchi-Sand.

"We cannot count on the goodwill of employers alone to ensure fairness for all of America's workers," Bianchi-Sand said, adding it would be a "giant step backwards to abandon affirmative action programs at this stage."

#### Unions, NAACP, Management

AFL-CIO President Lane Kirkland said the president has taken "a welcome step" in reaffirming the use of affirmative action to further equal rights and equal opportunity. Kirkland urged the Congress to follow the president's example "and not allow government to compromise the progress that has been made and can be made by weakening its critical affirmative action role."

John J. Sweeney, president of the Service Employees International Union, AFL-CIO, said in a statement he hoped the president's actions on affirmative action "will put an end to the cynical scapegoating of affirmative action for economic problems caused by capital flight, corporate restructuring, and government action."

The National Association for the Advancement of Colored People applauded the president for what the group called Clinton's "bold, decisive statement of support" for affirmative action programs and policies. Wade Henderson, director of NAACP's Washington Bureau, called the president's speech "a defining moment in the Clinton presidency."

A representative of the employer community also rendered support for the president's speech. "We're glad to see the president reaffirm the government's commitment to responsible affirmative action as a remedy for discrimination and we think it's important that the agencies follow his instructions to draw the line between legitimate affirmative action and reverse discrimination," said Peter Robertson, director of equal employment opportunity services for the Organization Resources Counselors, a national management consulting firm.

Robertson chairs ORC's equal opportunity group, a networking group of 150 corporate affirmative action officers.

—By Pamela M. Prah, Court Gifford, and Nancy Montwieler

#### OFCCP

#### PRESIDENT'S SPEECH ON AFFIRMATIVE ACTION EXPECTED TO HASTEN OFCCP REFORM EFFORTS

President Clinton's strong defense of affirmative action programs is expected to add "vigor" to the Labor Department's ongoing efforts to streamline

affirmative action requirements for federal contractors, Shirley J. Wilcher, the Labor Department's deputy assistant secretary for federal contract compliance, said July 19.

The Labor Department's Office of Federal Contract Compliance is "very pleased" with the president's speech on affirmative action, Wilcher said, as it reaffirmed the administration's commitment to equal opportunity and to the purpose of Executive Order 11246, she told BNA.

Executive Order 11246 is the 30-year-old edict—enforced by OFCCP—that requires companies that are awarded federal contracts of \$50,000 or more to develop and maintain written affirmative action plans. About 22 percent of the labor force is employed by federal contractors or subcontractors subject to OFCCP regulations.

The executive order was among several federal affirmative action programs that top White House officials scrutinized during a five-month review, examining how the programs ran, if they worked, and if they were fair (see related articles in this section).

The White House report concluded that OFCCP "does create opportunity" without requiring quotas or race-based hiring.

Even though OFCCP enforcement was scaled back during the 1980s, "there is reason to believe that it continues to have a positive and significant impact on remedying discrimination in the workplace," according to the report.

Wilcher said the president's backing of affirmative action and the report's findings mean OFCCP "can continue with more vigor" its efforts to reduce paperwork, streamline agency requirements, and better target its enforcement.

The changes OFCCP hopes to make to its operations were endorsed in the White House report, which suggested that the agency complete its plans to reduce the employer paperwork burden associated with the executive order and to reward successful companies by targeting enforcement on "problem firms."

That endorsement "facilitates the process and gives a greater sense of purpose" to agency initiatives, she said.

The agency was still reviewing the report's specific recommendations, she said.

Wilcher said she "had every confidence" that the president would come out in support of Executive Order 11246 once he was provided with all the data that showed that OFCCP was not about quotas and that the order was still needed.

The review also addressed the Equal Employment Opportunity Commission's oversight of affirmative action programs in federal agencies.

Although the effect of the administration's review is "very limited" on EEOC operations, Commission Chairman Gilbert Casellas said, "it validated the continuing need for us to strive for an ideal. We're not there yet. The job isn't done and people need to be reminded of that."

Casellas called Clinton's speech "a good strong statement—consistent with his request for a rational, national conversation on affirmative action."

"The president countered a lot of the fiction with fact and met a lot of the political invective with information," Casellas told BNA. "There's a lot of noise out there over affirmative action. The president brought clarity to it."

—By Pamela M. Prah and Nancy Montwieler

End of Section

# Clinton Avows Support For Affirmative Action

*'Mend It, but Don't End It,' President Says in Speech*

By John F. Harris  
Washington Post Staff Writer

Five months after questioning the future of affirmative action, President Clinton yesterday reached into his past for the answer, reciting the nation's racial progress since his days growing up in segregated Arkansas and vowing to support continued government intervention on behalf of minorities and women.

"My experiences with discrimination are rooted in the South and in the legacy slavery left," Clinton said at the start of a solemn speech at the National Archives. He concluded: "The job of ending discrimination in this country is not done. . . . We should reaffirm the principle of affirmative action and fix the practices. We should have a simple slogan: Mend it, but don't end it."

The president sketched in broad terms the changes he would like: a crackdown on fraud in government contracts steered to minorities and women under "set-aside" programs, for instance, and ensuring that firms only benefit for a fixed period of time.

The thrust of the speech, though, was a full-throated endorsement of government preference programs, not the political retreat that the administration had mulled last February, when Clinton began a government-wide review of affirmative action by saying, "We shouldn't be defending things that we can't defend."

Many of the leaders of minority and women's groups who earlier had expressed deep resentment of Clinton's review were in the audience for his speech and roared their approval. Jesse L. Jackson, who has been threatening to challenge Clinton for the presidency, offered lavish praise in a telephone interview from California. By contrast, Republican presidential candidates rushed out statements accusing Clinton of supporting reverse discrimination and promising to make the issue a centerpiece of the 1996 campaign.

Some moderate Democrats, who had urged Clinton to aggressively restructure affirmative action to put less emphasis on race and more on helping low-income people of all sorts, offered tepid comments. Sen. Joseph I. Lieber-

man (Conn.), chairman of the centrist Democratic Leadership Council, did not criticize Clinton but took an opposite interpretation of recent Supreme Court decisions. He said rulings such as *Adarand v. Peña*, which requires that preference programs be narrowly tailored to a "compelling" government interest, mean that the days are unavoidably numbered for many race-based programs.

But Clinton, faced with a sure fight next year, decided that he was more comfortable politically and personally with the traditional allies of affirmative action by his side. Despite his equivocating last winter, he ultimately decided he could defend virtually everything the government is doing to push educational institutions and private firms to open doors wider for minorities and women.

His argument was that widespread prejudice still exists and that greater inclusiveness in education and hiring benefits the economy as a whole.

He recalled that in 1960 Atlanta gave itself the slogan, "The city too busy to hate." While acknowledging that some residents of that former segregationist redoubt did occasionally find time to resist integration, Clinton said, "I am confident that Atlanta's success—it is now home to more foreign corporations than any other American city, and one year from today it will begin to host the Olympics—all began when people got too busy to hate."

Much of the current backlash against affirmative action, Clinton said, comes not from cases of reverse discrimination, which he argued are rare, but from the "sweeping historic changes" taking place in the global economy that have left many lower- and middle-income whites struggling to keep pace.

"Affirmative action did not cause the great economic problems of the American middle class," Clinton said. "It is simply wrong to play politics with the issue of affirmative action and divide our country at a time when, if we're really going to change things, we have to be united."

Those words won Clinton the warmest praise he has received in months from Jackson, who earlier had accused the president of contributing to a "scapegoating" trend.

"He set a strong moral tone for the country, and I thought it was presidential in the best sense of the word," Jackson said in an interview, before adding that "it will take more than one speech" before his concerns about Clinton are sufficiently allayed to rule out a presidential bid.

While Clinton often spends too much time figuring the political angles, Jackson said yesterday "his heart and his head were synchronized."

Many women's groups struck a similar note. Marcia Greenberger, of the National Woman's Law Center, said Clinton's speech "was extraordinary in the president's ability to articulate the country's stake in affirmative action, both as a practical matter and a moral necessity."

GOP leaders were almost uniformly derogatory in their comments. Clinton said his concept of affirmative action does not include rigid "quotas," only flexible goals, and does not allow the hiring of unqualified people. But Senate Majority Leader Robert J. Dole (R-Kan.), a presidential candidate and affirmative action supporter turned critic, called this a dodge.

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# Clinton Avows Support For Affirmative Action

The issue is not the quota versus goal distinction, he said in a statement, but "the practice of dividing Americans through any form of preferential treatment. . . . The real issue here isn't preferences for the unqualified, which virtually every American opposes, but preferences for the 'less qualified' versus those who are 'more qualified.'"

GOP presidential candidate Patrick J. Buchanan said "affirmative action belongs in the same graveyard as Jim Crow."

And another Republican contender, California Gov. Pete Wilson, drew special ire from the White House with his comment that Clinton's policies were encouraging "tribalism" in American life. "For Governor Wilson to use a word like 'tribalism' is the kind of code word politics that Republicans have engaged in for generations," said White House senior advisor George Stephanopoulos, who oversaw Clinton's review.

Republicans in Congress are divided about the scope and focus of efforts to overhaul affirmative action. But there are two principal legislative thrusts: One is a sweeping bill, being sponsored in the Senate by Dole and in the House by Rep. Charles T. Canaday (R-Fla.), that would eliminate gender and race-based federal affirmative action programs. Dole said he would introduce his bill next week; Canaday plans his before the August recess.

The other initiative is an attempt to eliminate set-asides for minorities and women in federal contracting through amendments to appropriations bills scheduled to reach the floors of the House and Senate next week. Leading that effort are Sen. Phil Gramm (R-Tex.) and Rep. Gary A. Franks (R-Conn.).

Staff writer Kevin Merida contributed to this report.

## EXECUTIVE ORDER-

As part of his just-concluded review of affirmative action, President Clinton yesterday signed an executive order directing Cabinet secretaries and agency officials to review all affirmative action programs to see that they meet four tests:

- "Any program must be eliminated or reformed," Clinton said, "if it:
  - creates a quota.
  - creates preferences for unqualified individuals.
  - creates reverse discrimination.
  - continues even after its equal opportunity purposes have been achieved."

The order, Clinton said, is an effort to bring the government into compliance with the Supreme Court's recent ruling in *Adarand v. Peña*, which held that federal affirmative action programs must meet a higher legal standard to be judged constitutional. Among other things, the court said that race-based programs must serve a compelling government interest and be narrowly tailored to reach their goal.

# Moving Back To Liberal Side Of the Divide

By Ann Devroy  
Washington Post Staff Writer

President Clinton yesterday interrupted his long summer of moving to the political center with a full embrace of affirmative action, bringing into sharp focus a fundamental difference with Republicans he once thought of blurring.

"This is what I believe," Clinton said in arguing that affirmative action programs that give job, contract and educational preferences to women and minorities to make up for past discrimination are fair, necessary and in need of some reform but not repeal.

The "mend it, don't end it" slogan for Clinton's current views put to rest five months of uncertainty as supporters weighed presidential statements, watched Clinton tack to the center and waited for the administration's journey into the substance and politics of affirmative action to come to an end.

Republicans roundly rejected what Clinton called "common ground" on the issue. California Gov. Pete Wilson, who is seeking the GOP presidential nomination, represented the view of virtually all the GOP presidential contenders when he said of Clinton's new/old policy, "He should have said end it. You can't mend it."

Virtually every organized affirmative action constituency group and advocate—almost of all of whom are aligned with traditional Democratic Party principles—rose to applaud. Women's rights groups and civil rights groups. Hispanic groups and groups representing African Americans. Congressional liberals and organized labor. Jesse L. Jackson. All those that have spent long, anxious months lobbying the president to stick with them on affirmative action, but fearful that he would not.

Since the November elections, when Republicans seized control of Congress and Clinton began actively planning his own reelection, he has made a series of moves, large and small, to the center of the political

spectrum. The largest was his endorsement of a balanced federal budget within 10 years, followed by addresses that emphasized the constitutionality of silent school prayer; his opposition to television violence and his call for a return to traditional, community values.

But he has drawn the line on two traditionally liberal Democratic positions: his support for abortion rights and for gun control.

On affirmative action, Clinton seemed of two minds, and sometimes more. In February, he opened what one of his aides called "the Pandora's box" of affirmative action when he warned congressional Democrats that the GOP would try to use the issue of racial preferences to slice into

his—and their—traditional multiracial coalition. The Republicans' goal, he said, was to use the issue to respond to the fears of white voters, especially men, and bring them to the GOP fold and keep them there.

Ordering a review of all the government's affirmative action programs, Clinton said the party had to stand behind the "best principles" of affirmative action but recommend changes where there are problems.

The review produced a full-scale anxiety attack among traditional Democratic groups, made worse a month later when the president expressed a preference for programs based on economic need, not race or gender. "I want to emphasize need-based programs where we can be-

cause they work better and have a bigger impact and generate broader [public] support," he said.

Speaking of programs that provide special advantages to people based on race or gender alone, he said, "It is difficult to draw a conclusion that they even do what they were intended to do in the first place."

But Clinton, who is passionately attached to the concept of finding "middle ground," now stands, by most political measurements, on the liberal side of the divide over affirmative action. Yesterday, he staked his ground as between a government that declares discrimination illegal and leaves it at that, and one that takes "draconian" measures like imposing quotas.

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Republicans, who were united in saying that preferences for one group can only mean discrimination against another, are unlikely to play on the ground Clinton has set out. But some advisers said he had no real choice.

One Democrat whose advice was sought said the president "would have looked so incredibly political, and we told him over and over that because everyone, including the white males he might be trying to impress, would see this as politically motivated—moving away from supporting something he has backed all his career—he wouldn't have gotten any credit from them anyway."

The president, she said, "did the principled thing. I think it will also be the politic thing."

Like most, she was uncertain until she heard the speech if Clinton would do what White House officials said he would do. Tuesday night, preparing for the address, the White House began lining up groups to issue statements of support, a routine procedure. A leader of one of the groups, reflecting the distrust that has grown between such groups and the Democratic president, said, "I told them I was prepared, of course, to issue the statement—after I hear the speech."

A member of a women's rights group put out a similar word: "If the president says what he told us he was going to say, we are very excited and delighted and will put out statements. If he doesn't, we're prepared for that, too."

# President Shows Fervent Support For Goals of Affirmative Action

By TODD S. PURDUM

WASHINGTON, July 19 — Four months after hinting that he might scale back Federal preference programs based on race and sex in the face of Republican demands to end them, President Clinton today issued a ringing reaffirmation of the goals and results of affirmative action, saying it has been good for America.

"Affirmative action has not always been perfect, and affirmative action should not go on forever," Mr. Clinton said in a speech at the National Archives. "It should be changed now to take care of those things that are wrong, and it should be retired when its job is done.

"I am resolved that that day will come, but the evidence suggests, indeed screams, that that day has not come. The job of ending discrimination in this country is not over." [Excerpts, Page B10.]

Administration aides said the White House had concluded not only that most such programs had worked well, but also that the political risks of tinkering with them now far outweighed any benefit Mr. Clinton might gain in new support from moderate voters. In particular, they said, it became apparent that the programs aided not just minorities but also women, whose electoral support the President especially needs.

The White House portrayed the President's speech today as the latest in a series of recent efforts to find common ground on divisive issues

like Federal spending, violence on television and prayer in the schools. Though his talk was low-key, he made no apologies for his views.

"We should have a simple slogan," Mr. Clinton said, in what seemed a rhyming nod to Jesse Jackson, who has been harshly skeptical of any effort to diminish affirmative action. "Mend it, but don't end it."

Though affirmative action had bipartisan support when programs were begun 25 years ago, Republicans were quick to criticize the President today as defending the status quo. "He should have said end it; you can't mend it," said Gov. Pete Wilson of California, a Presidential hopeful who is seeking to roll back his state's affirmative-action programs. The Senate majority leader, Bob Dole of Kansas, who agreed Tuesday to delay consideration of a bill to curtail affirmative action, perhaps until next year, renewed his vow to introduce legislation "to get

the Federal Government out of the group-preference business."

Several of the prominent civil rights and political leaders in the President's invited audience this morning suggested he would gain by standing his ground on an issue that has long been one of his central concerns as a post-civil rights era Southern politician.

Mr. Clinton ordered all Federal agencies to review their affirmative-action programs and eliminate or reshape any that impose a quota, create a preference for unqualified people, foster reverse discrimination or continue after their anti-discrimination purposes has been achieved. And he sketched plans for a new program that would set aside some Federal contracts for individuals, regardless of race or sex, if their businesses or employees were located in poor areas.

But the President proposed no elimination of any program, drew back from any suggestion that affirmative action needed profound rethinking and stood foursquare against arguments from Republicans and conservative Democrats alike that such programs had outlived their usefulness.

He imbued the 45-minute talk with personal history, recalling that the poll tax and segregated schools and washrooms were a fact of life in his Arkansas youth and that improvements did "not happen as some sort of random, evolutionary drift" but thanks to hard work, legal challenges and personal courage.

"I think his speech will help him tremendously at the grass-roots level," said Myrlie Evers-Williams, chairwoman of the National Association of Colored People and the widow of the Medgar Evers, the civil rights leader who was assassinated in Mississippi in 1963. "He has shown policies that I think the public will appreciate, and determined not to waver. It was a brave speech."

Mr. Jackson, who got a telephone briefing on the speech from Mr. Clinton on Tuesday, said today that the President "set a good moral tone for the country" and "spoke to Ameri-

ca's hopes and not its fears." He complained, though, that the Administration's review took so long that while Mr. Clinton "was in the stands reviewing and reflecting, the opposition was on the field scoring points."

The moderate Democratic Leadership Council, which Mr. Clinton helped found as Governor of Arkansas and which has long urged phasing out affirmative action in favor of broader economic development efforts, was considerably less effusive. Its president, Al From, said, "I hope the President's speech today is the first step in this direction."

For his part, Mr. Clinton gave "angry white men" their due, acknowledging that "some people are honestly concerned about the times affirmative action doesn't work, when it's done in the wrong way."

Mr. Clinton vowed that when the Administration found such cases, it would fight them in court, by filing reverse discrimination suits if necessary. "Most of these suits, however, affect women and minorities for a simple reason: because the vast majority of discrimination in America is still discrimination against them."

At another point he said: "Let me be clear about what affirmative action must not mean and what I won't allow it to be.

"It does not mean, and I don't favor, the unjustified preference of the unqualified over the qualified of any race or gender. It doesn't mean — and I don't favor — numerical quotas. It doesn't mean, and I don't favor, rejection or selection of any employee or student solely on the basis of race or gender without regard to merit."

George Stephanopoulos, the senior Presidential adviser who supervised the review of preference programs for the White House, said the President had determined not to single out any particular program for change or elimination pending the completion of detailed new guidelines by the Justice Department instructing agencies on compliance with a recent Supreme Court decision that cast some affirmative-action programs into doubt.

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Clinton voiced a spirited commitment to continue affirmative-action efforts. In an impassioned speech, the president advocated some specific reform actions, such as halting fraud. However, Clinton was adamant in his support for the programs.

L.A. TIMES 1/13

# Clinton Declares Affirmative Action Is 'Good for America'

■ **Policy:** President urges nation to mend the system, not eliminate it, and orders reforms. Address is hailed by liberal Democrats, civil rights advocates.

By PAUL RICHTER  
TIMES STAFF WRITER

WASHINGTON—In an unapologetic embrace of liberal Democratic Party values, President Clinton declared Wednesday that affirmative action has been "good for America" and urged the nation to "mend it, not end it."

Having concluded a six-month study of preference programs for women and minorities, Clinton asserted that the 25-year-old system retains its value in correcting historic wrongs and helping expand an economy that increasingly depends on minorities and women. Even as he ordered new efforts to root out abuses, Clinton insisted that "in the fight for the future, we need all hands on deck. And some of those hands still need a helping hand."

Recounting the incomplete successes of the civil rights movement and his own personal experience, Clinton portrayed the issue as a matter of America's loftiest aspirations. And while he acknowledged the presence of abuses in the system, he rejected suggestions that reverse discrimination is widespread.

"There are voices of division who would say, 'Forget all that,'" he said. "Don't you dare. Remember, we're still closing the gap between our founders' ideals and our realities."

The long-awaited address, delivered in the marbled solemnity of the National Archives in Washington, drew rhapsodic reviews from liberal Democrats and civil rights advocates who six months ago feared that Clinton was about to back away from affirmative action in the face of rising nationwide controversy. The civil rights community hopes that the speech will begin a presidential campaign to increase public support for programs that no longer have the wide public acceptance they once did.

Myrlie Evers-Williams, head of the National Assn. for the Advancement of Colored People, praised Clinton for "his bold, decisive statement," while Democratic Rep. Julian C. Dixon of Los Angeles called it a "giant step forward."

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The Rev. Jesse Jackson, now considering a challenge to Clinton for the Democratic presidential nomination, called the President's remarks "one of his finer hours as a leader of the country," although he added: "What we heard today is not where the White House was three months ago."

But it provoked an explosion of denunciation from GOP presidential aspirants and other Republicans, who asserted that affirmative action programs are an unfair and outmoded obstacle to a race-blind society.

"He is trying to keep in place a system that will contain the virus that threatens to tribalize America, to divide us," Gov. Pete Wilson told reporters in Sacramento. Clinton aide George Stephanopoulos said that "tribalize" is racial code language, but Wilson countered that he was only quoting historian Arthur Schlesinger, a Democrat, who has used it to refer to increasing conflicts among ethnic groups in society.

Senate Majority Leader Bob Dole (R-Kan.) said: "This is not a difficult issue. Discrimination is wrong. And preferential treatment is wrong too." Sen. Phil Gramm (R-Tex.) said that Clinton "is committed to solving the problem of discrimination in America by extending unfair advantage to even more people."

The term affirmative action, which was coined during the Lyndon B. Johnson Administration, refers to programs that attempt to make up for past discrimination against minorities and women by giving them preference in college admissions, employment and government contracting, while stopping short of relying on numerical quotas. Long an article of faith for most Democrats, but especially liberals, the concept has come under rising criticism from moderates and conservatives.

In its forceful and uncompromising language, the speech represents a substantial political risk for Clinton, who has trod carefully on the divisive affirmative action issue since his first presidential campaign. To win reelection, he badly needs the support of moderate voters who may be suspicious of affirmative action. He may especially need them in California, where the issue burns hottest.

But as he heads into the campaign year, he may need even more to solidify his political base among minorities and liberals and to avert a possible independent challenge by Jackson.

And perhaps he needs most of all to persuade Americans that he is willing to stand up for the things he values, even in the face of political pressure to do otherwise.

In its liberal sentiments, Clinton's speech contrasted markedly with speeches that he has recently delivered on such subjects as budget cutting, school prayer, deregulation and violence in the media.

To deliver his remarks, Clinton stood before the preserved original copies of the Declaration of Independence and the Constitution, which he called "America's only true crown jewels." He clearly sought to suggest that the principles of racial equality should also be dear to Americans.

He recalled his youth growing up in segregated Arkansas and his first visit to the archives in 1963, the year the University of Alabama was forcibly integrated, and Dr. Martin Luther King Jr. delivered his "I Have a Dream" speech only blocks away in Washington.

Clinton outlined what he said were the achievements of racial progress, including a space program that began exclusively

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with white male astronauts but grew to include women and minorities, including Sally K. Ride, Ellen Ochoa, Leroy Chao and Guion Bluford.

Clinton recalled that affirmative action had been developed with bipartisan support under a Republican President, Richard Nixon. He said that it grew out of years of "trying to navigate between unacceptable paths" of simply declaring discrimination illegal or trying to "impose change by leveling Draconian penalties on employers who don't meet certain imposed, ultimately arbitrary and sometimes unachievable quotas."

He said that racial bigotry is still commonplace, citing as the "worst and most recent evidence of this" reports of a racial picnic in Tennessee attended by federal agents, including some from the Treasury Department's Bureau of Alcohol, Tobacco and Firearms and the FBI.

The event was a "sickening reminder of how pervasive these kinds of attitudes still are," Clinton said, declaring that he intends to take "appropriate action" in the case.

In conjunction with the speech, Clinton issued a memorandum calling on agencies to review their affirmative action programs to ensure that they are in compliance with the Supreme Court's June ruling that race-conscious government programs must be judged under a standard of "strict scrutiny."

But he argued that the case does not necessarily spell a sharp scaling back of affirmative action, since, he said, state and local government have continued such programs under similar standards.

Clinton also called for a new federal set-aside program to funnel federal contracts to businesses in poor areas, even if they are owned by whites. The "empowerment communities" program, to be developed under the supervision of Vice President Al Gore, would need approval from the Republican-controlled Congress, a fact that appears to diminish its chances of becoming a reality.

Clinton acknowledged the flaws of some affirmative action programs and said that he has directed U.S. officials to root them out. The government needs to crack down, he said, on companies that pretend to be eligible and are not.

He said that criticisms of the evenhandedness or effectiveness of programs have been "fair questions."

Yet while Clinton acknowledged abuses in execution of the programs, he staunchly defended their underlying principles. He insisted that there is no reason that affirmative action should mean the funneling of government benefits to the unqualified.

He twice cited the efforts of his Small Business Administration to increase lending to minorities and women in his Administration. He said the White House review found that the SBA last year increased loans to minorities by two-thirds, loans to women by more than 80% and that it did not decrease loans to white men. Yet, "not a single loan went to an unqualified person."

"Affirmative action has not always been perfect and affirmative action should not go on forever," the President said. "It should be changed now to take care of those things that are wrong and it should be retired when its job is done."

"I am resolved that that day will come," Clinton said. "But the evidence suggests—indeed, screams—that that day has not come."

Clinton praised the most controversial aspect of affirmative action, the set-asides that apportion a share of all contracts for minorities or women. "It has helped a new generation of entrepreneurs to flourish," he said.

Advocates for such programs, beleaguered in recent months, could not contain their delight.

"There was nothing in the speech I would have disagreed with," said A. J. Cooper, an official of the National Assn. of Minority Automobile Dealers.

But some of Clinton's admirers acknowledged that they had not been entirely sure that he would come out to squarely on their side. Some noted that last winter, some White House officials were arguing for Clinton to endorse the California initiative that would end state affirmative action preference programs.

"It was much stronger than I thought it would be, going in," said Eleanor Smeal, president of the Feminist Majority.

Meanwhile, Clinton's allies in the moderate to conservative wing of the party were subdued.

Sen. Joseph I. Lieberman (D-Conn.), chairman of the Democratic Leadership Council, which had tried to push Clinton toward programs based on financial need, did not criticize Clinton. But in comments on the Senate floor, he worried about the unfairness of affirmative action and predicted that its programs would not stand up in the face of the court's decision.

LA TIMES

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**'There are voices of division who would say, "Forget all that," don't you dare. Remember, we're still closing the gap between our founders' Ideals and our realities.'**

PRESIDENT CLINTON

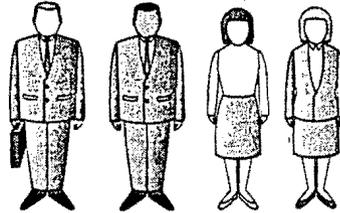
## Orders From the White House

Highlights of White House action Wednesday on federal affirmative action programs.

### CLINTON'S ORDERS

President Clinton told heads of federal departments and agencies that any affirmative action program must be eliminated or reformed if it:

- Creates a quota
- Creates reverse discrimination
- Creates preferences for unqualified individuals
- Continues even after its equal opportunity purposes have been achieved



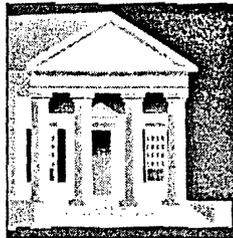
### THE SET-ASIDE PROGRAM

Vice President Al Gore is to lead a Community Empowerment Board that will develop a set-aside program targeting federal contracts to small companies, regardless of their owners' sex or race, that locate in poor communities. "Looking beyond the issue of fair and effective responses to discrimination, we must recognize that there are communities and regions in our country where the free enterprise system is not working to provide jobs and opportunity," the President's affirmative action report said.



**Gore's new mission: jobs for poor communities**

### THE SUPREME COURT GUIDELINES



The high court set affirmative action standards recently, ruling that:

"All racial classifications" by government agencies are "inherently suspect and presumptively invalid." The court said such programs cannot be broadly applied to remedy suspected discrimination over time, but could be used to correct specific, provable cases of discrimination.

Source: Times staff and wire reports

# GOP in Bitter Disarray Over Bias Programs

■ **Politics:** Democrats seem to have reached a general accord. Republicans, on the contrary, find themselves deeply divided on issue.

By SAM FULWOOD III  
TIMES STAFF WRITER

WASHINGTON—While Democrats appear to have reached some level of agreement on how to proceed on affirmative action, the Republicans are in disarray, acrimoniously arguing among themselves over how forcefully to oppose race-based federal policies.

Republican congressional leaders' reluctance to introduce legislation attacking affirmative action programs is attributed by many to concern that steps to end such programs would make them appear racist and sexist. The

specter of 1996 presidential politics also hovers over the debate.

In a sign that many party faithful see as a retreat, House Speaker Newt Gingrich (R-Ga.) has urged his colleagues—including Senate Majority Leader Bob Dole (R-Kan.), who is campaigning for his party's presidential nomination on an anti-affirmative action platform—to delay introducing promised legislation until later this year. His critics accuse Gingrich of backing away from a politically sensitive issue but his aides say that he wants to craft legislation carefully and thoughtfully.

"We are a few months away from moving our affirmative action agenda," said Tony Blankley, Gingrich's chief spokesman. "We have conveyed our thoughts all around the party that it would be best to think through our policy and how best to communicate what that policy is."

But that go-slow approach has angered some party activists who fear that the GOP is worrying too much about politics and too little about keeping faith with its anti-affirmative action rhetoric.

"I think that decision is symptomatic of a certain level of discomfort with the issue on the part of Republicans," said Abigail Thurnstrom, a political science professor at Boston University who closely watches Republican congressional leaders. "This is not a subject—race—that they feel comfortable dealing with. It is not where they live."

Thurnstrom said that Republican leaders are sensitive to charges of racism and sexism, making them cautious in their efforts to balance their anti-affirmative action legislation with policies that would provide opportunity for minorities and women without promoting group preferences.

"The message [anti-affirmative action leaders] are sending to the black and Latino communities is that we're going to take something from you," Thurnstrom said. "It is extremely important for the Republicans to say what they are going to do in place of affirmative action. That's certainly the way Gingrich is thinking."

But some party stalwarts, such as Linda Chavez, a conservative anti-affirmative action activist who chaired the U.S. Commission on Civil Rights in the Ronald Reagan Administration, said that such talk is political doublespeak. "They're a bunch of nervous nellys up there who have never been comfortable talking about race and hope that it goes away," Chavez said. "They are basically getting cold feet."

Chavez, who has argued for years against federal set-aside and affirmative action programs that benefit women and minorities, said that she is angry with her party's leaders because they are "acting like Bill Clinton... by wanting to be on both sides of the affirmative action debate and wanting to avoid making anyone mad."

"Republicans want to sound like

they're dismantling preference programs, but so far they aren't doing very much. That's pulling a Clinton."

But Blankley disputed that view, arguing that the Republican Party has "an opportunity" to gain support among African American and Latino voters by making sure it has something to say about what it supports instead of only arguing against affirmative action.

"If we don't express our full view on affirmative action, including the positive aspects of our policies, then we will miss out on this opportunity to reach the broader public," Blankley said. "When we have our full program together, then all Republicans will have a better chance to get out before the country and deliver a more coordinated message of what we're opposed to and what we are for."

Gingrich, in fact, often rails against "preferences based on genetic codes" and promises sweeping legislation that would abolish affirmative action programs altogether.

Both Dole and Sen. Phil Gramm (R-Tex.), another GOP presidential hopeful, have spoken out against affirmative action but neither has introduced legislation nor given specific details of what they would do.

Last March, Dole announced that he would submit a bill which would ban racial and gender preferences in hiring, promoting and business contracting with the federal government, said Joyce Campbell of the majority leader's office. She said that Dole remains opposed to government programs that give preferences to people based on race and gender and plans to introduce his bill next week.

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Immediately after Clinton's speech in support of affirmative action, Dole criticized the President on the Senate floor Wednesday but did not say when his legislation will be submitted.

Rep. Charles T. Canady (R-Fla.), who chairs a House subcommittee on the Constitution, said that he is working with both Gingrich and Dole on proposed legislation but said that he could not promise when exactly the bill will be submitted.

"We Republicans are not unanimous on this," he said. "I understand that sometimes things don't move as fast in Congress as some people like but we are working on this and we will have the bill soon."

# Unfinished Business: Government Contracts

■ **Courts:** Clinton has endorsed fairness. But that doesn't erase a strict Supreme Court ruling that undercuts affirmative action in awarding funds.

By DAVID G. SAVAGE  
TIMES STAFF WRITER

WASHINGTON—A Minnesota construction company which has paved roads at the White Sands Missile Base in New Mexico raises a problem that President Clinton largely glossed over Wednesday in his impassioned endorsement of federal affirmative action.

When most Americans think of "affirmative action," they think of jobs and college admissions. But at the federal level, the biggest battles have been fought over government contracts. And those federal efforts—a key to survival for many minority businesses—remain in jeopardy, despite the President's commitment to stay the course on them.

As one government lawyer said Wednesday, there is "clearly a tension" between the President's speech staunchly supporting affirmative action and a separate presidential directive that tells federal agencies to implement a strict Supreme Court ruling that undercuts affirmative action.

The recent ruling, in *Adarand Constructors vs. Peña*, says that the government may not use "racial classifications" to award any funds, except to remedy proven, past discrimination by an agency or its contractors.

In 1993, federal agencies awarded \$13 billion in contracts to firms owned by blacks, Latinos, Asians and Native Americans under a variety of special "set-aside" programs. But none of those programs was begun to remedy racial discrimination practiced by the Defense Department, the Transportation Department or Labor Department, for example.

In the immediate wake of the high court ruling, several Administration lawyers agreed that they would have to revise or repeal programs that reserve some contracts for minorities only. As an alternative,

Justice Sandra Day O'Connor urged the government to use "race-neutral means to increase minority business participation" by, for example, offering special assistance to "disadvantaged" firms when they apply for contracts.

But in the end, the President rejected that option and instead pledged his support for the continued use of "race-conscious" measures in employment, education and government contracting.

The President's strong support of affirmative action—the bully pulpit effect—will probably ensure that employers will continue to consider race, gender and ethnic background in hiring. Decisions about whether to use racial preference in college admissions will be left largely to the states. In California, the University of California Board of Regents—and even the state's voters—will decide.

But in government contracting, the final word likely will be spoken in the federal

courts. And the legal complaint filed by the Minnesota firm illustrates the dilemma facing the Clinton Administration.

In the past, the McCrossan Construction Co. had submitted a low bid and won contracts for roughly \$30 million in roadwork at the White Sands base. But last year, the chief contracting officer at the base announced that only minority-owned firms could submit bids for future road contracts.

Under a little-known federal regulation dubbed "the Rule of 2," departments are permitted to close off bids to white-owned firms if at least two qualified minority-owned businesses are available to do the work. Officials described the "Rule of 2" as one of several means of achieving the Defense Department's goal of steering at least 5% of its contract funds to minority-owned firms.

In 1994, the Pentagon awarded \$5.8 billion in contracts to companies owned by minorities, according to the President's

Affirmative Action Review.

"They basically put up a sign that says, 'No Whites Need Apply,'" said Jim Reeves, a Las Cruces, N.M., lawyer representing the company.

For months, the company had complained to the Pentagon without success that it was being unfairly excluded from applying for the work. But the high court's ruling of June 12 changed the rules of the debate.

"It came at just the right time for us," Reeves said.

In late June, the company filed a suit in federal court against base contracting officer Dennis Sutton and Defense Secretary William J. Perry contending that it was being "unlawfully excluded" from seeking a contract solely because of race.

Clinton's Justice Department has yet to reply to the suit but must do so by the end of this month. Administration lawyers will have to explain how their decision to close off contracts to white-owned firms is a "narrowly tailored" remedy for clear past discrimination by the government.

Still, the battle in the courts will likely take years to resolve.

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Attorneys for the Associated General Contractors of America predicted that the lawsuit in McCrossan Construction vs. Sutton will be the first of many.

"We were disappointed but not surprised" by the President's speech, said Mike Kennedy, a special counsel for Associated General Contractors. "I saw no recognition of the problem faced by contractors," he said.

Even some Democratic leaders questioned whether the President had come to the grips with the Supreme Court ruling and the strict standards it imposes for official affirmative action.

"In my own view, most government programs in which race, gender or similar status are dominant factors will not survive the Supreme Court's new Adarand test," Sen. Joseph I. Lieberman (D-Conn.), a former state attorney general, said on the Senate floor. "We must work together to find new and, I would hope, more broadly acceptable ways to achieve the goal of promoting equal opportunity for all, particularly for our poorest neighbors."

# Clinton backs bias benefits

## Offers reforms meant to 'mend' affirmative action

By Bill Nichols  
USA TODAY

President Clinton defended the concept behind federal affirmative action programs Wednesday in a much-awaited speech that capped a five-month White House review.

"Let me be clear — affirmative action has been good for America," Clinton said. "We should have a simple slogan: Mend it, but don't end it."

Clinton's fix-it approach — based on a 100-page review released by the White House — addresses some criticisms of affirmative action, but appears aimed at finding a common ground the public can support.

Among Clinton's reforms:

- ▶ No quotas.
- ▶ All affirmative action recipients must be qualified.
- ▶ Reverse discrimination will be vigorously prosecuted.
- ▶ Affirmative action programs that have served their purpose should be terminated.

Clinton asked Vice President Gore to devise a plan to include economically distressed areas in set-aside programs, even if white-owned firms benefit.

The president rejected those who have called for an end to affirmative action or a significant rollback: "The job of ending discrimination in this country is not over."

And he stopped well short of the radical rethinking some conservative Democrats want.

Leading Republicans called the speech little more than a political ploy to energize the Democratic base, particularly women and minorities.

"He should have said end it. You can't mend it," said California Gov. Pete Wilson, a GOP presidential candidate who wants to roll back his state's affirmative action programs.

Patrick Buchanan, another GOP hopeful, said Clinton's "plan to perpetuate government-sponsored racial discrimination is unjust and unconstitutional."

Civil rights leaders, however, were pleased, including Jesse Jackson, whom the White House is trying to coax away from a potential independent presidential candidacy.

Said Jackson: "He challenged the country to choose history over hysteria ... and seemed to be driven by conviction and courage and hope rather than fear."

# In defense of affirmative action

## President plays it safe with reform

By Bill Nichols  
USA TODAY

President Clinton's speech on affirmative action Wednesday was not the major policy shift some conservative Democrats wanted and some liberal Democrats feared.

Instead, Clinton followed the pattern of recent speeches on moral and social issues, finding what he believes is a reasonable middle ground a majority of the country will agree with.

This approach has had the effect of quieting dissent about Clinton among women and minorities and possibly slowing momentum toward a presidential run by Jesse Jackson.

White House senior adviser George Stephanopoulos put it this way: "We think we need reform, but not rollback."

Ironically, those likely to criticize his approach are not just Republicans seeking to end affirmative action, but Democratic centrists who had hailed this review at first as a major step for a "New Democrat."

Al From of the moderate Democratic Leadership Council issued a less-than-effusive statement:

"We have long believed race-conscious preferences ... are divisive and should be replaced over time with an economic development and empowerment strategy. ... I hope the president's speech today is the first step."

Clinton's speech plowed little new ground.

He offered no examples of affirmative action programs that don't work or that he would change, opting instead to reiterate principles he's long supported — no racial quotas, no preferences for unqualified applicants and a vow to punish reverse discrimination.

Clinton did say he wants to include white-owned businesses in depressed economic areas in federal set-aside programs and that he thinks affirmative action programs that have achieved their purpose should be ended.

And affirmative action foes can take some solace from a

Justice Department review to make sure federal programs agree with last month's Supreme Court ruling narrowing the scope of affirmative action.

Stephanopoulos said uncertainty about the scope of the court's ruling limited Clinton's ability to make more dramatic changes.

But Clinton's clear thrust was an unapologetic defense of racial and gender remedies for past and present discrimina-

tion. He said:

"When affirmative action is done right, it is flexible, it is fair and it works. To those who use this as a political strategy to divide us, we must say no."

That brought enthusiastic cheers from civil rights activists and even from Jackson, though he says he's still considering a presidential run.

That sets a clear distinction between Clinton and GOP presidential hopefuls, most of

whom want affirmative action ended or radically changed.

Senate Majority Leader Bob Dole plans a bill to "get the federal government out of the group preference business."

Sen. Phil Gramm, R-Texas, said Clinton was espousing "a philosophy that says that the way you correct for discrimination is to have the government engage in it."

Political analyst William Schneider said Clinton gave

possibly "the best defense in years of why we must continue affirmative action."

"But I don't think it will convert many of his critics ... The president kept saying he wanted to modify the abuses of affirmative action, where most who oppose it differ with the principle. The debate really is over the principle."

Cont'd 1 of 2



By Tim Dillon, USA TODAY

**SYMBOLS:** President Clinton amid displays of the Declaration of Independence, the Constitution and the Bill of Rights.

**PATRICIA IRELAND**



AP

NOW president says Clinton was careful

“

He has clearly moved more slowly and more carefully than some of us would like ... but on the issue of equal opportunity, this president gets it — personally, philosophically, politically.

”

**Strong words on both sides**

President Clinton's defense of affirmative action brought immediate and strong reaction from supporters and critics.

**PETE WILSON**



Reuters

California governor opposes program

“

I think he's done a real disservice. He's trying to keep in place a system that will contain the virus that threatens to tribalize America and divide it.

”

**MYRLIE EVERS-WILLIAMS**

“

Many people ... were holding their breath to see what position he would take. To me, it indicated strength in his belief and willingness to put politics aside and send a clear message to the likes of Gov. Pete Wilson.



AP

NAACP chairwoman supports president

”

**LAMAR ALEXANDER**



AP

Presidential hopeful sees a Clinton failure

“

It is un-American to treat people as members of a group rather than as individuals. Unfortunately, President Clinton's report fails to recognize this fundamental principle.

”

# Supreme Court leaves very little wiggle room

By Tony Mauro  
USA TODAY

Affirmative action was once viewed as the gleaming success story of the civil rights movement, creating thousands of jobs and educational opportunities and billions of dollars in business for minorities and women.

But now even the Supreme Court — which once nurtured affirmative action's growth — has pulled support.

By a 5-4 vote on June 12, the court struck down an affirmative action plan in a federal highway building program, applying a new, stricter standard that could wipe out many other programs.

From its beginnings in the Johnson and Nixon administrations, affirmative action has been on shaky ground:

► The Constitution's 14th Amendment guarantees the "equal protection" of the laws for all, without making a distinction between unequal treatment for a benign purpose on one hand or a racist purpose on the other.

► The Civil Rights Act of 1964, the major civil rights law of this century, does not authorize affirmative action and seems to prohibit it.

The Supreme Court gave affirmative action its blessing under the theory that, at least temporarily, minorities should be given "unequal protection" because past bias put them at a disadvantage.

Now it appears the court is returning to the view that government programs should be race-neutral.

"The court has basically said to the country that the Constitution is color-blind, and government has to operate accordingly," says University of Virginia political scientist David O'Brien.

Only two justices — Antonin Scalia and Clarence Thomas, the court's only black member — seem to believe that government affirmative action can never be justified. But the court majority sharply narrowed the ground on which affirmative action plans can stand.

"The court's decision leaves many questions open," said Justice Department official Walter Dellinger in a preliminary analysis of the ruling.

"I don't think the story on affirmative action is over," says New York Law School professor James Simon, author of a book on the court called *The Center Holds*. "The struggle continues."

A status report on affirmative action:

► **Federal programs.** The court said government must have a "compelling" interest in establishing affirmative action and must fashion a "narrowly tailored" program. But Dellinger's analysis suggests that Congress in some

## Where it stands

**1965 to June 12, 1995:** Affirmative action programs, required by a series of state and federal laws and regulations, provide preferences in hiring, contracting and college admissions to minorities and women to help overcome the effects of discrimination.

**June 12:** The Supreme Court in *Adarand vs. Peña* said federal affirmative action must — like state and local programs since a 1989 ruling — be "narrowly tailored" to redress specific cases of discrimination. The ruling is expected to end many programs by limiting the permissible grounds for them.

**Wednesday:** President Clinton championed programs that meet the court test, ordering federal agencies to eliminate any one that "creates a quota, creates preferences for unqualified individuals, creates reverse discrimination or continues even after its equal-opportunity purposes have been achieved." He fears such abuses could undermine support for affirmative action.

— Andrea Stone

instances would have to do the justifying — something this Congress may not have the desire to do.

Clinton endorsed surviving federal affirmative action plans except those requiring quotas or leading to reverse discrimination.

► **State and local programs.** Affirmative action plans at these levels were not affected by the recent ruling, but were placed under a similar "strict scrutiny" standard in 1989. Some have survived because studies show they are justified by lingering bias.

► **Private programs.** Business and industry have voluntarily established a range of affirmative action programs for hiring, training and promotions. The programs were not affected by the court's ruling in June and are less legally suspect because they do not involve discriminating by race. The court in 1979 said private affirmative action programs are permissible.

► **Education.** The June ruling did not affect race-based programs at universities — such as scholarship and admissions. But less than a month earlier, the court let stand a ruling that struck down the University of Maryland's all-black scholarship program.

**CITADEL APPEAL:** The Citadel will ask the U.S. Supreme Court to block a judge's order that would require the state-supported school to admit a woman to the all-male cadet corps. The Charleston, S.C., school must admit Shannon Faulkner, 19, or provide a court-approved alternative. School officials said there won't be time before the start of fall classes for a trial on the issue of whether a new women's leadership program at Spartanburg's Converse College is a suitable alternative. Fourteen women have applied to enter the Converse program; 10 have been accepted.

# President stands by affirmative action

By J. Jennings Moss  
THE WASHINGTON TIMES

President Clinton yesterday reaffirmed his support for affirmative action, urging Congress to "amend it but don't end it," and issued an eagerly awaited report that does not eliminate any federal program giving preferences to women or minorities.

Mr. Clinton said his five-month review of affirmative-action programs persuaded him the programs are still necessary. His reaffirmation pleased civil rights activists but disappointed conservatives in his party and elsewhere.

"Affirmative action has been good for America," he said to loud

## Dole says Clinton fosters confusion

applause from guests invited to hear his remarks in the Rotunda of the National Archives.

The site was chosen so that Mr. Clinton could speak with the Declaration of Independence, the Constitution and the Bill of Rights behind him.

"Affirmative action has not always been perfect and affirmative action should not go on forever," he said. "But the evidence suggests — indeed, screams — that that day [when it can end] has not come."

Senate Majority Leader Bob Dole said: "Instead of clarity, the president has chosen confusion.

He has chosen to complicate an uncomplicated issue with an avalanche of words and fine distinctions."

Rejecting calls from GOP presidential candidates like Mr. Dole, as well as from the Democratic Leadership Council (DLC), either to abolish affirmative action or to take significant steps to reduce its programs, Mr. Clinton called for federal agencies to study the issue further.

He said affirmative-action programs should be subject to four tests: whether they establish quotas; whether they foster illegal dis-

crimination of any kind, including reverse discrimination; whether they give preferences for unqualified people and whether they have succeeded.

Mr. Clinton even proposed a new type of affirmative action, one that would give an advantage in federal contracts to businesses — including those owned by white men — that operate in economically distressed areas. He asked Vice President Al Gore to develop the specifics of the proposal, which officials anticipate would require congressional approval.

The president's formal entry into the affirmative-action debate

see CLINTON, page A8

## FROM PAGE ONE

### CLINTON

From page A1

comes as Republicans on Capitol Hill have delayed significant action on reform until next year and as GOP presidential hopefuls have seized it as a potent issue for next year.

It also comes five weeks after the Supreme Court placed strict guidelines on federal affirmative-action programs in the case of Adarand Constructors vs. Pena. The Justice Department already has given federal agencies a list of criteria with which to judge the validity of their programs.

Civil rights groups, which at times over the five-month life of the administration's review had feared Mr. Clinton would turn against them, yesterday hailed his action, although some had reservations.

"It was a ringing reaffirmation of his commitment of opening up hiring opportunities to women and minorities for affirmative action and his opposition to quotas... It's not a reaffirmation of the status quo," said Ralph Neas, former executive director of the Leadership Conference on Civil Rights.

But Laura Murphy Lee, director of the Washington office of the American Civil Liberties Union,

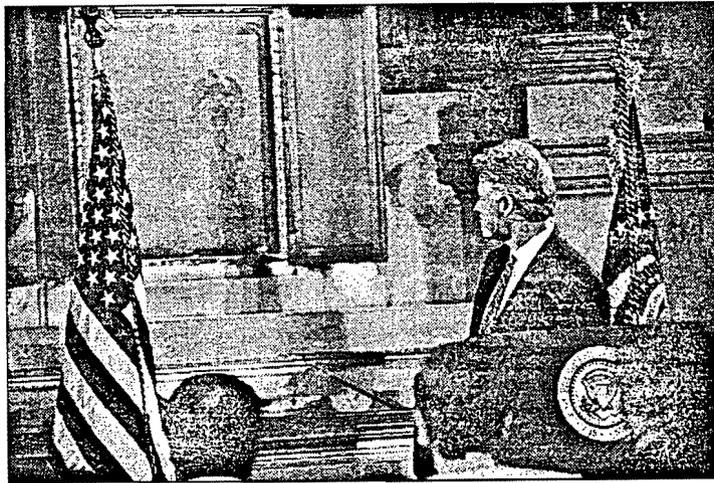


Photo by Kevin T. Gilbert/The Washington Times

Before delivering his speech, President Clinton gazes at the original copy of the Declaration of Independence at the National Archives.

said she does not think "the battle is over."

"It took us a lot of hard work to get us to this point. This speech was not a given," she said. "Although the president was committed, I still think agencies afraid of litigation may not be as strong as they need to be to enforce those programs."

For some who have been vocal about the need to end affirmative

action, Mr. Clinton's action was seen as both meek and as an attempt to shore up political support with his liberal Democratic base.

Mr. Clinton "squandered his opportunity to advance the American ideal of a color-blind nation in which all ethnic and racial discrimination is banished from our national government, including all the odious paraphernalia of reverse discrimination," said GOP

presidential candidate Pat Buchanan.

Even among Mr. Clinton's allies, there were signs of disappointment. The centrist DLC, which Mr. Clinton once headed as governor of Arkansas, had pushed for him to end set-aside programs and shift the attention to the plight of the economically disadvantaged.

"I hope the president's speech today is the first step in this direction," said DLC President Al From in a short, terse statement.

Mr. Clinton drew a contrast between those who have raised what he called "legitimate questions" about the effectiveness of affirmative action and those who he said were using the issue solely for political reasons. "To those who use this as a political strategy to divide us, we must say no," he said.

Drawing on his personal history and that of the nation, Mr. Clinton laid out the rationale for why he concluded that affirmative action must stay.

He cited statistics that the unemployment rate for blacks is twice that of whites, that women earn about 72 percent of what men doing the same job make and that white men hold 95 percent of senior management positions, even though they make up 43 percent of the work force.

# Clinton backing of preferences hit as polarizing races

By Donald Lambro  
THE WASHINGTON TIMES

President Clinton's strong defense of affirmative-action programs may improve his standing with black voters, but it remains a racially polarizing issue that has driven many white working-class Democrats from his party.

Mr. Clinton's reaffirmation of support for a system of racial preferences for minorities also could jeopardize his chances of carrying California, where an anti-affirmative action referendum is expected to be on the ballot in 1996.

## NEWS ANALYSIS

Clinton has taken a position that is basically at odds with the voters of California," said John Peschong, executive director of the California Republican Party. "We're going to continue to talk about preferences being a racist policy."

Few if any political strategists think that Mr. Clinton can win reelection without carrying California and opposition to racial preferences is strong throughout the state, as it is in many other areas of the country.

A Gallup Poll earlier this month found that 50 percent of all Americans surveyed said the government should "eliminate all or many" of its affirmative-action programs. Only 37 percent said it should "keep all or many of them."

"This is an issue that can only hurt us with the voters," said a Democratic strategist yesterday. "It reinforces [Mr. Clinton's] support with the civil rights wing of the party but it doesn't help the president among working class whites, especially in the South."

Civil rights groups yesterday applauded Mr. Clinton's statement of support for affirmative-action policies to steer federal contracts and other assistance to disadvantaged minorities. But it was also condemned by Republicans and some Democrats who said such programs were a failed vestige of the civil rights era and fostered reverse discrimination.

"The president stood tall this morning and spoke from his heart," said Rep. Kweisi Mfume, Maryland Democrat, the former chairman of the Congressional

Black Caucus. "We knew ... what the president has now reported to the nation. That is that affirmative action is still necessary, still effective and still worthwhile."

But Terry Michaels, a former press secretary to the Democratic National Committee and an early Clinton supporter, said the president's statement was "a bitter, last-straw disappointment."

Mr. Michaels noted that Mr. Clinton has abruptly reversed the position he supported as the Democratic Leadership Council chairman in 1991 when the DLC adopted language that said, "We believe the role of government is to guarantee equal opportunity not mandate equal outcomes."

"As usual, Clinton chose tactics over principles, slippery and seductive words rather than transforming leadership," Mr. Michaels said.

The president was forced to re-evaluate affirmative-action programs earlier this year when Republicans began raising the issue as a prelude to the issues they will be striking in the 1996 elections. But his decision yesterday to embrace the core of affirmative-action policy, with some minor reforms around its edges, drew strong responses from most of his potential rivals.

Senate Majority Leader Bob Dole — Kansas Republican and the front-running GOP presidential contender — said he was preparing to introduce legislation next week "to get the federal government out of the group-preference business."

"He should have said 'end it.' You can't mend it," said California Gov. Pete Wilson who is also seeking the Republican presidential nomination and is pushing to roll back his state's affirmative-action programs.

Mr. Wilson accused the president of employing a "political strategy to divide and to placate the advocates of continued racial discrimination."

George Stephanopoulos, a senior adviser to Mr. Clinton who headed the affirmative-action review, said comments like those from Mr. Wilson are "the kind of code-word politics that Republicans have engaged in for generations."

WASH.  
TIMES

# Set-aside critics see Clinton policy producing quotas

By Nancy E. Roman  
THE WASHINGTON TIMES

President Clinton's review of affirmative-action policies appears to leave current law in place — allowing set-asides and preferences based on race and sex.

"The president has issued a new affirmative-action policy based on a 100-page report. It would appear to be, despite its gloss, likely to be business as usual," said Chip Mellor, president of the Institute for Justice.

He said the report contains the "exact kind of legalisms, line drawing and minutiae" that have allowed abuse.

"He can say all that he wants about being against quotas," Mr. Mellor said. "We can say with confidence that the implementation of this report will lead to the equivalent of quotas and subsequent litigation."

Walter Olson, who studies affirmative action at the Manhattan

Institute, said Mr. Clinton did not retreat from any of the substance of Democratic affirmative-action programs.

"Where he sees the political pressure as most intense — set-asides for business — he will bend a little bit rhetorically," Mr. Olson said. "On all of the rest of it, he won't even bend."

Dismayed by the president's decision to maintain the status quo, Republicans said they will forge ahead with a plan to repeal set-asides in government contracting.

Sen. Phil Gramm said he will lead an effort next week to end such set-asides.

"The president gave a passionate speech. I could have given 90 percent of it and felt exactly the way he did," the Texas Republican said. "The problem is it didn't have anything to do with the issue at hand."

Rep. Gary Franks will propose an amendment to the defense appropriations bill to repeal set-

asides in government contracting. "Racial and gender-based preferences are wrong," the Connecticut Republican said.

Rep. W.J. "Billy" Tauzin, Louisiana Democrat, said Mr. Clinton was faced with an ultimatum: support affirmative action or face a challenge from the left in 1996.

"On a political level, he did the only thing he could do," Mr. Tauzin said. "On policy, he missed the mark."

Democratic members of the Congressional Black Caucus and the Congressional Caucus for Women's Issues gathered in praise of the president's speech.

"Today Bill Clinton showed that he had the guts to stand up and lead the American people out of their polarization," said D.C. Delegate Eleanor Holmes Norton, a member of both caucuses.

Rep. Corrine Brown, Florida Democrat, likened affirmative action to her great-grandmother's sweet-potato pie. "Affirmative ac-

tion is a thin slice — 4 percent," she said. "To tell you the truth, we ought to be going after the other 96 percent."

Rep. Kweisi Mfume, Maryland Democrat and former chairman of the Black Caucus, had warned Mr. Clinton that if he backed away from affirmative action, he would alienate a significant portion of his black voting base.

Mr. Mfume seemed mollified yesterday, saying the president "talked about affirmative action in a special way" and warning Republicans not to be divisive.

"Are you going to be the party of Abraham Lincoln or of David Duke?" he said, referring to the former Ku Klux Klansman who ran for governor of Louisiana as a Republican in 1991.

Rep. Charles T. Canady, Florida Republican and chairman of the House Judiciary subcommittee on the Constitution, plans to introduce a bill that would repeal all race and sex preferences.

# Clinton Assails Officers' Racist Event

## Gathering Is Defended by the Organizer as Get-Acquainted Party

By FOX BUTTERFIELD

KNOXVILLE, Tenn., July 19 — As President Clinton joined the growing list of critics of the annual "Good Ol' Boys Roundup" in the east Tennessee mountains, the organizer of the events defended them today as legitimate parties where Federal and local law-enforcement officers got a chance to know each other.

Gene Rightmyer, a retired agent of the Federal Bureau of Alcohol, Tobacco and Firearms, said that when a few racist incidents had occurred among some beer-sodden participants, he had told the culprits to stop or leave. He strongly denied assertions, first made by a member of a right-wing Alabama militia group, that this year's gathering featured the sale of "nigger hunting licenses" or T-shirts emblazoned with the Rev. Martin Luther King's face behind a target. Mr. Rightmyer said two black officers, including one from the firearms agency, had attended this year's gathering, and that when he learned that four white officers had complained about the blacks' presence, he told them, "You can do one of two things. Shut up or leave." The men left, he said.

In Washington today President Clinton said, "I want to say that if anybody who works in Federal law enforcement thinks that kind of behavior is acceptable, they ought to think about working someplace else." The Federal Bureau of Investigation and the Treasury Department, which oversees the firearms agency and the Secret Service, are already investigating press accounts of the event, and the Senate Judiciary Committee has scheduled a hearing on them on Friday.

Mr. Rightmyer, a native of Kentucky and a former marine, said he believed the criticism of the roundups was part of a politically motivated "setup" by the militia group, the Gadsden Minutemen, who harbor intense hostility toward the firearms agency for its role in regulating the manufacture and sale of guns.

Sitting in the office of his lawyer in Knoxville, W. Thomas Dillard, Mr. Rightmyer said that the original militia report on the roundups was

written on stationery that features the Confederate battle flag. The report, written by Jeff Randall, a founder of the Gadsden Minutemen, also contains an attack on the Southern Poverty Law Center, a prominent civil-rights group that investigates militia groups and racist organizations.

Mr. Rightmyer said he found it "strange" that the militia group, given its own views, would make accusations of racism against anyone else.

Mr. Randall said in his report, which was first picked up by The Washington Times, that he had infiltrated this year's roundup, putting on a police cap and sneaking in with a video camera through an unguarded rear entrance to the campground.

Mr. Randall later released videotape showing a sign reading "Nigger Check Point."

Mr. Rightmyer, 54, who retired from the firearms agency in 1994, said there had been such a sign, but that it was at the entrance to the gathering in 1990, not the one held this past May 18 to 20, as reported in the press, including The New York Times. He said that he had insisted that the sign be removed.

"When I arrived at the check-in point and saw the sign, I got out of my car and said, 'I want that down now,'" Mr. Rightmyer said. The sign was soon taken down, he said.

Several Justice Department and Treasury Department officials also said they thought the image of the sign was from the 1990 gathering, not from the one this past May. So did Morris Dees of the Southern Poverty Law Center.

"The video was doctored" by the militia group, Mr. Dees said. "A photograph of the sign taken in 1990 was doctored into the video."

A senior law-enforcement officer said: "The bottom line is we don't know. Whether or not it was, there was still some objectionable stuff going on at this roundup."

The videotape of the sign was provided to ABC News by a member of the militia. Gary Werdlow, the news director of the ABC News affiliate in Washington, WJLA-TV, said the sta-

tion had broadcast both still pictures from 1995 and videotape from the 1990 roundup, and made clear in the audio part of its broadcast which images were from which year.

The ABC affiliate in Washington provided a copy of the tape, without audio, on Tuesday to The New York Times, which published two photographs from the tape, including one of the offensive sign, on Wednesday.

Mr. Rightmyer said that in 1990 a small group of officers attending the roundup staged a skit, as part of the annual "Redneck of the Year" competition, which featured a white-robed Klansman forcing a black "slave" into oral sex. "It was in really bad taste, not funny, and I didn't know about it beforehand," he said. "There was no excuse for it, and I told them so, and they apologized."

The roundups began in 1980 as an office party for Bureau of Alcohol, Tobacco and Firearms agents from the Southeast, Mr. Rightmyer said, including agents from Georgia, Alabama, Kentucky and Virginia as well as Tennessee. But people had such a good time that they invited their friends, and the event rapidly increased in size, he said. This year there were more than 300 participants, 60 percent of them law-enforcement officers. There have been participants from all the Federal police agencies, he said, including the F.B.I., the Drug Enforcement Agency and the Secret Service as well as the firearms agency.

Mr. Rightmyer confirmed the account by the militia group that some participants this year had sold a hand-drawn T-shirt depicting a gallows and the initials "O. J.," Mr. Rightmyer said at first he did not find the shirt racially offensive, because several years ago he had sold a shirt reading "First Annual Ted Bundy Barbecue," after the execution of the serial killer in Florida. "I thought it was a statement for capital punishment," he said.

But later, when he learned that the same group of officers were the ones complaining about the presence of two black agents, he decided to tell them to stop or leave.

# Ex-Agent Says Militia Distorts Racist Acts at 'Roundups'

By Michael Abramowitz  
Washington Staff Writer

KNOXVILLE, Tenn., July 19—A retired federal agent who organized annual beer and rafting parties for law enforcement officers acknowledged today that several racist incidents had occurred at the gatherings in eastern Tennessee but suggested that an extremist militia group had exaggerated the events to embarrass the Bureau of Alcohol, Tobacco and Firearms.

Gene Rightmyer, who retired last

year from the ATF, defined the gatherings as "a bunch of good old boys having a good time."

The racist displays that have occurred since he first began hosting the event 16 years ago were not sanctioned by him and other organizers, and Rightmyer said in an interview that he went out of his way to police the event.

Rightmyer said that while the vast majority of the 300-odd friends and law enforcement officials who attend his "Good Ol' Boy Roundup" every spring are white males, blacks, wom-

en and other minorities also are invited. "For about three or four years or more, I've given a speech, that I don't care who you are, that if you have a badge—no matter what sex or race you are—you're blue as far as I'm concerned," he said.

In Washington today President Clinton depicted the roundup as "an event literally overflowing with racism, a sickening reminder of just how pervasive these kinds of attitudes still are." In a speech on affirmative action, Clinton said any federal officers who go along with such

behavior "ought to think about working someplace else."

Both the Justice and Treasury departments have opened wide-ranging investigations into reports that federal agents have attended the roundup, and the Senate Judiciary Committee will hold a hearing on it Friday.

The D.C. police department is investigating allegations that some of its officers participated in the event, the department's interim chief said yesterday. [Details, Page A16.]

Over the years, Rightmyer said, law enforcement officials from Maryland—"some state troopers, some locals"—as well as District police officers also have attended the roundup. He said a handful of D.C. officers had attended in recent years but he did not remember them attending this year.

"At one time, we had about 40 to 45 from the Maryland area," Rightmyer said, adding that they were attracted by "some of the best motorcycle riding areas in the country."

Rightmyer suggested that the controversy has been whipped up by extremist militia groups.

Many militia members have expressed anger over the ATF's involvement in the Waco siege and harbor other grievances. But he expressed dismay that the militia's allegations have been repeated by senators and other top officials with little knowledge, he said, of the facts.

"I'm not amazed, but I'm disappointed," Rightmyer said.

His account differs sharply from the portrait that has emerged since militia members infiltrated the gathering and began disseminating a video that has touched off a national controversy.

The video shows vendors selling T-shirts depicting the Rev. Martin Luther King Jr. in gun-sight cross hairs and others with the slogan "Boyz on the Hood," with police officers surrounding two black men spread-eagled over a police cruiser.

The video also shows a cardboard sign with a racist epithet supposedly posted at the entrance of the campgrounds to keep African Americans out.

Rightmyer said today that the sign had appeared at the 1990 roundup, not this year as suggested by the militia-produced video. Rightmyer said that when he saw the sign he immediately demanded that it be taken down.

"I know I said, 'I don't want this here, I don't appreciate it,'" Rightmyer said. "That could not have been up there more than 15 minutes."

Jeff Randall, a co-founder of the Gadsden Minutemen, the militia group that has taken the lead in publicizing the roundup, today rejected the suggestion that he was motivated by anger with the ATF when he

attended this May's gathering, posing as an Alabama police officer.

"I wasn't even thinking about Waco when I went in there," Randall said in a telephone interview. "I thought I would expose it because they keep saying militias are racist. We're 10 percent black. I wanted to expose who was racist first."

Randall said that when he arrived at the gathering he discovered a number of white agents who were angry about the presence of black agents, apparently for the first time. "There were a lot of racist T-shirts being sold," he added.

While he declined to identify individuals attending the event, Rightmyer said attendees came from all over the country, from Georgia, Alabama, Tennessee, Kentucky, as well as from Canada.

Rightmyer joined the ATF in 1968 and for 13 years headed the Knoxville office before he was transferred to Greeneville, Tenn., in 1990.

Rightmyer said the roundup began as kind of an office party for agents in the Knoxville office in 1980. He chose a beautiful site on the banks of the Ocoee River, a popular tourist spot in southeastern Tennessee where the Olympic whitewater canoeing competition will be held in 1996.

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# Several D.C. Officers Allegedly Attended Party

By Hamil R. Harris  
and Avis Thomas-Lester  
Washington Post Staff Writers

Within a few years, the event had ballooned to more than 300 people, with only a small fraction from ATF and other Treasury Department agencies. Rightmyer said he began renting a private campsite and began charging \$100 a person for those who wanted to raft. The price tag included a cap, T-shirt, standard meals of seafood gumbo and rib-eye steaks and "all the beer you could drink," he said.

Giving an interview today in a downtown Knoxville law office, about 30 miles from his home, Rightmyer, 53, described a boisterous annual party that involved volleyball matches of overweight law enforcement officials, baseball caps emblazoned with the letters MOB (for Mean Old Bastards), beer-drinking competitions and skits involving nominations for "Redneck of the Year."

Only once, he said, did the skit go over the line, with one person wearing a white sheet like the Ku Klux Klan leading around someone else, in black face.

"It was in bad taste and in poor humor," he said. "If my memory serves me right, it was their first year there and they were trying to impress people. And they were not impressing."

*Staff writer Ruben Castaneda contributed to this report.*

District police officials are investigating whether several D.C. officers attended an annual party for law enforcement officers in the Tennessee mountains where several racist incidents occurred.

Acting on complaints from officers who said they recognized colleagues in videotapes taken at the "Good Ol' Boy Roundup," the department's internal affairs division is checking leave records of officers who allegedly attended the event May 18 and 19 in Polk County, Tenn.

"I'm surprised and very disappointed if they were there," said Acting Police Chief Larry Soulsby, who ordered the investigation. "That type of behavior should have been left behind 50 or 100 years ago. To know that law enforcement officers could be involved in something like that is very disappointing."

Internal affairs investigators reviewed the video yesterday and are checking reports that D.C. officers participated in the annual party as far back as 1990.

"This is apparently something that officers have been going to for a number of years," said a source familiar with the investigation who spoke on the condition that he not be identified. "We're checking leave records to determine who was on leave during the week that this thing occurs. That will be easy enough. We're going to hit this hard."

Three officers allegedly were recognized in the video, and the names of three others have surfaced in connection with the event. Three of the officers contacted last night denied having been in Tennessee for the party.

One of those was Officer Marcello Muzzatti, the chief shop steward for the police union in the 5th District.

"I talked to JC Stamps [head of the union local], and he said, 'Do you know your name came up on this Good Ol' Boy thing?'" Muzzatti, 37, said. "But I can tell you that I have never been down there. I think that somebody might have gotten a roster of people who were in 5D vice at the time, and I was [in vice] then . . . Some of the people who went to the roundup are people I used to associate with."

Muzzatti, who left the vice unit in August 1991, said it was "common knowledge in 5D vice that officers attended" the roundup.

The roundups, which Muzzatti said coincide with a spring week set

aside to commemorate police heroism, drew officers interested in "getting together with other officers," he said.

"I know even some black officers who said they were invited," Muzzatti said. "The [white] officers I knew who went down there didn't understand what was going on. The problem was when they went back a second and third time, that's what the black officers can't understand. . . . I saw the signs [with racist slogans]; even if it was done as a joke, it was wrong."

The party is organized by a retired agent of the Bureau of Alcohol, Tobacco and Firearms and has grown to include as many as 300 federal and local officers, virtually all of them white. A video taken at the event by members of a militia group has been broadcast repeatedly since last week.

Among the items distributed at the roundup were T-shirts that show police officers with two black men bent over a blue and white police cruiser under the slogan "Boyz on the Hood."

Internal affairs officers are trying to locate one of those T-shirts because some officers say the vehicle pictured on the shirt is a D.C. police car. Similar shirts stirred a controversy in 1991 when they were sold at a Prince George's County store that sells equipment to police officers in the area.

Soulsby said last night that there is no room for racism in the department and that any officers who participated in racist acts will face disciplinary action. "I am not tolerating this," he said.

Union chief Stamps, when asked if he believes D.C. officers participated in the event, said, "I hope not. . . . We are just now coming around in building our morale back after the pay cut. We've had enough morale busters. This would only make it worse for our members to know that some of our members would participate in a roundup of that nature. It would only serve to divide us more."

"This is appalling," said Lt. Lowell Duckett, president of the D.C. Black Police Caucus and a frequent critic of the department. "These are police officers who have taken an oath of office to protect and serve the community regardless of race, creed or color."

*Staff writer Ruben Castaneda contributed to this report.*

**Affirmative Action****TEXAS-BASED CONTRACTING ASSOCIATION OFFERS MINORITY SET-ASIDE ALTERNATIVE**

A Texas-based organization developed to assist small, minority and women contractors gain access to public work construction projects without the aid of set-asides plans to expand nationally, organization officials announced at a July 19 briefing sponsored by the Center for Equal Opportunity.

Initiated two years ago, the non-profit National Council of Contractors Association is a public/private partnership that provides a "race neutral, proactive alternative to traditional affirmative action programs," said Dwight Nichols, NCCA managing director and chief executive officer. "With the

recent Supreme Court decision and the debate over affirmative action intensifying, NCCA's proven, non-race-based solutions are becoming increasingly important," he said.

The NCCA trains and provides technical assistance to small contractors to enable them to obtain surety bonds so they can compete for government and private contracts. In addition, the program offers construction management and field assistance to ensure the successful completion of projects.

In the past two years, the program has issued a total of 171 bid, payment, and performance bonds—worth an estimated \$31,501,317 million—and has increased minority participation in Austin's Capital Improvement Projects by more than 600 percent without the use of set-asides, Nichols said.

Moreover, the NCCA maintains that although it is a "race neutral" program, 85 percent of the contractors serviced were minority contractors, according to Stacy Taylor, chairman and CEO of the Standard Group of Companies, a national surety bond company.

Since NCCA's inception, minority and women-owned contractor participation in Austin has increased more than 20 percent, Taylor added.

**Public/Private Partnership**

Banks, bonding companies, and other members of the private sector contribute the financial resources and management experience to the NCCA, Nichols said. "We provide an atmosphere that encourages the private sector to get involved," he emphasized, adding that the private sector, not the government, should be securing these bonds.

Taylor also contended that the program cost is offset by lower bids generated through increased competitiveness provided by a larger pool of qualified contractors able to bid on city projects. He noted that to date, hard dollar savings to the Austin community has amounted to \$1,011,649, and expects other cities that participate in this program would completely recoup their investments within three years. "This program is set to be a trend," he predicted.

—By Tessa Gelbman

**Sex Discrimination****CLASS ACTION ALLEGES PUBLIX GROCERY CHAIN DENIES OPPORTUNITIES FOR FEMALE EMPLOYEES**

Eight female current and former employees of Publix Super Markets Inc. filed a class action suit July 19 claiming that the grocery chain has systematically discriminated against female employees in

its stores in Florida, South Carolina, and Georgia and retaliated against women who protest unequal treatment (*Shores v. Publix Super Markets Inc.*, DC MFla, No. 95-1162-CIV-T-17E, 7/19/95).

The suit, filed in the U.S. District Court for the Middle District of Florida, alleges that women were denied equal pay, desirable job assignments, promotions, and management opportunities.

The company denied the allegations, pointing out that the Equal Employment Opportunity Commission has made no findings that Publix has engaged in unlawful sex discrimination. "Never in Publix' history has the EEOC found reasonable cause to believe that Publix had engaged in unlawful gender discrimination," Jennifer Bush, a Publix spokeswoman, said in a statement. This record "indicates that the claims of these eight individuals are contrary to Publix' belief and practice," Bush said, adding that Publix "has a strong commitment to fair hiring and promotion, and has programs in place to reinforce that commitment."

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**Segregated Job System Alleged**

The named plaintiffs, six former and two current employees, alleged that Publix segregates its jobs according to sex. Women are hired for lower paying cashier and clerk positions with no hope of advancement, while men are hired into or assigned to higher-paying positions or placed on a career track, according to the plaintiffs.

The plaintiffs claimed that Publix lacks a system for announcing job opportunities within its stores and that prevents women from applying for promotions. The company discourages and deters women from applying for desirable assignments, promotions, and management positions, according to the plaintiffs. Decisions related to hiring, pay, job assignments, training, and promotions are made by a nearly all-male managerial staff using gender-biased and/or arbitrary criteria, according to the suit.

Publix has failed to take reasonable and adequate steps to eliminate the effects of its past discriminatory policy and pattern or practice, the plaintiffs' suit charges. The 70-page complaint alleges violations of Title VII of the 1964 Civil Rights Act and Florida law.

The plaintiffs' attorneys have set up a toll-free telephone number for current and former Publix employees and other people who may have information about discriminatory employment practices. Plaintiffs' attorney Barry Goldstein of Oakland, Calif., said that while there are limits on contact between plaintiffs' counsel and potential class members, he will ask the court for permission to communicate with the class members within the next week.

While 90 percent of Publix supermarkets are located in Florida, the supermarket chain also operates stores in Georgia and South Carolina, according to Goldstein. He estimated that Publix currently has 45,000 female employees. If certified by the district court, the class could ultimately include 100,000 current and former employees, and job applicants, according to Goldstein.

**Publix' 'Good Faith Effort'**

"Publix made a good faith effort to share with the plaintiffs' lawyers extensive factual information showing that there is no basis for the eight plaintiffs' allegations," said Charles Shanor, a former EEOC general counsel now in Atlanta who has provided counsel to Publix for the last two years.

The plaintiffs "are attempting to escalate eight diverse, unrelated, and individualized complaints about various local store employees into a class action covering nearly 500 supermarket locations. That is preposterous," he said.

Filing of the class action comes about two weeks after a federal district court approved a consent order in which Publix agreed to turn over to EEOC employment records regarding the chain's hiring and promotion practices. The subpoena action was part of an ongoing EEOC investigation of the supermarket chain. In March 1992, an EEOC commissioner's charge alleged that Publix discriminates against women in its stores across Florida. EEOC has not yet determined whether there is reasonable cause to believe that Publix has violated Title VII.

According to Goldstein, the private class action relates to the EEOC investigation in that the allegations in the class complaint are similar to those in the commissioner's charge. Goldstein does not have access to EEOC's investigation, however, he said that information has been described in the enforcement actions. Goldstein believes that the filing of a commissioner's charge adds support to the allegations in the complaint.

In December 1994, the United Food and Commercial Workers had mailed more than 300,000 postcards to women in Florida urging them to boycott Publix based on union charges that the chain fails to promote women to management jobs (239 DLR A-6, 12/15/94). Publix employees are not represented by a union.

MIAMI HERALD  
7/19/95

THE WALL STREET JOURNAL THURSDAY, JULY 20, 1995

## Publix Faces Gender Suit

A group of female workers charged that Publix Super Markets Inc., Florida's largest private employer, routinely denied female employees "desirable job assignments, promotions and management opportunities."

The suit, filed yesterday in U.S. District Court in Tampa, Fla., by eight current and former employees, alleges that Publix, with 45,000 women among its 93,000 employees, segregates jobs according to gender and keeps women out of management positions.

The plaintiffs are seeking to have the suit certified as a class action. If the court approves the request, the lawsuit could rank among the largest gender-discrimination suits on record in terms of the number of plaintiffs, attorneys said.

Publix, the seventh-largest grocery store chain in the U.S. with \$7.6 billion in sales, denied the allegations and said in a statement that it was committed to fair promotion practices.

Darlene Sarmiento, one of the plaintiffs, says she tried to get out of a cashier's job into a position stocking shelves, which can lead to management. But she says a male supervisor told her women were incapable of working in a supervisory position, adding that "women are good for having sex and that's about it."

In the past two years, four grocery store chains have paid millions of dollars to settle lawsuits alleging gender discrimination. The largest settlement to date was made last year when American Stores Co. agreed to pay \$107 million to 20,000 women to settle a sex-discrimination suit filed against the Northern California unit of its Lucky Stores supermarket chain.

## Expecting suit, Publix denies it discriminates

By SUSANA BARCIELA  
Herald Business Writer

Saying it will be sued today by eight employees, Publix Super Markets denied Tuesday that it discriminates against women in its hiring and promotion practices.

Publix attorneys have been informed that a class-action lawsuit will be filed against the company in federal court in Tampa, said Jennifer Bush, Publix spokeswoman.

"Publix is committed to fair promotion practices and any lawsuit that sug-

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*The EEOC has been investigating allegations of discrimination at Publix for at least three years.*

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gests otherwise is out of touch with reality," Bush said. She said she had not seen the lawsuit.

Publix employs about 95,000 people chainwide. With most of its 470 stores in Florida, it is the biggest private employer in the state.

The Equal Employment Opportunity Commission, which enforces federal employment laws, has been investigating allegations of discrimination at Publix for at least three years. It is one of the broadest such probes by the EEOC in Florida.

"There has been no finding to this point and we are certainly eager for that investigation to be over," Bush said.

She said women and minorities now make up 30 percent of Publix management, which is double the figure in 1987. She did not have figures for women alone, in management or in the total Publix staff.

**Taxes****CLINTON'S AFFIRMATIVE ACTION REVIEW  
DEFENDS FCC TAX CERTIFICATE PROGRAM**

President Clinton made a strong defense July 19 in his affirmative action report for a tax certificate program run by the Federal Communications Commission to promote minority ownership of broadcast facilities, despite the fact that Congress repealed the program last spring as part of a bill that Clinton signed into law.

Asked about the program at a press briefing July 19, presidential adviser George Stephanopoulos said Clinton signed the bill "with some reluctance." Stephanopoulos added that the president "doesn't want to rule out the possibility that you could be doing more to make sure you get a diversity of voices in the broadcasting area."

However, Clinton has no immediate plans to redress the situation, Stephanopoulos said. He added that it was highly unlikely that the administration could reform something that was already repealed.

Congress repealed the FCC's tax certificate policy, carried out under Section 1071 of the Internal Revenue Code, in April. The repeal was included in a bill (HR 831), which made permanent the 25 percent health deduction for self-employed workers. The repeal of FCC's tax certificate policy was proposed as a revenue offset for the bill.

**Bill Raised Cries Of Racism**

The proposal to repeal the FCC program raised cries of racism among many Democratic members, who charged that the repeal was the first step by the GOP in its attack on all affirmative action programs. Many Democrats suggested that the program be modified rather than be repealed outright.

But many Republicans, including House Ways and Means Committee Chairman Bill Archer (R-Texas), opposed modification, saying that the tax code should be "color blind" and not have preferences for any particular group or race. They further claimed that the program was riddled with abuse.

When he signed the bill into law, Clinton said he had many problems with the measure, including the repeal of the FCC tax certificate program. Clinton said he decided to sign the bill, however, because of its importance to 3.2 million self-employed workers and their families.

In his review of affirmative action programs, Clinton said the repeal is significant because the FCC believes that the program "was by far the best method to increase minority ownership of broadcast, cable, and satellite stations, and thereby achieve diversified programming." Because of the

lack of access to capital, minorities have been prevented from owning broadcast stations, the report added.

The report further stated that the majority of tax certificates has been used to acquire small radio and television stations. "FCC believes that the program has not been abused, either through the use of sham minority-controlled companies, or through the rapid flipping of licenses by new minority owners," it said.

The question of minority ownership of broadcast, cable, and satellite stations will be important in the future, the report said, because technology in this industry is rapidly changing, "transforming the meaning of broadcast," the report said.

"Congress, the administration, and the FCC will have to address the issue of whether the current station owners will simply be allowed to transfer their ownership and control to the new technology, and thereby largely retain the current ratios of ownership, or whether an entirely new system should be adopted that would open the market to a broadening of opportunity and participation," the report concluded.

# English-language amendment aimed at HUD's harassment

By Joyce Price  
THE WASHINGTON TIMES

An amendment to a bill the House Appropriations Committee has sent to the floor would block the Department of Housing and Urban Development from harassing or investigating any state or local government that enacts a law making English its official language.

Rep. Joe Knollenberg, Michigan Republican, said the amendment is intended to prevent a recurrence of what happened in Allentown, Pa., earlier this year, when HUD was looking into a law making English the official language of the city government.

Mr. Knollenberg "feels very strongly in these tight budget times that HUD should not be using funds for investigations like that," said Trent Wisecup, a spokesman for the congressman.

He added that Mr. Knollenberg "is very confident the language will be kept in the bill" by the full House, which is expected to vote on the HUD appropriations measure Tuesday.

"We always expect a struggle in the Senate ... but this is an issue

supported by 98 percent of the people," said Jim Boulet Jr., executive director of English First, a group that opposes bilingual education and backs efforts to make English the official language of the federal government.

Mr. Boulet said the HUD appropriations amendment followed English First's request to the Appropriations Committee that it investigate the Allentown episode.

"Thanks to the Knollenberg Amendment, HUD can no longer terrorize state and local governments that pass official-English laws," Mr. Boulet said. "HUD thought it could repeal official-English laws. The Knollenberg amendment will keep Secretary [Henry] Cisneros and his successors from abusing their power."

It was Mr. Cisneros who triggered the Allentown investigation. He was in Allentown last fall, and a Hispanic-American woman voiced concerns about the ordinance. Mr. Cisneros immediately turned to HUD's general counsel, who was traveling with him, and asked him to look into it.

Within weeks, Allentown officials began receiving threatening letters from a regional HUD of-

ficial in Philadelphia demanding that city leaders meet with HUD to answer questions about the English law.

Asked about the Knollenberg amendment yesterday, a HUD spokesman indicated it was of no consequence.

"HUD has not investigated English-only ordinances anyway," said William Connelly, who cited a letter Mr. Cisneros sent to Rep. Toby Roth, Wisconsin Republican, in May.

In the letter, Mr. Cisneros said HUD "did not embark on a formal investigation" of the Allentown ordinance.

What it did, he said, was make a "routine inquiry" into the ordinance.

Mr. Cisneros said enactment of an "English only" ordinance "in and of itself would not necessarily constitute a violation of Title VI." But, he said a federal probe of such a law "might be warranted" if the law interferes with HUD programs by prohibiting the use of bilingual documents HUD might require or if the measure was passed to "intentionally deprive" housing to protected groups.

## Judge throws out race, gender quotas

WEST PALM BEACH, Fla. — A state law allocating seats for women and minorities on judicial nomination panels is unconstitutional, a judge here has ruled in a decision that mirrors the prevailing political mood against preferential treatment based on race.

The decision, from U.S. District Judge Kenneth Ryskamp, calls into question the premise behind the Florida law — that it is necessary to promote diversity in Florida's judiciary.

That premise, Judge Ryskamp said, "rests on pure speculation and unfounded presumptions" since judicial nominating commissions do not themselves appoint judges but only recommend appointments to the governor.

"It is difficult to see how the statutory race and gender quota in question advances its intended goals with any degree of precision or certainty," Judge Ryskamp wrote July 7 in a ruling barring enforcement of the state law in a case brought by a Jupiter, Fla., lawyer.

# Calif. to vote on race-based college entry

By Gale Holland  
USA TODAY

SAN FRANCISCO — Jeff Prieto was in a Hispanic gang in Santa Barbara when he was recruited into one of the University of California's early affirmative action programs.

He split life between his neighborhood streets and the UC-Santa Barbara campus overlooking the Pacific Ocean.

He hung on and eventually graduated from UCLA law school. Now he's off to Princeton to study public policy.

Prieto, 34, says: "It's sad I may be the last one."

University regents decide today whether to scuttle affirmative action programs, a decision many think could spark a nationwide rollback of race and sex preferences in admissions and hiring that date to the 1960s.

Gov. Pete Wilson is leading the charge: He has made turning back affirmative action preferences the keynote of his Republican presidential bid.

He says he has enough votes from the Republican-dominated board. Others say it's too close to call.

Jesse Jackson will lead protests against the plan despite Wilson's pledge of arrests. "We hope we'll be spared from having to face a jail cell," he said Wednesday. "But if the regents refuse to uphold the law, we are willing."

University officials and educators see the proposal as a step toward chaos.

"If the University of California really walks away from a commitment to diversity... I think that is a very negative signal for the rest of higher education," said C. Peter Magrath, president of the National Association of State Universities and Land Grant Colleges.

California was one of the first states to adopt affirmative action in the late 1960s, when the students were almost all white. The state set up admissions standards that made race a key factor.

That standard was stricken by the U.S. Supreme Court in 1978, ruling in a "reverse-discrimination" suit by medical school applicant Alan Bakke.

Regents rewrote the rules to make race only one factor. Others: socioeconomic status, rural residency, athletic or other talents and physical handicaps.

Up to 60% of students in the nine-school system get special consideration.

The result: a diverse student body. This shift occurred as the system locked a Top 20 academic ranking.

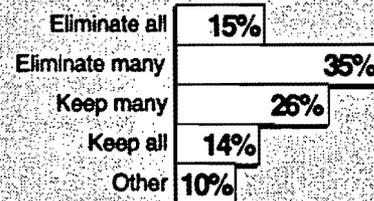
Competition is so fierce at Berkeley and UCLA — the elite campuses — that



By Robert Hanashiro, USA TODAY  
**LAW SCHOOL GRADUATE:** Jeff Prieto, 34, credits affirmative action

## Affirmative action programs opposed

Half of Californians say the federal government should eliminate all or many affirmative action programs, says a USA TODAY/CNN/Gallup Poll taken before President Clinton's speech.



Source: A USA TODAY/CNN/Gallup poll July 7-9 of 326 adults in California.  
Margin of error: ± 6 percentage points.

By Genevieve Lynn, USA TODAY

thousands of applicants with 4.0 grade point averages are turned away.

Officials and affirmative action supporters say conservatives are scapegoating minorities because whites are getting squeezed out at the top schools.

Nonsense, says regent Ward Connerly. Racial preferences are as degrading as the segregated drinking fountains he faced as a youth in Louisiana.

Arrayed against Connerly are most top university officials, who say pure merit-based admissions are a myth.

At Berkeley and UCLA, unease about affirmative action bubbles.

"We still need it," says Berkeley student Benjamin Valenzuela, 19. "I think it's as segregated as ever."

But Berkeley economics major Mark Gervase, 20, says affirmative action is detrimental. "The feeling is maybe academic qualities are slipping."

\$12.5 billion dispensed so far.

The amendment would prohibit any federal employee from disbursing funds from the economic stabilization fund to help the economy of another country.

The multibillion dollar fund was used by the Clinton administration to finance the U.S. portion of the Mexican bailout.

Sanders said that the amendment would make sure that for fiscal 1996 no funds would be disbursed from the fund without the approval of Congress. "That's the way it should be," he added.

Sanders and others were furious earlier this year when the Republican leadership did not have a floor vote on the Clinton plan for Mexico.

In other action, members rejected an attempt to allow federal employees to purchase health insurance that includes abortion coverage. The bill would prohibit such policies.

Steny H. Hoyer, D-Md., ranking Democrat on the Treasury-Postal Service Appropriations Subcommittee, offered an amendment that would have stripped that prohibition from the bill. The amendment failed, 188-235.

Supporters of the amendment argued it was unfair to federal employees to restrict their health insurance benefits. "This is not about abortion," said Nancy L. Johnson, R-Conn. "This is about equality."

But anti-abortion activist Christopher H. Smith, R-N.J., responded that the federal government should not be "subsidizing the dismemberment of babies."

Members overwhelmingly rejected, 111-317, an amendment that would prevent any employee of the Bureau of Alcohol, Tobacco and Firearms from getting a raise or a bonus during fiscal 1996.

• **Agriculture spending.** At press time, the House had begun consideration of the fiscal 1996 spending bill (HR 1976) for agriculture programs.

**SENATE FLOOR**

**DOLE PONDER'S CLINTON'S PLEA FOR A DELAY ON BOSNIA VOTE**

Senate Majority Leader Bob Dole last night said he was "inclined" to delay until next week legislation to breach the United Nations arms embargo on Bosnia.

Dole, Kan., said President Clinton, in a lengthy telephone call, urged him to delay action on an embargo bill at least until after a high-level meeting next week by NATO leaders who are seeking a new policy to protect Bosnian Muslims from Serb attacks.

Last night, Dole said he would make a final decision this morning whether to delay work on the bill. But he appeared

**Democrats Praise Clinton's Plan**

**GOP Vows to Scale Back Affirmative Action**

Republicans in Congress said yesterday they will press ahead with efforts to weaken, if not eliminate outright, the range of federal affirmative action programs that were defended yesterday by President Clinton.

In a speech at the National Archives where he formally unveiled his administration's review of all government affirmative action programs, the president rejected calls that they should be dismantled. He said such programs do not discriminate against white men and are needed "to open the doors of education, employment and business development opportunities to qualified individuals who happen to be members of groups that have experienced longstanding and persistent discrimination."

"We should have a simple slogan: Mend it, but don't end it," Clinton said of government affirmative action programs, which the Supreme Court ruled last month should survive only if they can withstand "strict scrutiny" by judges looking for a "compelling government interest."

Clinton insisted that the job of eliminating barriers to equal opportunity is incomplete, and he said in a memorandum to federal officials, "The federal government will continue to support lawful consideration of race, ethnicity, and gender under programs that are flexible, realistic, subject to re-evaluation and fair."

**GOP Readies Legislation**

While acknowledging that "the evils of discrimination and racism persist," Senate Majority Leader Bob Dole, Kan., said he no longer supports affirmative action programs as the means to combat them. "Discrimination is wrong. And preferential treatment is wrong, too," he said.

Dole promised to offer legislation next week "designed to get the federal government out of the group-preference business."

Sen. Phil Gramm, R-Texas, and Rep. Gary A. Franks, R-Conn., said they would launch their effort next week to try to prohibit set-asides in future federal contract awards by attempting to attach amendments to fiscal 1996 appropriations bills. Franks said his first target would be the defense spending bill.

In the House, Republican leaders have apparently concluded that they are not going to push sweeping legislation this year that would end affirmative action programs.

**Backing for Clinton**

Clinton's female and minority-group allies were reassured by his stance. Members of the Congressional Black Caucus cheered the president's speech, with Rep. Kweisi Mfume, D-Md., saying that those who favor preferences have "the best quarterback, the president of the United States."

At a news conference by female lawmakers, Del. Eleanor Holmes Norton, D-D.C., said Clinton "has guts" for resisting political pressure to abandon or muddle his affirmative action views.

Clinton, who ordered an executive branch review of affirmative action programs in February, directed all departments and agencies to eliminate or overhaul any program that "creates a quota, creates preferences for unqualified individuals, creates reverse discrimination or continues even after its equal opportunity purposes have been achieved."

**Gore's 'Empowerment' Project**

The 100-page White House report released before Clinton's speech also called for the establishment of a Community Empowerment Board chaired by Vice President Al Gore to develop a set-aside program to target contracts to small companies — regardless of the race or sex of their owners — that locate in poor communities.

That proposal was designed to counter calls by House GOP leaders for an "empowerment" initiative to replace race- and gender-based affirmative action.

In a jab at Republicans, Clinton said, "There are a lot of people who oppose affirmative action today who supported it for a very long time." He said, "It is simply wrong to play politics with the issue of affirmative action and divide our country at a time when, if we're going to really change things, we have to be united."

ready to accept Clinton's plea.

The bill (S 21) would require Clinton to terminate the three-year-old U.N. embargo on combatants in the former Yugoslavia with the goal of aiding the outgunned Muslim-led forces.

Supporters of the bill say the international peacekeeping effort has been a failure and Bosnians have been left defenseless against Serbian advances, even into U.N. "safe areas".

"There are no perfect options. There are no easy answers," said Dole. "We know what has not worked — relying on the U.N. forces to protect the Bosnians."

**SENATE FLOOR**

**DOLE SAYS 'I'M FINISHED' WITH EFFORTS TO SAVE RESCISSIONS BILL**

The Senate last night failed in attempts to clear a path for final action today on a stalled \$16.3 billion rescissions package. A frustrated Majority Leader Bob Dole, Kan., said, "I'm finished with this bill."

The measure (HR 1944) has been held up at the insistence of Paul Wellstone, D-Minn., who has been holding out for action on amendments.

Minority Leader Tom Daschle, S.D., objected to a proposal by Dole that would have allowed brief debate last night and today and votes on two Democratic amendments before a vote on final passage. Daschle, who supports the bill, objected on behalf of the absent Wellstone.

Wellstone was seeking restoration of about \$320 million in proposed cuts for low-income energy assistance (LIHEAP) for cold-weather states. He is also seeking restoration of cuts proposed for job retraining programs.

Dole had agreed to allow votes on amendments to restore funds on those two items, but Wellstone last night insisted on being able to offer a third amendment to restore \$5.5 million for a health care counseling program for the elderly.

Outside the chamber, Dole told reporters that he had not entirely ruled out another agreement on the rescissions bill, but he considered the possibility dim.

The measure (HR 1944) also includes funds for California, Oklahoma and about three dozen other states that are recovering from disasters.

**SENATE FLOOR**

**REPUBLICANS SEE PROGRESS ON STALLED REGULATORY BILL**

Key Republicans last night said the Senate may be near to ending the impasse that has sidetracked a bill to overhaul the federal regulatory process.

"Some common ground" was reached

yesterday, said Majority Leader Bob Dole, Kan. He said he hoped an agreement could be reached to wrap up work on the measure today or tomorrow.

Judiciary Committee Chairman Orrin G. Hatch, R-Utah, said backers of the bill (S 343) were making concessions on several issues, including the degree to which regulations under existing laws would have to meet the bill's analytical requirements and the number of opportunities businesses and individuals would have to sue to overturn regulations.

Hatch and other aides also said ground was being given to members who want to delete a provision that would make it more difficult for the government to include substances on the Toxic Release Inventory, a list of chemicals about which businesses must inform the public when they are released into the environment.

Republicans have failed twice in efforts to invoke cloture and limit debate on the bill. Bill supporters are hoping they can assemble the votes to cut off debate by making some concessions. But it is a delicate balance: Some conservatives are cool to the idea of changing the judicial review and petition procedure sections.

**APPROPRIATIONS**

**MILITARY CONSTRUCTION SPENDING ADVANCES IN SENATE COMMITTEE**

The Senate Appropriations Committee yesterday approved, 24-0, an \$11.2 billion military construction bill for fiscal 1996 that provides funds for family housing, barracks and base closings.

The bill contains \$461 million more than President Clinton requested and \$18 million less than the House-passed version of the bill (HR 1817).

Conrad Burns, R-Mont., the chairman of the panel's Military Construction Subcommittee, said 38 percent of the bill will fund family housing, which the Pentagon has said is substandard and in need of replacement or wholesale renovation, and 35 percent would implement earlier base closing rounds.

As approved earlier by the Military Construction Subcommittee, the bill would deny the Air Force's request for money to build new quarters for generals and other officers, describing the proposal as extraneous at a time when the rank-and-file were living in insufficient housing.

The bill does increase funds for facilities for the National Guard and Reserve. The administration had requested \$182 million, and the legislation raises that total to \$452 million.

**APPROPRIATIONS**

**HOUSE PANEL INCREASES FUNDS FOR ANTI-CRIME INITIATIVES**

The House Appropriations Committee yesterday gave voice vote approval to a

draft \$27.6 billion fiscal 1996 spending bill for the departments of Commerce, Justice and State and the federal judiciary.

The committee agreed, without dissent and with little discussion, to add \$403 million in spending to the bill the subcommittee approved: \$243 million for anti-terrorism expenses, about half of what President Clinton had asked for earlier this week, and \$160 million from the crime trust fund for other anti-crime initiatives.

Even before the committee added the anti-crime money, the bill was more generous to Justice and judiciary programs than to programs under the departments of Commerce and State. The bill would substantially increase Justice Department funding, particularly for beefing up the border patrol and providing crime-fighting grants to state and local governments. The bill would cut funding for the Commerce Department by about 20 percent and for the State Department by almost 10 percent.

The panel defeated two amendments by Nita M. Lowey, D-N.Y., to increase spending for programs to combat violence against women.

The amendments, rejected by voice vote and 19-29, would have provided the added funding either within the pending bill or by shifting money to other parts of the budget. Subcommittee Chairman Harold Rogers, R-Ky., noted that the bill would triple funding under the panel's jurisdiction for domestic violence programs.

**LAW/JUDICIARY**

**WACO HEARINGS OPEN WITH VIVID TESTIMONY, PARTISAN RHETORIC**

Hearings by two House subcommittees investigating the assaults by federal law enforcement agents on the Branch Davidian compound near Waco, Texas, opened with a round of partisan bickering over whether the hearings had been tainted.

"I make no apology for seeking the truth," said the chairman for the day, Bill Zeff, R-N.H. "Let the chips fall where they may."

Zeliff, chairman of the Government Reform Subcommittee on National Security, and Bill McCollum, R-Fla., of the Judiciary Subcommittee on Crime, are expected to call as many as 90 witnesses.

But Democrats pressed their accusations that the hearings have been tainted, in particular by allegations that the National Rifle Association helped to plan them. "From the beginning, these hearings have had the odor of bias hanging over them," said Charles E. Schumer, D-N.Y. "And over the last week, we've discovered where that smell is coming from — the National Rifle Association."

# House Committee Meetings

Tenn.) of House Transportation and Infrastructure Committee will hold a hearing on relations between the U.S. and Japan on aviation issues.

9:30am 2187 Rayburn Bldg. **July 20**

Witnesses scheduled:

**PANEL:**

Frederick W. Smith - chairman, president, and chief executive officer, Federal Express Corp.; Gerald Greenwald - chairman and chief executive officer, United Airlines

**PANEL:**

Ed Stimpson - president, General Aviation Manufacturers Association; John W. Olcott - president, National Business Aircraft Association

## COURT CONSTRUCTION

Public Buildings and Economic Development Subcommittee (Chairman Gilchrest, R-Md.) of House Transportation and Infrastructure Committee will hold a hearing on the General Services Administration's federal courthouse construction program.

10am 2253 Rayburn Bldg. **July 20**

Witnesses scheduled:

Rep. Rick Lazio, R-N.Y.; Rep. Solomon P. Ortiz, D-Texas; Rep. Pete Peterson, D-Fla.; Robert Broomfield - Arizona District Judge; Thurmond Davies - acting deputy administrator, General Services Administration

## Ways & Means

### MEDICARE SOLVENCY & BUDGET RECONCILIATION

Health Subcommittee (Chairman Thomas, R-Calif.) of House Ways and Means Committee will hold hearings on the solvency of the Medicare system, the federal health care system for the elderly. The hearings will focus on proposals to secure the funds during this summer's budget reconciliation process. The Board of Trustees overseeing the Medicare funds recently projected that the Medicare system will run out of money by 2002.

10am 1100 Longworth Bldg. **July 20**

Witnesses scheduled:

**PANEL:**

Rep. Jim McDermott, D-Wash.; Rep. Jim McCrery, R-La.; Charles Stenholm, D-Texas; Pat Roberts, R-Kansas; Rep. Steve Gunderson, R-Wis.; Rep. Glen Poshard, D-Ill

**PANEL:**

Gov. Lawton Chiles, D-Fla.

**PANEL:**

Bruce Vladek - administrator, Health Care Financing Administration

**PANEL:**

Witnesses TBA: Health Industry Manufacturers Association; American College of Osteopathic Medicine, Stanford University; American Geriatrics Society

**PANEL:**

Witnesses TBA: Boston Teaching Hospitals; New York City Teaching Hospitals

**PANEL:**

Howard Hughes - Geisinger Health Systems; Glenn Nelson - Rural Policy Research Institute; Charlotte L. Hardt - member, Board of Trustees, National Rural Health Association

**PANEL:**

Witnesses TBA: National Association for Home Care; American Health Care Association; American Rehabilitation Association; National Hospice Organization

# NewsEvents

SCHEDULED TODAY

## HEALTH CARE FUNDING

National Health Council will sponsor a breakfast meeting to hear Senate Appropriations Committee Chairman Sen. Mark Hatfield, R-Ore., discuss the outlook for health funding.

8:30am Atrium Ballroom, Washington Court Hotel, 525 New Jersey Ave. N.W. **July 20**

Contact: Laura Smith at 202-785-3910

## FLAT TAX PROPOSALS

Citizens for a Sound Economy will sponsor a breakfast meeting with House Majority Leader Rep. Dick Armye, R-Texas, who will discuss his flat tax proposal.

8:30am B-318 Rayburn Bldg. **July 20**

Contact: 202-783-3870

## FDA RESTRICTIONS ON DRUG ADVERTISING

Washington Legal Foundation will sponsor a news conference to discuss Food and Drug Administration (FDA) restrictions on advertising by pharmaceutical companies.

9am 2000 Massachusetts Ave. N.W. **July 20**

Contact: Richard Samp at 202-588-0302

## AARP/MEDICARE CONFERENCE

The American Association of Retired Persons holds a conference to explore the long-term future of Medicare. First of two days.

9am Omni Shoreham, 2500 Calvert St. NW, Palladian Room **July 20**

Contact: Christine Kirby, 202-434-2560

**Highlight**

9:45am: Health Care Financing Administrator Bruce Vladek delivers remarks on "Medicare: Current Trends and Future Directions."

## AFL-CIO CONFERENCE

The AFL-CIO holds its 33rd annual national conference on community services. Fifth of final day.

9am Hyatt Regency Washington, 400 New Jersey Ave. NW **July 20**

Contact: Drew Von Bergen, 202-942-1553

**Highlight**

8:30pm: Rep. John Lewis, D-Ga., receives the Murray-Green-Meaney leadership award for his commitment to civil rights. Ballroom

## PUBLIC LANDS NEWS CONFERENCE

Actor/director Robert Redford comments on the release of a new report titled, "Selling Our Heritage: Congressional Plans for America's Public Lands" at a news conference sponsored by the National Resources Defense Council. NRDC Executive Director John Adams also attends.

9:30am National Press Club, 14th and F streets NW **July 20**

Contact: Diane Dulken, 202-783-7800 or the NPC, 202-662-7501

## POSTAL SERVICE LABOR/ MANAGEMENT PROBLEMS

Rep. Esteban Torres, D-Calif., and Rep. David Dreier, R-Calif., will hold a news conference to

discuss ongoing labor/management problems at the U.S. Postal Service, which have contributed to several recent violent incidents.

10:30am House Radio-TV Gallery (H-321) Capitol Bldg.

**July 20**

Contact: Roderic Young at 202-225-8256 (Torres); Brad Smith at 202-225-2305 (Dreier)

## REGULATORY REFORM NEWS CONFERENCE

The Competitive Enterprise Institute holds a news conference to present its analysis of the Senate regulatory reform bill. Participants include Steven Milloy, a risk assessment specialist.

10:30am National Press Club, 14th and F streets NW, West Room **July 20**

Contact: 202-331-1010

## LOBBYING DISCLOSURE

A group of lobbyists will hold background briefing session on the Lobbying Disclosure Act of 1995 (S 101).

11am SD-562 Dirksen Bldg. **July 20**

Contact: Deborah Lewis at 202-332-3224

## NORTHEAST INTERSTATE DAIRY COMPACT

Sen. James M. Jeffords, R-Vt., and Sen. Patrick J. Leahy, R-Vt., will hold a news conference to discuss legislation that would ratify action by six New England states to help give farmers and consumers fair and stable milk prices.

11:15am SD-138 Dirksen Bldg. **July 20**

Contact: Erik Smulson at 202-224-5141

## LABORERS/TRADE ZONES NEWS CONFERENCE

Women workers from Central America discuss the poor labor conditions in countries which have free trade zones with the United States at a news conference co-sponsored by House Minority Whip David Bonior, D-Mich., and Rep. Marcy Kaptur, D-Ohio.

3pm 2105 Rayburn Bldg. **July 20**

Contact: George Wilson, 202-225-4146

## MEDICARE RESTRUCTURING

Sen. Judd Gregg, R-N.H., will hold a news conference to discuss a draft proposal to revise and restructure Medicare.

3pm SR-392 Russell Bldg. **July 20**

Contact: Kristin Hyde at 202-224-3324

## AFFIRMATIVE ACTION FORUM

The Freedom Forum holds a forum discussion titled "Affirmative Action at a Crossroads: Reflections on Its Legacy." Representatives from the Department of Labor, the American Jewish Committee, the office of Federal Contract Compliance Programs and the Cato Institute will examine the issue just one day after President Clinton's announcement on the White House review of federal affirmative action programs.

7pm Freedom Forum, 1101 Wilson Blvd., Arlington, Va., 22nd floor **July 20**

Contact: Molly O'Connell, 703-284-2807

## House Future Meetings

### SUBCOMMITTEE MARKUP:

#### 1995 FARM BILL

Commodities Subcommittee (Chairman Barrett, R-Neb.) of House Agriculture Committee will mark up draft legislation that would reauthorize farm programs and subsidies for another five years.

Time TBA 1302 Longworth Bldg. date TBA  
Note: This markup was originally scheduled for June 27 through June 30.

## Appropriations 225-2771

### APPROPS FULL COMMITTEE MARKUP

House Appropriations Committee (Chairman Livingston, R-La.) will mark up pending legislation.

8:15am 2360 Rayburn Bldg. July 20

10am 2360 Rayburn Bldg. July 21

#### Agenda:

July 20

HR - - FY96 Labor/HHS Appropriations

July 21

HR - - FY96 Defense Appropriations

### SUBCOMMITTEE MARKUP:

#### FY96 D.C. APPROPRIATIONS

District of Columbia Subcommittee (Chairman Walsh, R-N.Y.) of House Appropriations Committee will mark up draft legislation making appropriations for programs under its jurisdiction.

Time and room TBA (TENTATIVELY MID-SEPTEMBER)

#### Agenda:

HR - - Fiscal 1996 D.C. Appropriations

## Banking & Financial Services 225-7502

### STATE & LOCAL

#### DEBT AND INVESTMENT

Capital Markets, Securities and Government Sponsored Enterprises Subcommittee (Chairman Baker, R-La.) of House Banking and Financial Services Committee will hold hearings on the way state and local governments handle debt issues and investments.

9:30am 2128 Rayburn Bldg. July 26, 27

### WHITewater

House Banking and Financial Services Committee (Chairman Leach, R-Iowa) will hold hearings on investments made in the late 1970s by the President and Mrs. Clinton in the Whitewater land development company. The investment is currently the subject of an investigation headed by and independent counsel.

Time TBA 2128 Rayburn Bldg. date TBA  
(WEEK OF AUGUST 7)

### REVISING HOUSING PROGRAMS

Housing and Community Opportunity Subcommittee (Chairman Lazio, R-N.Y.) of House Banking and Financial Services Committee will hold a hearing on revising federal housing programs.

Time TBA 2128 Rayburn Bldg. date TBA  
Note: This hearing was originally scheduled for June 6.

★ New listing

## Commerce

### UNDERGROUND STORAGE OF RADIOACTIVE WASTE

Energy and Power Subcommittee (Chairman Schaefer, R-Colo.) of House Commerce Committee will hold a hearing on the Waste Isolation Pilot Plant Land Withdrawal Amendment Act;

9:30am 2322 Rayburn Bldg. July 21

#### Agenda:

HR 1663 - A bill to amend the Waste Isolation Pilot Plant Land Withdrawal Act.

### PARKINSON'S DISEASE RESEARCH

Health and Environment Subcommittee (Chairman Bilirakis, R-Fla.) of House Commerce Committee will hold a hearing on the research in the causes of Parkinson's disease and other neurological disorders.

9:30am 2123 Rayburn Bldg. July 21

### CLEAN AIR ACT

#### AMENDMENTS REVIEW

Oversight and Investigations Subcommittee (Chairman Barton, R-Texas) of House Commerce Committee will continue hearings on the implementation and enforcement of amendments to the Clean Air Act of 1990.

10am 2325 Rayburn Bldg. July 21

#### Agenda & witnesses scheduled:

Hazardous air pollutants

Note: This hearing was originally scheduled for July 13.

### FUTURE OF MEDICARE

Health and Environment Subcommittee (Chairman Bilirakis, R-Fla.) of House Commerce Committee will hold hearings on the growth of the Medicare program, the federal health insurance plan for the elderly.

Time TBA 2123 Rayburn Bldg. July 25

### MEDICAID REVISIONS

Health and Environment Subcommittee (Chairman Bilirakis, R-Fla.) of House Commerce Committee will continue hearings on proposed changes to Medicaid, the health insurance program primarily for the poor whose costs are shared by federal and state governments.

Time TBA 2123 Rayburn Bldg. date TBA

### SUBCOMMITTEE MARKUP:

#### FCC REAUTHORIZATION

Telecommunications and Finance Subcommittee (Chairman Fields, R-Texas) of House Commerce Committee will mark up pending legislation.

Time TBA 2123 Rayburn Bldg. date TBA

#### Agenda:

HR 1869 - A bill to amend the Communications Act of 1934 to extend the authorizations of appropriations of the Federal Communications Commission, and for other purposes.

Note: This markup was originally scheduled for June 20.

## Economic & Educational Opportunities 225-4527

### EDUCATION DEPARTMENT REORGANIZATION

House Economic and Educational Opportunities

Committee (Chairman Goodling, R-Pa.) will continue hearings on the reorganization of the Department of Education.

Time TBA 2175 Rayburn Bldg. July 25

Note: This hearing was originally scheduled for July 11.

### NATIONAL LABOR RELATIONS BOARD

#### Field Hearing

Employer-Employee Relations Subcommittee (Chairman Fawell, R-Ill.) of House Economic and Educational Opportunities Committee will hold a field hearing on the National Labor Relations Board.

Time TBA Location TBA July 28

(TENTATIVE)

### MILWAUKEE SCHOOL CHOICE PROGRAM

#### Field Hearing

Oversight and Investigations Subcommittee (Chairman Hoekstra, R-Mich.) of House Economic and Educational Opportunities Committee will hold a field hearing on the Milwaukee school choice program.

Time TBA Milwaukee, Wis. July 28

(TENTATIVE)

### FULL COMMITTEE MARKUP

House Economic and Educational Opportunities Committee (Chairman Goodling, R-Pa.) will mark up pending legislation.

9:30am 2175 Rayburn Bldg. July 20

Time TBA 2175 Rayburn Bldg. date TBA

#### Agenda:

July 20

HR 1594 - A bill to place restrictions on the promotion by the Department of Labor and other federal agencies and instrumentalities of economically targeted investments in connection with employee benefit plans.

HR 1114 - A bill to authorize minors who are under the child labor provisions of the Fair Labor Standards Act of 1938 and who are under 18 years of age to load materials into balers and compactors that meet appropriate American National Standards Institute design safety standards.

HR 1225 - A bill to amend the Fair Standards Act of 1938 to exempt employees who perform certain court reporting duties from the compensatory time requirements applicable to certain public agencies, and for other purposes.

#### date TBA

HR - - A bill to amend the General Education Provisions Act to make a technical correction to the Family Education Privacy Act

HR - - A bill to amend the General Education Provisions Act to change the statute of limitations on the audit requirement

HR - - A bill to amend the Individuals with Disabilities Education Act to require publication of all policy memos in the Federal Register

Note: Markup of the three draft education bills originally on the agenda for July 20 has been postponed.

### ERISA ISSUES

Employer-Employee Relations Subcommittee (Chairman Fawell, R-Ill.) of House Economic and Educational Opportunities Committee will hold a hearing on pending legislation relating to employees' health-care coverage and the Employee Retirement Income Security Act of 1974 (known as ERISA).

Time TBA 2175 Rayburn Bldg. date TBA

#### Agenda:

HR 995 - A bill to amend the Employee Retirement Income Security Act of 1974 to provide new portability

■ Revised listing

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# The Agony of OPM

By Mike Causey  
Washington Post Staff Writer

If the Office of Personnel Management ever chooses a motto, it ought to be: "Will the last person out please turn off the lights?"—that is, if some other federal agency being reinvented isn't using it already.

The government's central personnel, policy, recruiting and examining agency, which has suffered three rounds of layoffs in less than three years, is braced for another reduction in force. If it happens, hundreds of workers could be out on the street by Oct. 1, the start of the fiscal year.

Contractors probably drool at the thought of picking up OPM's business, either by providing employment services or by training agencies to take over chores now handled by OPM. The House already has indicated that it wants contractors to handle retirement functions for agencies. What's happening at OPM is a preview for other agencies being whittled down by Congress.

To add insult to injury, there is a real chance of a government-wide shutdown in October if Congress and the White House deadlock on the budget for the coming fiscal year.

In the last two years, OPM's full-time work force has dropped 31 percent, to 3,824 workers. Officials hoped further downsizing could be stretched over the next two years to give agencies time to adjust, OPM time to find paying customers and workers a chance to retire or find other jobs.

But the Treasury, Postal Service, General Government appropriation bill passed by the House would cut OPM's allowance by \$26 million a year, starting in October. If the Senate goes along and it becomes law, that could mean major layoffs for OPM, which spends most of its money on payroll. OPM already has taken a bigger proportion of layoffs than any other federal agency. The House cutbacks could mean more job cuts and force agencies that use OPM for recruiting and testing to do those things for themselves.

The House bill supports OPM plans to privatize investigative services. But it directs OPM to

go slow and to have an independent study on the cost-effectiveness of such a move, as well as on its effect on civil service employees who are privatized.

## No 2 Percent Solution

Federal workers hoping for a waiver of the early-retirement penalty this year can forget it. The National Security Agency asked for authority to offer workers early retirement (without the 2 percent reduction for each year retirees are younger than 55) during a special 90-day early-out period. But the NSA request was rejected by the House civil service subcommittee. The Clinton administration also opposed the request on cost grounds.

## Departures

Logistics specialist Tony D'Ambrosio has retired from the Army Security Assistance Command after 47 years (20 in uniform) with Uncle Sam.

Joseph J. Boyle, one of Interior's top water resources budget specialists, has retired after 30 years with the government. That includes time with the Office of Management and Budget and the Army Corps of Engineers.

Bettye L. Wages is retiring today after 30 years' service. She is chief medical technologist at the National Institutes of Health's Hematology Service.

## Retirement-Minded

The Professional Managers Association says most managers it surveyed would retire immediately if offered early-retirement incentives, buyouts or both. Most respondents said they would leave early because of pending changes in the retirement system. Others said low morale, which they attributed to efforts to reinvent agencies, is the primary reason they would leave if somebody made them a decent offer.

Thursday, July 20, 1995

## FOR MORE INFORMATION

To post questions or comments for Mike Causey, see *Digital Ink*, The Post's on-line service. To learn about *Digital Ink*, call 1-800-510-5104, ext. 9000.

**Appropriations****HOUSE APPROPRIATORS INCREASE INS BUDGET  
LEVEL-FUND EEOC, CIVIL RIGHTS COMMISSION**

The House Appropriations Committee July 11 approved a budget that would give the Immigration and Naturalization Service a significant increase in the coming fiscal year. The committee recommended that both the Equal Employment Opportunity Commission and the Commission on Civil Rights receive level funding in fiscal 1997.

The committee recommended a total budget of \$3.1 billion for INS for fiscal year 1997. The funding amount is \$531 million more than the agency's fiscal 1996 level, and \$19 million over the amount requested by the Clinton administration, according to the committee (54 DLR C-4, 3/20/96).

Over 1,200 more personnel should be added at the borders, including border patrols, and adequate detention resources should be provided, the committee said.

The subcommittee on House Appropriations Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies approved the agencies' budget July 9 (133 DLR A-4, 7/11/96).

**Report Cites ADR At EEOC**

EEOC's plans to implement Alternative Dispute Resolution will reduce the commission's need for additional resources, the committee said in its report recommending the agency receive the same amount of funding as it received in fiscal 1996.

The committee recommended a funding level of \$233 million for fiscal 1997—\$35 million less than the administration's fiscal 1997 request of \$268 million.

The committee said it believes that implementing Alternative Dispute Resolution in EEOC's administrative process "to reduce its backlogs and provide mediation-based means to resolving cases" would "reduce the requirement for additional resources for the EEOC." The House and the Senate have passed measures that would reauthorize the use of alternative means of resolving disputes in the federal administrative process (108 DLR A-15, 6/5/96, 115 DLR A-8, 6/14/96).

**Commission On Civil Rights Budget**

The CCR would receive \$8,740,000 for fiscal 1997. The funding level is the same as fiscal 1996 and is \$2,660,000 less than the Clinton administration requested for fiscal 1997. The administration requested \$9.3 million, and expressed a "preference" for \$11.4 million (54 DLR C-4, 3/20/96).

The House Subcommittee on the Constitution and the Judiciary Committee, the authorizing committee, has requested that the commission's funding not be increased above the fiscal 1996 level until Congress takes action on reauthorizing the commission, according to the Appropriations Committee report.

The committee also cited the commission's hiring of 10 additional staffers despite the lower funding in fiscal 1996, to support the committee's belief that 1997 funding "should continue to be adequate to support the commission's requirements," according to the report. The committee said it continues to believe that the commission "can augment" resources for research-related tasks and fact-finding by using employees from the agencies that have expertise in civil rights and related matters.

**HILL NEWS** YESTERDAY

**APPROPRIATIONS**

**HOUSE PANEL APPROVES MEASURE FOR COMMERCE, JUSTICE, AND STATE**

The House Appropriations Committee yesterday approved, by voice vote, a \$29.5 billion spending bill for the departments of Commerce, Justice and State, the federal judiciary and related agencies.

The draft fiscal 1997 measure would increase spending for law enforcement programs, including initiatives to fight drugs, juvenile crime and illegal immigration. The 11th of the 13 fiscal 1997 appropriations measure to be approved by the House committee, the bill would provide \$1.1 billion more than fiscal 1996 spending but \$2.1 billion less than President Clinton's request.

It includes more than the president sought for the Drug Enforcement Administration (increased by \$173 million over the fiscal 1996 level), the Immigration and Naturalization Service (\$32 million over this year) and the Violence Against Women Act (\$22.5 million more than this year). The bill would maintain, at \$1.4 billion, Community Oriented Policing Services, the administration's initiative to help communities put more police on the streets.

But the bill would cut \$120 million from this year's Commerce Department allocation (to \$3.5 billion) and \$79 million from the State Department (to \$3.89 billion). It would chop the Legal Services Corporation budget nearly in half (to \$141 million).

- **Missile treaty.** The panel adopted a contentious amendment on negotiations to revise the Anti-Ballistic Missile treaty between the United States, Russia and other remnants of the former Soviet Union.

Proposed by Chairman Robert L. Livingston, R-La., the amendment would remove funding for the negotiation and implementation of any agreement unless President Clinton certifies he will submit substantive treaty changes for consideration by the Senate. Approved by a party-line vote of 26-21, the amendment was termed "veto bait" by the panel's ranking Democrat, David R. Obey, Wis.

The committee also adopted, by voice vote, an amendment to eliminate funding for TV Marti broadcasts to Cuba and to reallocate \$11 million to the Immigration and Naturalization Service for additional Border Patrol agents.

# SENATE Future Listings

**Appropriations** 224-3471

**FULL COMMITTEE MARKUP** ★  
Senate Appropriations Committee (Chairman Hatfield, R-Ore.) will mark up pending legislation.

2pm S-128 Capitol Bldg. **July 16, 18, 23**

Agenda:

**July 16**

S — - FY97 Energy and Water appropriations  
HR 3662 - A bill making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 1997, and for other purposes.

**July 18**

HR 3675 - A bill making appropriations for the Department of Transportation and related agencies for the fiscal year ending September 30, 1997, and for other purposes.

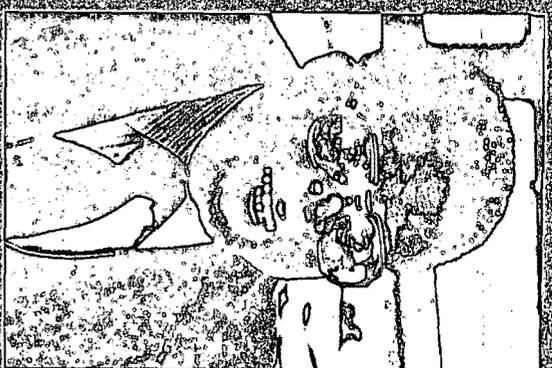
HR 3754 - A bill making appropriations for the legislative branch for the fiscal year ending September 30, 1997, and for other purposes.

**July 23**

HR — - FY97 Commerce, Justice, State and the Judiciary appropriations  
HR - - FY97 D.C. Appropriations  
HR 3755 - A bill making appropriations for the the Departments of Labor, Health and Human Services, and Education, and related agencies, for the fiscal year ending Sept. 30, 1997, and for other purposes.

★ *New Listing*

MIL RICHETS and THE REAGAN ADMINISTRATION



Norman C. Amaker is Professor of Law, Loyola University of Chicago. As a member of the legal staff of the NAACP Legal Defense Fund during the 1960s, he argued scores of civil rights cases before federal and state trial and appellate courts, including the United States Supreme Court. He has taught, written, and lectured extensively on this topic.

This is a measured and comprehensive view of the volatile civil rights record of the Reagan administration. Norman Amaker offers both the careful analysis and the clarifying insights that often have been missing from discussion of civil rights during this decade.

LEANOR HOLMES NORTON

Professor of Law  
Loyola University Law Center  
former Chair of Equal Employment Opportunities Commission

Professor Amaker, a veteran of the 1960's desegregation advance—progress we too proudly deemed permanent—here performs a painful penance by documenting a decade of retreat on virtually every civil rights front. His book inspires though, both by recounting the courageous resistance that prevented retreats from becoming routs and by reminding us that the struggle for racial justice can continue with or without the federal government's support.

ERRICK A. BELL, JR.

Professor of Law  
Harvard University School of Law

the best summary to date of extremely serious reversals of federal civil rights policy in the Reagan era.

ARY ORFIELD

Department of Political Science  
University of Chicago

Amaker CIVIL RIGHTS

599  
DUAL RIGHTS  
and THE REAGAN  
ADMINISTRATION

NORMAN C. AMAKER

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## THE EXECUTIVE ROLE IN CIVIL RIGHTS ENFORCEMENT FROM EISENHOWER TO CARTER

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"Don't judge us by what we say but by what we do,"<sup>1</sup> John M. Mitchell who was then attorney general responded to criticism of the Nixon administration's civil rights policies similar to those of President Reagan's. What governments, like individuals, do generally reveals more about what they are than what they say. But governments have responsibilities that individuals do not have and governments speak in ways that individuals cannot. Therefore, what government officials say (particularly when the official is president of the United States), as well as what they do, matters a great deal because it affects what is and is not done by other officials of the government. What Congress (and the Court) does or does not do and what the nation at large may perceive as the right thing to do may also matter.

Hence judgment of the record of successive administrations regarding civil rights enforcement is appropriate with respect to words as well as deeds, with respect to subtleties as well as overt declarations, and the choices that were not made when choice was possible as well as the choices actually made.

This chapter applies these measures to each administration from Dwight D. Eisenhower's to Jimmy Carter's. The record includes executive orders; appointments in the executive and judicial branches; agency actions; legislation proposed to Congress; action taken on legislation passed by Congress; suits filed and positions taken by the Justice Department in particular cases; and enforcement of court decisions and statements of positions taken by the president or subordinate officials with civil rights responsibilities through speeches, press conferences, or otherwise. In these ways, what previous administrations did and said can be judged to determine their views of appropriate public policy regarding civil rights enforcement and the consequences of those views for the nation.

**THE EISENHOWER ADMINISTRATION**

In 1953 Eisenhower succeeded President Harry S Truman, the first president who had attempted to initiate significant civil rights enforcement efforts at the federal level. Except for desegregation of the armed forces, Truman's attempts largely failed. Congress refused to adopt the civil rights legislation he proposed in 1948, which incorporated the recommendations of his Committee on Civil Rights' report for the adoption of a fair employment practices law, an antipoll tax measure, and an antilynch law. The committee's report remained, however, a blueprint for the future. In the meantime, President Truman took action within the executive branch that did not require congressional acquiescence. In addition to issuing the order that eventually resulted in desegregation of the military, he created a Fair Employment Practices Committee within the Civil Service Commission, in an effort to combat discrimination in federal employment,<sup>2</sup> and a Government Contract Compliance Committee to aid in enforcing President Franklin D. Roosevelt's 1941 executive order barring discrimination by government contractors.<sup>3</sup>

Before Eisenhower took office, he had told the Armed Services Committee of the Senate that a certain amount of segregation was necessary in the army,<sup>4</sup> reflecting the views of his generation as well as his own background and experience at the apex of an all-white military chain of command. At a press conference in late 1953, he expressed "doubt" that "civil rights legislation identified as such ... will come up."<sup>5</sup> Moreover, on more than one occasion he expressed the view that the only "cure for our racial difficulties" was in the hearts and minds of individual citizens,<sup>6</sup> not in "punitive or compulsory federal law."<sup>7</sup>

Among the earliest of Eisenhower's major judicial appointments as president was that of former California Republican governor, Earl Warren, to be chief justice of the United States. At a White House "stag" dinner early in 1954 after conclusion of the oral arguments in the *Brown* cases, Eisenhower, quite improperly, lobbied the chief justice to rule in favor of school segregation, echoing the segregationist argument that white girls should not be placed in the same classrooms as black boys. Eisenhower's impropriety was compounded by the fact that the lead attorney for the school segregation cause, John W. Davis, was present at the dinner.<sup>8</sup> After Warren wrote the *Brown* opinion, Eisenhower called the appointment "the biggest damn fool mistake I ever made."<sup>9</sup>

Despite Eisenhower's reluctance to use federal authority to advance civil rights, the historical tide nevertheless moved him in that direction. By the end of his first term, he had issued a statement taking "pride" in the desegregation of facilities used by civilian employees at naval installations in southern states,<sup>10</sup> had issued his own executive order establishing the President's Committee on Government Employment Practices to make the policy of equal opportunity in government employment effective (superseding Truman's order creating a Fair Employment Board),<sup>11</sup> and had widened the scope of the Government Contract Compliance Committee.<sup>12</sup> By the end of his second term, he had issued proclamations commanding that obstruction of school desegregation at Little Rock, Arkansas, cease; federalizing the Arkansas National Guard; and directing the use of U.S. Army personnel to enforce the orders.<sup>13</sup> He had also signed into law the century's first civil rights bills.

Another significant accomplishment during the Eisenhower administration (although the president could hardly have been aware of it at the time) was the appointment of several Republican federal judges whose decisions in civil rights cases during the late 1950s and the 1960s were to have a tremendous influence on the development of civil rights law.<sup>14</sup> By the time of his last State of the Union Address in January 1961, President Eisenhower summarized the civil rights progress of his administration as follows:

- The first consequential federal civil rights legislation in 85 years (the acts of 1957 and 1960) had been enacted.
- A new Civil Rights Division in the Department of Justice to enforce the new voting laws contained in the legislation had been established.
- Greater job opportunity had been provided under the President's Committees on Government Contracts and Government Employment Practices.
- A Civil Rights Commission had been created to survey discrimination in housing as well as in voting and education.
- All segregation had been abolished in the armed forces, veterans hospitals, and all federal employment, including employment in the District of Columbia.<sup>15</sup>

Thus President Eisenhower, despite his own predilections, had been compelled by events to mark a clear path for the government's enforcement effort. The first postwar Republican administration was constrained to build on the actions of the Truman administration, taking credit (as is the habit in politics) for the initial progress. The glow from the "torch passed to a new generation of Americans" at

President John F. Kennedy's inauguration in 1961 spurred the progress.

### THE KENNEDY ADMINISTRATION

In addition to the torch's glow, the Kennedy administration also felt the heat of what had become evident racial discord in the nation, heat which would eventually demand sustained intervention by the federal executive. The Brown decision and its aftermath had galvanized a people's crusade that would be known ever after as the Civil Rights Movement. Although common (but not universal) agreement fixes the beginning of the movement as the boycott of municipally owned buses in Montgomery, Alabama, led by Martin Luther King, Jr. in December 1955, clearly the movement peaked in the 1960s during the Kennedy and the Johnson years when widespread student-led sit-ins and massive protest demonstrations took place. The movement prompted the development of a clear cut national civil rights agenda which, for the first time since the first Reconstruction era, accorded civil rights enforcement by the executive a highly visible national priority.

Evidence of the growing priority occurred early in President Kennedy's term, for in March 1961 he issued an executive order combining the Committees on Government Contracts and Government Employment Practices into the President's Committee on Equal Employment Opportunity, with increased enforcement powers directed toward combating employment discrimination. The order appointed the vice president as chairman of the committee and directed the secretary of labor to implement equal employment practices in hiring federal employees and government contractors.<sup>16</sup> In the following month, President Kennedy sent a memorandum to all executive department and agency heads directing that no use be made of the name, facilities, sponsorship, or activities of any federal government executive department or agency in connection with any employee recreation organization that practiced racial discrimination. The memo required immediate and specific action to assure the result; a report of the action taken was to be made by 1 May 1961. The memo referred to the previously issued Executive Order (No. 10925) as reaffirming that discrimination "is contrary to constitutional principles" and that it is the policy of the executive branch to encourage "positive measures of equal opportunity for all

qualified persons within the government" (emphasis supplied).<sup>17</sup> Later in 1961, the president, by executive order, established the President's Commission on the Status of Women,<sup>18</sup> thus taking the federal government's first step toward remedies for sex discrimination. The commission's report became the basis for the the first piece of federal legislation on this subject, The Equal Pay Act of 1963, which addressed sex-based wage discrimination.

Just as the December 1961 presidential message and order on the status of women marked a new direction for the federal executive in this area, President Kennedy's Executive Order No. 11063, issued 20 November 1962, marked the beginning of the executive effort against discrimination in housing. In April 1962, the president had issued a brief statement on equal opportunity in housing in which he welcomed hearings then being conducted by the Commission on Civil Rights on the status of equal housing. Without waiting for the results of those hearings, Kennedy issued the housing order (promised during his campaign) directing federal agencies and departments to take steps to prevent discrimination in housing owned (in whole or in part) by the federal government or built with federal loans, grants, or other assistance. A President's Committee on Equal Opportunity in Housing was created and charged with the responsibility of coordinating departmental activities to implement the program. In addition, the Kennedy administration took steps in 1963 to stop discrimination in apprenticeship programs and construction programs allied to the federal government under contract or some form of federal assistance.<sup>19</sup>

As important as these initiatives were in expanding the federal role in civil rights protection, the most significant achievement of the Kennedy presidency in this area was its forthright and determined reaction to the era's highly visible civil rights struggles. Most notable were

- use of federal marshals and the federalizing of the national guard to secure the admission of James Meredith as the first known black student at the University of Mississippi in 1962
- use of federal force to quell the disturbance following bombings during civil rights demonstrations in Birmingham, Alabama, in May 1963
- use of federal marshals and the Alabama National Guard on the occasion of the desegregation of the University of Alabama in June 1963.

It might well be argued that any occupant of the White House during

this period would have been required to respond in much the same way; indeed, Eisenhower had taken similar action in Little Rock. But the difference was notable. The president's action was accompanied by an expression of unmistakable moral outrage that went beyond the pragmatic political Kennedy persona. The president "was eyeball-to-eyeball with the segregationists and there was fire in his eye."<sup>20</sup> Through his words as well as his deeds, he set a course for the nation as only a president can. In a radio and television address to the nation on 30 September 1962, when James Meredith entered "Ole Miss," Kennedy said:

Even though this Government had not originally been a party to the case, my responsibility as President was . . . inescapable. I accept it. My obligation under the Constitution and the statutes of the United States was and is to implement the orders of the court with whatever means are necessary. . . .<sup>21</sup>

Later, in a speech on 11 June 1963, when desegregation of the University of Alabama was accomplished, the president sought to rally the country behind the new, far-reaching civil rights legislation that he was about to propose, citing the "events in Birmingham and elsewhere" where "the fires of frustration and discord [were] burning. . . ." He declared that "we are confronted primarily with a moral issue" and posed the question:

If an American, because his skin is dark . . . cannot enjoy the full and free life which all of us want, then who among us would be content to have the color of his skin changed and stand in his place? Who among us would then be content with the counsels of patience and delay?<sup>22</sup>

Kennedy went on to say that the following week he would ask Congress "to make a commitment it has not fully made in this century."

On 19 June, he sent a message to Congress proposing enactment of the bill containing provisions for equal access to public accommodations and facilities, strengthened federal presence in desegregation of public schools, nondiscrimination in employment, nondiscrimination in the use of federal funds, and additional protection of voting rights.

Clearly, by the premature end of his presidency in November 1963, John Kennedy had established a civil rights agenda for the country with the clear moral leadership of the office pointing the way towards its fulfillment. Words and deeds were unequivocally allied. Three points, however, must be noted. First, of course, is the fact that the events—"the fires of discord"—generated by the civil

rights movement prodded the agenda. Second, the issues of right versus wrong were clear-cut; the "moral issue" in the president's words, was "as old as the Scriptures and . . . as clear as the American Constitution."<sup>23</sup> Even so, Kennedy made choices that could well have been made the other way, thus accepting executive responsibility and asserting presidential leadership. Third, black votes in several key states had provided the margin of difference in an extremely close presidential election, but it is doubtful that the overall Kennedy record can be explained solely on this basis. (The Kennedy record, by the way, contains some regrettable judicial appointments to the federal bench in the South.) Rather, historical and social forces combined with moral suasion and strong leadership to create the basis for sustained executive action in the following years.

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### *THE JOHNSON ADMINISTRATION*

Whatever John Kennedy might have accomplished in enforcing civil rights during a second term (and, given the record, there is every reason to believe it would have been considerable), there can be no question that the presidency of Lyndon Johnson exhibited the greatest amount of sustained executive leadership in this field in the nation's history. During the period from his succession in November 1963 to his departure in January 1969, enforcement of civil rights by the executive branch of the government became a firmly established reality.

Johnson was accustomed to exerting strong leadership. By all accounts, he was one of the most able Senate majority leaders in the nation's history. He had exerted his leadership to fashion the compromise that resulted in passage of the 1957 Civil Rights Act.<sup>24</sup> With his assumption of the presidency, he secured passage of the most far-reaching civil rights legislation in the nation's history: the Civil Rights Act of 1964 (the bill proposed by President Kennedy in 1963); the Voting Rights Act of 1965; the Age Discrimination in Employment Act of 1967; and the Fair Housing Act of 1968, all of which are discussed in later chapters.

But there was much more. In January 1964, in a message to Congress, Johnson proposed a "war on poverty" that he linked to the ending of discrimination against nonwhites, citing data that underscored the differences in the status of white and nonwhite

Americans in education, employment, health care, and housing. Beyond civil rights legislation, he stated, the fight to end discrimination required constructive action to eradicate these differences.<sup>25</sup> The Economic Opportunity Act of 1964 was the result.<sup>26</sup> He used the powers of his office not only to prod Congress in enacting legislation but also to issue additional executive orders strengthening enforcement of the policies manifested by legislation and previous executive orders. For example, by Executive Order No. 11197,<sup>27</sup> he established the President's Council on Equal Opportunity to recommend ways to implement more effectively the 1957 and 1964 Civil Rights Acts and to suggest changes in administrative structure to better coordinate and improve equal opportunity programs. Executive Order No. 11246<sup>28</sup> issued 24 September 1965 (which in ensuing years would be referred to as The Executive Order), directed the Civil Service Commission to administer federal policy guaranteeing equal employment opportunity in federal employment; it also directed the secretary of labor to administer the government's nondiscrimination policies respecting government contracts and federally assisted construction contracts. This order remains the basis of the federal government's contractual compliance program (discussed in chapter 6). Executive Order No. 11247, issued the same day, provided for coordination by the attorney general of enforcement of Title VI of the 1964 Civil Rights Act banning discrimination in federally assisted programs (discussed in chapter 4).<sup>29</sup>

In other actions, Johnson also manifested the strength of his administration's commitment to civil rights enforcement and its expansion to all areas of racial discrimination. For example, in February 1965, acting on a report by the Commission on Civil Rights, he directed the secretary of agriculture to adopt changes in departmental programs recommended by that report to combat discrimination in farm programs.<sup>30</sup> Before a joint session of Congress on 15 March 1965, a week after marchers were beaten at a bridge outside Selma, Alabama, as they attempted to go from Selma to Montgomery in demonstration of support for voting rights, he proposed enactment of the Voting Rights Act of 1965. The message went to the entire country as well as to Congress. The heart of the message was captured in two clearly stated passages: "It is wrong—deadly wrong," President Johnson said, "to deny any of your fellow Americans the right to vote in this country." Moreover, "it is not just Negroes, but really it is all of us, who must overcome the crippling legacy of bigotry and injustice. . . . And we shall overcome."<sup>31</sup>

The essence of the leadership Johnson provided to the nation as a whole during his administration was summed up in his address at Howard University a short time later, which stated that the goal of civil rights progress must be achievement as well as opportunity.<sup>32</sup> There were other initiatives later in his administration, such as his message to Congress in 1966 proposing enactment of a civil rights bill to reform federal criminal statutes to gain greater protection for blacks against violence, to reform federal jury selection procedures to eliminate discrimination in this area and to enact a fair housing law.<sup>33</sup> Congress adopted all these measures before Johnson left office.

But the vital lasting contribution made by Johnson, beyond the concrete executive actions and proposals for and signing of the most civil rights legislation in any period since the first Reconstruction era, was the clear, unequivocal statement repeated time after time to the nation about how imperative it was to enforce civil rights throughout the country. The observation concerning the inevitability and the confluence of ineluctable social forces in Kennedy's shortened term can be made with respect to the Johnson years. But Johnson clearly added to those forces the power and prestige of the office and his own apparent personal convictions; so that when he left the presidency, he also left a full-blown set of priorities to advance on the civil rights front. Enforcement in both letter and spirit was clearly the policy of the government.

### **THE NIXON ADMINISTRATION**

Richard M. Nixon's presidency was a period of consolidation, advancement—and retreat. The enforcement priorities with respect to discrimination in employment and the government's responsibility not to permit discrimination in federally assisted programs which had been solidified under Johnson were consolidated under Nixon. During his first term, President Nixon reaffirmed the policy barring discrimination by government contractors by directing all federal agencies and departments to review their programs to make sure they were in accordance with Executive Order No. 11246.<sup>34</sup> During this period, attention was drawn particularly to job discrimination in the construction industry, culminating in the administration's so-called Philadelphia Plan for enforcement of The Executive Order. The plan, when challenged, was upheld by the courts.<sup>35</sup> During his second term, Nixon, by an executive order superseding that of

President Johnson, broadened the role of the attorney general in coordinating enforcement of Title VI, authorizing him to prescribe standards and procedures for review and investigation of all agencies' programs providing financial assistance.<sup>36</sup>

Civil rights also advanced on several other fronts, particularly in the area of women's rights, by now a burgeoning movement of its own. A broad ban on sex discrimination in employment had been made a part of the 1964 Civil Rights Act (in fact, by an amendment on the floor of the House of Representatives added at the last minute in an effort to defeat the bill) to accompany the ban on sex-based wage discrimination adopted in 1963. When Nixon took office in 1969, he created a task force on women's rights and responsibilities which issued a report, *A Matter of Simple Justice*,<sup>37</sup> similar to earlier reports on racial discrimination.

From this report came the suggestions for action that were adopted in some significant pieces of legislation enacted during the Nixon years banning sex discrimination in educational programs,<sup>38</sup> in housing,<sup>39</sup> and in credit,<sup>40</sup> all of which are discussed in later chapters. In his January 1972 State of the Union Address, President Nixon stressed his commitment to equal rights for women and commented on the number of women he had appointed to high-level federal positions and on the increase in the number of women in middle-management positions and on boards and commissions. A statement on the Status of Women within the Administration, released in April of that year, reflected the increased numbers.<sup>41</sup> In August 1973, Nixon reaffirmed his support for the Equal Rights Amendment, which Congress had passed in 1972, and he proclaimed 26 August 1973—the anniversary of the ratification of the Nineteenth Amendment, which permitted women to vote—as Women's Equality Day,<sup>42</sup> continuing a practice begun a year earlier with a similar proclamation.<sup>43</sup> He also proposed that Congress broaden the jurisdiction of the Civil Rights Commission to encompass sex-based discrimination.

On the employment front, President Nixon endorsed, in his 1972 State of the Union Address, legislation to amend Title VII of the 1964 Civil Rights Act to increase the enforcement powers of the Equal Employment Opportunity Commission (EEOC) created under the statute. He sought to grant the commission authority to seek court enforcement against prohibited discrimination and to widen its scope to ban discriminatory employment practices of state and local governments and educational institutions. These amendments passed Congress and were signed into law in March 1972.<sup>44</sup>

The effect of these commendable initiatives was submerged,

however, by President Nixon's retreat in the area of school desegregation. In 1969, the Nixon Justice Department, under the direction of Attorney General John Mitchell and Assistant Attorney General for Civil Rights Jerris Leonard, went to court to oppose immediate implementation of the requirements of the Brown cases. It was the first time in the memory of civil rights lawyers since those decisions that lawyers for the United States and lawyers for the private plaintiffs (among whom was the author) were on opposite sides in a school desegregation case. Although the Supreme Court rejected the position taken by the Department of Justice in the cases,<sup>45</sup> the action of the Justice Department, with the apparent approval of the president, signaled a rupture in what had been an alliance between the executive branch and the plaintiffs in school desegregation cases.

It soon became apparent that the Nixon administration not only objected to quickening the pace of school desegregation but also objected to seeking its accomplishment by busing. Even while proclaiming his personal belief in the rightness of the Brown decision in a statement in March 1970 and assuring that the constitutional mandate would be enforced, President Nixon made clear then and on subsequent public occasions that he was opposed to busing.<sup>46</sup> Indeed, a Nixon proposal for funding to assist school districts in the desegregation process—made in May 1970 and partially adopted in the Emergency School Aid Act of 1972<sup>47</sup>—was conceived of as a means to avoid busing, which the federal courts were increasingly requiring and which the Supreme Court approved during his first term.<sup>48</sup> Of course, the effect on the public of the Nixon stance on busing was to encourage public opposition to school desegregation.

His position on public school desegregation was further reflected in his failed attempts to secure appointment to the Supreme Court of Clement Haynsworth and G. Harrold Carswell, two southern conservative judges who, the president said, were the "strict constructionists" of the Constitution that he had promised to appoint during his election campaign. In response to intense opposition mounted by civil rights advocates, the Senate rejected both nominations, but the president's effort to secure these appointments despite that opposition was widely viewed as indicative of a retreat from enforcement of civil rights. (Eventually, Nixon found other "strict constructionist" appointees with records less repugnant to the civil rights community, whom the Senate confirmed.)

More for what was attempted than for what was done, the Nixon presidency has been viewed as one not supportive of advances on the civil rights front. The perception is accurate as far as it goes, but

some advances were made, particularly with respect to women's rights. There was certainly no overt effort at wholesale displacement of the executive role in enforcing civil rights, but examination of the Nixon record reveals that here was no vigorous champion; that presidential insistence on the importance of civil rights as a national priority had diminished; that overall leadership was lacking; and that setbacks were avoided only because the growth of civil rights enforcement in prior years, and the continuation of social change and its effect on the judicial and legislative branches of the government, would not allow it.

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#### THE FORD ADMINISTRATION

Nixon selected Gerald Ford to succeed Spiro Agnew as vice president to assure continuation of the Nixon policies if Ford succeeded to the presidency. When circumstances (Watergate) forced Nixon's resignation and Ford's succession, the expectation that Ford's administration would in significant aspects, including civil rights policies, be a clone of Richard Nixon's was realized. Ford did little more than carry out the policies he found in place. Annually during the three Augusts that he served from 1974 to 1976, he issued the same Women's Equality Day proclamation that Richard Nixon inaugurated earlier, claiming support for the Equal Rights Amendment. During the spring of 1976, Ford stated that he had directed the attorney general to continue an active search for a school busing case that would serve as a suitable vehicle for judicial review of the current case law on busing as a means of overturning that law, and he accelerated his efforts to develop legislative remedies to minimize busing. He also expressed his intention to recommend such legislation to Congress.<sup>49</sup> During the summer<sup>50</sup> he proposed legislation to Congress to limit busing and later, in a special message, urged action on it.<sup>51</sup> That specific legislation did not pass but the so-called Byrd amendment, which restricted busing as a means of administrative enforcement by the Department of Health, Education, and Welfare, did and was signed into law by Ford (discussed in chapter 3).<sup>52</sup>

The only notable civil rights legislation enacted during the Ford administration was the 1975 extension for seven years of the special provisions of the Voting Rights Act of 1965, which included for the first time provisions for protecting the voting rights of language-

minority citizens. The 1975 Voting Rights Act Amendments, unlike those of 1982 (see chapter 7), were passed without incident. There was no resistance to them by the Ford administration. Indeed, other than to continue to support the Nixon position on busing, Ford did not seek to dismantle the machinery for executive enforcement of civil rights protections. It is worth noting, however, that with the appointment of William Coleman as secretary of transportation, he made the second appointment of a black man to the cabinet (Robert Weaver, Lyndon Johnson's secretary of housing and urban development, was the first).

In sum, the Ford civil rights record was not notable. He did nothing particularly good but (with the exception of continuing Nixon's school desegregation policies) did very little harm.

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#### THE CARTER ADMINISTRATION

The administration of Carter, Reagan's immediate predecessor, was marked by two noteworthy developments in the area of civil rights. First, there was an increased emphasis on making the enforcement mechanisms more efficient, particularly with respect to enforcement of the, by now, extensive network of equal employment opportunity laws and regulations, and in assuring nondiscrimination in federally assisted programs. Second, for the first time in the history of the civil rights enforcement effort, a substantial cadre of people drawn from the groups whom the civil rights laws were enacted to protect were appointed to positions in which they were able to exercise real enforcement authority. Blacks, other minorities, and women were appointed to the federal bench, where, because the appointments are for life, their decisions have the potential for sustained, lasting impact. Together these developments reinvigorated the civil rights enforcement effort that had become listless in the Ford years.

As President Carter stated in his last State of the Union Address in January 1980, the goal of the effort to restructure the civil rights enforcement machinery was to allow the government to focus on large-scale enforcement of the civil rights laws. To this end, Carter directed the implementation of a sweeping reorganization of the equal employment opportunity effort in his Reorganization Plan No. 1 of 1978. Under the reorganization plan, the main government agency responsible for all federal efforts opposing discrimination in employment was to be the Equal Employment Opportunity Com-

mission (EEOC), established under the 1964 Civil Rights Act and chaired for the first time by a black woman, Eleanor Holmes Norton. Transferred to EEOC were all duties relating to equal pay enforcement; enforcement of the ban on age discrimination and discrimination against the handicapped; enforcement of nondiscrimination in federal government employment; and the overall responsibility for coordination of the equal employment opportunity effort accompanied by the appropriate transfer of budget, personnel, and files. The Office of Federal Contract Compliance, which had been created to enforce Executive Order No. 11246, the government's contractual program, was reorganized and became the Office of Federal Contract Compliance Programs. In addition, a civil rights unit was created in the Office of Management and Budget (OMB) to monitor civil rights enforcement and to advise the OMB director on the funding and management resources needed for effective enforcement, obviously a related concern. And during the last few months of the administration, President Carter signed an executive order giving the attorney general authority to enforce all federal laws mandating nondiscrimination in the provision of federal financial assistance and making the Justice Department the agency responsible for coordinating the enforcement of these provisions by all agencies. The order was seen by the president as "an important step toward a comprehensive, coherent approach to the goal of distributing federal aid on a nondiscriminatory basis," which would give the Department of Justice the leadership role in this area equivalent to that of the EEOC in employment.<sup>53</sup>

Of equal or perhaps even greater importance than this "management systems" approach with its stated goal of efficiency and comprehensiveness were the appointments made by President Carter, particularly at the Justice Department. Largely because of these appointments, which represented a clear presidential direction that the civil rights laws were to be vigorously enforced, the Justice Department under Carter became known as one that took its law enforcement responsibilities seriously without reference to political considerations. The ground-breaking appointment was that of a black activist civil rights lawyer, Drew Days III, as the assistant attorney general for civil rights. As head of the Civil Rights Division, Days—backed fully by a southerner as attorney general, Griffin Bell, who had been appointed to the federal bench by Kennedy—seized the leadership reins at the Justice Department with innovative lawsuits designed to carry out the affirmative action goals of federal law in housing (exclusionary zoning cases), voting (cases involving

dilution of minority voting strength), employment (hiring, promotion, and back-pay class relief) and education (busing and other mandatory pupil reassignment requirements). Carter supported his Justice Department's civil rights enforcement program, which included encouraging the courts to make new laws to provide remedies designed to overcome past discrimination.

In remarks to the Leadership Conference on Civil Rights (a consortium of civil rights activist groups) in January 1980, Carter stated that in the first three years of his administration, more blacks, women, and Hispanics had been appointed to the federal courts than in all the previous administrations combined. He noted that 28 of the 32 women then serving on the federal bench had been appointed by him. He noted that when he was sworn in as president, not one woman was a U.S. attorney. The final Carter record shows that 14 percent of his judicial appointments were blacks, 14 percent were women and just under 7 percent were Hispanic.<sup>54</sup> (Truman appointed the first blacks to the federal judiciary, and Lyndon Johnson appointed the first black justice to the Supreme Court, Thurgood Marshall.) Other pathbreaking appointments made by President Carter were those of Andrew Young, the first black appointed as U.S. ambassador to the United Nations, and Patricia Harris, the first black woman cabinet appointment. (In his 1979 State of the Union Address, Carter also noted his appointment of another woman to head a cabinet department—later in his administration, there was a third—and the appointment of women in approximately 20 percent of the senior posts throughout the government, many in areas where no woman previously had served.)

Carter also sought to advance women's rights through support of the Equal Rights Amendment. But despite the extension of the deadline for ratification to 30 June 1982, accomplished with his administration's efforts, the amendment was not ratified. Carter also supported and signed the Pregnancy Disability Amendments Act of 1978,<sup>55</sup> which amended Title VII of the 1964 Civil Rights Act to include pregnancy within the definition of "sex" as a prohibited category of employment discrimination (overturning a U.S. Supreme Court opinion that had ruled otherwise).<sup>56</sup> Finally, Carter proposed strengthening the Fair Housing Act of 1968 by urging that the law be amended to give the responsible administering agency, the Department of Housing and Urban Development, enforcement powers by authorizing it to issue "cease and desist" orders against violations of the act. (This proposal never passed Congress.)

Overall, Carter took seriously his responsibilities to enforce civil

rights laws and tried to advance enforcement by measures that would allow subordinate government officials to do their jobs more efficiently and effectively. There was no sustained delivery of a vocal, highly visible public message under Carter as there had been with Lyndon Johnson, his last Democratic predecessor, but the Carter administration fully supported the goals of the civil rights laws that had been passed and the remedies the courts had endorsed to carry out those goals. Carter also gave full support to administration officials with specific civil rights enforcement responsibilities, particularly the Justice Department, and showed a clear willingness to appoint persons who understood and were sympathetic to those goals.

This was the atmosphere that prevailed in the executive branch in January 1981 when Ronald Reagan entered the White House. And although the record of all the administrations from Eisenhower's to Carter's supports assertions about the greater relative vigor with which Democratic administrations have championed civil rights enforcement, the record of none of them (including that of Richard Nixon) manifested a tendency to subvert in any fundamental way the protective goals of civil rights laws that had evolved over nearly three decades of concerted and painful effort in response to a history with even greater pain. It was this record and this history that confronted the Reagan administration with the opportunity to make history by its record. That record is the subject of the ensuing chapters.

#### Notes

1. Telephone conversation with John V. Wilson, public relations department, Dep't of Justice (26 Mar. 1985). Mitchell spoke to a Mississippi citizens' groups in the department's auditorium in 1969.
2. Exec. Order No. 9664, 3 C.F.R. 166 (Supp. 1945).
3. Exec. Order No. 10308, 3 C.F.R. 519 (Supp. 1951).
4. *Public Papers of the Presidents of the United States, Harry S. Truman* 800 (1952).
5. *Public Papers of the Presidents of the United States, Dwight D. Eisenhower* 842 (1953).
6. *Public Papers of the Presidents of the United States, Dwight D. Eisenhower* 514 (1958).

7. *Public Papers of the Presidents of the United States, Dwight D. Eisenhower* 293 (1954).
8. See Burk, *The Eisenhower Administration and Black Civil Rights*, 142 (1984).
9. McFeeley, *Appointment of Judges* 3 (1987). See also Kluger, *Simple Justice* 665 (1976).
10. *Public Papers of the Presidents of the United States, Dwight D. Eisenhower* 765 (1953).
11. Exec. Order No. 10590, 3 C.F.R. 53 (Supp. 1955).
12. Exec. Order No. 10479, 3 C.F.R. 97 (Supp. 1953).
13. Presidential Proclamation 3204, 3 C.F.R. 132 (1957).
14. See Read & McGough *Let Them Be Judged* 38-59 (1978) for a description of Eisenhower's appointees to the Fifth Circuit Court of Appeals, the leading federal appellate court in decisions rendered in civil rights cases. See also Bass, *Unlikely Heroes* (1981).
15. State of the Union Address by President John F. Kennedy, Jan. 1961.
16. Exec. Order No. 10925, 3 C.F.R. 86 (Supp. 1961), 6 R.R.L.R. 9 (1961).
17. 6 R.R.L.R. 9 (1961).
18. Exec. Order No. 10980, 3 C.F.R. 138 (Supp. 1961).
19. 8 R.R.L.R. 349 (1963).
20. National Broadcasting Co. telecast (Oct. 1962).
21. *Public Papers of the Presidents of the United States, John F. Kennedy* 727 (1962).
22. *Public Papers of the Presidents of the United States, John F. Kennedy* 469 (1963).
23. *Id.*
24. See Kearns, *Lyndon Johnson and the American Dream* 146-52 (1976); Burk, *The Eisenhower Administration and Black Civil Rights* 225-26 (1984).
25. 1 *Public Papers of the Presidents of the United States, Lyndon B. Johnson* 165 (1963-64).
26. 2 *Public Papers of the Presidents of the United States, Lyndon B. Johnson* 988-90 & 1202 (1963-64). See P.L. 88-452 (78 Stat. 508) (1964).
27. Exec. Order No. 11197, 3 C.F.R. 278 (1964-65 comp.), revoked by Exec. Order No. 11247.
28. Exec. Order No. 11246, 3 C.F.R. 339 (1965).
29. 10 R.R.L.R. 1848 (1965), superceded by Exec. Order No. 11764.
30. *Public Papers of the Presidents of the United States, Lyndon B. Johnson* 222 (1965).
31. *Id.* at 283-84.
32. Howard University speech by President Lyndon B. Johnson (4 June 1965).
33. 1 *Public Papers of the Presidents of the United States, Lyndon B. Johnson* 5 (1966). The Civil Rights Act of 1966 was passed by the House of Representatives on 9 Aug. 1966 but failed to pass in the Senate.
34. *Public Papers of the Presidents of the United States, Richard M. Nixon* 273 (1970).
35. See *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971).

36. Exec. Order No. 11764, 39 Fed. Reg. 2575 (23 Jan. 1974).
37. Weekly Compilation of Presidential Documents.
38. Education Amendments of 1972, P.L. 92-318, tit. IX, 86 Stat. 373; 20 U.S.C. §§ 1681-1686.
39. Civil Rights Act of 1968, tit. VIII (Fair Housing Act, 42 U.S.C. §§ 3601ff.) was amended in 1974 to include a ban on sex discrimination, P.L. 93-383, § 808(b)(1), 88 Stat. 729, 42 U.S.C. § 3604(a)-(e).
40. Equal Credit Opportunity Act of 1974, P.L. 90-321, tit. VII, as added P.L. 93-495, tit. V § 503 (28 Oct. 1974), 88 Stat. 1521, 15 U.S.C. §§ 1691-1691(f)(1976).
41. *Public Papers of the Presidents of the United States, Richard M. Nixon* 556 (1972).
42. 38 Fed. Reg. 22369, 2 U.S. Code Cong. & Admin. News 3445 (1973).
43. Proclamation 4147, 3 U.S. Code Cong. & Admin. News 5465 (1972).
44. Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103.
45. See *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969).
46. See Nixon address, *Public Papers of the Presidents of the United States, Richard M. Nixon* 425 (1972).
47. P.L. 92-318, 86 Stat. 354, 20 U.S.C. § 1601 *et seq.* (1976).
48. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).
49. 3 *Public Papers of the Presidents of the United States, Gerald R. Ford* 1767 (29 May 1976).
50. *Id.* at 1908 (24 June 1976).
51. *Id.* at 2062 (22 July 1976).
52. P.L. 94-206, § 209 (1976), (amending 42 U.S.C. § 2000d, 90 Stat. 22).
53. Exec. Order No. 12250.
54. Newark Star Ledger, Dec. 1984, at 8, col. 1.
55. Civil Rights Act of 1964, as amended, § 701(k), P.L. 95-555, 92 Stat. 2076 (1978), 42 U.S.C. § 2000e.
56. *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

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**EMPLOYMENT**

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The preceding chapter described the interlocking character of discrimination in education, housing, and employment as a "vicious triangle." The description is as deliberate as it is accurate, because throughout our nation's history, deliberate conduct has characterized employment discrimination. Because the effects of that conduct are substantial, equally deliberate conduct is necessary to eradicate those effects. The discussion in this chapter concludes that the Reagan administration has not responded to the need in light of the continuing nature of the problem, the federal government's role in compounding it (as in housing discrimination), and the law enforcement responsibilities subsequently imposed by law on the government to assist in eradicating those effects.

The seminal cause of the problem of employment discrimination for black Americans was, of course, slavery—the institutional paradigm of work without pay, power, or prestige the normal goals of the workplace. The consequences of slavery endured long after formal abolition in the form of racial discrimination in both the public and private sectors. Discrimination limited most blacks to menial jobs, and confined those who were educated or otherwise trained to service or professional roles within the black community. The experience of other nonwhites was similar. For women the discrimination resulted from beliefs about their roles as homemakers and mothers and their physical characteristics.<sup>1</sup>

Labor market discrimination for blacks, other minorities, and women extended well into this century when the federal government began its efforts to counteract some of these conditions through legislation, regulation, and court decisions contemplating executive action. Tracing the evolution of those efforts defines the executive's responsibilities and provides the backdrop for focus on the Reagan administration's approach to them.

### EVOLUTION OF FEDERAL LAW TO COMBAT EMPLOYMENT DISCRIMINATION: THE EXECUTIVE'S ROLE

In 1866, after the Thirteenth Amendment had abolished slavery, Congress passed the nation's first civil rights bill (chapter 1). The bill responded to the most obvious disability of the slave system—the inability of the slave either to decide whether or for whom to work and to be paid for working—by declaring that the former slaves or their descendants had the “same right” to contract as white citizens.<sup>2</sup> However, not until 1975 was this language judicially declared usable as a remedy against employment discrimination.<sup>3</sup> In 1883 Congress passed legislation establishing a competitive civil service merit system for federal employment under the direction of a Civil Service Commission created by the act subject to presidential appointment.<sup>4</sup> Despite this legislation, overt discrimination persisted in the federal service as in the private sector. During President William Howard Taft's administration, racial segregation was established in the Census Bureau and extended by President Woodrow Wilson to the Department of the Treasury and the Postal Service.<sup>5</sup> In the late nineteenth century, women were employed almost exclusively as clerks at salaries set by statute at one-half those paid to men. A merit system rule allowed appointing officers to refuse to consider women who had been certified as qualified by the Civil Service Commission.<sup>6</sup> Prior to 1940, black employment in the federal service was primarily in custodial and similar low-paying jobs.

In 1940, Congress took the first step to eliminate discrimination in federal employment by passage of the Ramspeck Act, which authorized the president to modify pay standards for government employees provided there was no discrimination on the basis of race, color, or creed.<sup>7</sup> Just 19 days earlier, President Franklin Roosevelt issued the first of a series of executive orders banning racial, ethnic, or religious discrimination in federal employment.<sup>8</sup> In 1941, a Fair Employment Practices Committee (FEPC) was established by executive order.<sup>9</sup> Although the committee was authorized to investigate discrimination complaints, during the first two years of its existence it abdicated this responsibility to the Civil Service Commission, which rarely made a finding of discrimination. By 1943, the committee began to act independently, but between 1941 and 1946, when it was abolished, it found discrimination in only 58 cases of nearly 2,000 complaints of discrimination it investigated.<sup>10</sup>

Fifteen years after abolition of the FEPC, in 1961 President John Kennedy promulgated Executive Order No. 10925<sup>11</sup> establishing the sustained national policy against employment discrimination that continues to the present. The order established the President's Committee on Equal Employment Opportunity with an announced emphasis on affirmative action rather than merely nondiscrimination respecting individual complaints. Two years later Congress passed the Equal Pay Act,<sup>12</sup> requiring that women receive equal pay with men for equal work (defined as “equal skill, effort and responsibility and . . . performed under similar working conditions”).<sup>13</sup> It was the first legislation proscribing sex discrimination and was especially notable because it applied to the private sector. President Kennedy lived to sign the act but it was President Lyndon B. Johnson who signed the Civil Rights Act of 1964,<sup>14</sup> the most sweeping commitment made by the people of the United States through their elected representatives to eradicate employment discrimination in the private sector.

Enforcement of the Civil Rights Act's Title VII, which outlaws employment discrimination, has prompted much litigation and debate—a reflection of the far-reaching nature of the employment discrimination problem as well as the deep-seated resistance to the law's goals. It makes illegal a wide array of “unlawful employment practices”—discriminatory hiring, promotion, and firing; compensation; and other employment conditions on the basis of race, color, religion, sex, or national origin. It applies to employers (of 15 or more persons), labor unions, apprentice programs, and employment agencies. Exceptions are made for certain bona fide occupational reasons related to sex or religion (but not race). With these exceptions, members of the protected classes may seek both administrative and judicial remedies for the discrimination prohibited. When a judicial remedy is sought, either by aggrieved parties or by the responsible government agency, and a violation is established, a court may not only “enjoin the respondent from engaging in such unlawful employment practice” but may also “order such affirmative action as may be appropriate . . . [emphasis supplied].”<sup>15</sup>

In 1965, President Johnson by executive order transferred federal equal employment responsibility from the President's Committee on Equal Employment Opportunity to the Civil Service Commission.<sup>16</sup> Sex discrimination, not included in any previous executive order (but now twice the subject of legislation), was banned in federal employment in 1967.<sup>17</sup> In 1969, President Richard M. Nixon by executive order required each federal agency to develop an affirm-

ative action program to overcome past discrimination.<sup>18</sup> However, in 1971 congressional committees found that minorities and women still were not sufficiently represented throughout the federal bureaucracy. Accordingly, Congress enacted the 1972 Amendments to Title VII, extending to federal employees the basic protections given to private sector employees under the 1964 act.<sup>19</sup> At the same time, state and local governments, their agencies, and political subdivisions were made subject to Title VII.<sup>20</sup>

A third major thrust of national policy against employment discrimination is directed toward employers who do business with the federal government. Although these employers are subject to Title VII, the federal government has continued to use its power over the government's procurement process to require government contractors to desist from employment discrimination. President Kennedy's 1961 executive order<sup>21</sup> established specific sanctions for noncompliance—the termination of existing contracts and the debarment from future contracts. President Johnson later made the secretary of labor rather than a presidential committee responsible for assuring compliance, and again required contractors to take affirmative action to ensure equal opportunity.<sup>22</sup>

In its last stages, the evolutionary process in employment discrimination law encompassed two other groups of workers: older workers and handicapped workers. The problem of age discrimination had been recognized by Congress as early as the 1950s, and efforts were made to add age discrimination as one of the prohibited categories in Title VII.<sup>23</sup> Although these efforts failed, a provision of the act directed the secretary of labor to prepare a report to Congress on age discrimination in employment. The report, furnished to Congress in 1965, recognized age discrimination as a national problem requiring federal intervention.<sup>24</sup> Consequently, two years later, the Age Discrimination in Employment Act of 1967<sup>25</sup> was passed protecting workers ages 40 to 65. The secretary of labor was designated as the government's enforcement arm, but the substantive aspects of the act so closely track those in title VII that it is clear that Congress intended the new act to be interpreted and applied in much the same way. Later amendments of the act broadened its coverage to include states, their political subdivisions, and the federal government,<sup>26</sup> and extended the protected age group to age seventy.<sup>27</sup>

Employment discrimination against handicapped persons was proscribed by the Rehabilitation Act of 1973.<sup>28</sup> Section 503 of the act<sup>29</sup> requires that any contract for procurement by federal agencies

in excess of \$2,500 contain a provision that the employer will "take affirmative action to employ and advance qualified individuals despite their handicap." Administration is by the Labor Department as in the case of the executive order relating to federal procurement. Section 504<sup>30</sup> bans handicap discrimination in federally assisted programs. It, like Title IX (see chapter 4), is applicable to employment discrimination in these programs. (Title VI also forbids discrimination in federally assisted programs that provide employment.) The Department of Health and Human Services administers this section. Section 501(b)<sup>31</sup> imposes an "affirmative action" obligation in the federal hiring process congruent with that imposed on contractors and the federal government.

In addition to this effort to create a unified structure of major statutes and regulations, there are shards of federal law elsewhere, all requiring some measure of enforcement by the executive branch. They complete a network of federal law designed to vanquish, to the extent that mere written rules can, the continuation of discrimination in employment. They include

- the Omnibus Crime Control and Safe Streets Act, which prohibits discrimination in employment on the basis of race, national origin, sex, or religion in the administration of law enforcement programs financed by the act<sup>32</sup>
- the State and Local Fiscal Assistance Act of 1972, which applies to state and local government programs funded by the federal government and permits termination of such aid when Title VII violations are established<sup>33</sup>
- the Vietnam Era Veterans Readjustment Act,<sup>34</sup> which imposes an affirmative action obligation on federal government contractors to hire and promote disabled veterans consonant with their obligation respecting minorities and women.

This extensive network of federal employment law requires a course of action to maximize employment opportunities for the protected classes in order to prevent nullification of the commands of national law. Enforcement responsibility is shared among

- the Equal Employment Opportunity Commission (EEOC), which was established under Title VII of the 1964 Act<sup>35</sup> to provide an administrative remedy for private employment discrimination with expanded powers pursuant to the 1972 amendments to seek a judicial remedy as well<sup>36</sup>
- the Office of Federal Contract Compliance Programs (OFCCP) in

the Department of Labor which is responsible for enforcing the obligations of federal contractors<sup>37</sup>

□ the Department of Justice which is responsible for litigation against state and local governments<sup>38</sup> (and which may also intervene in lawsuits initiated by private individuals who are members of the protected classes).<sup>39</sup>

### **THE REAGAN RECORD IN EMPLOYMENT**

The major institutions that deal with the issue of discrimination in employment are the Equal Employment Opportunity Commission, the Office of Federal Contract Compliance Programs, and the Justice Department.

#### **Equal Employment Opportunity Commission**

The Equal Employment Opportunity Commission (EEOC) is composed of five commissioners appointed by the president and confirmed by the Senate.<sup>40</sup> From its inception, EEOC's mission has been to lead the federal government's antidiscrimination effort in the private sector. It was hampered originally by Congress's failure to grant it "cease-and-desist" authority similar to that granted to the National Labor Relations Board under the National Labor Relations Act passed in the 1930s to curb "unfair labor practice(s)" of employers and unions relating to the collective bargaining process.<sup>41</sup> Instead, the less effective remedy chosen merely authorized the EEOC to investigate and attempt conciliation of charges of discrimination filed by individuals (either on their own behalf or as representatives of a class) or by one of the commissioners (commissioner's charge).<sup>42</sup>

The 1972 amendments to the act again refused to grant cease-and-desist powers but did authorize the EEOC to sue in the federal courts and to intervene in suits brought by private parties. The EEOC's jurisdiction was further increased during the Carter administration by transfer of enforcement authority for the Equal Pay Act; the Age Discrimination in Employment Act; section 717 of Title VII (added in 1972 to protect federal employees); section 501 of the Rehabilitation Act (regarding federal employment of the handicapped), and the Fair Labor Standards Act Amendments of 1974, as amended (prohibiting age discrimination in federal employment).<sup>43</sup> In short,

the EEOC's broad responsibility is to curb prohibited employment discrimination by both administrative and judicial action in all areas affecting employees in the private sector and the federal government (except federal contractors, which is discussed in the next section).

The EEOC has approximately thirty-one hundred employees in addition to the five commissioners.<sup>44</sup> Its current chairman is Clarence Thomas, a black Republican lawyer from Savannah, Georgia. He was the assistant secretary for civil rights in the Department of Education before becoming EEOC chairman in May 1983. The EEOC record under Thomas's leadership defies description as either clearly progressive or clearly retrogressive. Perhaps the record reflects no more than a change in emphasis from that of the prior administration, but a change in philosophy is apparent as well. As noted, EEOC's main enforcement tasks are the processing of charges of discrimination in an effort to resolve them administratively if possible (including the referral of charges to state or local agencies as provided in the statute), and litigation pursuant to charges filed in pattern-or-practice cases.<sup>45</sup> A third important EEOC function, in accordance with its increased responsibilities after the 1978 reorganization, is that of coordinating the equal opportunity efforts of other agencies, including development of uniform definitions of discrimination, and standards and procedures for enforcement.

In the case of charge processing, it can be argued that a shift in emphasis has occurred rather than an actual decline in enforcement activity. The system adopted under President Jimmy Carter's EEOC Chairwoman, Eleanor Holmes Norton, consisted of three major components:

- a rapid charge processing system that focuses on quick settlement of individual complaints through a face-to-face fact-finding conference
- a backlog charge processing system designed to make inroads on the large number of charges that had accumulated over several years, again to facilitate the settling of such cases quickly by narrowing the scope of the charge
- a systemic program to determine whether reasonable cause existed for the charge and whether litigation should be undertaken on a basis broader than mere resolution of the charging parties' complaints—that is, because of patterns or practices of discrimination by significant offenders such as large nationwide companies.

The number of cases EEOC has closed since 1980, the last year of the Carter administration, has increased and the backlog of cases

has decreased. At the same time, the number of settlements has fallen but the number of no-reasonable-cause determinations has risen. And the time committed to processing the cases has increased.<sup>46</sup>

The largest number of closures apparently resulting from the rapid-charge process occurred during Chairman Thomas's first year at EEOC's helm, fiscal 1983, after a decline during the previous fiscal year when EEOC was essentially under caretaker leadership.<sup>47</sup> Combined with the data on decrease in the backlog of cases, these figures suggest that EEOC perhaps has been efficient both in responding to new charges and in disposing of old ones. In the latter instance, though, this could mean that the cases were just too stale, the problem had been resolved without EEOC intervention, or the charging parties' circumstances had changed, making intervention unnecessary or unwarranted. As far as new charges are concerned, it is possible to conclude from the data either that the agency has been quite successful under its methods, or that it has been very unsuccessful (the decrease in the number of settlements might suggest this), or that it has emphasized speed of process at the cost of appropriate results. Moreover, an increase in the number of no-reasonable-cause findings might mean that a large number of frivolous charges were filed or that the agency's investigative methods were less than vigorous. The increase in the time committed to process could mean thoroughness or inefficiency.

The interpretation of the data ultimately depends on one's perspective on what is important for the agency to do—a matter of emphasis. Because staff overall has been reduced and funding cut (in terms of real as opposed to nominal dollars)<sup>48</sup> it is clear here, as throughout the civil rights agency enforcement process, that there are limits on what can be accomplished. Although the data can be said to suggest less than vigorous enforcement, even within these limits,<sup>49</sup> so sweeping a judgment regarding EEOC's charge-processing activities is unwarranted without knowledge of the cases concerned.

As for litigation, again the data are susceptible to varying interpretations. The number of cases EEOC has taken to court has declined visibly from the Carter years. The largest declines occurred during the first years of the Reagan administration. The number of filings has increased since then but still is considerably smaller than in the previous administration. The sharpest decline initially was in the so-called systemic or pattern-or-practice cases, which fell from 62 in fiscal 1980 to 0 in fiscal 1982 and then increased to 10 in fiscal 1983. The number of EEOC amicus briefs also declined sharply

during that period (from 75 in fiscal 1980 to 28 in fiscal 1983, a decline of 62.7 percent).<sup>50</sup>

Explanations for the decline include, of course, the usual one of attorney staff reduction.<sup>51</sup> Because responsibility for litigation rests primarily with the Office of the General Counsel (with EEOC approval of the cases selected for litigation), clearly reduction of the number of attorneys in that office would have some effect on the agency's ability to litigate. But because the general counsel's staff relies on information developed during the charge-processing activity and on the recommendations of the investigatory staff of cases with litigation potential, determinations made during this enforcement phase also clearly influence the extent of litigation activity. If, as asserted by a former EEOC general counsel,<sup>52</sup> there has been an increased emphasis on the closure of cases, with a concomitant commitment to close cases without fully exploring whether reasonable cause exists for the charge made, the number of cases recommended for court enforcement would also fall.

As to the first possible explanation, reduction in staff support (at least without other offsetting measures) inevitably cripples needed enforcement and can properly be taken as a sign of lessened commitment. As to the second possible explanation, although a blanket condemnation based on the charge-processing data alone may not be warranted, there can be no doubt that a policy that emphasizes speed of closure without making a rational determination about the validity of the charge is inappropriate. Performance standards that sacrifice proper investigation coupled with staff reductions, limit the agency's ability to use its most effective enforcement weapon—litigation. As noted in the previous chapter with respect to a similar reduction in Justice Department pattern-or-practice filings against housing discrimination, it is unlikely that the sharp decline in the number of cases taken to court in the early years of President Reagan's first administration reflected a similar decline in employment discrimination.

A more likely explanation is that the administration has been unwilling to recognize the need, and there is ample evidence of this. For example, Michael J. Connally, who served as EEOC general counsel from November 1981 to September 1982, apparently repeatedly turned down cases recommended to him by staff in EEOC regional offices. He was also reported to have expressed some antipathy toward class-action suits charging age discrimination and those claiming that women's pay should be judged by a standard of the "comparable worth" of the job involved in addition to the "equal

pay for equal work" standard.<sup>53</sup> As noted, the sharpest falloff in litigation activity was in the area Congress had determined that action was most needed—the pattern-or-practice or systemic cases—designed to affect large employers and broad areas of discrimination. Because the stated policy of the administration is to pursue only the claims of "identifiable victims" of discrimination, a decreased emphasis on pattern-or-practice or class-action lawsuits is not surprising.

In the first year of Reagan's second term, EEOC litigation activity increased somewhat over the earlier years. The staff of the general counsel recommended 708 cases for litigation, a significant increase over the previous year, 1984, when only 276 cases were recommended. And 286 cases were actually filed in court, a marked increase from the two previous years, when only 136 and 226, respectively, were filed, but still less than the number filed in 1981. Available evidence again suggests, however, that the increase in recommendations and actual filings is still not in the systemic or class-action cases, but in cases involving individual charges by the so-called actual victims of discrimination.<sup>54</sup>

Beyond numbers and kind of litigation, there is the question of the conduct of the litigation pursued. In a highly publicized settlement of a discrimination suit against General Motors in October 1983, trumpeted by EEOC as the largest of its kind in history (in which GM agreed to pay \$42 million), EEOC settled without requiring that back pay be provided to members of the classes—minorities and women. Back pay is a remedy specifically mentioned in Title VII whenever a court orders relief after a finding of discrimination,<sup>55</sup> a remedy which the Supreme Court has characterized as in keeping with the "make whole" objective of the act.<sup>56</sup> Of course, the GM settlement did not involve such a finding, so technically the consent agreement need not have included such a provision. However, EEOC, as the principal organ of Title VII enforcement, was and is<sup>57</sup> expected to take the initiative in carrying out the policy manifested in Title VII rather than to acquiesce in a settlement apparently subversive to that policy.

The General Motors settlement did include other provisions—specifically, goals and timetables for implementation—that the president and his Justice Department have opposed as unwarranted preferential treatment. To this extent, the EEOC record can be seen in shades of gray not possible in the case of the Justice Department. That shading is also seen in the EEOC's effort in April 1984 to file an amicus curiae brief in *Williams v. New Orleans*,<sup>58</sup> a case involving

discrimination in that city's police department, in an effort to support a plan of goals and timetables the Justice Department opposed. The Justice Department eventually prevailed upon the EEOC not to file the brief and intervened to challenge the plan, a challenge that ultimately failed. Subsequently, Chairman Thomas stated that he did not believe that the EEOC has the authority to file such briefs in public sector cases, the domain of the Justice Department since the 1972 amendments to Title VII.

The disturbing aspects of this assertion are the capitulation to the Justice Department and its encroachment on EEOC's independence. Filing of an amicus brief requires only the permission of the parties to a lawsuit, or the court. Although Thomas may be correct regarding EEOC's inability to intervene formally as a party—because it is the Justice Department that is authorized to seek a remedy against local governments,—an amicus filing is another matter. The problem here obviously was the position taken by the Justice Department and the eventual concurrence with it by EEOC.<sup>59</sup>

In another example, EEOC also attempted to carry out its responsibilities for federal agency enforcement directly against the Justice Department by insisting that the department, like every other federal department, submit its detailed employment figures and practices relating to women and minorities to EEOC. In September 1983, the Justice Department for the second time submitted departmental employment data to EEOC that did not include numerical goals as required. The department, of course, is philosophically opposed to such goals despite their endorsement by the courts (see discussion below). Notwithstanding, EEOC rejected the data, at that point taking a different view of its duties. Chairman Thomas was quoted as saying that the goals were necessary "for me to do the job Congress requires me to do."<sup>60</sup>

Thomas subsequently adopted the Justice Department's position in EEOC's pursuit of litigation, however, thus further contributing to the gray picture of EEOC enforcement. He endorsed the effort of several administration agencies—the Office of Personnel Management, the Commission on Civil Rights, and the Justice Department—to change EEOC's guidelines for employee selection and retention by private employers. The guidelines, which EEOC had adopted in 1978, state that any employee test or selection procedure in hiring, promotion, transfer, or dismissal, with an adverse impact on racial and ethnic minorities and women, is discriminatory unless justified by business necessity. These guidelines reflect the prevailing law as announced by the Supreme Court.<sup>61</sup> They also have been, from their

inception, deferred to by the courts as an authoritative interpretation of Title VII.<sup>62</sup> They use, as the courts do, a statistical measure to determine the existence of adverse impact as evidence of discrimination that an employer may explain for business reasons. Thomas expressed "serious reservations" about the guidelines in December 1984 because of their reliance on statistical measures,<sup>63</sup> and, in testimony before the House Education and Labor Committee, stated that he opposed goals, timetables, and quotas for minorities in the work force.<sup>64</sup> In February 1986, EEOC announced that it had abandoned affirmative action hiring goals and timetables in its settlement of cases brought against private employers.<sup>65</sup> In August 1986, after the Supreme Court in July of that year upheld affirmative action programs involving goals and timetables,<sup>66</sup> Chairman Thomas told members of Congress during a hearing that he would drop his opposition to such measures because "the Court has ruled. . . That's the law of the land, whether I like it or not."<sup>67</sup>

As to the more comprehensive concept of affirmative action that requires (beyond goals and timetables) concerted effort to overcome past discrimination by "make-whole" measures retroactive rather than merely prospective in nature, however, Thomas has been quoted as stating that it is just as "insane" for blacks to expect relief from the federal government for years of discrimination as it is to expect a mugger to nurse his victim back to health. "Ultimately," he stated, "the burden of being mugged falls on you. Now you don't want it that way, and I don't want it that way. But that's the way it happens. . . . Before affirmative action how did I make it?"<sup>68</sup> On another occasion, he expressed his belief that because blacks and other minorities face so many socioeconomic problems as well as racial discrimination, that a "neutral" law such as he believes Title VII to be, is "an improper vehicle for reparation."<sup>69</sup>

These views apparently were incorporated in the terms of the General Motors settlement that earmarked approximately \$15 million for education and skills-development programs for minorities and women. However laudable that aspect of the settlement may be, however great the need for education and training as a socioeconomic matter, however accurate the chairman's description of the broader problem, there is nevertheless a role for law to play. Laws, although not a panacea for all discrimination, when enforced, make other solutions not only possible, but workable. The nation made this assumption when it enacted Title VII in 1964 and created EEOC, and when it amended the statute in 1972 to grant the agency expanded enforcement authority.

### Office of Federal Contract Compliance Programs

Presidential authority to issue executive orders banning federal contractor discrimination and to use various affirmative action measures to enforce the ban including quotas (percentage of the work force), numerical goals, and timetables for achieving them, have been repeatedly upheld by numerous court decisions and legal opinions, including that of President Nixon's attorney general before President Reagan was elected.<sup>70</sup>

The heart of the contract compliance program is Executive Order No. 11246 as amended by Executive Order No. 11375, and their implementing regulations. In every nonexempt supply or construction contract (exemptions are based primarily on the relatively small dollar amount involved, similar to Title VII's exemption for businesses with fewer than 15 employees), standard form clauses impose the basic obligation not to discriminate against minorities and females and to take affirmative action to employ them (the equal opportunity clause).<sup>71</sup>

Similar guarantees must be obtained by government contractors from their subcontractors.<sup>72</sup> Construction contractors who are involved in a project assisted by a federal grant, loan, insurance or guarantee must also include an equal opportunity clause.<sup>73</sup> The equal opportunity clause requires the contractor (when used, the term also includes a subcontractor) to certify that it does not maintain segregated facilities or permit its employees to work at any location it controls where such facilities are maintained.<sup>74</sup>

Similar obligations are imposed in the regulations applicable to handicapped workers and disabled Vietnam era veterans as a consequence of the expansion in June 1975 of the responsibilities of the Office of Federal Contract Compliance for enforcement of section 503 of the Rehabilitation Act of 1973, as amended,<sup>75</sup> and section 402 of of the Vietnam Era Veterans' Readjustment Assistance Act.<sup>76</sup> With this additional responsibility, the office was reorganized and renamed the Office of Federal Contract Compliance Programs (OFCCP). Subsequently, all contract compliance responsibility that had been assigned to other agencies and departments in the executive branch was consolidated in OFCCP in 1978 pursuant to Reorganization Plan No. 1.<sup>77</sup>

Before President Reagan assumed office, regulations were issued to implement the affirmative action obligation. The first regulations, issued in 1968, required contractors to evaluate the minority representation (or utilization) of their work force in all job categories

and to develop and file a written affirmative action program for each facility with annual reporting of the results.<sup>78</sup> The requirements were clarified and expanded by subsequent regulations. Federal contractors are also required to develop affirmative action programs for women and to remedy the effects of past discrimination on incumbent employees (the "affected class"). Procedures for imposing sanctions for failure to comply were established.<sup>79</sup> With the addition of a back pay remedy in 1977 as a formal part of the regulations (although it had been obtained from contractors previously),<sup>80</sup> the basic aspects of the compliance program were in place by 1981 when the new administration embarked on its mission to change the affirmative action program.

Its mission was undertaken in two ways, by changing enforcement and by attempting across-the-board changes in the governing regulations.

#### ■ CHANGED ENFORCEMENT

The primary OFCCP enforcement tools are as follows:

- the four-step compliance review consisting of a so-called desk audit of a contractor's affirmative action compliance program, an on-site review of any deficiencies revealed by the audit as well as of other matters not revealed, an off-site analysis of information uncovered during the on-site review, and preparation of a compliance review report as the basis for further action;
- complaint procedures whereby individuals can assert personal claims of discrimination or breach of a contractor's affirmative action obligation and OFCCP itself may assert noncompliance with affirmative action obligations after a compliance review (similar to an EEOC commissioner's charge), which may result in sanctions that include back pay or retroactive seniority measures (short of the more serious debarment or contract cancellation or suspension remedies); and
- references to either EEOC or the Justice Department for judicial enforcement where administrative enforcement is deemed unworkable.<sup>81</sup>

The effect of this enforcement apparatus has been diminished by the reduction in funding and staff during the Reagan administration. At the time of the 1978 reorganization, funding—and the number of authorized positions—increased greatly. A leveling off in 1981, Reagan's first year, was followed by a sharp decline since 1982. In fiscal 1985, there was a decline in real dollars and another small

reduction in staff.<sup>82</sup> Although complaint investigations and compliance reviews rose between fiscal 1980 and fiscal 1983, the number of debarments of contractors fell sharply (from 5 in fiscal 1980 to zero in fiscal 1982, 1983, and 1984), and so did the amount of back-pay awards (\$9.3 million in fiscal 1980 to \$2.7 million in fiscal 1984). The number of administrative complaints filed also dropped from 53 in fiscal 1980 to 18 in 1983 (rising to 23 in 1984) with a low of only 5 in fiscal 1982.<sup>83</sup>

Thus, in a pattern similar to that at EEOC, the data show increased activity in investigation and review but considerably less enforcement during Reagan's first term and little difference during the second. Whereas almost half of the cases where violations were found among contractors were settled with conciliation agreements in fiscal 1980, only 30 percent of such cases were closed with such agreements by the third quarter of fiscal 1983. The first and only debarment of a contractor during the Reagan administration's two terms occurred in 1986; and the number of recipients receiving back pay dropped sharply from fiscal 1980 (4,336) to the first six months of fiscal 1985 (211).<sup>84</sup> Affected-class cases involving incumbent employees declined from 467 in fiscal 1980 to 222 pending in fiscal 1982 and declined to 165 pending during the first quarter of fiscal 1983. Twenty-six percent of investigations sustained allegations of discrimination in fiscal 1980, compared with only 16 percent in fiscal 1982.<sup>85</sup> A picture of more complaints; rapidly handled, with fewer cause findings, indicates either no investigation or incomplete ones (unless, of course, there are now so many worthless complaints lodged against so many complying employers).

Former OFCCP officials have so testified and have pointed to policy innovations that account for the disparity in enforcement under current and prior administrations. The establishment of quotas for staff compliance reviews by each investigator, plus time restraints, was said to deter enforcement, regardless of the size or complexity of the company or its degree of preparedness for the review. Moreover, enforcement actions in field offices must be sent for review to the poorly equipped national office.<sup>86</sup> One official testified that former OFCCP Director Ellen Bergman also instructed regional administrators not to accept affirmative action plans (AAPs) if the plans set goals beyond those expected from the availability of the protected population in the area from which the work force was drawn,<sup>87</sup> even though such voluntary goal setting beyond legal requirements has been upheld by the U.S. Supreme Court.<sup>88</sup> Testimony by a high Labor Department official refuted this assertion.<sup>89</sup>

At the same hearings, former labor secretary Raymond Donovan testified that the large back pay award figure in fiscal 1980 was unique because there had been an unusually large settlement that year. Hence, he argued, the number of settlements was about the same in 1982 as in 1980,<sup>90</sup> an assertion belied by the figures.

OFCCP Director Susan Meisinger explained the decline of debarments to zero (before the one debarment in 1986) as resulting from the legal requirement of an administrative hearing prior to debarment. She noted, however, that there were 122 recommendations for debarment pending as of the date of her testimony in 1984.<sup>91</sup> And well into President Reagan's second term, critics other than past OFCCP officials continued to take the administration to task for its "very weak enforcement . . . in terms of any sanctions being applied." They have particularly contrasted the sole contractor debarment after more than five years of the Reagan administration with the 13 debarments that occurred during President Carter's administration.<sup>92</sup>

Resolution of the conflicts in the testimony of officials, as well as in the responses of some of them to their critics, is neither possible nor necessary here. But the inferences that may properly be drawn from the record certainly lend some credence to the assertions of weakened enforcement. Former secretary Donovan's response to the decline in back pay awards, for example, does not account for the differences reflected by the record. Not only did the dollar amounts of such awards sharply decline, the number of recipients also declined from 4,336 in fiscal 1980 to 496 in fiscal 1984.<sup>93</sup> Moreover, although the severity of the debarment sanction has limited its use in the past, there were a number of debarments in the Carter administration<sup>94</sup> and before.

Because of the relative infrequency of the debarment, contract suspension, and cancellation sanctions, it was recommended during the Ford administration that these penalties be supplemented by others.<sup>95</sup> Consequently, regulations were adopted in 1977 to permit administrative orders enjoining contract violations and providing for back pay rather than debarment.<sup>96</sup> Use of the back pay remedy as an alternative to the more severe sanctions, therefore, is critical in the overall enforcement scheme. If there are no debarments or contract suspensions and cancellations and very few back pay awards, there is little of significance left in the enforcement program. Yet, according to the director's testimony before the House Appropriations Committee in April 1984, more than 100 debarment recommendations were pending.<sup>97</sup> Surely, these recommendations, in cases where cause has been shown, manifest a need for enforce-

ment. And these recommendations do not take into account the large number of cases that have been closed without findings of cause, commitment letters, or conciliation agreements. How many of these require administrative sanctions is not known, but it seems safe to assume that many do and that such sanctions would have been applied if OFCCP enforcement was stronger.

#### ■ ATTEMPTED CHANGES IN REGULATIONS

In December 1980, the Carter administration proposed new regulations to consolidate the regulations for Executive Order No. 11246, section 503 of the Rehabilitation Act of 1973, and section 402 of the Vietnam Era Veterans Readjustment Act.<sup>98</sup> Soon after President Reagan took office, the effective date of the regulations was postponed and a review of them undertaken. Subsequently, revised regulations were published in the *Federal Register* on 25 August 1981, and again on 23 April 1982.<sup>99</sup>

Several changes were proposed to

- reduce the scope of coverage
- raise the threshold dollar amounts for a written affirmative action plan
- relax the requirement for an affirmative action plan that includes goals and timetables where "underutilization" of women and minorities is shown
- permit contractors employing between 250 and 500 employees to prepare abbreviated affirmative action plans
- allow approval of an affirmative action plan for a five-year period ("extended duration AAP") rather than for only one year at a time
- eliminate all preaward compliance reviews
- provide back-pay awards only to the identifiable victims of discrimination
- limit the time period for which such awards can be sought.

The proposals would also have combined minorities and females for the purpose of a contractor's utilization analysis of its work force and would have determined goals for women in the construction industry on an aggregate rather than trade-by-trade basis.

These proposals prompted extensive public comment, and disapproval outweighed support by nearly a three-to-one margin. Although the proposals had been made initially without consulting EEOC, the final revisions were submitted for EEOC review in February 1983. EEOC commented that some of them (for example, the rule that back pay be limited to only identifiable victims and

then only for a two-year period prior to the OFCCP's notification of an employer that a complaint was filed) violated current case law. Criticized also as possibly violating current law was the proposed change to a five-year AAP. EEOC noted that this would limit OFCCP's ability to identify discriminatory practices. In response, the deputy undersecretary of labor wrote to the EEOC chairman in July 1983 informing him that his comments would be taken into account but that there would be no change in the relaxed underutilization rule, the aggregation rule for women in the construction trades, the rule discontinuing the practice of setting goals for minorities and women, and the five-year AAP rule. Given the objections to the proposals, final rules have not been published as this book goes to press.<sup>100</sup>

But action consistent with at least some of them apparently has been taken. Preaward reviews, for example, dropped from 594 in fiscal 1980 to 130 in fiscal 1982, and none were planned for fiscal 1983 or 1984.<sup>101</sup> Through a new program instituted by EEOC, the National Self-Monitoring Reporting System (NSMRS), there has been de facto implementation of some of the other features of the proposed regulations, including exemption from the annual compliance reviews and the use of national rather than regional data to assess underutilization. This program was put into effect without clearance from EEOC or, indeed, from the Labor Department's own solicitor.<sup>102</sup> Apparently, criticism of the agreements entered into under this program caused their suspension during further review.<sup>103</sup>

The record obviously is not complete. External pressure or, indeed, reconsideration may cause some scaling back in the effort to limit coverage or change compliance requirements. But the record is surely complete enough: the pattern of lessened enforcement plus attempted regulatory change is consistent with the Reagan administration's overall approach. There have always been questions raised about how effective the government's contract compliance program is even with sustained effort.<sup>104</sup> Those questions now are largely moot. Whatever affirmative action meant in the program as previously administered, it means very little now at least as far as dependency on OFCCP is concerned.

The picture, though mixed at EEOC, is unmixed at OFCCP. It is also unmixed at the Justice Department.

### The Justice Department

The administration's distaste for the legal requirements of affirmative action is most apparent in the Justice Department. Beyond mere

differences in judgment as to how the laws should be applied in doubtful cases, there is forthright opposition to the concept of affirmative action, despite clarity in the law as to the circumstances in which such action is required. Voluntary affirmative action measures (those not involving direct legal compulsion) have also been vigorously opposed. However, before the department's conduct under the Reagan administration is described, it is important to understand what its responsibility is, how it was discharged prior to this administration and what the law requires.

### ■ THE JUSTICE DEPARTMENT'S RESPONSIBILITIES

Despite the transfer to EEOC under the 1972 Title VII amendments of the pattern-or-practice authority of the attorney general to sue private employers and unions, the responsibility for litigation against discriminatory employment practices that remains with the Justice Department is substantial. First is its responsibility, created by those amendments, for bringing pattern-or-practice suits against state or local government units.<sup>105</sup> Second is its continuing authority, unchanged by the amendments, to intervene in cases brought by private litigants upon certification that such cases "are of general public importance."<sup>106</sup> Third is its responsibility to sue recipients of federal financial assistance under statutes outlawing discrimination in programs providing such assistance, whenever the providing agency refers cases to the department and a primary objective of the assistance is to provide employment,<sup>107</sup> or whenever nondiscrimination in employment is necessary for nondiscrimination in the program.<sup>108</sup> (How the department has discharged this responsibility was discussed in chapter 4.)

Fourth, under the Omnibus Crime Control and Safe Streets Act of 1968 as amended, which prohibits discrimination in employment in the expenditure of Office of Justice Programs (formerly, the Law Enforcement Assistance Administration) funds for the reduction of crime and the improvement of criminal justice, the Department of Justice may sue fund recipients that fail to comply with program assistance requirements (as it can any other violator referred by a granting agency); it may also bring pattern-or-practice suits against recipients of government grants on its own initiative.<sup>109</sup> Fifth, discriminatory employment practices of state and local government units receiving revenue-sharing funds under the State and Local Fiscal Assistance Act of 1972, as amended by the State and Local Fiscal Assistance Amendments of 1976,<sup>110</sup> may be made the subject of a pattern-or-practice suit.

Finally, under Executive Order No. 11246, the attorney general, upon referral from the Department of Labor (OFCCP)<sup>111</sup> or without such referral where the Justice Department initiates its own investigation,<sup>112</sup> may sue federal contractors who do not comply with the order and its implementing regulation. Thus, in addition to its responsibility for suits against state and local government units, the Justice Department retains considerable leverage in the private sector (along with EEOC and OFCCP) because of its authority to sue private program recipients and private employers who contract with the government.

The principal litigating objectives that characterized the Justice Department's work prior to the Reagan administration were development of a body of case law that would allow affected entities and the general public to understand equal employment requirements, and provision of as effective relief as possible to as large a number of employment discrimination victims as possible. Cases were targeted by comparing the representation of minorities in an employer's work force with their representation in the workforce of the employer's geographic location; by industries where discriminatory conditions existed; and by employers in industries with particularly poor statistics as well as notable specific discriminatory practices. When the shift was made to public sector cases after 1972—mainly against police and fire departments but increasingly against public utilities and city, county, and some suburban governments—statistical measures again were used to compare the size of a standard metropolitan statistical area (SMSA) with the ratio of minorities and women employed in the SMSA. Large cities and counties were targeted in much the same way as large employers, because of the probable yield from these suits when weighed against the stated objectives.<sup>113</sup> In the selection of cases, therefore, numbers were important to the expected results.

The results in the cases the Justice Department brought or participated in from the late 1960s to the end of the Carter administration not only created a body of law that gave concrete meaning to affirmative action as a concept, but also translated the concept in terms of *measurable numbers* for judging achievement. For example, cases filed by the Civil Rights Division were among the first decisions holding that federal law not only forbade overt, purposeful discrimination but also apparently neutral practices that perpetuated the effects of past discrimination.<sup>114</sup> The Justice Department also filed other cases condemning the discriminatory use of tests and other selection criteria.<sup>115</sup>

The remedial principles requiring positive conduct to counteract the effects of past discrimination also were formulated in cases filed by the division<sup>116</sup> or in those in which the division joined as amicus.<sup>117</sup> As to the use of numerical goals with accompanying timetables, the division either filed cases that sustained their use<sup>118</sup> or joined cases filed by others.<sup>119</sup>

Beyond the involvement of the Justice Department, the use of numerical measures for judging the accomplishment of the goals of antidiscrimination in employment had been consistently upheld in a range of settings addressed by court decisions in numerous lawsuits brought by other litigants before the Reagan years. Every federal appellate court that ruled on the issue concluded that, under appropriate circumstances, goals and timetables may be made a part of a court's remedial order.<sup>120</sup> These decisions accorded with the apparent congressional consensus reflected in the defeat of an amendment to the 1972 Title VII amendments that would have prevented federal agencies and officials from imposing goals and timetables or other forms of numerical relief under Title VII or The Executive Order.<sup>121</sup>

Moreover, the Supreme Court had clearly approved the use of back pay as a remedy<sup>122</sup> and had ruled that private employers may adopt and implement voluntary affirmative action plans using numerical goals. In *United Steelworkers v. Weber*,<sup>123</sup> the Court rejected a "reverse discrimination" challenge to a voluntary plan adopted by the Kaiser Aluminum Company and the steelworkers, which established a training program that reserved half of its openings for black workers. Characterizing the plan as a temporary measure designed to eliminate racial imbalance, the Court ruled that Title VII did not bar efforts to "voluntarily adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."<sup>124</sup> Finally, in a case of notoriety equal to *Weber*, a majority of the justices of the Supreme Court in the *Bakke* case<sup>125</sup> (which involved admission to a medical school and was decided a year before *Weber*) endorsed the proposition that affirmative action measures need not be restricted to the so-called identifiable victims of discriminatory conduct; race (or sex) may be taken into account to correct past inequities.

Such was the course of action taken by the Justice Department and the legal development from litigation undertaken both within and without the department, when the president's men occupied the seats of power at 10th Street and Constitution Avenue in Washington, D.C. How has the Justice Department under the Reagan

administration used its power to carry out its responsibility under the laws forbidding employment discrimination?

#### ■ THE DEPARTMENT'S RECORD

In a series of public comments and other actions early in his term, Assistant Attorney General William Bradford Reynolds set the stage for the department's litigation conduct that followed. In testimony before a House of Representatives subcommittee in September 1981, he stated that the Justice Department will not urge or support in any case "the use of quotas or any other numerical or statistical formulae designed to provide to non-victims of discrimination preferential treatment based on race, sex, national origin or religion." The department, Congress was told, would confine its requests for injunctions as to future conduct, increased recruitment efforts, and back pay and retroactive seniority only for identifiable victims of discrimination.<sup>126</sup> These views were reiterated at a Washington, D.C., conference the following month.<sup>127</sup> Again, in September 1981, Reynolds wrote a letter to the acting EEOC chairman (who had not been previously consulted) stating that the department "is unable to conclude at present that there is statutory authority for compelling [the] use [of goals and timetables] in affirmative action planning."<sup>128</sup> Copies of the letter were sent to the heads of all federal agencies. In October 1981, Reynolds stated in an interview that the equal employment opportunity requirements under Executive Order No. 11246, as amended, should also be restricted to exclude the setting of goals and timetables.<sup>129</sup> Finally, in December 1981, he announced his intention to seek a test case to overturn the *Weber* decision because he felt it was "wrongly decided."<sup>130</sup> This intention was reiterated at a conference in January 1982.<sup>131</sup>

The net effect of these statements was verbal repudiation of the legal principles that had evolved over the four decades since President Roosevelt's first executive order. The touchstone of the principles has been affirmative action measures that, whether undertaken by court order or voluntarily, include members of the victimized classes protected by law as well as individuals capable of being identified in particular instances. The remaining task of the Reagan administration's Justice Department was to carry out the assistant attorney general's assertions in specific cases.

In *United States v. Vermont*,<sup>132</sup> the department entered into a consent decree that relied on recruitment programs to increase the number of minorities and women in the applicant pool as the sole

means for accomplishing affirmative action without requiring affirmative measures in hiring, thus leaving the possibility that despite the increased presence of minorities and women in the pool, none would in fact be hired.

In *Lidell v. St. Louis Board of Education*<sup>133</sup> (discussed in chapter 3), one of the department's objections to the voluntary metropolitan desegregation plan involved there was that the agreement established a goal for the employment of black teachers and administrators in the suburban school districts on the basis of their availability in the metropolitan area, with specific hiring ratios included to meet the goal. The plan, however, was flexible specifically stating that failure to meet the goal could be justified by showing that the school district had hired the best qualified person. But the Justice Department attacked the agreement because it did not require hiring from a race-neutral hiring pool. Such an objection is clearly different from the position articulated by Reynolds and acted on in the foregoing case, that affirmative action recruiting is permissible. Surely, it cannot be that recruitment is permissible when it may not result in actual hiring but not permissible when it may.

In *Connecticut v. Teal*,<sup>134</sup> the Department joined the defendant, the State of Connecticut, in arguing, in a suit alleging the discriminatory effect of a written examination required by a state agency for advancement as a supervisor, that plaintiffs had not made out a case of discrimination sufficient to require the state to justify the racial impact of the test under the standard of *Griggs v. Duke Power Co.*,<sup>135</sup> because the "bottom line" of the supervisory promotion process was an appropriate racial balance. The Supreme Court, noting that EEOC had not joined the department in this argument, rejected it on the basis of the law as settled in *Griggs*, holding that discrimination against individual employees could not be justified by an employer simply because an employer did not discriminate against the class as a whole. What is interesting here is that the department used the group situation as an argument against relief for individuals who claimed that they were identifiable victims. (In May 1983, however, the department sued the Milwaukee Police Department, challenging the use of an allegedly discriminatory promotion examination and asking that the persons who took the exam and were denied promotion unfairly be promoted. The suit was filed a year after the *Teal* decision and did not seek any group relief.)<sup>136</sup>

In four cases involving police or fire departments and party agreements in settlement of claims of discrimination, the department opposed affirmative action measures agreed on and eventually

endorsed by the courts. In two of the cases, *Williams v. City of New Orleans*<sup>137</sup> and *Bratton v. City of Detroit*,<sup>138</sup> promotions of black and white officers on a fifty-fifty basis were upheld on appeal despite the department's opposition. In the New Orleans case, the department's position was in conflict with that taken by EEOC, which eventually voted not to file a brief it had prepared supporting the affirmative action plan because of pressure from the Justice Department.<sup>139</sup> In the Detroit case, the Justice Department sought to intervene at the appellate stage to challenge the affirmative action plan and to argue that resolution of the case would affect the attorney general's enforcement authority under Title VII, but the Court of Appeals for the Sixth Circuit denied its request noting that "the Justice Department's claim in this regard lacks much of the weight it might otherwise carry given the conflict between the position the department has taken here and that taken by others vested with enforcement powers under Title VII, particularly EEOC."<sup>140</sup> Two other cases, from Boston and Memphis, concerned the issue of whether white employees who had greater seniority than blacks who had been hired or promoted as a consequence of an affirmative action plan could be laid off before the blacks to protect the goals of the plan. In 1983, the Supreme Court dismissed the Boston case as moot despite the Justice Department's argument to the contrary,<sup>141</sup> but in June 1984, held in the Memphis case that in the absence of provisions in the consent decree that established the plan specifically directed toward the effects of seniority in layoffs, a court may not alter the requirements of an applicable seniority system.<sup>142</sup>

Assistant Attorney General Reynolds hailed the decision as "a monumental triumph for civil rights" and "an exhilarating decision" and announced that the department intended to review and possibly challenge all job-discrimination decrees involving the government that contained racial preference features for those who were not "the actual victims of discrimination."<sup>143</sup> Commentators on Reynolds's expressed views made the point that "he attempted to make the . . . decision out to be something it was not,"<sup>144</sup> and that "the real problem" is not what the opinion said "but with what Reynolds thinks it said," because he "is in a position to do a good deal of harm. . . ."<sup>145</sup>

Reynolds quickly carried through on his promise by challenging an order similar to that in Memphis in a case filed against Cincinnati's police department.<sup>146</sup> Subsequently, the department used the Memphis decision to prod approximately fifty cities throughout the nation to abandon affirmative action hiring and promotion plans for their police and fire departments which had been approved or ordered in

court decrees.<sup>147</sup> The department also filed suit in the District of Columbia against the city's affirmative action program for its fire department<sup>148</sup> and argued against a one-black-for-one-white promotion plan for the Alabama State police in a federal appeals court,<sup>149</sup> using the Memphis case as a springboard for challenging all affirmative action in government employment.<sup>150</sup>

In the next stage of its challenge to affirmative action in hiring and promotions, the department argued, in two cases heard by the Supreme Court in February 1986, against court decrees that had approved race-conscious relief on behalf of nonwhite workers.<sup>151</sup> In one case, a federal court endorsed in a consent decree an agreement by the city of Cleveland and an organization of black and Hispanic firefighters employed by the city providing for immediate promotions on a one-white-to-one-nonwhite basis and subsequent selection of candidates for promotion in accordance with specified promotional goals expressed in terms of percentages. The city entered into the agreement because it had a history dating back to 1972 of prior judicial findings of race discrimination in its police and fire departments. In the other case, a federal court in New York imposed a decree on a union and apprenticeship committee found guilty of violating Title VII by discriminating against nonwhite workers in recruitment, selection, training, and admission to the Sheet Metal Workers Union. The decree also provided race-conscious relief in the form of a 29 percent nonwhite membership goal based on the percentage of nonwhites in the relevant labor pool. The lawsuit had been preceded by a nearly 10-year effort to correct the discrimination found, and the defendants had been held in contempt for violating the court's order.

Then in May 1986, while these cases were pending decision by the Supreme Court, the Court decided another affirmative action case (*Wygant v. Jackson Board of Education*),<sup>152</sup> involving a school district in Michigan where the school board, under its collective bargaining agreement negotiated with its teachers' union, had agreed in successive contracts to the layoff of tenured white teachers with greater seniority than minority teachers who were retained in order to preserve gains in minority hiring. The Court held that these provisions of the contract violated the equal protection clause of the Fourteenth Amendment because they had not been adopted to cure prior racial discrimination by the school board and were not carefully adapted to remedy such discrimination had it been found. At the same time, the Court endorsed the use of affirmative action measures in appropriate situations.<sup>153</sup>

The Justice Department's reaction, through Assistant Attorney

General Reynolds, was that this decision required repeal of The Executive Order provisions mandating affirmative action goals and timetables by government contractors because the goals and timetables were not predicated on prior findings of discrimination.<sup>154</sup> The case, though, had nothing to do with the provisions of The Executive Order (which, as noted earlier, have been repeatedly upheld).<sup>155</sup> As he had done with the 1984 decision in *Firefighters v. Stotts* (the Memphis case that, like *Wygant*, had disapproved of layoffs that defeated the seniority expectations of white workers), Reynolds attempted to use a case decided on a very different set of facts and circumstances to argue that the Supreme Court had endorsed the department's position with respect to all race-conscious relief in hiring and promotion as distinguished from layoffs. The attempt failed and the department's position was rebuffed on 2 July 1986, when the Court decided the Cleveland and New York cases upholding the lower courts' decrees. The Court ruled that race-conscious affirmative relief, whether adopted voluntarily to settle a lawsuit (*Local 93*, the Cleveland case)<sup>156</sup> or imposed after findings of discrimination (*Local 28*, the New York case),<sup>157</sup> is appropriate and need not be limited to the actual victims of discrimination when the circumstances warrant relief and the measures adopted are carefully tailored to remedy the prior discrimination shown. As a consequence of these decisions, the Justice Department announced that it was dropping its challenge to affirmative action hiring and promotion in the police and fire departments of Indianapolis and Chicago,<sup>158</sup> and generally abandoned its nationwide effort,—begun after the *Stotts* decision—to require states, counties, and cities to repeal their affirmative action plans for minority and female hiring and advancement in these departments.

The Justice Department's opposition to affirmative action goals continued into the next term of the Supreme Court. In November 1986, the administration opposed affirmative action plans in two cases. In one case the department renewed its argument (previously urged unsuccessfully in the court of appeals) that a one-for-one, black-white promotion quota for Alabama state troopers was unconstitutional. In the second case it argued that a voluntary affirmative action plan adopted by a California county road agency to overcome the exclusion of women from jobs in the agency violated Title VII.<sup>159</sup> On 25 February 1987 the Court upheld the one-to-one quota in *United States v. Paradise*,<sup>160</sup> holding that the Constitution permits the imposition of racial quotas on public employers with a long history of racial discrimination and a record of resistance to court

orders to remedy the situation. On 25 March 1987, in *Johnson v. Santa Clara County Transportation Agency*,<sup>161</sup> the Court ruled that the voluntary plan did not violate Title VII. The *Johnson* case reaffirmed the Court's earlier decision in *Steelworkers v. Weber*,<sup>162</sup> and extended it to public employers and to sex discrimination.

Finally, prior to the Court's decisions in 1986 and 1987, the department had opposed two other affirmative action initiatives of a different sort. First was the "set-aside" of a certain percentage of contracts in the construction industry for minority contractors. Congress approved a 10 percent set-aside for minority contractors in the Public Works Employment Act of 1977 and the Supreme Court upheld the set-aside over the challenge of white contractors in *Fullilove v. Klutznick* in 1980.<sup>163</sup> Notwithstanding, in March 1984 the department filed a brief in a federal court in Atlanta asking that the set-aside program in Dade County, Florida, be invalidated.<sup>164</sup>

Second was the "comparable worth" proposal, relating to the pay of women for work not the same as, but arguably comparable in value to, that done by men, but for which men are better paid. The 1963 Equal Pay Act was passed to assure equal pay for equal work, and under Title VII sex-based wage discrimination is forbidden. In 1981 the Supreme Court ruled that sex-based wage discrimination claims under Title VII need not conform to the Equal Pay Act standard, but the Court specifically declined to rule on the comparable worth question.<sup>165</sup> Subsequently, a federal appeals court overturned a district court ruling that had endorsed the concept.<sup>166</sup>

#### SUMMARY

Just as the set-aside question was settled by the Supreme Court in *Klutznick*, so too has the question of the propriety of voluntary affirmative action been settled in *Weber* and, more recently, in *Johnson*. The decisions in the *Memphis Firefighters* and *Wygant* cases clearly do not undermine these decisions, or as evidenced by the Court's rulings in its last two terms, the affirmative action policy reflected generally in national laws. At most, these cases reflect another aspect of important national policy also protected under law: that of upholding seniority rights when those rights are not themselves the product of prohibited discrimination.

The department's energetic conduct opposing affirmative action, as shown clearly by the Court's decisions, is at odds with the laws

it must enforce. Aside from the comparable worth question, the laws' requirements are clear. Unless and until the laws, as interpreted by the nation's highest court, change, the department, as the nation's chief law enforcer, is obliged to carry out the policies the laws express. These permit, and in some cases require, affirmative action. Continued opposition to affirmative action therefore is simply not law enforcement.

#### Notes

1. See also *Bradwell v. Illinois*, 83 U.S. 130, 21 L.Ed. 442 (1873):

... the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded on the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and function of womanhood.

\* \* \*

The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

Concurrence of Mr. Justice Bradley, 83 U.S. at 141; 21 L.Ed. at 446.  
See also *Muller v. Oregon*, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908).

2. Civil Rights Act of 1866 § 1, 14 Stat. 27, codified as 42 U.S.C. § 1981.

3. See *Johnson v. Railway Express Agency*, 421 U.S. 454, 44 L.Ed.2d 295, 95 S. Ct. 1716 (1975). Indeed, the disinterment of the 1866 act as a remedy for housing discrimination that occurred in *Jones v. Mayer Co.*, 392 U.S. 409, in 1968 (ch. 5) also enabled the statute to be used as a remedy for discrimination against employment, 392 U.S. at 422, note 78.

4. The Pendleton Act, also known as the Civil Service Act, 22 Stat. 403, Ch.27 (16 Jan. 1883). The act as codified is in 5 U.S.C. §§ 1101 et seq.

5. Van Riper, *History of the United States Civil Service* 161-62 & 241-42. (1958). In 1913, Wilson wrote, "I would say that I do approve of the segregation that is being attempted in several of the departments." (*Id.* at 242, n. 52.)

6. U.S. Comm'n on Civil Rights, *To Eliminate Employment Discrimination* 9 (The Federal Civil Rights Enforcement Effort—1974, Vol. 5, 1975) [hereinafter 1975 CRC Report].

7. 5 U.S.C. §§ 2102, 3304 (1940).

8. Exec. Order No. 8587, 3 C.F.R. 824 (1940).

9. Exec. Order No. 8802, 3 C.F.R. 234 (Supp. 1941).

10. Krislov, *The Negro in Federal Employment: The Quest for Equal Opportunity* 33-34 (1967).

11. 3 C.F.R. 86 (Supp. 1961).

12. P.L. 88-38, 77 Stat. 56, 29 U.S.C. § 206(d) (10 June 1963).

13. 29 U.S.C. § 206(d)(1)(1970).

14. P.L. 88-352, 78 Stat. 241 (2 July 1964), 42 U.S.C. § 2000a et seq.

15. 42 U.S.C. § 2000e-5(g).

16. Exec. Order No. 11246, 3 C.F.R. 339 (1964-65 Comp.).

17. Exec. Order No. 11375, 3 C.F.R. 684 (Supp. 1967).

18. Exec. Order No. 11478, 3 C.F.R. 133 (1969).

19. *Equal Employment Opportunity Act of 1972*, P.L. 92-261, 86 Stat. 103, 42 U.S.C. § 2000e et seq. (24 Mar. 1972).

20. *Id.* § 2, 42 U.S.C. § 2000e as amended.

21. See source cited supra note 11.

22. Exec. Order No. 11246, 3 C.F.R. 167 (1965).

23. M. Player, *Employment Discrimination Law* 216 (1980).

24. Secretary of Labor, *The Older American Workers: Age Discrimination in Employment* (1965).

25. P.L. 90-202, 81 Stat. 602, 29 U.S.C. §§ 621-634 (15 Dec. 1967).

26. *Age Discrimination in Employment Amendments of 1974*, P.L. 93-259, 29 U.S.C. § 621 et seq., 88 Stat. 74 (enacted 8 Apr. 1974).

27. *Age Discrimination in Employment Amendments of 1978*, P.L. 95-256, 29 U.S.C. § 623 et seq., 92 Stat. 189-98 (6 Apr. 1978).

28. P.L. 93-112, 87 Stat. 355, 29 U.S.C. § 701 et seq. (26 Sept. 1973).

29. 29 U.S.C. § 793.

30. 29 U.S.C. § 794.

31. 29 U.S.C. § 791(b).

32. P.L. 90-351, 82 Stat. 208, 42 U.S.C. § 3766 (19 June 1968).

33. P.L. 92-512, 86 Stat. 919-36, § 6701 et seq. See *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977).

34. P.L. 92-540, 86 Stat. 1074, 38 U.S.C. § 2011 et seq. (24 Oct. 1972).

35. P.L. 88-352, 78 Stat. 241, specifically, 42 U.S.C. § 2000e-4. 42 U.S.C. § 2000e-4(f) contains the powers of the comm'n as established under 42 U.S.C. § 2000e-4(a). Legal representation is provided under 42 U.S.C. § 2000e-4(g).

36. See source cited supra note 19.

37. Reorganization Plan No. 1 of 1978, 92 Stat. 3781, 43 Fed. Reg. 19807 (1978); Exec. Order No. 12144, 44 Fed. Reg. 37193 (1979).

38. Title VII of source cited supra note 19: 1975 amends. to 1972 amends., P.L. 93-608; 1978 amends., P.L. 93-555.

39. 42 U.S.C. § 2000e-5(f).

40. See supra note 35 and accompanying text.

41. National Labor Relations Act, 49 Stat. 449, Title 29 U.S.C. §§ 151-166 (5 July 1935).
42. See *supra* note 35.
43. See sources cited *supra* note 37. Left unchanged by this reorganization, however, were the enforcement provisions of the non-Title-VII acts involved. Thus EEOC must adapt its enforcement procedures to those specified in these statutes.
44. The number of authorized positions at EEOC decreased from a peak of 3,627 in 1979 to 3,127 in 1983, about the same as in 1982. The decrease began under the Carter administration but the sharpest drop occurred during the first Reagan year. It was estimated that this same approximate force level continued through 1985. See Burbridge, *The Impact of Changes in Policy on the Federal Equal Employment Opportunity Effort* 39 & 41, chart 3 (Urban Institute discussion paper, 1984).
45. Civil Rights Act of 1964, P.L. 88-352, 42 U.S.C. § 2000e-5(d) & (f) (2).
46. Burbridge, *supra* note 44 at 39-40 & 43, table 2. For additional data through 1985, see also Burbridge, *Changes in Equal Employment Enforcement: What Enforcement Statistics Tell Us* Rev. of Black Pol. Econ. 76 (table 2) & 77 (Summer 1986) [hereinafter *Enforcement*].
47. Burbridge, *supra* note 44 at 43, table 2.
48. *Id.* at 34 & 35, chart 1.
49. Oversight Hearings on EEOC Enforcement of Title VII, House of Representatives (26 Oct. 1983) (statements of J. Nancy Kreiter, research director, Women Employed; Edward A. Watkins, president, National Council of EEOC Local #216, American Federation of Government Employees, AFL-CIO; & Donald L. Slate, former general counsel, EEOC) [hereinafter *Oversight Hearings*].
50. Burbridge, *supra* note 44 at 42, 44, (table 3), 45 & 46. For additional data, see *Enforcement, supra* note 46. These data and those referred to in the text accompanying *supra* notes 46, 47 & 48 were compiled by Women Employed, a Chicago-based advocacy group for women, and were cited in *Oversight Hearings, supra* note 49.
51. See *Oversight Hearings, supra* note 49 testimony of Richard Seymour for the Lawyers' Committee for Civil Rights Under Law.
52. *Oversight Hearings, supra* note 49 (statement of Donald L. Slate, general counsel, EEOC). Slate resigned early in 1984 after charging in an internal EEOC memo that a quota system required by Chairman Thomas weakened the charge-processing component of enforcement. See Wash. Post, 8 Feb. 1984 at 16, col. 1. This criticism was also made during the oversight hearings by EEOC's employee union representative, Edward Watkins. See Burbridge, *supra* note 44 at 42.
53. See EEOC's Two Part Mission Pulling Its Employees in Opposing Directions, Wash. Post, 12 March 1984, The Federal Page, col. 1.
54. *Enforcement, supra* note 46 at 76 (table 2) & 77-79.
55. Award of back pay in suit under Civil Rights Act of 1964, tit. VII, amended by EEOA of 1972. See 42 U.S.C. § 2000e & 21 A.L.R. Fed. 472.
56. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S. Ct. 2362, 45 L.Ed. 2d 280 (1975).
57. See *Oversight Hearings, supra* note 49.
58. *Williams v. New Orleans*, 729 F.2d 1554 (5th Cir. 1984).
59. Indeed, the House Committee on Government Operations which conducted the October 1983 oversight hearings recommended that EEOC file an amicus brief in any public sector case in which it was interested to allow the court to decide the propriety of its doing so if the Justice Department objected. Report by House Committee on Government Operations on EEOC Handling of Sex Based Wage Discrimination, Daily Lab. Rep., 25 May 1984.
60. *Controlling Destiny at the EEOC*, Nat'l L.J. 43 (30 Jan. 1984).
61. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
62. See, for example, *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Briot v. Zia Co.*, 478 F.2d 1200 (10th Cir. 1973); *Nance v. Union Carbide Corp.*, 397 F. Supp. 436 (W.D.N.C. 1975). See also Chi. Tribune, 3 Dec. 1984, § 1 at 17, col. 2.
63. Chi. Tribune, 3 Dec. 1984, § 1 at 17, col. 1.
64. *Id.*, 15 Dec. 1984, § 1 at 8, col. 1.
65. *Id.*, 12 Feb. 1986, § 1 at 12, col. 1.
66. *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 106 S. Ct. 3019, 92 L.Ed.2d 344 (1986); *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986).
67. Jet 6 (11 Aug. 1986).
68. Wash. Post, 5 Dec. 1983, at A8, col. 1. It goes without saying that the answer to the question posed by Chairman Thomas was irrelevant to his responsibilities to enforce Title VII as vigorously as he could.
69. See source cited *supra* note 60.
70. 42 Op. Att'y Gen., No. 21 (1961), 42 Comp. Gen. 692 (1963); *Farmerv. Philadelphia Elec. Co.*, 329 F.2d 3 (3d Cir. 1964); *Farkas v. Texas Instruments Co.*, 375 F.2d 629 (5th Cir. 1967); 42 Op. Att'y Gen. 405, 408 (1969); *Contractor's Ass'n of Eastern Pa. v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), cert. denied, 404 U.S. 854; *Legal Aid Soc'y v. Brennan*, 381 F. Supp. 125 (N.D. Cal. 1974); *United States v. Mississippi Power and Light Co.*, 638 F.2d 899, 250 (5th Cir. 1981). See also *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).
71. Exec. Order No. 11246, Part II, §§ 202, 204, 3 C.F.R. 1964-65 Comp. at 341, 342, amended by Exec. Order No. 11375, 3 C.F.R. 685 (1966-70 Comp.).
72. Exec. Order No. 11246, Part II § 203, 3 C.F.R. 1964-65 Comp. at 341 & 342 amended by Exec. Order No. 11375, 3 C.F.R. (1966-70 Comp.) 686 (1967).
73. Exec. Order No. 11246, Part III § 301, 3 C.F.R. 345 (1964-65 Comp.) 41 C.F.R. §§ 60-1.4(b), 60-1.5(a)(1974).
74. 41 C.F.R. §§ 60-1.8, 60-1.5(a) (1974). See also Jet 6 (11 Aug. 1986).
75. Rehabilitation Act of 1973, P.L. 93-112, 87 Stat. 355, tit. 29 § 701 et seq. (26 Sept. 1973).
76. P.L. 92-540, 86 Stat. 1074, tit. 38 § 101 et seq. (1972 & 1974); P.L. 93-508, 88 Stat. 1578, tit. 38 § 219 et seq.
77. See sources cited *supra* note 37.
78. 41 C.F.R. § 60.1.40 (1974).
79. 41 C.F.R. § 60.2 et seq. (1964). A compliance review procedure was added in 1974.
80. See 41 C.F.R. § 60-1.26, as amended, 42 Fed. Reg. 3454 (1977).
81. See generally, U.S. Department of Labor, Office of Federal Contract Compliance

Programs (1979). (Compliance reviews of selected contractors are routinely conducted throughout the year.)

82. Burbridge, *supra* note 44 at 49, 50 & 51 (charts 4 & 5).

83. *Id.* at 50 (table 4). See also sources cited *supra* note 46.

84. *Chi. Tribune*, 3 Sept. 1986, § 1 at 12, col. 1.

85. U.S. Comm'n on Civil Rights, *Federal Civil Rights Commitments: An Assessment of Enforcement Resources and Performance* (1983)[hereinafter *Federal Civil Rights Commitments*].

86. See Testimony of Samuel Lynn, a former assistant regional administrator, U.S. House of Representatives, *Oversight Hearings of the OFCCP* (1984).

87. See *id.* (testimony of Jay Sauls).

88. *United Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct 2721, 61 L.Ed. 2d 480 (1979).

89. Hearings, U.S. Congress, House of Reps., Comm. on Appropriations, Subcomm. on Departments of Labor, Health and Human Services, Education and Related Agencies, *Appropriations for 1983* (18 Mar. 1982) (testimony of Robert Collyer).

90. *Id.*, 10 Mar. 1982.

91. See Hearings, U.S. Congress, House of Reps., Comm. on Appropriations, Subcomm. on Departments of Labor, Health and Human Services, Education and Related Agencies, *Appropriations for 1985* (11 Apr. 1984).

92. See *supra* note 84.

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102. Memorandum from associate solicitor of Labor, James D. Henry, to Susan Meisinger, acting director, OFCCP, *Daily Lab. Rep. No. 60* (1984).

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122. See sources cited *supra* note 117.
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129. *New Civil Rights Chief Lacks Experience*, *Critics Say*, *Legal Times* 6 (26 Oct. 1981).
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139. *EEOC Reverses Stand On New Orleans Suit Due to Pressure from Justice Department*, *Wall St. J.*, 7 Apr. 1983, at 16, col. 1.
140. *Nat'l L. J.*, 18 July 1983.

141. *Boston Firefighters Union, Local 718 v. Boston Chapter NAACP*, 461 U.S. 477, 103 S. Ct. 2076 (1983).
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143. *Chi. Tribune*, 14 June 1984, § 1 at 1, col. 1.
144. *Id.*, 15 June 1984, § 1 at 26, col. 1.
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150. See *Chi. Tribune*, 26 Feb. 1986, § 1, at 10, col. 1.
151. *Id.*
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153. 476 U.S. 280-81, 106 S.Ct. 1850, 90 L.Ed.2d 273.
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**THE EXECUTIVE ROLE  
IN CIVIL RIGHTS ENFORCEMENT  
FROM EISENHOWER TO CARTER**

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"Don't judge us by what we say but by what we do," John M. Mitchell who was then attorney general responded to criticism of the Nixon administration's civil rights policies similar to those of President Reagan's. What governments, like individuals, do generally reveals more about what they are than what they say. But governments have responsibilities that individuals do not have and governments speak in ways that individuals cannot. Therefore, what government officials say (particularly when the official is president of the United States), as well as what they do, matters a great deal because it affects what is and is not done by other officials of the government. What Congress (and the Court) does or does not do and what the nation at large may perceive as the right thing to do may also matter.

Hence judgment of the record of successive administrations regarding civil rights enforcement is appropriate with respect to words as well as deeds, with respect to subtleties as well as overt declarations, and the choices that were not made when choice was possible as well as the choices actually made.

This chapter applies these measures to each administration from Dwight D. Eisenhower's to Jimmy Carter's. The record includes executive orders; appointments in the executive and judicial branches; agency actions; legislation proposed to Congress; action taken on legislation passed by Congress; suits filed and positions taken by the Justice Department in particular cases; and enforcement of court decisions and statements of positions taken by the president or subordinate officials with civil rights responsibilities through speeches, press conferences, or otherwise. In these ways, what previous administrations did and said can be judged to determine their views of appropriate public policy regarding civil rights enforcement and the consequences of those views for the nation.

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Programs (1979). (Compliance reviews of selected contractors are routinely conducted throughout the year.)

82. Burbridge, *supra* note 44 at 49, 50 & 51 (charts 4 & 5).

83. *Id.* at 50 (table 4). See also sources cited *supra* note 46.

84. *Chi. Tribune*, 3 Sept. 1986, § 1 at 12, col. 1.

85. U.S. Comm'n on Civil Rights, *Federal Civil Rights Commitments: An Assessment of Enforcement Resources and Performance (1983)* [hereinafter *Federal Civil Rights Commitments*].

86. See Testimony of Samuel Lynn, a former assistant regional administrator, U.S. House of Representatives, *Oversight Hearings of the OFCCP (1984)*.

87. See *Id.* (testimony of Jay Sauls).

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90. *Id.*, 10 Mar. 1982.

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41. National Labor Relations Act, 49 Stat. 449, Title 29 U.S.C. §§ 151-166 (5 July 1935).
42. See *supra* note 35.
43. See sources cited *supra* note 37. Left unchanged by this reorganization, however, were the enforcement provisions of the non-Title-VII acts involved. Thus EEOC must adapt its enforcement procedures to those specified in these statutes.
44. The number of authorized positions at EEOC decreased from a peak of 3,627 in 1979 to 3,127 in 1983, about the same as in 1982. The decrease began under the Carter administration but the sharpest drop occurred during the first Reagan year. It was estimated that this same approximate force level continued through 1985. See Burbridge, *The Impact of Changes in Policy on the Federal Equal Employment Opportunity Effort* 39 & 41, chart 3 (Urban Institute discussion paper, 1984).
45. Civil Rights Act of 1964, P.L. 88-352, 42 U.S.C. § 2000e-5(d) & (f) (2).
46. Burbridge, *supra* note 44 at 39-40 & 43, table 2. For additional data through 1985, see also Burbridge, *Changes in Equal Employment Enforcement: What Enforcement Statistics Tell Us* Rev. of Black Pol. Econ. 76 (table 2) & 77 (Summer 1986) [hereinafter *Enforcement*].
47. Burbridge, *supra* note 44 at 43, table 2.
48. *Id.* at 34 & 35, chart 1.
49. *Oversight Hearings on EEOC Enforcement of Title VII, House of Representatives* (26 Oct. 1983) (statements of J. Nancy Kreiter, research director, Women Employed; Edward A. Watkins, president, National Council of EEOC Local #216; American Federation of Government Employees, AFL-CIO; & Donald L. Slate, former general counsel, EEOC) [hereinafter *Oversight Hearings*].
50. Burbridge, *supra* note 44 at 42, 44, (table 3), 45 & 46. For additional data, see *Enforcement, supra* note 46. These data and those referred to in the text accompanying *supra* notes 46, 47 & 48 were compiled by Women Employed, a Chicago-based advocacy group for women, and were cited in *Oversight Hearings, supra* note 49.
51. See *Oversight Hearings, supra* note 49 testimony of Richard Seymour for the Lawyers' Committee for Civil Rights Under Law.
52. *Oversight Hearings, supra* note 49 (statement of Donald L. Slate, general counsel, EEOC). Slate resigned early in 1984 after charging in an internal EEOC memo that a quota system required by Chairman Thomas weakened the charge-processing component of enforcement. See Wash. Post, 8 Feb. 1984 at 16, col. 1. This criticism was also made during the oversight hearings by EEOC's employee union representative, Edward Watkins. See Burbridge, *supra* note 44 at 42.
53. See EEOC's *Two Part Mission Pulling Its Employees in Opposing Directions*, Wash. Post, 12 March 1984; *The Federal Page*, col. 1.
54. *Enforcement, supra* note 46 at 76 (table 2) & 77-79.
55. Award of back pay in suit under Civil Rights Act of 1964, tit. VII, amended by EEOA of 1972. See 42 U.S.C. § 2000e & 21 A.L.R. Fed. 472.
56. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S. Ct. 2362, 45 L.Ed. 2d 280 (1975).
57. See *Oversight Hearings, supra* note 49.
58. *Williams v. New Orleans*, 729 F.2d 1554 (5th Cir. 1984).
59. Indeed, the House Committee on Government Operations which conducted the October 1983 oversight hearings recommended that EEOC file an amicus brief in any

- public sector case in which it was interested to allow the court to decide the propriety of its doing so if the Justice Department objected. Report by House Committee on Government Operations on EEOC Handling of Sex Based Wage Discrimination, Daily Lab. Rep., 25 May 1984.
60. *Controlling Destiny at the EEOC*, Nat'l L.J. 43 (30 Jan. 1984).
61. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
62. See, for example, *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Briot v. Zia Co.*, 478 F.2d 1200 (10th Cir. 1973); *Nance v. Union Carbide Corp.*, 397 F. Supp. 436 (W.D.N.C. 1975). See also Chi. Tribune, 3 Dec. 1984, § 1 at 17, col. 2.
63. Chi. Tribune, 3 Dec. 1984, § 1 at 17, col. 1.
64. *Id.*, 15 Dec. 1984, § 1 at 8, col. 1.
65. *Id.*, 12 Feb. 1986, § 1 at 12, col. 1.
66. *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 106 S. Ct. 3019, 92 L.Ed.2d 344 (1986); *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986).
67. *Jet* 6 (11 Aug. 1986).
68. Wash. Post, 5 Dec. 1983, at A8, col. 1. It goes without saying that the answer to the question posed by Chairman Thomas was irrelevant to his responsibilities to enforce Title VII as vigorously as he could.
69. See source cited *supra* note 60.
70. 42 Op. Att'y Gen., No. 21 (1961), 42 Comp. Gen. 692 (1963); *Farmerv. Philadelphia Elec. Co.*, 329 F.2d 3 (3d Cir. 1964); *Farkas v. Texas Instruments Co.*, 375 F.2d 629 (5th Cir. 1967); 42 Op. Att'y Gen. 405, 408 (1969); *Contractor's Ass'n of Eastern Pa. v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), cert. denied, 404 U.S. 854; *Legal Aid Soc'y v. Brennan*, 381 F. Supp. 125 (N.D. Cal. 1974); *United States v. Mississippi Power and Light Co.*, 638 F.2d 899, 250 (5th Cir. 1981). See also *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).
71. Exec. Order No. 11246, Part II, §§ 202, 204, 3 C.F.R. 1964-65 Comp. at 341, 342, amended by Exec. Order No. 11375, 3 C.F.R. 685 (1966-70 Comp.).
72. Exec. Order No. 11246, Part II § 203, 3 C.F.R. 1964-65 Comp. at 341 & 342 amended by Exec. Order No. 11375, 3 C.F.R. (1966-70 Comp.) 686 (1967).
73. Exec. Order No. 11246, Part III § 301, 3 C.F.R. 345 (1964-65 Comp.); 41 C.F.R. §§ 60-1.4(b), 60-1.5(a) (1974).
74. 41 C.F.R. §§ 60-1.8, 60-1.5(a) (1974). See also *Jet* 6 (11 Aug. 1986).
75. Rehabilitation Act of 1973, P.L. 93-112, 87 Stat. 355, tit. 29 § 701 et seq. (26 Sept. 1973).
76. P.L. 92-540, 86 Stat. 1074, tit. 38 § 101 et seq. (1972 & 1974); P.L. 93-508, 88 Stat. 1578, tit. 38 § 219 et seq.
77. See sources cited *supra* note 37.
78. 41 C.F.R. § 60.1.40 (1974).
79. 41 C.F.R. § 60.2 et seq. (1964). A compliance review procedure was added in 1974.
80. See 41 C.F.R. § 60-1.26, as amended, 42 Fed. Reg. 3454 (1977).
81. See generally, U.S. Department of Labor, Office of Federal Contract Compliance

it must enforce. Aside from the comparable worth question, the laws' requirements are clear. Unless and until the laws, as interpreted by the nation's highest court, change, the department, as the nation's chief law enforcer, is obliged to carry out the policies the laws express. These permit, and in some cases require, affirmative action. Continued opposition to affirmative action therefore is simply not law enforcement.

#### Notes

1. See also *Bradwell v. Illinois*, 83 U.S. 130, 21 L.Ed. 442 (1873):

... the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded on the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and function of womanhood.

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The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

Concurrence of Mr. Justice Bradley, 83 U.S. at 141; 21 L.Ed. at 446.  
See also *Muller v. Oregon*, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908).

2. Civil Rights Act of 1866 § 1, 14 Stat. 27, codified as 42 U.S.C. § 1981.

3. See *Johnson v. Railway Express Agency*, 421 U.S. 454, 44 L.Ed.2d 295, 95 S. Ct. 1716 (1975). Indeed, the disinterment of the 1866 act as a remedy for housing discrimination that occurred in *Jones v. Mayer Co.*, 392 U.S. 409, in 1968 (ch. 5) also enabled the statute to be used as a remedy for discrimination against employment, 392 U.S. at 422, note 78.

4. The Pendleton Act, also known as the Civil Service Act, 22 Stat. 403, Ch. 27 (16 Jan. 1883). The act as codified is in 5 U.S.C. §§ 1101 et seq.

5. Van Riper, *History of the United States Civil Service* 161-62 & 241-42. (1958). In 1913, Wilson wrote, "I would say that I do approve of the segregation that is being attempted in several of the departments." (Id. at 242, n. 52.)

6. U.S. Comm'n on Civil Rights, *To Eliminate Employment Discrimination 9* (The Federal Civil Rights Enforcement Effort—1974, Vol. 5, 1975) [hereinafter 1975 CRC Report].

7. 5 U.S.C. §§ 2102, 3304 (1940).

8. Exec. Order No. 8587, 3 C.F.R. 824 (1940).

9. Exec. Order No. 8802, 3 C.F.R. 234 (Supp. 1941).

10. *Krislov, The Negro in Federal Employment: The Quest for Equal Opportunity* 33-34 (1967).

11. 3 C.F.R. 86 (Supp. 1961).

12. P.L. 88-38, 77 Stat. 56, 29 U.S.C. § 206(d) (10 June 1963).

13. 29 U.S.C. § 206(d)(1) (1970).

14. P.L. 88-352, 78 Stat. 241 (2 July 1964), 42 U.S.C. § 2000a et seq.

15. 42 U.S.C. § 2000e-5(g).

16. Exec. Order No. 11246, 3 C.F.R. 339 (1964-65 Comp.).

17. Exec. Order No. 11375, 3 C.F.R. 684 (Supp. 1967).

18. Exec. Order No. 11478, 3 C.F.R. 133 (1969).

19. *Equal Employment Opportunity Act of 1972*, P.L. 92-261, 86 Stat. 103, 42 U.S.C. § 2000e et seq. (24 Mar. 1972).

20. Id. § 2, 42 U.S.C. § 2000e as amended.

21. See source cited supra note 11.

22. Exec. Order No. 11246, 3 C.F.R. 167 (1965).

23. M. Player, *Employment Discrimination Law* 216 (1980).

24. Secretary of Labor, *The Older American Workers: Age Discrimination in Employment* (1965).

25. P.L. 90-202, 81 Stat. 602, 29 U.S.C. §§ 621-634 (15 Dec. 1967).

26. *Age Discrimination in Employment Amendments of 1974*, P.L. 93-259, 29 U.S.C. § 621 et seq., 88 Stat. 74 (enacted 8 Apr. 1974).

27. *Age Discrimination in Employment Amendments of 1978*, P.L. 95-256, 29 U.S.C. § 623 et seq., 92 Stat. 189-98 (6 Apr. 1978).

28. P.L. 93-112, 87 Stat. 355, 29 U.S.C. § 701 et seq. (26 Sept. 1973).

29. 29 U.S.C. § 793.

30. 29 U.S.C. § 794.

31. 29 U.S.C. § 791(b).

32. P.L. 90-351, 82 Stat. 208, 42 U.S.C. § 3766 (19 June 1968).

33. P.L. 92-512, 86 Stat. 919-36, § 6701 et seq. See *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977).

34. P.L. 92-540, 86 Stat. 1074, 38 U.S.C. § 2011 et seq. (24 Oct. 1972).

35. P.L. 88-352, 78 Stat. 241, specifically, 42 U.S.C. § 2000e-4. 42 U.S.C. § 2000e-4(f) contains the powers of the comm'n as established under 42 U.S.C. § 2000e-4(a). Legal representation is provided under 42 U.S.C. § 2000e-4(g).

36. See source cited supra note 19.

37. *Reorganization Plan No. 1 of 1978*, 92 Stat. 3781, 43 Fed. Reg. 19807 (1978); Exec. Order No. 12144, 44 Fed. Reg. 37193 (1979).

38. Title VII of source cited supra note 19; 1975 amends. to 1972 amends., P.L. 93-608; 1978 amends., P.L. 93-555.

39. 42 U.S.C. § 2000e-5(f).

40. See supra note 35 and accompanying text.

General Reynolds, was that this decision required repeal of The Executive Order provisions mandating affirmative action goals and timetables by government contractors because the goals and timetables were not predicated on prior findings of discrimination.<sup>154</sup> The case, though, had nothing to do with the provisions of The Executive Order (which, as noted earlier, have been repeatedly upheld).<sup>155</sup> As he had done with the 1984 decision in *Firefighters v. Stotts* (the Memphis case that, like *Wygant*, had disapproved of layoffs that defeated the seniority expectations of white workers), Reynolds attempted to use a case decided on a very different set of facts and circumstances to argue that the Supreme Court had endorsed the department's position with respect to all race-conscious relief in hiring and promotion as distinguished from layoffs. The attempt failed and the department's position was rebuffed on 2 July 1986, when the Court decided the *Cleveland* and *New York* cases upholding the lower courts' decrees. The Court ruled that race-conscious affirmative relief, whether adopted voluntarily to settle a lawsuit (*Local 93*, the *Cleveland* case)<sup>156</sup> or imposed after findings of discrimination (*Local 28*, the *New York* case),<sup>157</sup> is appropriate and need not be limited to the actual victims of discrimination when the circumstances warrant relief and the measures adopted are carefully tailored to remedy the prior discrimination shown. As a consequence of these decisions, the Justice Department announced that it was dropping its challenge to affirmative action hiring and promotion in the police and fire departments of Indianapolis and Chicago,<sup>158</sup> and generally abandoned its nationwide effort—begun after the *Stotts* decision—to require states, counties, and cities to repeal their affirmative action plans for minority and female hiring and advancement in these departments.

The Justice Department's opposition to affirmative action goals continued into the next term of the Supreme Court. In November 1986, the administration opposed affirmative action plans in two cases. In one case the department renewed its argument (previously urged unsuccessfully in the court of appeals) that a one-for-one, black-white promotion quota for Alabama state troopers was unconstitutional. In the second case it argued that a voluntary affirmative action plan adopted by a California county road agency to overcome the exclusion of women from jobs in the agency violated Title VII.<sup>159</sup> On 25 February 1987, the Court upheld the one-to-one quota in *United States v. Paradise*,<sup>160</sup> holding that the Constitution permits the imposition of racial quotas on public employers with a long history of racial discrimination and a record of resistance to court

orders to remedy the situation. On 25 March 1987, in *Johnson v. Santa Clara County Transportation Agency*,<sup>161</sup> the Court ruled that the voluntary plan did not violate Title VII. The *Johnson* case reaffirmed the Court's earlier decision in *Steelworkers v. Weber*,<sup>162</sup> and extended it to public employers and to sex discrimination.

Finally, prior to the Court's decisions in 1986 and 1987, the department had opposed two other affirmative action initiatives of a different sort. First was the "set-aside" of a certain percentage of contracts in the construction industry for minority contractors. Congress approved a 10 percent set-aside for minority contractors in the Public Works Employment Act of 1977 and the Supreme Court upheld the set-aside over the challenge of white contractors in *Fullilove v. Klutznick* in 1980.<sup>163</sup> Notwithstanding, in March 1984 the department filed a brief in a federal court in Atlanta asking that the set-aside program in Dade County, Florida, be invalidated.<sup>164</sup>

Second was the "comparable worth" proposal, relating to the pay of women for work not the same as, but arguably comparable in value to, that done by men, but for which men are better paid. The 1963 Equal Pay Act was passed to assure equal pay for equal work, and under Title VII sex-based wage discrimination is forbidden. In 1981 the Supreme Court ruled that sex-based wage discrimination claims under Title VII need not conform to the Equal Pay Act standard, but the Court specifically declined to rule on the comparable worth question.<sup>165</sup> Subsequently, a federal appeals court overturned a district court ruling that had endorsed the concept.<sup>166</sup>

#### SUMMARY

Just as the set-aside question was settled by the Supreme Court in *Klutznick*, so too has the question of the propriety of voluntary affirmative action been settled in *Weber* and, more recently, in *Johnson*. The decisions in the *Memphis Firefighters* and *Wygant* cases clearly do not undermine these decisions, or as evidenced by the Court's rulings in its last two terms, the affirmative action policy reflected generally in national laws. At most, these cases reflect another aspect of important national policy also protected under law: that of upholding seniority rights when those rights are not themselves the product of prohibited discrimination.

The department's energetic conduct opposing affirmative action, as shown clearly by the Court's decisions, is at odds with the laws

endorsed by the courts. In two of the cases, *Williams v. City of New Orleans*<sup>137</sup> and *Bratton v. City of Detroit*,<sup>138</sup> promotions of black and white officers on a fifty-fifty basis were upheld on appeal despite the department's opposition. In the New Orleans case, the department's position was in conflict with that taken by EEOC, which eventually voted not to file a brief it had prepared supporting the affirmative action plan because of pressure from the Justice Department.<sup>139</sup> In the Detroit case, the Justice Department sought to intervene at the appellate stage to challenge the affirmative action plan and to argue that resolution of the case would affect the attorney general's enforcement authority under Title VII, but the Court of Appeals for the Sixth Circuit denied its request noting that "the Justice Department's claim in this regard lacks much of the weight it might otherwise carry given the conflict between the position the department has taken here and that taken by others vested with enforcement powers under Title VII, particularly EEOC."<sup>140</sup> Two other cases, from Boston and Memphis, concerned the issue of whether white employees who had greater seniority than blacks who had been hired or promoted as a consequence of an affirmative action plan could be laid off before the blacks to protect the goals of the plan. In 1983, the Supreme Court dismissed the Boston case as moot despite the Justice Department's argument to the contrary,<sup>141</sup> but in June 1984, held in the Memphis case that in the absence of provisions in the consent decree that established the plan specifically directed toward the effects of seniority in layoffs, a court may not alter the requirements of an applicable seniority system.<sup>142</sup>

Assistant Attorney General Reynolds hailed the decision as "a monumental triumph for civil rights" and "an exhilarating decision" and announced that the department intended to review and possibly challenge all job-discrimination decrees involving the government that contained racial preference features for those who were not "the actual victims of discrimination."<sup>143</sup> Commentators on Reynolds's expressed views made the point that "he attempted to make the . . . decision out to be something it was not,"<sup>144</sup> and that "the real problem" is not what the opinion said "but with what Reynolds thinks it said," because he "is in a position to do a good deal of harm. . . ."<sup>145</sup>

Reynolds quickly carried through on his promise by challenging an order similar to that in Memphis in a case filed against Cincinnati's police department.<sup>146</sup> Subsequently, the department used the Memphis decision to prod approximately fifty cities throughout the nation to abandon affirmative action hiring and promotion plans for their police and fire departments which had been approved or ordered in

court decrees.<sup>147</sup> The department also filed suit in the District of Columbia against the city's affirmative action program for its fire department<sup>148</sup> and argued against a one-black-for-one-white promotion plan for the Alabama State police in a federal appeals court,<sup>149</sup> using the Memphis case as a springboard for challenging all affirmative action in government employment.<sup>150</sup>

In the next stage of its challenge to affirmative action in hiring and promotions, the department argued, in two cases heard by the Supreme Court in February 1986, against court decrees that had approved race-conscious relief on behalf of nonwhite workers.<sup>151</sup> In one case, a federal court endorsed in a consent decree an agreement by the city of Cleveland and an organization of black and Hispanic firefighters employed by the city providing for immediate promotions on a one-white-to-one-nonwhite basis and subsequent selection of candidates for promotion in accordance with specified promotional goals expressed in terms of percentages. The city entered into the agreement because it had a history dating back to 1972 of prior judicial findings of race discrimination in its police and fire departments. In the other case, a federal court in New York imposed a decree on a union and apprenticeship committee found guilty of violating Title VII by discriminating against nonwhite workers in recruitment, selection, training, and admission to the Sheet Metal Workers Union. The decree also provided race-conscious relief in the form of a 29 percent nonwhite membership goal based on the percentage of nonwhites in the relevant labor pool. The lawsuit had been preceded by a nearly 10-year effort to correct the discrimination found, and the defendants had been held in contempt for violating the court's order.

Then in May 1986, while these cases were pending decision by the Supreme Court, the Court decided another affirmative action case (*Wygant v. Jackson Board of Education*),<sup>152</sup> involving a school district in Michigan where the school board, under its collective bargaining agreement negotiated with its teachers' union, had agreed in successive contracts to the layoff of tenured white teachers with greater seniority than minority teachers who were retained in order to preserve gains in minority hiring. The Court held that these provisions of the contract violated the equal protection clause of the Fourteenth Amendment because they had not been adopted to cure prior racial discrimination by the school board and were not carefully adapted to remedy such discrimination had it been found. At the same time, the Court endorsed the use of affirmative action measures in appropriate situations.<sup>153</sup>

The Justice Department's reaction, through Assistant Attorney

administration used its power to carry out its responsibility under the laws forbidding employment discrimination?

#### ■ THE DEPARTMENT'S RECORD

In a series of public comments and other actions early in his term, Assistant Attorney General William Bradford Reynolds set the stage for the department's litigation conduct that followed. In testimony before a House of Representatives subcommittee in September 1981, he stated that the Justice Department will not urge or support in any case "the use of quotas or any other numerical or statistical formulae designed to provide to non-victims of discrimination preferential treatment based on race, sex, national origin or religion." The department, Congress was told, would confine its requests for injunctions as to future conduct, increased recruitment efforts, and back pay and retroactive seniority only for identifiable victims of discrimination.<sup>126</sup> These views were reiterated at a Washington, D.C., conference the following month.<sup>127</sup> Again, in September 1981, Reynolds wrote a letter to the acting EEOC chairman (who had not been previously consulted) stating that the department "is unable to conclude at present that there is statutory authority for compelling [the] use [of goals and timetables] in affirmative action planning."<sup>128</sup> Copies of the letter were sent to the heads of all federal agencies. In October 1981, Reynolds stated in an interview that the equal employment opportunity requirements under Executive Order No. 11246, as amended, should also be restricted to exclude the setting of goals and timetables.<sup>129</sup> Finally, in December 1981, he announced his intention to seek a test case to overturn the Weber decision because he felt it was "wrongly decided."<sup>130</sup> This intention was reiterated at a conference in January 1982.<sup>131</sup>

The net effect of these statements was verbal repudiation of the legal principles that had evolved over the four decades since President Roosevelt's first executive order. The touchstone of the principles has been affirmative action measures that, whether undertaken by court order or voluntarily, include members of the victimized classes protected by law as well as individuals capable of being identified in particular instances. The remaining task of the Reagan administration's Justice Department was to carry out the assistant attorney general's assertions in specific cases.

In *United States v. Vermont*,<sup>132</sup> the department entered into a consent decree that relied on recruitment programs to increase the number of minorities and women in the applicant pool as the sole

means for accomplishing affirmative action without requiring affirmative measures in hiring, thus leaving the possibility that despite the increased presence of minorities and women in the pool, none would in fact be hired.

In *Lidell v. St. Louis Board of Education*<sup>133</sup> (discussed in chapter 3), one of the department's objections to the voluntary metropolitan desegregation plan involved there was that the agreement established a goal for the employment of black teachers and administrators in the suburban school districts on the basis of their availability in the metropolitan area, with specific hiring ratios included to meet the goal. The plan, however, was flexible specifically stating that failure to meet the goal could be justified by showing that the school district had hired the best qualified person. But the Justice Department attacked the agreement because it did not require hiring from a race-neutral hiring pool. Such an objection is clearly different from the position articulated by Reynolds and acted on in the foregoing case, that affirmative action recruiting is permissible. Surely, it cannot be that recruitment is permissible when it may not result in actual hiring but not permissible when it may.

In *Connecticut v. Teal*,<sup>134</sup> the Department joined the defendant, the State of Connecticut, in arguing, in a suit alleging the discriminatory effect of a written examination required by a state agency for advancement as a supervisor, that plaintiffs had not made out a case of discrimination sufficient to require the state to justify the racial impact of the test under the standard of *Griggs v. Duke Power Co.*,<sup>135</sup> because the "bottom line" of the supervisory promotion process was an appropriate racial balance. The Supreme Court, noting that EEOC had not joined the department in this argument, rejected it on the basis of the law as settled in *Griggs*, holding that discrimination against individual employees could not be justified by an employer simply because an employer did not discriminate against the class as a whole. What is interesting here is that the department used the group situation as an argument against relief for individuals who claimed that they were identifiable victims. (In May 1983, however, the department sued the Milwaukee Police Department, challenging the use of an allegedly discriminatory promotion examination and asking that the persons who took the exam and were denied promotion unfairly be promoted. The suit was filed a year after the *Teal* decision and did not seek any group relief.)<sup>136</sup>

In four cases involving police or fire departments and party agreements in settlement of claims of discrimination, the department opposed affirmative action measures agreed on and eventually

Finally, under Executive Order No. 11246, the attorney general, upon referral from the Department of Labor (OFCCP)<sup>111</sup> or without such referral where the Justice Department initiates its own investigation,<sup>112</sup> may sue federal contractors who do not comply with the order and its implementing regulation. Thus, in addition to its responsibility for suits against state and local government units, the Justice Department retains considerable leverage in the private sector (along with EEOC and OFCCP) because of its authority to sue private program recipients and private employers who contract with the government.

The principal litigating objectives that characterized the Justice Department's work prior to the Reagan administration were development of a body of case law that would allow affected entities and the general public to understand equal employment requirements, and provision of as effective relief as possible to as large a number of employment discrimination victims as possible. Cases were targeted by comparing the representation of minorities in an employer's work force with their representation in the workforce of the employer's geographic location; by industries where discriminatory conditions existed; and by employers in industries with particularly poor statistics as well as notable specific discriminatory practices. When the shift was made to public sector cases after 1972—mainly against police and fire departments but increasingly against public utilities and city, county, and some suburban governments—statistical measures again were used to compare the size of a standard metropolitan statistical area (SMSA) with the ratio of minorities and women employed in the SMSA. Large cities and counties were targeted in much the same way as large employers, because of the probable yield from these suits when weighed against the stated objectives.<sup>113</sup> In the selection of cases, therefore, numbers were important to the expected results.

The results in the cases the Justice Department brought or participated in from the late 1960s to the end of the Carter administration not only created a body of law that gave concrete meaning to affirmative action as a concept, but also translated the concept in terms of *measurable numbers* for judging achievement. For example, cases filed by the Civil Rights Division were among the first decisions holding that federal law not only forbade overt, purposeful discrimination but also apparently neutral practices that perpetuated the effects of past discrimination.<sup>114</sup> The Justice Department also filed other cases condemning the discriminatory use of tests and other selection criteria.<sup>115</sup>

The remedial principles requiring positive conduct to counteract the effects of past discrimination also were formulated in cases filed by the division<sup>116</sup> or in those in which the division joined as *amicus*.<sup>117</sup> As to the use of numerical goals with accompanying timetables, the division either filed cases that sustained their use<sup>118</sup> or joined cases filed by others.<sup>119</sup>

Beyond the involvement of the Justice Department, the use of numerical measures for judging the accomplishment of the goals of antidiscrimination in employment had been consistently upheld in a range of settings addressed by court decisions in numerous lawsuits brought by other litigants before the Reagan years. Every federal appellate court that ruled on the issue concluded that, under appropriate circumstances, goals and timetables may be made a part of a court's remedial order.<sup>120</sup> These decisions accorded with the apparent congressional consensus reflected in the defeat of an amendment to the 1972 Title VII amendments that would have prevented federal agencies and officials from imposing goals and timetables or other forms of numerical relief under Title VII or The Executive Order.<sup>121</sup>

Moreover, the Supreme Court had clearly approved the use of back pay as a remedy<sup>122</sup> and had ruled that private employers may adopt and implement voluntary affirmative action plans using numerical goals. In *United Steelworkers v. Weber*,<sup>123</sup> the Court rejected a "reverse discrimination" challenge to a voluntary plan adopted by the Kaiser Aluminum Company and the steelworkers, which established a training program that reserved half of its openings for black workers. Characterizing the plan as a temporary measure designed to eliminate racial imbalance, the Court ruled that Title VII did not bar efforts to "voluntarily adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."<sup>124</sup> Finally, in a case of notoriety equal to *Weber*, a majority of the justices of the Supreme Court in the *Bakke* case<sup>125</sup> (which involved admission to a medical school and was decided a year before *Weber*) endorsed the proposition that affirmative action measures need not be restricted to the so-called identifiable victims of discriminatory conduct; race (or sex) may be taken into account to correct past inequities.

Such was the course of action taken by the Justice Department and the legal development from litigation undertaken both within and without the department, when the president's men occupied the seats of power at 10th Street and Constitution Avenue in Washington, D.C. How has the Justice Department under the Reagan

At the same hearings, former labor secretary Raymond Donovan testified that the large back pay award figure in fiscal 1980 was unique because there had been an unusually large settlement that year. Hence, he argued, the number of settlements was about the same in 1982 as in 1980,<sup>90</sup> an assertion belied by the figures.

OFCCP Director Susan Meisinger explained the decline of debarments to zero (before the one debarment in 1986) as resulting from the legal requirement of an administrative hearing prior to debarment. She noted, however, that there were 122 recommendations for debarment pending as of the date of her testimony in 1984.<sup>91</sup> And well into President Reagan's second term, critics other than past OFCCP officials continued to take the administration to task for its "very weak enforcement . . . in terms of any sanctions being applied." They have particularly contrasted the sole contractor debarment after more than five years of the Reagan administration with the 13 debarments that occurred during President Carter's administration.<sup>92</sup>

Resolution of the conflicts in the testimony of officials, as well as in the responses of some of them to their critics, is neither possible nor necessary here. But the inferences that may properly be drawn from the record certainly lend some credence to the assertions of weakened enforcement. Former secretary Donovan's response to the decline in back pay awards, for example, does not account for the differences reflected by the record. Not only did the dollar amounts of such awards sharply decline, the number of recipients also declined from 4,336 in fiscal 1980 to 496 in fiscal 1984.<sup>93</sup> Moreover, although the severity of the debarment sanction has limited its use in the past, there were a number of debarments in the Carter administration<sup>94</sup> and before.

Because of the relative infrequency of the debarment, contract suspension, and cancellation sanctions, it was recommended during the Ford administration that these penalties be supplemented by others.<sup>95</sup> Consequently, regulations were adopted in 1977 to permit administrative orders enjoining contract violations and providing for back pay rather than debarment.<sup>96</sup> Use of the back pay remedy as an alternative to the more severe sanctions, therefore, is critical in the overall enforcement scheme. If there are no debarments or contract suspensions and cancellations and very few back pay awards, there is little of significance left in the enforcement program. Yet, according to the director's testimony before the House Appropriations Committee in April 1984, more than 100 debarment recommendations were pending.<sup>97</sup> Surely, these recommendations, in cases where cause has been shown, manifest a need for enforce-

ment. And these recommendations do not take into account the large number of cases that have been closed without findings of cause, commitment letters, or conciliation agreements. How many of these require administrative sanctions is not known, but it seems safe to assume that many do and that such sanctions would have been applied if OFCCP enforcement was stronger.

#### ■ ATTEMPTED CHANGES IN REGULATIONS

In December 1980, the Carter administration proposed new regulations to consolidate the regulations for Executive Order No. 11246, section 503 of the Rehabilitation Act of 1973, and section 402 of the Vietnam Era Veterans Readjustment Act.<sup>98</sup> Soon after President Reagan took office, the effective date of the regulations was postponed and a review of them undertaken. Subsequently, revised regulations were published in the *Federal Register* on 25 August 1981, and again on 23 April 1982.<sup>99</sup>

Several changes were proposed to

- reduce the scope of coverage
- raise the threshold dollar amounts for a written affirmative action plan
- relax the requirement for an affirmative action plan that includes goals and timetables where "underutilization" of women and minorities is shown
- permit contractors employing between 250 and 500 employees to prepare abbreviated affirmative action plans
- allow approval of an affirmative action plan for a five-year period ("extended duration AAP") rather than for only one year at a time
- eliminate all preaward compliance reviews
- provide back-pay awards only to the identifiable victims of discrimination
- limit the time period for which such awards can be sought.

The proposals would also have combined minorities and females for the purpose of a contractor's utilization analysis of its work force and would have determined goals for women in the construction industry on an aggregate rather than trade-by-trade basis.

These proposals prompted extensive public comment, and disapproval outweighed support by nearly a three-to-one margin. Although the proposals had been made initially without consulting EEOC, the final revisions were submitted for EEOC review in February 1983. EEOC commented that some of them (for example, the rule that back pay be limited to only identifiable victims and

and to develop and file a written affirmative action program for each facility with annual reporting of the results.<sup>78</sup> The requirements were clarified and expanded by subsequent regulations. Federal contractors are also required to develop affirmative action programs for women and to remedy the effects of past discrimination on incumbent employees (the "affected class"). Procedures for imposing sanctions for failure to comply were established.<sup>79</sup> With the addition of a back pay remedy in 1977 as a formal part of the regulations (although it had been obtained from contractors previously),<sup>80</sup> the basic aspects of the compliance program were in place by 1981 when the new administration embarked on its mission to change the affirmative action program.

Its mission was undertaken in two ways: by changing enforcement and by attempting across-the-board changes in the governing regulations.

#### ■ CHANGED ENFORCEMENT

The primary OFCCP enforcement tools are as follows:

- the *four-step compliance review* consisting of a so-called desk audit of a contractor's affirmative action compliance program, an on-site review of any deficiencies revealed by the audit as well as of other matters not revealed, an off-site analysis of information uncovered during the on-site review, and preparation of a compliance review report as the basis for further action;
- *complaint procedures* whereby individuals can assert personal claims of discrimination or breach of a contractor's affirmative action obligation and OFCCP itself may assert noncompliance with affirmative action obligations after a compliance review (similar to an EEOC commissioner's charge), which may result in sanctions that include back pay or retroactive seniority measures (short of the more serious debarment or contract cancellation or suspension remedies); and
- *references* to either EEOC or the Justice Department for judicial enforcement where administrative enforcement is deemed unworkable.<sup>81</sup>

The effect of this enforcement apparatus has been diminished by the reduction in funding and staff during the Reagan administration. At the time of the 1978 reorganization, funding—and the number of authorized positions—increased greatly. A leveling off in 1981, Reagan's first year, was followed by a sharp decline since 1982. In fiscal 1985, there was a decline in real dollars and another small

reduction in staff.<sup>82</sup> Although complaint investigations and compliance reviews rose between fiscal 1980 and fiscal 1983, the number of debarments of contractors fell sharply (from 5 in fiscal 1980 to zero in fiscal 1982, 1983, and 1984), and so did the amount of back-pay awards (\$9.3 million in fiscal 1980 to \$2.7 million in fiscal 1984). The number of administrative complaints filed also dropped from 53 in fiscal 1980 to 18 in 1983 (rising to 23 in 1984) with a low of only 5 in fiscal 1982.<sup>83</sup>

Thus, in a pattern similar to that at EEOC, the data show increased activity in investigation and review but considerably less enforcement during Reagan's first term and little difference during the second. Whereas almost half of the cases where violations were found among contractors were settled with conciliation agreements in fiscal 1980, only 30 percent of such cases were closed with such agreements by the third quarter of fiscal 1983. The first and only debarment of a contractor during the Reagan administration's two terms occurred in 1986; and the number of recipients receiving back pay dropped sharply from fiscal 1980 (4,336) to the first six months of fiscal 1985 (211).<sup>84</sup> Affected-class cases involving incumbent employees declined from 467 in fiscal 1980 to 222 pending in fiscal 1982 and declined to 165 pending during the first quarter of fiscal 1983. Twenty-six percent of investigations sustained allegations of discrimination in fiscal 1980, compared with only 16 percent in fiscal 1982.<sup>85</sup> A picture of more complaints, rapidly handled, with fewer cause findings, indicates either no investigation or incomplete ones (unless, of course, there are now so many worthless complaints lodged against so many complying employers).

Former OFCCP officials, have so testified and have pointed to policy innovations that account for the disparity in enforcement under current and prior administrations. The establishment of quotas for staff compliance reviews by each investigator, plus time restraints, was said to deter enforcement, regardless of the size or complexity of the company or its degree of preparedness for the review. Moreover, enforcement actions in field offices must be sent for review to the poorly equipped national office.<sup>86</sup> One official testified that former OFCCP Director Ellen Bergman also instructed regional administrators not to accept affirmative action plans (AAPs) if the plans set goals beyond those expected from the availability of the protected population in the area from which the work force was drawn,<sup>87</sup> even though such voluntary goal-setting beyond legal requirements has been upheld by the U.S. Supreme Court.<sup>88</sup> Testimony by a high Labor Department official refuted this assertion.<sup>89</sup>

inception, deferred to by the courts as an authoritative interpretation of Title VII.<sup>62</sup> They use, as the courts do, a statistical measure to determine the existence of adverse impact as evidence of discrimination that an employer may explain for business reasons. Thomas expressed "serious reservations" about the guidelines in December 1984 because of their reliance on statistical measures,<sup>63</sup> and, in testimony before the House Education and Labor Committee, stated that he opposed goals, timetables, and quotas for minorities in the work force.<sup>64</sup> In February 1986, EEOC announced that it had abandoned affirmative action hiring goals and timetables in its settlement of cases brought against private employers.<sup>65</sup> In August 1986, after the Supreme Court in July of that year upheld affirmative action programs involving goals and timetables,<sup>66</sup> Chairman Thomas told members of Congress during a hearing that he would drop his opposition to such measures because "the Court has ruled. . . . That's the law of the land, whether I like it or not."<sup>67</sup>

As to the more comprehensive concept of affirmative action that requires (beyond goals and timetables) concerted effort to overcome past discrimination by "make-whole" measures retroactive rather than merely prospective in nature, however, Thomas has been quoted as stating that it is just as "insane" for blacks to expect relief from the federal government for years of discrimination as it is to expect a mugger to nurse his victim back to health. "Ultimately," he stated, "the burden of being mugged falls on you. Now you don't want it that way, and I don't want it that way. But that's the way it happens. . . . Before affirmative action how did I make it?"<sup>68</sup> On another occasion, he expressed his belief that because blacks and other minorities face so many socioeconomic problems as well as racial discrimination, that a "neutral" law such as he believes Title VII to be, is "an improper vehicle for reparation."<sup>69</sup>

These views apparently were incorporated in the terms of the General Motors settlement that earmarked approximately \$15 million for education and skills-development programs for minorities and women. However laudable that aspect of the settlement may be, however great the need for education and training as a socioeconomic matter, however accurate the chairman's description of the broader problem, there is nevertheless a role for law to play. Laws, although not a panacea for all discrimination, when enforced, make other solutions not only possible, but workable. The nation made this assumption when it enacted Title VII in 1964 and created EEOC, and when it amended the statute in 1972 to grant the agency expanded enforcement authority.

#### Office of Federal Contract Compliance Programs

Presidential authority to issue executive orders banning federal contractor discrimination and to use various affirmative action measures to enforce the ban including quotas (percentage of the work force), numerical goals, and timetables for achieving them, have been repeatedly upheld by numerous court decisions and legal opinions, including that of President Nixon's attorney general before President Reagan was elected.<sup>70</sup>

The heart of the contract compliance program is Executive Order No. 11246 as amended by Executive Order No. 11375, and their implementing regulations. In every nonexempt supply or construction contract (exemptions are based primarily on the relatively small dollar amount involved, similar to Title VII's exemption for businesses with fewer than 15 employees), standard form clauses impose the basic obligation not to discriminate against minorities and females and to take affirmative action to employ them (the equal-opportunity clause).<sup>71</sup>

Similar guarantees must be obtained by government contractors from their subcontractors.<sup>72</sup> Construction contractors who are involved in a project assisted by a federal grant, loan, insurance or guarantee must also include an equal opportunity clause.<sup>73</sup> The equal opportunity clause requires the contractor (when used, the term also includes a subcontractor) to certify that it does not maintain segregated facilities or permit its employees to work at any location it controls where such facilities are maintained.<sup>74</sup>

Similar obligations are imposed in the regulations applicable to handicapped workers and disabled Vietnam era veterans as a consequence of the expansion in June 1975 of the responsibilities of the Office of Federal Contract Compliance for enforcement of section 503 of the Rehabilitation Act of 1973, as amended,<sup>75</sup> and section 402 of the Vietnam Era Veterans' Readjustment Assistance Act.<sup>76</sup> With this additional responsibility, the office was reorganized and renamed the Office of Federal Contract Compliance Programs (OFCCP). Subsequently, all contract compliance responsibility that had been assigned to other agencies and departments in the executive branch was consolidated in OFCCP in 1978 pursuant to Reorganization Plan No. 1.<sup>77</sup>

Before President Reagan assumed office, regulations were issued to implement the affirmative action obligation. The first regulations, issued in 1968, required contractors to evaluate the minority representation (or utilization) of their work-force-in-all-job-categories

pay for equal work" standard.<sup>53</sup> As noted, the sharpest falloff in litigation activity was in the area Congress had determined that action was most needed—the pattern-or-practice or systemic cases—designed to affect large employers and broad areas of discrimination. Because the stated policy of the administration is to pursue only the claims of "identifiable victims" of discrimination, a decreased emphasis on pattern-or-practice or class-action lawsuits is not surprising.

In the first year of Reagan's second term, EEOC litigation activity increased somewhat over the earlier years. The staff of the general counsel recommended 708 cases for litigation, a significant increase over the previous year, 1984, when only 276 cases were recommended. And 286 cases were actually filed in court, a marked increase from the two previous years, when only 136 and 226, respectively, were filed, but still less than the number filed in 1981. Available evidence again suggests, however, that the increase in recommendations and actual filings is still not in the systemic or class-action cases, but in cases involving individual charges by the so-called actual victims of discrimination.<sup>54</sup>

Beyond numbers and kind of litigation, there is the question of the conduct of the litigation pursued. In a highly publicized settlement of a discrimination suit against General Motors in October 1983, trumpeted by EEOC as the largest of its kind in history (in which GM agreed to pay \$42 million), EEOC settled without requiring that back pay be provided to members of the classes—minorities and women. Back pay is a remedy specifically mentioned in Title VII whenever a court orders relief after a finding of discrimination,<sup>55</sup> a remedy which the Supreme Court has characterized as in keeping with the "make whole" objective of the act.<sup>56</sup> Of course, the GM settlement did not involve such a finding, so technically the consent agreement need not have included such a provision. However, EEOC, as the principal organ of Title VII enforcement, was and is<sup>57</sup> expected to take the initiative in carrying out the policy manifested in Title VII rather than to acquiesce in a settlement apparently subversive to that policy.

The General Motors settlement did include other provisions—specifically, goals and timetables for implementation—that the president and his Justice Department have opposed as unwarranted preferential treatment. To this extent, the EEOC record can be seen in shades of gray not possible in the case of the Justice Department. That shading is also seen in the EEOC's effort in April 1984 to file an amicus curiae brief in *Williams v. New Orleans*,<sup>58</sup> a case involving

discrimination in that city's police department, in an effort to support a plan of goals and timetables the Justice Department opposed. The Justice Department eventually prevailed upon the EEOC not to file the brief and intervened to challenge the plan, a challenge that ultimately failed. Subsequently, Chairman Thomas stated that he did not believe that the EEOC has the authority to file such briefs in public sector cases, the domain of the Justice Department since the 1972 amendments to Title VII.

The disturbing aspects of this assertion are the capitulation to the Justice Department and its encroachment on EEOC's independence. Filing of an amicus brief requires only the permission of the parties to a lawsuit, or the court. Although Thomas may be correct regarding EEOC's inability to intervene formally as a party—because it is the Justice Department that is authorized to seek a remedy against local governments,—an amicus filing is another matter. The problem here obviously was the position taken by the Justice Department and the eventual concurrence with it by EEOC.<sup>59</sup>

In another example, EEOC also attempted to carry out its responsibilities for federal agency enforcement directly against the Justice Department by insisting that the department, like every other federal department, submit its detailed employment figures and practices relating to women and minorities to EEOC. In September 1983, the Justice Department for the second time submitted departmental employment data to EEOC that did not include numerical goals as required. The department, of course, is philosophically opposed to such goals despite their endorsement by the courts (see discussion below). Notwithstanding, EEOC rejected the data, at that point taking a different view of its duties. Chairman Thomas was quoted as saying that the goals were necessary "for me to do the job Congress requires me to do."<sup>60</sup>

Thomas subsequently adopted the Justice Department's position in EEOC's pursuit of litigation, however, thus further contributing to the gray picture of EEOC enforcement. He endorsed the effort of several administration agencies—the Office of Personnel Management, the Commission on Civil Rights, and the Justice Department—to change EEOC's guidelines for employee selection and retention by private employers. The guidelines, which EEOC had adopted in 1978, state that any employee test or selection procedure in hiring, promotion, transfer, or dismissal, with an adverse impact on racial and ethnic minorities and women, is discriminatory unless justified by business necessity. These guidelines reflect the prevailing law as announced by the Supreme Court.<sup>61</sup> They also have been, from their

has decreased. At the same time, the number of settlements has fallen but the number of no-reasonable-cause determinations has risen. And the time committed to processing the cases has increased.<sup>46</sup>

The largest number of closures apparently resulting from the rapid-charge process occurred during Chairman Thomas's first year at EEOC's helm, fiscal 1983, after a decline during the previous fiscal year when EEOC was essentially under caretaker leadership.<sup>47</sup> Combined with the data on decrease in the backlog of cases, these figures suggest that EEOC perhaps has been efficient both in responding to new charges and in disposing of old ones. In the latter instance, though, this could mean that the cases were just too stale, the problem had been resolved without EEOC intervention, or the charging parties' circumstances had changed, making intervention unnecessary or unwarranted. As far as new charges are concerned, it is possible to conclude from the data either that the agency has been quite successful under its methods, or that it has been very unsuccessful (the decrease in the number of settlements might suggest this), or that it has emphasized speed of process at the cost of appropriate results. Moreover, an increase in the number of no-reasonable-cause findings might mean that a large number of frivolous charges were filed or that the agency's investigative methods were less than vigorous. The increase in the time committed to process could mean thoroughness or inefficiency.

The interpretation of the data ultimately depends on one's perspective on what it is important for the agency to do—a matter of emphasis. Because staff overall has been reduced and funding cut (in terms of real as opposed to nominal dollars)<sup>48</sup> it is clear here, as throughout the civil rights agency enforcement process, that there are limits on what can be accomplished. Although the data can be said to suggest less than vigorous enforcement, even within these limits,<sup>49</sup> so sweeping a judgment regarding EEOC's charge-processing activities is unwarranted without knowledge of the cases concerned.

As for litigation, again the data are susceptible to varying interpretations. The number of cases EEOC has taken to court has declined visibly from the Carter years. The largest declines occurred during the first years of the Reagan administration. The number of filings has increased since then but still is considerably smaller than in the previous administration. The sharpest decline initially was in the so-called systemic or pattern-or-practice cases, which fell from 62 in fiscal 1980 to 0 in fiscal 1982 and then increased to 10 in fiscal 1983. The number of EEOC amicus briefs also declined sharply

during that period (from 75 in fiscal 1980 to 28 in fiscal 1983, a decline of 62.7 percent).<sup>50</sup>

Explanations for the decline include, of course, the usual one of attorney staff reduction.<sup>51</sup> Because responsibility for litigation rests primarily with the Office of the General Counsel (with EEOC approval of the cases selected for litigation), clearly reduction of the number of attorneys in that office would have some effect on the agency's ability to litigate. But because the general counsel's staff relies on information developed during the charge-processing activity and on the recommendations of the investigatory staff of cases with litigation potential, determinations made during this enforcement phase also clearly influence the extent of litigation activity. If, as asserted by a former EEOC general counsel,<sup>52</sup> there has been an increased emphasis on the closure of cases, with a concomitant commitment to close cases without fully exploring whether reasonable cause exists for the charge made, the number of cases recommended for court enforcement would also fall.

As to the first possible explanation, reduction in staff support (at least without other offsetting measures) inevitably cripples needed enforcement and can properly be taken as a sign of lessened commitment. As to the second possible explanation, although a blanket condemnation based on the charge-processing data alone may not be warranted, there can be no doubt that a policy that emphasizes speed of closure without making a rational determination about the validity of the charge is inappropriate. Performance standards that sacrifice proper investigation coupled with staff reductions, limit the agency's ability to use its most effective enforcement weapon—litigation. As noted in the previous chapter with respect to a similar reduction in Justice Department pattern-or-practice filings against housing discrimination, it is unlikely that the sharp decline in the number of cases taken to court in the early years of President Reagan's first administration reflected a similar decline in employment discrimination.

A more likely explanation is that the administration has been unwilling to recognize the need, and there is ample evidence of this. For example, Michael J. Connally, who served as EEOC general counsel from November 1981 to September 1982, apparently repeatedly turned down cases recommended to him by staff in EEOC regional offices. He was also reported to have expressed some antipathy toward class-action suits charging age discrimination and those claiming that women's pay should be judged by a standard of the "comparable worth" of the job involved in addition to the "equal

the Department of Labor which is responsible for enforcing the obligations of federal contractors<sup>37</sup>

□ the Department of Justice which is responsible for litigation against state and local governments<sup>38</sup> (and which may also intervene in lawsuits initiated by private individuals who are members of the protected classes).<sup>39</sup>

### THE REAGAN RECORD IN EMPLOYMENT

The major institutions that deal with the issue of discrimination in employment are the Equal Employment Opportunity Commission, the Office of Federal Contract Compliance Programs, and the Justice Department.

#### Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC) is composed of five commissioners appointed by the president and confirmed by the Senate.<sup>40</sup> From its inception, EEOC's mission has been to lead the federal government's antidiscrimination effort in the private sector. It was hampered originally by Congress's failure to grant it "cease-and-desist" authority similar to that granted to the National Labor Relations Board under the National Labor Relations Act passed in the 1930s to curb "unfair labor practice(s)" of employers and unions relating to the collective bargaining process.<sup>41</sup> Instead, the less effective remedy chosen merely authorized the EEOC to investigate and attempt conciliation of charges of discrimination filed by individuals (either on their own behalf or as representatives of a class) or by one of the commissioners (commissioner's charge).<sup>42</sup>

The 1972 amendments to the act again refused to grant cease-and-desist powers but did authorize the EEOC to sue in the federal courts and to intervene in suits brought by private parties. The EEOC's jurisdiction was further increased during the Carter administration by transfer of enforcement authority for the Equal Pay Act; the Age Discrimination in Employment Act; section 717 of Title VII (added in 1972 to protect federal employees); section 501 of the Rehabilitation Act (regarding federal employment of the handicapped), and the Fair Labor Standards Act Amendments of 1974, as amended (prohibiting age discrimination in federal employment).<sup>43</sup> In short,

the EEOC's broad responsibility is to curb prohibited employment discrimination by both administrative and judicial action in all areas affecting employees in the private sector and the federal government (except federal contractors, which is discussed in the next section).

The EEOC has approximately thirty-one hundred employees in addition to the five commissioners.<sup>44</sup> Its current chairman is Clarence Thomas, a black Republican lawyer from Savannah, Georgia. He was the assistant secretary for civil rights in the Department of Education before becoming EEOC chairman in May 1983. The EEOC record under Thomas's leadership defies description as either clearly progressive or clearly retrogressive. Perhaps the record reflects no more than a change in emphasis from that of the prior administration, but a change in philosophy is apparent as well. As noted, EEOC's main enforcement tasks are the processing of charges of discrimination in an effort to resolve them administratively if possible (including the referral of charges to state or local agencies as provided in the statute), and litigation pursuant to charges filed in pattern-or-practice cases.<sup>45</sup> A third important EEOC function, in accordance with its increased responsibilities after the 1978 reorganization, is that of coordinating the equal opportunity efforts of other agencies, including development of uniform definitions of discrimination, and standards and procedures for enforcement.

In the case of charge processing, it can be argued that a shift in emphasis has occurred rather than an actual decline in enforcement activity. The system adopted under President Jimmy Carter's EEOC Chairwoman, Eleanor Holmes Norton, consisted of three major components:

- a rapid charge processing system that focuses on quick settlement of individual complaints through a face-to-face fact-finding conference
- a backlog charge processing system designed to make inroads on the large number of charges that had accumulated over several years, again to facilitate the settling of such cases quickly by narrowing the scope of the charge
- a systemic program to determine whether reasonable cause existed for the charge and whether litigation should be undertaken on a basis broader than mere resolution of the charging parties' complaints—that is, because of patterns or practices of discrimination by significant offenders such as large nationwide companies.

The number of cases EEOC has closed since 1980, the last year of the Carter administration, has increased and the backlog of cases

ative action program to overcome past discrimination.<sup>18</sup> However, in 1971 congressional committees found that minorities and women still were not sufficiently represented throughout the federal bureaucracy. Accordingly, Congress enacted the 1972 Amendments to Title VII, extending to federal employees the basic protections given to private sector employees under the 1964 act.<sup>19</sup> At the same time, state and local governments, their agencies, and political subdivisions were made subject to Title VII.<sup>20</sup>

A third major thrust of national policy against employment discrimination is directed toward employers who do business with the federal government. Although these employers are subject to Title VII, the federal government has continued to use its power over the government's procurement process to require government contractors to desist from employment discrimination. President Kennedy's 1961 executive order<sup>21</sup> established specific sanctions for noncompliance—the termination of existing contracts and the debarment from future contracts. President Johnson later made the secretary of labor rather than a presidential committee responsible for assuring compliance, and again required contractors to take affirmative action to ensure equal opportunity.<sup>22</sup>

In its last stages, the evolutionary process in employment discrimination law encompassed two other groups of workers: older workers and handicapped workers. The problem of age discrimination had been recognized by Congress as early as the 1950s, and efforts were made to add age discrimination as one of the prohibited categories in Title VII.<sup>23</sup> Although these efforts failed, a provision of the act directed the secretary of labor to prepare a report to Congress on age discrimination in employment. The report, furnished to Congress in 1965, recognized age discrimination as a national problem requiring federal intervention.<sup>24</sup> Consequently, two years later, the Age Discrimination in Employment Act of 1967<sup>25</sup> was passed protecting workers ages 40 to 65. The secretary of labor was designated as the government's enforcement arm, but the substantive aspects of the act so closely track those in title VII that it is clear that Congress intended the new act to be interpreted and applied in much the same way. Later amendments of the act broadened its coverage to include states, their political subdivisions, and the federal government,<sup>26</sup> and extended the protected age group to age seventy.<sup>27</sup>

Employment discrimination against handicapped persons was proscribed by the Rehabilitation Act of 1973.<sup>28</sup> Section 503 of the act<sup>29</sup> requires that any contract for procurement by federal agencies

in excess of \$2,500 contain a provision that the employer will "take affirmative action to employ and advance qualified individuals despite their handicap." Administration is by the Labor Department as in the case of the executive order relating to federal procurement. Section 504<sup>30</sup> bans handicap discrimination in federally assisted programs. It, like Title IX (see chapter 4), is applicable to employment discrimination in these programs. (Title VI also forbids discrimination in federally assisted programs that provide employment.) The Department of Health and Human Services administers this section. Section 501(b)<sup>31</sup> imposes an "affirmative action" obligation in the federal hiring process congruent with that imposed on contractors and the federal government.

In addition to this effort to create a unified structure of major statutes and regulations, there are shards of federal law elsewhere, all requiring some measure of enforcement by the executive branch. They complete a network of federal law designed to vanquish, to the extent that mere written rules can, the continuation of discrimination in employment. They include

- the Omnibus Crime Control and Safe Streets Act, which prohibits discrimination in employment on the basis of race, national origin, sex, or religion in the administration of law enforcement programs financed by the act<sup>32</sup>.
- the State and Local Fiscal Assistance Act of 1972, which applies to state and local government programs funded by the federal government and permits termination of such aid when Title VII violations are established<sup>33</sup>
- the Vietnam Era Veterans Readjustment Act,<sup>34</sup> which imposes an affirmative action obligation on federal government contractors to hire and promote disabled veterans consonant with their obligation respecting minorities and women.

This extensive network of federal employment law requires a course of action to maximize employment opportunities for the protected classes in order to prevent nullification of the commands of national law. Enforcement responsibility is shared among

- the Equal Employment Opportunity Commission (EEOC), which was established under Title VII of the 1964 Act<sup>35</sup> to provide an administrative remedy for private employment discrimination with expanded powers pursuant to the 1972 amendments to seek a judicial remedy as well<sup>36</sup>
- the Office of Federal Contract Compliance Programs (OFCCP) in

**EVOLUTION OF FEDERAL LAW TO COMBAT EMPLOYMENT  
DISCRIMINATION: THE EXECUTIVE'S ROLE**

In 1866, after the Thirteenth Amendment had abolished slavery, Congress passed the nation's first civil rights bill (chapter 1). The bill responded to the most obvious disability of the slave system—the inability of the slave either to decide whether or for whom to work and to be paid for working—by declaring that the former slaves or their descendants had the “same right” to contract as white citizens.<sup>2</sup> However, not until 1975 was this language judicially declared usable as a remedy against employment discrimination.<sup>3</sup> In 1883 Congress passed legislation establishing a competitive civil service merit system for federal employment under the direction of a Civil Service Commission created by the act subject to presidential appointment.<sup>4</sup> Despite this legislation, overt discrimination persisted in the federal service as in the private sector. During President William Howard Taft's administration, racial segregation was established in the Census Bureau and extended by President Woodrow Wilson to the Department of the Treasury and the Postal Service.<sup>5</sup> In the late nineteenth century, women were employed almost exclusively as clerks at salaries set by statute at one-half those paid to men. A merit system rule allowed appointing officers to refuse to consider women who had been certified as qualified by the Civil Service Commission.<sup>6</sup> Prior to 1940, black employment in the federal service was primarily in custodial and similar low-paying jobs.

In 1940, Congress took the first step to eliminate discrimination in federal employment by passage of the Ramspeck Act, which authorized the president to modify pay standards for government employees provided there was no discrimination on the basis of race, color, or creed.<sup>7</sup> Just 19 days earlier, President Franklin Roosevelt issued the first of a series of executive orders banning racial, ethnic, or religious discrimination in federal employment.<sup>8</sup> In 1941, a Fair Employment Practices Committee (FEPC) was established by executive order.<sup>9</sup> Although the committee was authorized to investigate discrimination complaints, during the first two years of its existence it abdicated this responsibility to the Civil Service Commission, which rarely made a finding of discrimination. By 1943, the committee began to act independently, but between 1941 and 1946, when it was abolished, it found discrimination in only 58 cases of nearly 2,000 complaints of discrimination it investigated.<sup>10</sup>

Fifteen years after abolition of the FEPC, in 1961 President John Kennedy promulgated Executive Order No. 10925<sup>11</sup> establishing the sustained national policy against employment discrimination that continues to the present. The order established the President's Committee on Equal Employment Opportunity with an announced emphasis on affirmative action rather than merely nondiscrimination respecting individual complaints. Two years later Congress passed the Equal Pay Act,<sup>12</sup> requiring that women receive equal pay with men for equal work (defined as “equal skill, effort and responsibility and . . . performed under similar working conditions”).<sup>13</sup> It was the first legislation proscribing sex discrimination and was especially notable because it applied to the private sector. President Kennedy lived to sign the act but it was President Lyndon B. Johnson who signed the Civil Rights Act of 1964,<sup>14</sup> the most sweeping commitment made by the people of the United States through their elected representatives to eradicate employment discrimination in the private sector.

Enforcement of the Civil Rights Act's Title VII, which outlaws employment discrimination, has prompted much litigation and debate—a reflection of the far-reaching nature of the employment discrimination problem as well as the deep-seated resistance to the law's goals. It makes illegal a wide array of “unlawful employment practices”—discriminatory hiring, promotion, and firing; compensation; and other employment conditions on the basis of race, color, religion, sex, or national origin. It applies to employers (of 15 or more persons), labor unions, apprentice programs, and employment agencies. Exceptions are made for certain bona fide occupational reasons related to sex or religion (but not race). With these exceptions, members of the protected classes may seek both administrative and judicial remedies for the discrimination prohibited. When a judicial remedy is sought, either by aggrieved parties or by the responsible government agency, and a violation is established, a court may not only “enjoin the respondent from engaging in such unlawful employment practice” but may also “order such affirmative action as may be appropriate . . . [emphasis supplied].”<sup>15</sup>

In 1965, President Johnson by executive order transferred federal equal employment responsibility from the President's Committee on Equal Employment Opportunity to the Civil Service Commission.<sup>16</sup> Sex discrimination, not included in any previous executive order (but now twice the subject of legislation), was banned in federal employment in 1967.<sup>17</sup> In 1969, President Richard M. Nixon by executive order required each federal agency to develop an affirm-

The preceding chapter described the interlocking character of discrimination in education, housing, and employment as a "vicious triangle." The description is as deliberate as it is accurate, because throughout our nation's history, deliberate conduct has characterized employment discrimination. Because the effects of that conduct are substantial, equally deliberate conduct is necessary to eradicate those effects. The discussion in this chapter concludes that the Reagan administration has not responded to the need in light of the continuing nature of the problem, the federal government's role in compounding it (as in housing discrimination), and the law enforcement responsibilities subsequently imposed by law on the government to assist in eradicating those effects.

The seminal cause of the problem of employment discrimination for black Americans was, of course, slavery—the institutional paradigm of work without pay, power, or prestige the normal goals of the workplace. The consequences of slavery endured long after formal abolition in the form of racial discrimination in both the public and private sectors. Discrimination limited most blacks to menial jobs, and confined those who were educated or otherwise trained to service or professional roles within the black community. The experience of other nonwhites was similar. For women the discrimination resulted from beliefs about their roles as homemakers and mothers and their physical characteristics.<sup>1</sup>

Labor market discrimination for blacks, other minorities, and women extended well into this century when the federal government began its efforts to counteract some of these conditions through legislation, regulation, and court decisions contemplating executive action. Tracing the evolution of those efforts defines the executive's responsibilities and provides the backdrop for focus on the Reagan administration's approach to them.

rights laws and tried to advance enforcement by measures that would allow subordinate government officials to do their jobs more efficiently and effectively. There was no sustained delivery of a vocal, highly visible public message under Carter as there had been with Lyndon Johnson, his last Democratic predecessor, but the Carter administration fully supported the goals of the civil rights laws that had been passed and the remedies the courts had endorsed to carry out those goals. Carter also gave full support to administration officials with specific civil rights enforcement responsibilities, particularly the Justice Department, and showed a clear willingness to appoint persons who understood and were sympathetic to those goals.

This was the atmosphere that prevailed in the executive branch in January 1981 when Ronald Reagan entered the White House. And although the record of all the administrations from Eisenhower's to Carter's supports assertions about the greater relative vigor with which Democratic administrations have championed civil rights enforcement, the record of none of them (including that of Richard Nixon) manifested a tendency to subvert in any fundamental way the protective goals of civil rights laws that had evolved over nearly three decades of concerted and painful effort in response to a history with even greater pain. It was this record and this history that confronted the Reagan administration with the opportunity to make history by its record. That record is the subject of the ensuing chapters.

#### Notes

1. Telephone conversation with John V. Wilson, public relations department, Dep't of Justice (26 Mar. 1985). Mitchell spoke to a Mississippi citizens' groups in the department's auditorium in 1969.
2. Exec. Order No. 9664, 3 C.F.R. 166 (Supp. 1945).
3. Exec. Order No. 10308, 3 C.F.R. 519 (Supp. 1951).
4. *Public Papers of the Presidents of the United States, Harry S. Truman* 800 (1952).
5. *Public Papers of the Presidents of the United States, Dwight D. Eisenhower* 842 (1953).
6. *Public Papers of the Presidents of the United States, Dwight D. Eisenhower* 514 (1958).

7. *Public Papers of the Presidents of the United States, Dwight D. Eisenhower* 293 (1954).
8. See Burk, *The Eisenhower Administration and Black Civil Rights*, 142 (1984).
9. McFeeley, *Appointment of Judges* 3 (1987). See also Kluger, *Simple Justice* 665 (1976).
10. *Public Papers of the Presidents of the United States, Dwight D. Eisenhower* 765 (1953).
11. Exec. Order No. 10590, 3 C.F.R. 53 (Supp. 1955).
12. Exec. Order No. 10479, 3 C.F.R. 97 (Supp. 1953).
13. Presidential Proclamation 3204, 3 C.F.R. 132 (1957).
14. See Read & McGough *Let Them Be Judged* 38-59 (1978) for a description of Eisenhower's appointees to the Fifth Circuit Court of Appeals, the leading federal appellate court in decisions rendered in civil rights cases. See also Bass, *Unlikely Heroes* (1981).
15. State of the Union Address by President John F. Kennedy, Jan. 1961.
16. Exec. Order No. 10925, 3 C.F.R. 86 (Supp. 1961), 6 R.R.L.R. 9 (1961).
17. 6 R.R.L.R. 9 (1961).
18. Exec. Order No. 10980, 3 C.F.R. 138 (Supp. 1961).
19. 8 R.R.L.R. 349 (1963).
20. National Broadcasting Co. telecast (Oct. 1962).
21. *Public Papers of the Presidents of the United States, John F. Kennedy* 727 (1962).
22. *Public Papers of the Presidents of the United States, John F. Kennedy* 469 (1963).
23. *Id.*
24. See Kearns, *Lyndon Johnson and the American Dream* 146-52 (1976); Burk, *The Eisenhower Administration and Black Civil Rights* 225-26 (1984).
25. 1 *Public Papers of the Presidents of the United States, Lyndon B. Johnson* 165 (1963-64).
26. 2 *Public Papers of the Presidents of the United States, Lyndon B. Johnson* 988-90 & 1202 (1963-64). See P.L. 88-452 (78 Stat. 508) (1964).
27. Exec. Order No. 11197, 3 C.F.R. 278 (1964-65 comp.), revoked by Exec. Order No. 11247.
28. Exec. Order No. 11246, 3 C.F.R. 339 (1965).
29. 10 R.R.L.R. 1848 (1965), superceded by Exec. Order No. 11764.
30. *Public Papers of the Presidents of the United States, Lyndon B. Johnson* 222 (1965).
31. *Id.* at 283-84.
32. Howard University speech by President Lyndon B. Johnson (4 June 1965).
33. 1 *Public Papers of the Presidents of the United States, Lyndon B. Johnson* 5 (1966): The Civil Rights Act of 1966 was passed by the House of Representatives on 9 Aug. 1966 but failed to pass in the Senate.
34. *Public Papers of the Presidents of the United States, Richard M. Nixon* 273 (1970).
35. See *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971).

mission (EEOC), established under the 1964 Civil Rights Act and chaired for the first time by a black woman, Eleanor Holmes Norton. Transferred to EEOC were all duties relating to equal pay enforcement; enforcement of the ban on age discrimination and discrimination against the handicapped; enforcement of nondiscrimination in federal government employment; and the overall responsibility for coordination of the equal employment opportunity effort accompanied by the appropriate transfer of budget, personnel, and files. The Office of Federal Contract Compliance, which had been created to enforce Executive Order No. 11246, the government's contractual program, was reorganized and became the Office of Federal Contract Compliance Programs. In addition, a civil rights unit was created in the Office of Management and Budget (OMB) to monitor civil rights enforcement and to advise the OMB director on the funding and management resources needed for effective enforcement, obviously a related concern. And during the last few months of the administration, President Carter signed an executive order giving the attorney general authority to enforce all federal laws mandating nondiscrimination in the provision of federal financial assistance and making the Justice Department the agency responsible for coordinating the enforcement of these provisions by all agencies. The order was seen by the president as "an important step toward a comprehensive, coherent approach to the goal of distributing federal aid on a nondiscriminatory basis," which would give the Department of Justice the leadership role in this area equivalent to that of the EEOC in employment.<sup>53</sup>

Of equal or perhaps even greater importance than this "management systems" approach with its stated goal of efficiency and comprehensiveness were the appointments made by President Carter, particularly at the Justice Department. Largely because of these appointments, which represented a clear presidential direction that the civil rights laws were to be vigorously enforced, the Justice Department under Carter became known as one that took its law enforcement responsibilities seriously without reference to political considerations. The ground-breaking appointment was that of a black activist civil rights lawyer, Drew Days III, as the assistant attorney general for civil rights. As head of the Civil Rights Division, Days—backed fully by a southerner as attorney general, Griffin Bell, who had been appointed to the federal bench by Kennedy—seized the leadership reins at the Justice Department with innovative lawsuits designed to carry out the affirmative action goals of federal law in housing (exclusionary zoning cases), voting (cases involving

dilution of minority voting strength), employment (hiring, promotion, and back-pay class relief) and education (busing and other mandatory pupil reassignment requirements). Carter supported his Justice Department's civil rights enforcement program, which included encouraging the courts to make new laws to provide remedies designed to overcome past discrimination.

In remarks to the Leadership Conference on Civil Rights (a consortium of civil rights activist groups) in January 1980, Carter stated that in the first three years of his administration, more blacks, women, and Hispanics had been appointed to the federal courts than in all the previous administrations combined. He noted that 28 of the 32 women then serving on the federal bench had been appointed by him. He noted that when he was sworn in as president, not one woman was a U.S. attorney. The final Carter record shows that 14 percent of his judicial appointments were blacks, 14 percent were women and just under 7 percent were Hispanic.<sup>54</sup> (Truman appointed the first blacks to the federal judiciary, and Lyndon Johnson appointed the first black justice to the Supreme Court, Thurgood Marshall.) Other pathbreaking appointments made by President Carter were those of Andrew Young, the first black appointed as U.S. ambassador to the United Nations, and Patricia Harris, the first black woman cabinet appointment. (In his 1979 State of the Union Address, Carter also noted his appointment of another woman to head a cabinet department—later in his administration, there was a third—and the appointment of women in approximately 20 percent of the senior posts throughout the government, many in areas where no woman previously had served.)

Carter also sought to advance women's rights through support of the Equal Rights Amendment. But despite the extension of the deadline for ratification to 30 June 1982, accomplished with his administration's efforts, the amendment was not ratified. Carter also supported and signed the Pregnancy Disability Amendments Act of 1978,<sup>55</sup> which amended Title VII of the 1964 Civil Rights Act to include pregnancy within the definition of "sex" as a prohibited category of employment discrimination (overturning a U.S. Supreme Court opinion that had ruled otherwise).<sup>56</sup> Finally, Carter proposed strengthening the Fair Housing Act of 1968 by urging that the law be amended to give the responsible administering agency, the Department of Housing and Urban Development, enforcement powers by authorizing it to issue "cease and desist" orders against violations of the act. (This proposal never passed Congress.)

Overall, Carter took seriously his responsibilities to enforce civil

some advances were made, particularly with respect to women's rights. There was certainly no overt effort at wholesale displacement of the executive role in enforcing civil rights, but examination of the Nixon record reveals that here was no vigorous champion; that presidential insistence on the importance of civil rights as a national priority had diminished; that overall leadership was lacking; and that setbacks were avoided only because the growth of civil rights enforcement in prior years, and the continuation of social change and its effect on the judicial and legislative branches of the government, would not allow it.

### THE FORD ADMINISTRATION

Nixon selected Gerald Ford to succeed Spiro Agnew as vice president to assure continuation of the Nixon policies if Ford succeeded to the presidency. When circumstances (Watergate) forced Nixon's resignation and Ford's succession, the expectation that Ford's administration would in significant aspects, including civil rights policies, be a clone of Richard Nixon's was realized. Ford did little more than carry out the policies he found in place. Annually during the three Augusts that he served from 1974 to 1976, he issued the same Women's Equality Day proclamation that Richard Nixon inaugurated earlier, claiming support for the Equal Rights Amendment. During the spring of 1976, Ford stated that he had directed the attorney general to continue an active search for a school busing case that would serve as a suitable vehicle for judicial review of the current case law on busing as a means of overturning that law, and he accelerated his efforts to develop legislative remedies to minimize busing. He also expressed his intention to recommend such legislation to Congress.<sup>49</sup> During the summer<sup>50</sup> he proposed legislation to Congress to limit busing and later, in a special message, urged action on it.<sup>51</sup> That specific legislation did not pass but the so-called Byrd amendment, which restricted busing as a means of administrative enforcement by the Department of Health, Education, and Welfare, did and was signed into law by Ford (discussed in chapter 3).<sup>52</sup>

The only notable civil rights legislation enacted during the Ford administration was the 1975 extension for seven years of the special provisions of the Voting Rights Act of 1965; which included for the first time provisions for protecting the voting rights of language-

minority citizens. The 1975 Voting Rights Act Amendments, unlike those of 1982 (see chapter 7), were passed without incident. There was no resistance to them by the Ford administration. Indeed, other than to continue to support the Nixon position on busing, Ford did not seek to dismantle the machinery for executive enforcement of civil rights protections. It is worth noting, however, that with the appointment of William Coleman as secretary of transportation, he made the second appointment of a black man to the cabinet (Robert Weaver, Lyndon Johnson's secretary of housing and urban development, was the first).

In sum, the Ford civil rights record was not notable. He did nothing particularly good but (with the exception of continuing Nixon's school desegregation policies) did very little harm.

### THE CARTER ADMINISTRATION

The administration of Carter, Reagan's immediate predecessor, was marked by two noteworthy developments in the area of civil rights. First, there was an increased emphasis on making the enforcement mechanisms more efficient, particularly with respect to enforcement of the, by now, extensive network of equal employment opportunity laws and regulations, and in assuring nondiscrimination in federally assisted programs. Second, for the first time in the history of the civil rights enforcement effort, a substantial cadre of people drawn from the groups whom the civil rights laws were enacted to protect were appointed to positions in which they were able to exercise real enforcement authority. Blacks, other minorities, and women were appointed to the federal bench, where, because the appointments are for life, their decisions have the potential for sustained, lasting impact. Together these developments reinvigorated the civil rights enforcement effort that had become listless in the Ford years:

As President Carter stated in his last State of the Union Address in January 1980, the goal of the effort to restructure the civil rights enforcement machinery was to allow the government to focus on large-scale enforcement of the civil rights laws. To this end, Carter directed the implementation of a sweeping reorganization of the equal employment opportunity effort in his Reorganization Plan No. 1 of 1978. Under the reorganization plan, the main government agency responsible for all federal efforts opposing discrimination in employment was to be the Equal Employment Opportunity Com-

President Johnson, broadened the role of the attorney general in coordinating enforcement of Title VI, authorizing him to prescribe standards and procedures for review and investigation of all agencies' programs providing financial assistance.<sup>36</sup>

Civil rights also advanced on several other fronts, particularly in the area of women's rights, by now a burgeoning movement of its own. A broad ban on sex discrimination in employment had been made a part of the 1964 Civil Rights Act (in fact, by an amendment on the floor of the House of Representatives added at the last minute in an effort to defeat the bill) to accompany the ban on sex-based wage discrimination adopted in 1963. When Nixon took office in 1969, he created a task force on women's rights and responsibilities which issued a report, *A Matter of Simple Justice*,<sup>37</sup> similar to earlier reports on racial discrimination.

From this report came the suggestions for action that were adopted in some significant pieces of legislation enacted during the Nixon years banning sex discrimination in educational programs,<sup>38</sup> in housing,<sup>39</sup> and in credit,<sup>40</sup> all of which are discussed in later chapters. In his January 1972 State of the Union Address, President Nixon stressed his commitment to equal rights for women and commented on the number of women he had appointed to high-level federal positions and on the increase in the number of women in middle-management positions and on boards and commissions. A statement on the Status of Women within the Administration, released in April of that year, reflected the increased numbers.<sup>41</sup> In August 1973, Nixon reaffirmed his support for the Equal Rights Amendment, which Congress had passed in 1972, and he proclaimed 26 August 1973—the anniversary of the ratification of the Nineteenth Amendment, which permitted women to vote—as Women's Equality Day,<sup>42</sup> continuing a practice begun a year earlier with a similar proclamation.<sup>43</sup> He also proposed that Congress broaden the jurisdiction of the Civil Rights Commission to encompass sex-based discrimination.

On the employment front, President Nixon endorsed, in his 1972 State of the Union Address, legislation to amend Title VII of the 1964 Civil Rights Act to increase the enforcement powers of the Equal Employment Opportunity Commission (EEOC) created under the statute. He sought to grant the commission authority to seek court enforcement against prohibited discrimination and to widen its scope to ban discriminatory employment practices of state and local governments and educational institutions. These amendments passed Congress and were signed into law in March 1972.<sup>44</sup>

The effect of these commendable initiatives was submerged,

however, by President Nixon's retreat in the area of school desegregation. In 1969, the Nixon Justice Department, under the direction of Attorney General John Mitchell and Assistant Attorney General for Civil Rights Jerris Leonard, went to court to oppose immediate implementation of the requirements of the *Brown* cases. It was the first time in the memory of civil rights lawyers since those decisions that lawyers for the United States and lawyers for the private plaintiffs (among whom was the author) were on opposite sides in a school desegregation case. Although the Supreme Court rejected the position taken by the Department of Justice in the cases,<sup>45</sup> the action of the Justice Department, with the apparent approval of the president, signaled a rupture in what had been an alliance between the executive branch and the plaintiffs in school desegregation cases.

It soon became apparent that the Nixon administration not only objected to quickening the pace of school desegregation but also objected to seeking its accomplishment by busing. Even while proclaiming his personal belief in the rightness of the *Brown* decision in a statement in March 1970 and assuring that the constitutional mandate would be enforced, President Nixon made clear then and on subsequent public occasions that he was opposed to busing.<sup>46</sup> Indeed, a Nixon proposal for funding to assist school districts in the desegregation process—made in May 1970 and partially adopted in the Emergency School Aid Act of 1972<sup>47</sup>—was conceived of as a means to avoid busing, which the federal courts were increasingly requiring and which the Supreme Court approved during his first term.<sup>48</sup> Of course, the effect on the public of the Nixon stance on busing was to encourage public opposition to school desegregation.

His position on public school desegregation was further reflected in his failed attempts to secure appointment to the Supreme Court of Clement Haynsworth and G. Harrold Carswell, two southern conservative judges who, the president said, were the "strict constructionists" of the Constitution that he had promised to appoint during his election campaign. In response to intense opposition mounted by civil rights advocates, the Senate rejected both nominations, but the president's effort to secure these appointments despite that opposition was widely viewed as indicative of a retreat from enforcement of civil rights. (Eventually, Nixon found other "strict constructionist" appointees with records less repugnant to the civil rights community, whom the Senate confirmed.)

More for what was attempted than for what was done, the Nixon presidency has been viewed as one not supportive of advances on the civil rights front. The perception is accurate as far as it goes, but

Americans in education, employment, health care, and housing. Beyond civil rights legislation, he stated, the fight to end-discrimination required constructive action to eradicate these differences.<sup>25</sup> The Economic Opportunity Act of 1964 was the result.<sup>26</sup> He used the powers of his office not only to prod Congress in enacting legislation but also to issue additional executive orders strengthening enforcement of the policies manifested by legislation and previous executive orders. For example, by Executive Order No. 11197,<sup>27</sup> he established the President's Council on Equal Opportunity to recommend ways to implement more effectively the 1957 and 1964 Civil Rights Acts and to suggest changes in administrative structure to better coordinate and improve equal opportunity programs. Executive Order No. 11246<sup>28</sup> issued 24 September 1965 (which in ensuing years would be referred to as The Executive Order), directed the Civil Service Commission to administer federal policy guaranteeing equal employment opportunity in federal employment; it also directed the secretary of labor to administer the government's nondiscrimination policies respecting government contracts and federally assisted construction contracts. This order remains the basis of the federal government's contractual compliance program (discussed in chapter 6). Executive Order No. 11247, issued the same day, provided for coordination by the attorney general of enforcement of Title VI of the 1964 Civil Rights Act banning discrimination in federally assisted programs (discussed in chapter 4).<sup>29</sup>

In other actions, Johnson also manifested the strength of his administration's commitment to civil rights enforcement and its expansion to all areas of racial discrimination. For example, in February 1965, acting on a report by the Commission on Civil Rights, he directed the secretary of agriculture to adopt changes in departmental programs recommended by that report to combat discrimination in farm programs.<sup>30</sup> Before a joint session of Congress on 15 March 1965, a week after marchers were beaten at a bridge outside Selma, Alabama, as they attempted to go from Selma to Montgomery in demonstration of support for voting rights, he proposed enactment of the Voting Rights Act of 1965. The message went to the entire country as well as to Congress. The heart of the message was captured in two clearly stated passages: "It is wrong—deadly wrong," President Johnson said, "to deny any of your fellow Americans the right to vote in this country." Moreover, "it is not just Negroes, but really it is all of us, who must overcome the crippling legacy of bigotry and injustice. . . . And we shall overcome."<sup>31</sup>

The essence of the leadership Johnson provided to the nation as a whole during his administration was summed up in his address at Howard University a short time later, which stated that the goal of civil rights progress must be achievement as well as opportunity.<sup>32</sup> There were other initiatives later in his administration, such as his message to Congress in 1966 proposing enactment of a civil rights bill to reform federal criminal statutes to gain greater protection for blacks against violence, to reform federal jury selection procedures to eliminate discrimination in this area and to enact a fair housing law.<sup>33</sup> Congress adopted all these measures before Johnson left office.

But the vital lasting contribution made by Johnson, beyond the concrete executive actions and proposals for and signing of the most civil rights legislation in any period since the first Reconstruction era, was the clear, unequivocal statement repeated time after time to the nation about how imperative it was to enforce civil rights throughout the country. The observation concerning the inevitability and the confluence of ineluctable social forces in Kennedy's shortened term can be made with respect to the Johnson years. But Johnson clearly added to those forces the power and prestige of the office and his own apparent personal convictions, so that when he left the presidency, he also left a full-blown set of priorities to advance on the civil rights front. Enforcement in both letter and spirit was clearly the policy of the government.

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#### THE NIXON ADMINISTRATION

Richard M. Nixon's presidency was a period of consolidation, advancement—and retreat. The enforcement priorities with respect to discrimination in employment and the government's responsibility not to permit discrimination in federally assisted programs which had been solidified under Johnson were consolidated under Nixon. During his first term, President Nixon reaffirmed the policy barring discrimination by government contractors by directing all federal agencies and departments to review their programs to make sure they were in accordance with Executive Order No. 11246.<sup>34</sup> During this period, attention was drawn particularly to job discrimination in the construction industry, culminating in the administration's so-called Philadelphia Plan for enforcement of The Executive Order. The plan, when challenged, was upheld by the courts.<sup>35</sup> During his second term, Nixon, by an executive order superseding that of

this period would have been required to respond in much the same way; indeed, Eisenhower had taken similar action in Little Rock. But the difference was notable. The president's action was accompanied by an expression of unmistakable moral outrage that went beyond the pragmatic political Kennedy persona. The president "was eyeball-to-eyeball with the segregationists and there was fire in his eye."<sup>20</sup> Through his words as well as his deeds, he set a course for the nation as only a president can. In a radio and television address to the nation on 30 September 1962, when James Meredith entered "Ole Miss," Kennedy said:

Even though this Government had not originally been a party to the case, my responsibility as President was . . . inescapable. I accept it. My obligation under the Constitution and the statutes of the United States was and is to implement the orders of the court with whatever means are necessary. . . .<sup>21</sup>

Later, in a speech on 11 June 1963, when desegregation of the University of Alabama was accomplished, the president sought to rally the country behind the new, far-reaching civil rights legislation that he was about to propose, citing the "events in Birmingham and elsewhere" where "the fires of frustration and discord [were] burning. . . ." He declared that "we are confronted primarily with a moral issue" and posed the question:

If an American, because his skin is dark . . . cannot enjoy the full and free life which all of us want, then who among us would be content to have the color of his skin changed and stand in his place? Who among us would then be content with the counsels of patience and delay?<sup>22</sup>

Kennedy went on to say that the following week he would ask Congress "to make a commitment it has not fully made in this century."

On 19 June, he sent a message to Congress proposing enactment of the bill containing provisions for equal access to public accommodations and facilities, strengthened federal presence in desegregation of public schools, nondiscrimination in employment, nondiscrimination in the use of federal funds, and additional protection of voting rights.

Clearly, by the premature end of his presidency in November 1963, John Kennedy had established a civil rights agenda for the country with the clear moral leadership of the office pointing the way towards its fulfillment. Words and deeds were unequivocally allied. Three points, however, must be noted. First, of course, is the fact that the events—"the fires of discord"—generated by the civil

rights movement prodded the agenda. Second, the issues of right versus wrong were clear-cut; the "moral issue" in the president's words, was "as old as the Scriptures and . . . as clear as the American Constitution."<sup>23</sup> Even so, Kennedy made choices that could well have been made the other way, thus accepting executive responsibility and asserting presidential leadership. Third, black votes in several key states had provided the margin of difference in an extremely close presidential election, but it is doubtful that the overall Kennedy record can be explained solely on this basis. (The Kennedy record, by the way, contains some regrettable judicial appointments to the federal bench in the South.) Rather, historical and social forces combined with moral suasion and strong leadership to create the basis for sustained executive action in the following years.

#### THE JOHNSON ADMINISTRATION

Whatever John Kennedy might have accomplished in enforcing civil rights during a second term (and, given the record, there is every reason to believe it would have been considerable), there can be no question that the presidency of Lyndon Johnson exhibited the greatest amount of sustained executive leadership in this field in the nation's history. During the period from his succession in November 1963 to his departure in January 1969, enforcement of civil rights by the executive branch of the government became a firmly established reality.

Johnson was accustomed to exerting strong leadership. By all accounts, he was one of the most able Senate majority leaders in the nation's history. He had exerted his leadership to fashion the compromise that resulted in passage of the 1957 Civil Rights Act.<sup>24</sup> With his assumption of the presidency, he secured passage of the most far-reaching civil rights legislation in the nation's history: the Civil Rights Act of 1964 (the bill proposed by President Kennedy in 1963); the Voting Rights Act of 1965; the Age Discrimination in Employment Act of 1967; and the Fair Housing Act of 1968, all of which are discussed in later chapters.

But there was much more. In January 1964, in a message to Congress, Johnson proposed a "war on poverty" that he linked to the ending of discrimination against nonwhites, citing data that underscored the differences in the status of white and nonwhite

President John F. Kennedy's inauguration in 1961 spurred the progress.

### THE KENNEDY ADMINISTRATION

In addition to the torch's glow, the Kennedy administration also felt the heat of what had become evident racial discord in the nation, heat which would eventually demand sustained intervention by the federal executive. The Brown decision and its aftermath had galvanized a people's crusade that would be known ever after as the Civil Rights Movement. Although common (but not universal) agreement fixes the beginning of the movement as the boycott of municipally owned buses in Montgomery, Alabama, led by Martin Luther King, Jr. in December 1955, clearly the movement peaked in the 1960s during the Kennedy and the Johnson years when widespread student-led sit-ins and massive protest demonstrations took place. The movement prompted the development of a clear cut national civil rights agenda which, for the first time since the first Reconstruction era, accorded civil rights enforcement by the executive a highly visible national priority.

Evidence of the growing priority occurred early in President Kennedy's term, for in March 1961 he issued an executive order combining the Committees on Government Contracts and Government Employment Practices into the President's Committee on Equal Employment Opportunity, with increased enforcement powers directed toward combating employment discrimination. The order appointed the vice president as chairman of the committee and directed the secretary of labor to implement equal employment practices in hiring federal employees and government contractors.<sup>16</sup> In the following month, President Kennedy sent a memorandum to all executive department and agency heads directing that no use be made of the name, facilities, sponsorship, or activities of any federal government executive department or agency in connection with any employee recreation organization that practiced racial discrimination. The memo required immediate and specific action to assure the result; a report of the action taken was to be made by 1 May 1961. The memo referred to the previously issued Executive Order (No. 10925) as reaffirming that discrimination "is contrary to constitutional principles" and that it is the policy of the executive branch to encourage "positive measures of equal opportunity for all

qualified persons within the government" (emphasis supplied).<sup>17</sup> Later in 1961, the president, by executive order, established the President's Commission on the Status of Women,<sup>18</sup> thus taking the federal government's first step toward remedies for sex discrimination. The commission's report became the basis for the the first piece of federal legislation on this subject, The Equal Pay Act of 1963, which addressed sex-based wage discrimination.

Just as the December 1961 presidential message and order on the status of women marked a new direction for the federal executive in this area, President Kennedy's Executive Order No. 11063, issued 20 November 1962, marked the beginning of the executive effort against discrimination in housing. In April 1962, the president had issued a brief statement on equal opportunity in housing in which he welcomed hearings then being conducted by the Commission on Civil Rights on the status of equal housing. Without waiting for the results of those hearings, Kennedy issued the housing order (promised during his campaign) directing federal agencies and departments to take steps to prevent discrimination in housing owned (in whole or in part) by the federal government or built with federal loans, grants, or other assistance. A President's Committee on Equal Opportunity in Housing was created and charged with the responsibility of coordinating departmental activities to implement the program. In addition, the Kennedy administration took steps in 1963 to stop discrimination in apprenticeship programs and construction programs allied to the federal government under contract or some form of federal assistance.<sup>19</sup>

As important as these initiatives were in expanding the federal role in civil rights protection, the most significant achievement of the Kennedy presidency in this area was its forthright and determined reaction to the era's highly visible civil rights struggles. Most notable were

- use of federal marshals and the federalizing of the national guard to secure the admission of James Meredith as the first known black student at the University of Mississippi in 1962
- use of federal force to quell the disturbance following bombings during civil rights demonstrations in Birmingham, Alabama, in May 1963
- use of federal marshals and the Alabama National Guard on the occasion of the desegregation of the University of Alabama in June 1963.

It might well be argued that any occupant of the White House during

### THE EISENHOWER ADMINISTRATION

In 1953 Eisenhower succeeded President Harry S Truman, the first president who had attempted to initiate significant civil rights enforcement efforts at the federal level. Except for desegregation of the armed forces, Truman's attempts largely failed. Congress refused to adopt the civil rights legislation he proposed in 1948, which incorporated the recommendations of his Committee on Civil Rights' report for the adoption of a fair employment practices law, an antipoll tax measure, and an antilynch law. The committee's report remained, however, a blueprint for the future. In the meantime, President Truman took action within the executive branch that did not require congressional acquiescence. In addition to issuing the order that eventually resulted in desegregation of the military, he created a Fair Employment Practices Committee within the Civil Service Commission, in an effort to combat discrimination in federal employment,<sup>2</sup> and a Government Contract Compliance Committee to aid in enforcing President Franklin D. Roosevelt's 1941 executive order barring discrimination by government contractors.<sup>3</sup>

Before Eisenhower took office, he had told the Armed Services Committee of the Senate that a certain amount of segregation was necessary in the army,<sup>4</sup> reflecting the views of his generation as well as his own background and experience at the apex of an all-white military chain of command. At a press conference in late 1953, he expressed "doubt" that "civil rights legislation identified as such ... will come up."<sup>5</sup> Moreover, on more than one occasion he expressed the view that the only "cure for our racial difficulties" was in the hearts and minds of individual citizens,<sup>6</sup> not in "punitive or compulsory federal law."<sup>7</sup>

Among the earliest of Eisenhower's major judicial appointments as president was that of former California Republican governor, Earl Warren, to be chief justice of the United States. At a White House "stag" dinner early in 1954 after conclusion of the oral arguments in the *Brown* cases, Eisenhower, quite improperly, lobbied the chief justice to rule in favor of school segregation, echoing the segregationist argument that white girls should not be placed in the same classrooms as black boys. Eisenhower's impropriety was compounded by the fact that the lead attorney for the school segregation cause, John W. Davis, was present at the dinner.<sup>8</sup> After Warren wrote the *Brown* opinion, Eisenhower called the appointment "the biggest damn fool mistake I ever made."<sup>9</sup>

Despite Eisenhower's reluctance to use federal authority to advance civil rights, the historical tide nevertheless moved him in that direction. By the end of his first term, he had issued a statement taking "pride" in the desegregation of facilities used by civilian employees at naval installations in southern states,<sup>10</sup> had issued his own executive order establishing the President's Committee on Government Employment Practices to make the policy of equal opportunity in government employment effective (superseding Truman's order creating a Fair Employment Board),<sup>11</sup> and had widened the scope of the Government Contract Compliance Committee.<sup>12</sup> By the end of his second term, he had issued proclamations commanding that obstruction of school desegregation at Little Rock, Arkansas, cease; federalizing the Arkansas National Guard; and directing the use of U.S. Army personnel to enforce the orders.<sup>13</sup> He had also signed into law the century's first civil rights bills.

Another significant accomplishment during the Eisenhower administration (although the president could hardly have been aware of it at the time) was the appointment of several Republican federal judges whose decisions in civil rights cases during the late 1950s and the 1960s were to have a tremendous influence on the development of civil rights law.<sup>14</sup> By the time of his last State of the Union Address in January 1961, President Eisenhower summarized the civil rights progress of his administration as follows:

- The first consequential federal civil rights legislation in 85 years (the acts of 1957 and 1960) had been enacted.
- A new Civil Rights Division in the Department of Justice to enforce the new voting laws contained in the legislation had been established.
- Greater job opportunity had been provided under the President's Committees on Government Contracts and Government Employment Practices.
- A Civil Rights Commission had been created to survey discrimination in housing as well as in voting and education.
- All segregation had been abolished in the armed forces, veterans hospitals, and all federal employment, including employment in the District of Columbia.<sup>15</sup>

Thus President Eisenhower, despite his own predilections, had been compelled by events to mark a clear path for the government's enforcement effort. The first postwar Republican administration was constrained to build on the actions of the Truman administration, taking credit (as is the habit in politics) for the initial progress. The glow from the "torch passed to a new generation of Americans" at

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**THE EXECUTIVE ROLE  
IN CIVIL RIGHTS ENFORCEMENT  
FROM EISENHOWER TO CARTER**

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"Don't judge us by what we say but by what we do,"<sup>1</sup> John M. Mitchell who was then attorney general responded to criticism of the Nixon administration's civil rights policies similar to those of President Reagan's. What governments, like individuals, do generally reveals more about what they are than what they say. But governments have responsibilities that individuals do not have and governments speak in ways that individuals cannot. Therefore, what government officials say (particularly when the official is president of the United States), as well as what they do, matters a great deal because it affects what is and is not done by other officials of the government. What Congress (and the Court) does or does not do and what the nation at large may perceive as the right thing to do may also matter.

Hence judgment of the record of successive administrations regarding civil rights enforcement is appropriate with respect to words as well as deeds, with respect to subtleties as well as overt declarations, and the choices that were not made when choice was possible as well as the choices actually made.

This chapter applies these measures to each administration from Dwight D. Eisenhower's to Jimmy Carter's. The record includes executive orders; appointments in the executive and judicial branches; agency actions; legislation proposed to Congress; action taken on legislation passed by Congress; suits filed and positions taken by the Justice Department in particular cases; and enforcement of court decisions and statements of positions taken by the president or subordinate officials with civil rights responsibilities through speeches, press conferences, or otherwise. In these ways, what previous administrations did and said can be judged to determine their views of appropriate public policy regarding civil rights enforcement and the consequences of those views for the nation.

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## SSupreme Court Ruling a Blow to Minority Candidates

WASHINGTON (AP) The Supreme Court threw out predominantly minority congressional districts in Texas and North Carolina on Thursday in rulings that could crush other efforts to maximize the political clout of blacks and Hispanics.

Voters are "more than mere racial statistics," the court declared in two 5-4 rulings that invalidated three districts in Texas and one in North Carolina. The justices said the states unlawfully made race the main factor in drawing the boundaries.

Such districts "cause constitutional harm" because they "convey the message that political identity is, or should be, predominantly racial," Justice Sandra Day O'Connor wrote in one of the court's main opinions.

The decisions, sure to affect many federal, state and local elections nationwide, delighted some conservatives but outraged civil rights groups.

Abigail Thernstrom of the conservative Institute for Justice called the rulings "a victory for those who favor a colorblind society."

But Elaine Jones of the NAACP Legal Defense Fund said the decisions "really torch the fundamental right of African-Americans, Hispanics and others to be included as participatory citizens in this democracy."

The American Civil Liberties Union's Laughlin McDonald said, "The inevitable consequence ... will be to produce a Congress that is increasingly white at a time that the nation is becoming increasingly diverse."

President Clinton, who has enjoyed strong support from minority voters, said he was disappointed by the rulings. "I think the affected voters will see that they need to work ever harder to make sure their voices are heard," he said.

The immediate impact in Texas and North Carolina appeared to be political chaos. It is unclear whether new districts must be drawn for the general elections in November.

In Texas, the court struck down two predominantly black congressional districts, the 30th in Dallas and the 18th in Houston, as well as the majority-Hispanic 29th in Houston.

In North Carolina, the black-majority 12th district was declared unlawfully created.

All four districts currently are represented by Democrats.

The decisions were silent as to how officials in each state should respond. What happens next could be up to special three-judge federal courts that have presided over the disputes.

In Texas, the three judges are Edith Jones, David Hittner and Melinda Harmon all Republican appointees.

In North Carolina, the judges are Democratic appointees James Phillips and Earl Britt and Republican appointee Richard Voorhees.

The court first struck down North Carolina's reapportionment plan in 1993. Since that year, a slim majority of the justices has seemed intent on minimizing race as a factor for drawing election districts.

"Our precedents, which acknowledge voters as more than mere racial statistics, play an important role in defining the political identity of the American voter," O'Connor wrote.

She said the court's work "evinces a commitment to eliminate unnecessary and excessive government use and reinforcement of racial stereotypes."

But Justice John Paul Stevens, one of the dissenters, wrote: "The court's aggressive supervision of state action designed to accommodate the political concerns of historically disadvantaged minority groups is seriously misguided."

"A majority's attempt to enable the minority to participate more effectively in the process of democratic government should not be viewed with the same hostility that is appropriate for oppressive and exclusionary abuses of political powers," Stevens said.

O'Connor was joined by Chief Justice William H. Rehnquist and Justices Anthony M. Kennedy, Antonin Scalia and Clarence Thomas in voting to strike down the congressional districts at issue.

Stevens was joined in dissent by Justices David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer.

The decisions were not all bad news for civil rights activists.

O'Connor, writing for herself, Rehnquist and Kennedy, said race-conscious redistricting might be constitutional in some cases even if minority-majority districts were created intentionally.

Those who challenge such districts must prove that race was "the predominant factor" that subordinated other, legitimate redistricting considerations, she said.

That important holding apparently is supported by seven of the court's members the O'Connor three and the four dissenters.

And at least five justices O'Connor and Thursday's dissenters moved the court away from the notion that major parts of the federal Voting Rights Act of 1965 might be unconstitutional.

In both of Thursday's rulings, the court said the redistricting plans are "not narrowly tailored to serve a compelling state interest."

In the Texas dispute, Texas Republicans had challenged 24 of the state's 30 congressional districts.

Districts 18 and 29 in Houston are represented, respectively, by Sheila Jackson Lee, a black Democrat, and Gene Green, a white Democrat.

The state's 30th congressional district in Dallas is represented by Eddie Bernice Johnson, a black Democrat.

North Carolina's 12th district is represented by Mel Watt, a black Democrat.

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