

The Split Society

Some 30 years after the civil rights movement's march on Washington, segregation has all but disappeared as a pressing issue on the national agenda, despite evidence that the chasms between black and white may be growing wider.

BY ROCHELLE L. STANFIELD

"This is America, and there is racism in this country," Delores A. Irvin said matter-of-factly. "Being black in America has been—and still is—very hard."

Irvin runs a program in Chicago that helps poor black families from the city's public housing projects rent apartments in its predominantly white suburbs. She ostensibly was describing her program, but the subtext was clear: For blacks, regardless of income, segregation driven by racial animosity remains an immutable fact of life.

While Irvin may be the image of a middle-class professional, "if I went to certain of these areas, I would get rebuffed," she said. "Being an African-American, it goes with the territory."

It's been 40 years since the Supreme Court declared that separate education for blacks isn't equal, and 30 years since Congress passed the 1964 Civil Rights Act. But integration is still a fragile exception; segregation the sturdy rule. The desegregation of America's public schools, which continued through the 1980s despite the hostility of the Reagan Administration, has now reversed. Residential integration, for the most part, has hardly happened at all.

"If you thought that segregation of blacks was a problem in 1960, the numbers you're seeing today would indicate that it's still a problem," Roderick J. Harrison, chief of the Census Bureau's racial statistics branch, said. "If you were hoping that civil rights, fair-housing laws, the growth of the black middle class would, over a 20-30 year period, really change the picture, I think everybody would agree" that they haven't.

For more than two decades, Presidents did little to push for the vigorous enforcement of antidiscrimination laws. Desegregation became a word rarely, if ever, spoken in public, regardless of the race of the speaker or the audience.

"We don't talk about race anymore," Mayor Sharpe James of Newark, N.J., acknowledged at a recent question-and-answer session with *National Journal*

reporters. "We don't understand that it's as fundamental as motherhood and apple pie, and we will never be a great nation until we recognize the fact that our diversity is our strength!" (For more on that session, see *NJ*, 3/26/94, p. 726.)

Not all black leaders agree with James. Indeed, black nationalists and some black politicians see advantages in racial concentration. But surveys show that an overwhelming majority of blacks desire integration.

For the first time in decades, a President and some members of his Cabinet are talking about desegregation. So far, however, their rhetoric speaks louder than their deeds.

It started with Housing and Urban Development (HUD) Secretary Henry G. Cisneros, who, from virtually his first day on the job, began speaking openly and passionately about desegregating housing, especially in cases where federal policies caused the segregation in the first place.

"This is offensive wherever it occurs," he said recently, referring to segregated HUD-owned housing. "It is just wrong."

Cisneros has promised to desegregate HUD housing programs and has made the enforcement of fair-housing laws a high priority. He's even backed up the rhetoric with some money to establish programs similar to the one Irvin runs in Chicago.

Next came Attorney General Janet Reno. She quietly began beefing up the housing section of the Justice Department's Civil Rights Division when she arrived in Washington. In December, she spoke out on the subject of fair lending, telling leaders of financial institutions that they must stop their long-standing, subtle but pervasive discrimination in making mortgage loans.

Together, Reno and Cisneros—with the cooperation of Eugene A. Ludwig, the Comptroller of the Currency—engineered a fair-lending agreement between the two departments and eight other federal bodies that regulate financial institutions. On March 8, the top officials of all 10 entities stood before a jam-packed press conference to announce, in effect,

that they would for the first time consistently enforce a law that's been on the books for 26 years.

"It restates the current law, so there's nothing new in that," Roberta Achtenberg, the assistant HUD secretary for fair housing and equal opportunity, acknowledged in an interview. "But it's pretty remarkable in the annals of banking history."

As for President Clinton, civil rights activists praise him for talking about integration. To commemorate Martin Luther King Jr. Day on Jan. 17, Clinton signed an executive order to create a Cabinet-level interagency council on fair housing and ordered it to get moving on antidiscrimination initiatives.

Eight days later, in his State of the Union message, Clinton said, "We must continue to enforce fair lending and fair housing and all civil rights laws, because America will never be complete in its renewal until everyone shares in its bounty."

Civil rights activists said that they couldn't recall the last time a President made such a specific plea about civil rights enforcement in a State of the Union speech—at least not since President Johnson's 1965 message.

But Clinton has been very slow to act. An assistant attorney general for civil rights has just been confirmed, and other key civil rights posts in the Administration have gone unfilled. Vacancies remain at the Equal Employment Opportunity Commission, which continues to tread water as it has for 12 years.

Despite the promises, strong policy directives and personal intervention of Cisneros and Achtenberg, however, civil rights activists complain that much of HUD's bureaucratic machinery has yet to gear up to implement fair housing.

And desegregation seems to have missed the elementary and secondary education arena altogether. At Justice's Civil Rights Division, the education section remains a backwater.

And Education Secretary Richard W. Riley has been silent on the subject, though he's pushed for higher standards at urban schools where minority youths are concentrated. That is somewhat of a surprise because Riley has one of the strongest civil rights backgrounds in Clinton's Cabinet. In 1970, as South Carolina's governor, for example, he took an active role in promoting school desegregation in Greenville.

School desegregation activists haven't complained too bitterly, however, taking some comfort in the renewed drive for fair housing. "We've gone from full reverse to neutral," said Gary Orfield, a professor of education and social policy at Harvard University who has designed

school desegregation plans ordered by the courts. "And that's some progress."

LIVING ARRANGEMENTS

The post-World War II civil rights drive started with the schools and got its first big push with the Supreme Court's 1954 ruling in *Brown v. Board of Education*. But if American society is ever to become racially integrated, activists and researchers agree, it will have to happen by desegregating housing. That's still a long way away, even though Congress



Assistant HUD secretary Roberta Achtenberg
"Sometimes HUD has been the problem."

passed the Fair Housing Act in 1968 and strengthened it 20 years later.

Some progress on the integration front, however, is under way.

Reynolds Farley, a professor of sociology at the University of Michigan, created a mild flurry of excitement in civil rights circles in February when he reported "modest" but "pervasive" declines in residential segregation across the United States in the 1980s. He looked at Census Bureau data from the 232 metropolitan areas in which blacks make up at least 3 per cent of the population and found a decrease in segregation in 194 of them.

Farley also highlighted a trend that may augur significant future declines in

segregation. He found the biggest upticks in integration in small but growing metropolitan areas in the South and West—Orlando, Fla., and Riverside, Calif., for example—where a large proportion of the housing was built after the 1968 Fair Housing Act and not subject to the segregated patterns set in northeastern and midwestern cities before World War II. (See box, p. 764.)

But even Farley, who's among the most optimistic of the researchers who follow these trends, acknowledged that the changes were far from dramatic. "It is a small movement that is creeping along," he said in a recent interview.

And it doesn't really affect most blacks where they live now, which is in the large metropolitan areas of the old Industrial Belts of the Northeast and Midwest, the most segregated places in the nation.

Douglas S. Massey, a professor of sociology at the University of Chicago, and Nancy A. Denton, an assistant professor of sociology at the State University of New York (Albany), examined segregation in the nation's 30 largest metropolitan areas, where 60 per cent of urban blacks reside. They found very little change in the past 20 years; most of the decline that did take place occurred during the 1970s.

In six major metropolitan areas (Chicago; Cleveland; Detroit; Gary, Ind.; New York City; and Newark, N.J.) in 1990, for example, the

average black family lived in a highly segregated neighborhood (one in which at least 80 per cent of the black households would have to move to predominantly white neighborhoods to achieve full integration). The biggest sustained drops over the two decades were in Boston and Los Angeles, but by 1990 both metropolitan areas were still highly segregated.

Researchers have also found that black residential segregation is fundamentally different from that of other racial and ethnic groups. Blacks are more concentrated and isolated in center cities (many would have to go clear across the city to find a white family, for example), a condition that Massey and Denton call "hyper-

Richard A. Bloom

MOST AND LEAST

The greatest segregation of blacks occurs in the old industrial centers of the Northeast and Midwest, where segregated housing patterns were established before World War II and not broken, according to Reynolds Farley, a sociologist who's studied patterns of segregation in 232 metropolitan areas with substantial black populations. The least segregation is in newer, generally smaller, metropolitan areas in the South and West, particularly in communities that have big military bases or universities. This table lists the 15 most segregated and least segregated metropolitan areas in 1990, and the percentage of black households that would have to move to predominantly white neighborhoods to achieve full integration.

Most Segregated

Gary, Ind.	91%
Detroit	89
Chicago	87
Cleveland	86
Buffalo, N.Y.	84
Flint, Mich.	84
Milwaukee	84
Saginaw, Mich.	84
Newark, N.J.	83
Philadelphia	82
St. Louis	81
Ft. Myers, Fla.	81
Sarasota, Fla.	80
Indianapolis	80
Cincinnati	80

Least Segregated

Charlottesville, Va.	45%
Danville, Va.	45
Killeen, Texas	45
San José	45
Tucson	45
Honolulu	44
Anaheim, Calif.	43
Cheyenne, Wyo.	43
Ft. Walton Beach, Fla.	43
Clarksville, Tenn.	42
Lawrence, Kan.	41
Fayetteville, N.C.	41
Anchorage	38
Lawton, Okla.	37
Jacksonville, N.C.	31

SOURCE: Reynolds Farley, Population Studies Center, University of Michigan

segregation." Neither Hispanics nor Asians live in hypersegregated neighborhoods.

At the current rate of integration, the Census Bureau's Harrison predicted, it could take as long as 100 years for black segregation to fall to the level of Hispanic segregation.

During the 1980s, the segregation rates for Hispanics and Asians increased because immigration was so great and the first stop for most newcomers is a neighborhood settled by their compatriots. But as soon as Latinos or Asian-Americans assimilate and acquire some money, many move into majority-white neighborhoods. That's not the case with African-Americans.

"Levels of segregation for the black nonpoor are very close to those of the black poor," Harrison said. "In most other groups, there is a sharp difference in segregation, with the poor being much more segregated."

Even when blacks move into the suburbs, most of them end up in predominantly black enclaves. The close-in Washington suburb of Prince George's County, Md., for example, became 51 per cent black in 1990. But the distribution was far from even. Bowie remained 94 per cent white, for example, while Hillcrest Heights was 88 per cent black and Suitland was 84 per cent black.

Perhaps such statistics show that blacks prefer to live in segregated communities, some observers have suggested. After all, there's been a rise in black nationalism with the increasing prominence of the Nation of Islam. Black politicians cultivate predominantly black cities and congressional districts. And on many university campuses, black students are demanding their own African-American dormitories.

There's even a name for new middle-class black suburbs and neighborhoods: "zones of emergence." The phrase was coined by Richard P. Nathan, a longtime urban researcher who's now the provost of the Rockefeller College of Public Affairs at the State University of New York (Albany).

"There is something of a movement in the African-American community away from integrationist perspectives," said David A. Bositis, a senior research associate at the Joint Center for Political and Economic Studies, a Washington think tank that's devoted to African-American issues.

If there is such movement, however, it apparently hasn't touched most blacks. Polls consistently show that the overwhelming majority of blacks would prefer to live in an integrated neighborhood. A recent survey for the National Conference of Christians and Jews, for example, showed that although blacks, Hispanics

and Asian-Americans had little good to say about one another or about whites, most of them—including 71 per cent of the blacks—supported "full integration."

Farley studied the housing preferences of blacks and whites in the Detroit area—the second-most-segregated metropolitan area in the nation, with a long history of bitter racial animosity—in 1976 and 1992. In both years, the vast majority of the blacks opted for integrated neighborhoods, with a 50-50 ratio their ideal. Most blacks ranked an all-black neighborhood very low on their preference list, and only 25 per cent said that they would be willing to move into such a neighborhood.

In the 15 years between the studies, whites became much more accepting of integration, but not to the point, apparently, of a 50-50 mix. In 1992, 56 per cent said they would be comfortable living in a neighborhood that was a third black, up from 43 per cent in 1976. In 1992, 53 per cent of the white respondents said that they would try to move out of a majority-black neighborhood, down from 64 per cent in 1976.

So, if everybody is for integration, why doesn't it happen? Government officials and civil rights activists answer in unison: Discrimination in the housing industry is remarkably tenacious.

"Markets, when left alone, don't generate integrated outcomes very often, even when there are people out there who would prefer them," John Yinger, a professor of sociology at Syracuse University who conducted housing discrimination studies for HUD in the late 1980s, said.

Yinger and most of his colleagues argue for a concerted policy to speed racial integration.

"I would hate to see us move toward a separate but equal society, even if it were possible to have that equality," said George C. Galster, a visiting senior research associate at the Urban Institute who has written extensively about desegregation. "I think that's a lousy public policy goal."

"You can't attack urban problems unless you come to terms with segregation and the forces that produce it," Massey said in a recent interview. "Whatever you try to do in the realm of education or job training or community investment is going to be overwhelmed by these disastrous neighborhood conditions, which follow fairly axiomatically from segregation."

Florence W. Roisman, a longtime civil rights activist who now teaches law at Georgetown University, had a dire prediction. "I think integration is an idea whose time must be now," she said, "because if it isn't, what happened to what used to be Yugoslavia is going to happen to us."

TAKING ACTION

If Cisneros and Reno have their way, the federal government will aggressively promote housing integration. That would reverse decades of practice because, despite the fair-housing laws on the books, the federal government itself has erected some of the highest barriers to housing desegregation for both the middle class and the poor.

"Sometimes HUD has been the problem," Achtenberg said. "We are not the cause of all segregated housing patterns in America today, but we have all too often played some role even by virtue of the way we have allowed our programs to reinforce racially restrictive neighborhood patterns."

Nowhere is that truer than in the suburbs, which since the early 1950s the Federal Housing Administration (FHA) has helped to build and finance as white necklaces around increasingly black cities.

In FHA-assisted projects, developers are required to search out minority buyers but rarely do.

"HUD is doing zip, nada, nothing," Roisman said. "HUD's own studies show that a lot of the projects that are supposed to have affirmative fair-housing marketing plans don't have them and even when they have them, they're not followed and the people who work there don't know about them or laugh them off."

Acknowledging that "the affirmative marketing requirements are quite minimal," Achtenberg said that HUD is "in the process of revising the entire affirmative marketing program."

As long as many middle-class black families can't get mortgages, however, no amount of marketing will help. That's where the new fair-lending agreement should come into play.

"We're devoting a lot of resources to obtain voluntary compliance [by the financial institutions]," said Paul F. Hancock, the chief of the Civil Rights Division's housing section at the Justice Department. "But we're also telling the industry that for those that don't get the message and continue to discriminate, we will use the full extent of our enforcement powers."

Hancock's office has already begun to do so. In the past 18 months, it has taken four banks to court and in several cases obtained settlements of about \$1 million.

"The statistics on fair lending are easy to show," John P. Relman, the director of the fair-housing project of the Washington Lawyers Committee for Civil Rights and Urban Affairs, said. "Four cases in the last year and a half—three of them in the last half-year—and before that, zero."

For the poor, on the other hand, action by the Clinton Administration is slower, despite the resolve of top officials.

Last September, Cisneros swooped down on the small all-white town of Vidor, Texas, a longtime Ku Klux Klan stronghold, and with federal marshals took over the Vidor public housing project and forcibly integrated it.

In the intervening six months, 12 black families have moved into the Vidor project, and so far, Achtenberg explained—superstitiously knocking on the wood of her desk—all has gone well. "But our work is not over by a long shot," she said.

That's for sure, civil rights activists say. Vidor is a tiny fragment of a sprawling, 14-year-old segregation case against HUD in East Texas, and Texas is but one small example of a nationwide problem of segregated HUD-owned and subsidized housing for the poor.

In 1980, Dallas lawyer Mike Daniel sued HUD for allowing segregation in public housing projects in 36 Texas counties. HUD and the Justice Department's Civil Division fought the case. Daniel won, but little was done. Now, more than a decade later, Cisneros is trying to remedy the situation and integrate the housing

projects. But he's apparently running into as much resistance from the federal bureaucracy as he is from the local segregationists.

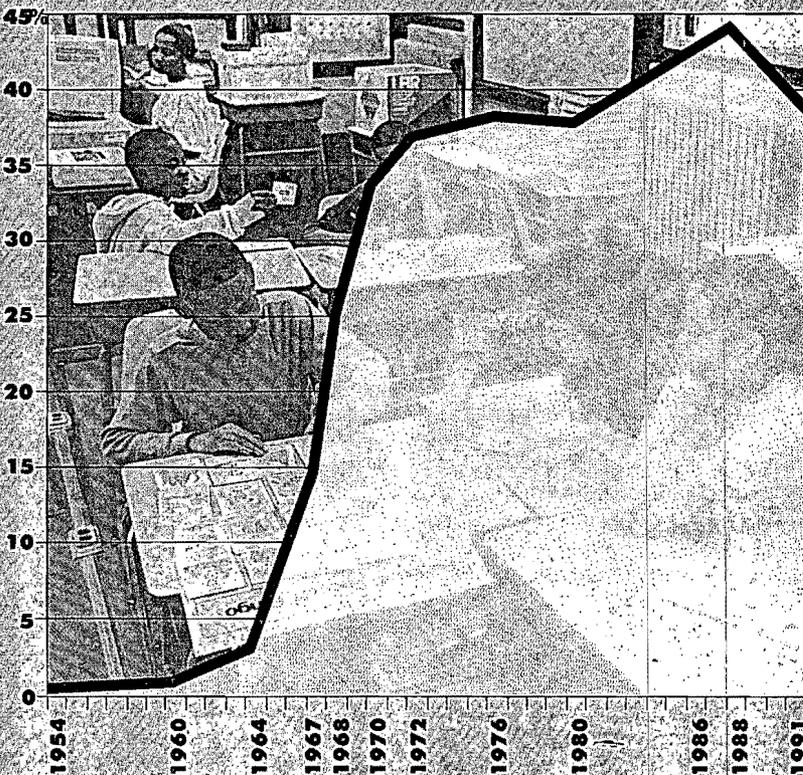
Cisneros, for example, formed a federal-local task force to come up with a desegregation plan. The plan used racial data by census tracts, each of which contains about 4,000 people. That might have been a logical desegregation unit in Achtenberg's hometown of San Francisco, where a census tract covers a typical neighborhood, but "in most East Texas towns, a census tract includes the whole town and sometimes extends for 80 square miles out into the country," Daniel explained.

As a result, the housing projects appeared on paper to be a lot less segregated than they really are. "So they could use that analysis to basically say they don't have to do much more," Daniel said. "Declare a victory that HUD housing in East Texas is desegregated."

So Daniel complained and demanded that the plan be based on census blocks, statistical designations that are about the size of city blocks. "The Justice Department lawyers said, with a straight face, that they couldn't get block data and pro-

REVERSAL IN THE SOUTH

Percentage of black students in majority-white schools



SOURCE: Harvard Project on School Desegregation

students from outside the neighborhood or even outside the city.

"I think it's yet to be seen what the Clinton Administration will do," William L. Taylor, a Washington-based civil rights lawyer, said. "I think it is reasonable to expect that this battering that went on during the Reagan and Bush Administrations will cease, but absent any kind of affirmative policy, I think the trend toward resegregation is likely to continue."

Because the school systems in many of the large old northern cities are predominantly black, the only way meaningful desegregation can occur is to transfer city students to suburban schools and vice versa. Naturally, there is a lot of controversy and considerable disagreement about the value of such transfers.

Orfield and others point to studies that show that poor black students do much better in white suburban schools. James E. Rosenbaum, a professor of education and social policy at Northwestern University, studied children involved in the Chicago program that Irvin runs, for example. That program began in 1976 as the result of a court case, *Hills v. Gautreaux*. In 1989, Rosenbaum compared the records of children who had moved out to the suburbs with those of similar children who had remained in the city. The differences were striking.

Where 20 per cent of the city students had dropped out, only 5 per cent of the suburban students had. A similar pattern prevailed for college attendance. Among those who moved to the suburbs, 54 per cent attended college—and 27 per cent of them a four-year college. The comparable figures for those who remained in the city was 21 per cent and 4 per cent. Of those who didn't go to college, 75 per cent of the suburban students had a full-time job, compared with only 41 per cent of the city students.

But Rosenbaum acknowledged that the dramatic results didn't happen overnight. "We found that suburban movers initially had difficulties adapting to the higher expectations in the suburban schools, and their grades suffered in their first years there," he wrote in an article in the June 1993 issue of the *North Carolina Law Review*.

The same is true for a massive city-suburban magnet program in St. Louis and its suburbs. "I think it's accomplishing a lot," said Susan Uchitelle, the executive director of the Voluntary Interdistrict Coordinating Council, which runs the decade-old program. "But it's going to take more than 10 years" for the impact to show up in test scores.

Under the program, 14,000 young St. Louis residents take buses out to suburban schools while 1,100 suburban youngsters travel in the opposite direction to

magnet schools in the city. Tests have shown that the black elementary school students who travel out to the suburbs haven't done much better than children who remain in the city. But by 10th grade, the achievement of the city students begins to decline while that of the suburban students begins to improve.

St. Louis Mayor Freeman R. Bosley Jr., who is black, has expressed his misgivings about this plan in particular and busing in general.

"Even though I appreciate white kids and black kids going to school together, it has not been good for the neighborhoods," he told editorial writers at the *St. Louis Post-Dispatch* last fall. "If you don't have good neighborhood schools, people won't live there. If you live there and send your kids to school somewhere else, there's no sense of commitment."

Bosley also complained about the \$25 million that the city must spend to bus its

nia's human relations law in 1970. "It remains the Pennsylvania Human Relations Commission's position that physical desegregation of schools is required," said Michael Hardiman, the lawyer who argued that side of the case. "But it doesn't stop there."

"Our view is that you could stop looking at the issue of mandatory busing and physical integration and start focusing on educational quality issues," responded Michael Churchill, a lawyer for the Public Interest Law Center of Philadelphia, which intervened in the case. "Desegregation is not disappearing as an issue, but it's not going to be the preeminent issue. Quality is going to be."

The prospects don't look good for achieving integration through new plans to bus city students to the suburbs. The Minnesota State Board of Education has recommended doing just that. Minnesota has long been known as the state that can



Paul F. Hancock, who heads the Civil Rights Division's housing section at Justice
In the past 18 months, his office has sued four lenders and obtained big settlements.

children out to the suburbs. He said he'd rather use the money to improve the city's schools.

Bosley's concerns seem to jibe with the Clinton Administration's policy of putting a high priority on improving schools and saying nothing about integrating them. But the debate continues as to whether that policy can be implemented. Apparently separate but equal was not really decided once and for all in 1954.

A state court judge in Pennsylvania recently ordered Philadelphia's schools to both desegregate and improve the education achievement of poor students. The ruling is the latest development in a case that was brought under Pennsylva-

peacefully accomplish the kind of difficult social experiments that would provoke riots in other states. But when the board's plan was announced, there was an explosion of protest. "We took phone calls for two solid days from the community," said Barbara Stillwell, an employee who worked on the plan. "It was quite challenging to sit and listen politely to some of the comments we got."

A color-blind society is still a very long way off. The Clinton Administration seems willing to address the issue of housing integration, but it has done little, if anything, to eliminate school segregation—the condition that started the civil rights movement 40 years ago. ■

duced a HUD intellectual who also said it," Daniel said. "I just don't see how anybody who [knows about census data] could possibly fall for that crap."

The complaint eventually reached Achtenberg on a Thursday. On Friday, she ordered that the plans be reworked. But that wasn't the end of the fight, Daniel said. "On Monday, the task force met to discuss *whether or not* to make any changes," he said. "It just goes on and on."

Meanwhile, the Administration's fiscal 1995 budget requests several small pots of money to encourage integration in assisted housing. One proposal seeks \$149 million to establish programs, such as the one in Chicago, to help families who live in subsidized housing in inner cities look for apartments in the suburbs. Another would allocate \$24 million to demonstrate one-stop shopping for subsidized housing in an entire metropolitan area, merging what are now separate, segregated housing programs for cities and their suburbs.

The Buffalo (N.Y.) metropolitan area, for example, has two housing voucher programs—one for the city and one for all its suburbs. The one for the suburbs has a residency requirement that makes it just about impossible for blacks from the city to get a subsidized apartment in the predominantly white suburbs. Achtenberg acknowledged the problem and said that she is trying to fix it.

"They've taken some fine first steps," said Thomas J. Henderson, the deputy director of the Lawyers' Committee for Civil Rights Under Law. "But we have yet to see whether the folks over there are up to the task of really coming to grips with the terrible legacy of institutionalized segregation that has been built into our housing system."

SEPARATE AND UNEQUAL

Until housing integration is achieved, real school desegregation is unlikely. And so far, the Clinton Administration's education policies don't change the equation.

An end to the institutionalized segre-

gation of education was what much of the civil rights movement was about in the 1960s and 1970s. The civil rights activists won, state-enforced segregation requirements ended and considerable integration took place. (See chart, p. 765.)

But that was mostly in the South, where housing generally was less segregated than in the North, and where many school districts covered whole counties, so that a district's school desegregation plan included white suburban students.

The issue is much trickier in the North, where schools have remained much more

Detroit schools that included busing to the suburbs. Afterward, northern whites found that they could hide from desegregation, and their flight to the suburbs picked up speed.

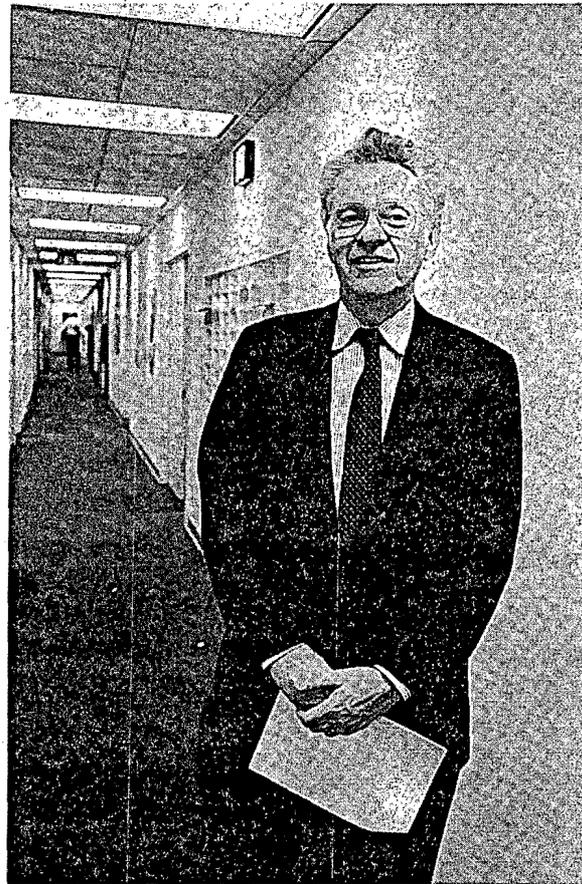
Black families are moving to the suburbs; too, but for black children, that doesn't necessarily mean going to an integrated school. Orfield found, for example, that of 1.3 million black students in the suburbs of the nation's 33 largest metropolitan areas, three-fifths went to predominantly black schools.

Since the 1970s, neither Congress nor five Presidents have done much to integrate the nation's public schools. In 1972, Congress enacted the Emergency School Assistance Act, which pumped billions of dollars into schools undergoing desegregation. But in 1981, at President Reagan's request, Congress abolished the program. Meanwhile, Congress has routinely attached an anti-busing rider to the Education Department's annual appropriation, prohibiting the use of any federal education funds for busing to achieve integration and making it difficult for the department to cut off assistance to schools that don't desegregate.

Nonetheless, the desegregation that was achieved in the late 1960s persisted for nearly two decades, primarily because the courts retained control over the school districts they had ordered desegregated. In the mid-1980s, however, William Bradford Reynolds, then the assistant attorney general for civil rights, intervened in several cases in an effort to remove the school systems from court supervision. Orfield and others attribute the resegregation that began during the Bush Administration partly to Reynolds's move.

What's more, many civil rights activists no longer look to the federal courts for help in achieving school integration. "We are not bringing any new school desegregation cases," said David S. Tatel, a Washington-based civil rights lawyer. "We are spending a lot of time with school districts that are trying to keep [old] desegregation plans going."

So far, the Clinton Administration has been all but mum on the subject of desegregating the nation's public schools, although it has actively promoted the desegregation of institutions of higher learning through lawsuits and minority scholarships. As for elementary and secondary schools, however, about all it has done is to propose, in its fiscal 1995 budget, increasing assistance to magnet schools from \$108 million to \$120 million. A less controversial alternative to mandatory busing to achieve some integration, magnet schools—often in poor city neighborhoods—receive extra funds to provide special programs to attract



William L. Taylor, a Washington civil rights lawyer
"It's yet to be seen what the Clinton Administration will do."

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segregated. In a recent study for the National School Boards Association, for example, Harvard's Orfield found that 50.1 per cent of black students in the Northeast attended schools that were 90-100 per cent minority during the 1991-92 school year; the comparable proportion in the South was 26.6 per cent. For more than a decade, Illinois, Michigan, New Jersey and New York have topped the list of states with the most segregated school systems.

The Supreme Court, which facilitated southern desegregation, complicated northern integration efforts with its 1974 ruling in *Milliken v. Bradley*. Its decision overturned a desegregation plan for the

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HUD's Priorities: Addressing Bias, Homelessness

Cisneros's Plan for Department Puts New Emphasis on Racism

By Guy Gugliotta
Washington Post Staff Writer

Housing Secretary Henry Cisneros yesterday unveiled an ambitious list of goals for the Department of Housing and Urban Development, identifying racial discrimination and homelessness as two of his top priorities.

"This is a live document, by which we will be judged and by which we will judge ourselves," Cisneros told HUD employees at the formal unveiling of HUD's new Program and Management Plan. He said, "We will be held accountable."

The 103-page document describes six areas of primary importance for the current fiscal year: racial discrimination, homelessness, public housing, community development, reform of the Federal Housing Administration and internal reorganization of HUD itself.

Some of these, among them the FHA, public housing and HUD administration, are well-publicized areas of agency concern. By emphasizing racial discrimination, however, Cisneros broke new ground for the Clinton administration, whose social policy has focused mainly on income rather than race.

Cisneros in September signaled HUD's intention to confront racism in housing when he fired the management of an East Texas housing authority for discrimination and harassment of African American tenants in a public housing project in the town of Vidor.

At a breakfast meeting early Wednesday, Cisneros said that Clinton and Vice President Gore had personally talked to me about Vidor to express their support. There will be no diminution of priority in HUD's willingness to step in whenever racism threatens properties where the agency has an interest, he said.

Cisneros told HUD employees the agency would improve enforcement of fair housing statutes by streamlining complaint procedures and ending segregation in HUD programs. The plan also calls for new regulatory structures to address "red-lining"—discrimination in mortgage lending and housing insurance in minority communities.

Also somewhat unanticipated was Cisneros's classification of homelessness as a top agency priority. Cisneros has spoken often about enlisting a wide range of services to provide a "continuum of care" for the homeless, but the initiative placed HUD as "first among equals" in a large group of agencies with a keen interest in homeless issues.

Last week congressional appropriators eliminated funding for the Interagency Council on the Homeless, the principal multiagency forum to address homelessness.

Cisneros confirmed that HUD will take over the activities of the council, which HUD sometimes was accused by other agencies of trying to dominate. At the breakfast meeting, he said he had fought against the demise of the panel and had "put out word" in the agency that any one working to close it down "would be out of line."

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LEVEL 1 - 76 OF 86 STORIES

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HEADLINE: State Leads Anti-Immigration Wave
Political Rhetoric Adds to Economic, Social Fears

BYLINE: Suzanne Espinosa Solis, Chronicle Staff Writer

BODY:

When Rudi DiPrima went to the Department of Motor Vehicles to apply for a new driver's license, the first thing the clerk wanted from him was proof that he had a legal right to be in the United States.

DiPrima happened to have his birth certificate, but as a blond San Francisco native, he couldn't believe that the state was asking to see it. He waited at the desk while three clerks checked and rechecked his documents. And by the time they sent him on to the next clerk, he was steamed.

'Pretty soon they'll start tattooing numbers on us at birth,' he muttered.

The DMV document check was a brief bureaucratic aggravation for DiPrima, but it was something more, too: one of the most visible signs of a cultural and political backlash against immigrants that is unprecedented in modern California history.

In the past year, long-simmering frustration with immigration -- illegal and legal -- has boiled over in the state. Where before immigration had caused modest concerns, suddenly a broad political opposition has risen against it.

Some, wearied by recession, argue that the immigrants take away jobs and impose a burden on welfare, schools and other government programs. Some environmentalists argue that California lacks the water and other natural resources to support the rapid growth caused by immigration. Other people worry that with so many new residents coming from so many foreign cultures, the familiar American culture will be diluted or lost.

'Unfortunately, it's become an ideological thing,' says businessman Mike Scott, a member of the Orange County-based Citizens for Responsible Immigration. 'It's a heart-gripping problem because you're dealing with human beings, but it can't go on. I'm afraid it's reached a flash point.'

Already, the impact is apparent.

Illegal immigrants devastated by January's Northridge earthquake have been denied earthquake-repair aid, although many have lived and paid taxes in the state for years. Children have been turned out of California schools along the border with Mexico. Activists are gathering signatures for the 'Save Our State' initiative that would deny illegal immigrants access to public schools, hospitals and other social services.

The San Francisco Chronicle, MARCH 29, 1994

Critics of the movement say the reaction is too strong and spreads too far. The sting of the backlash is being felt not just by illegal immigrants, they say, but by those who are here legally.

The descendants of Mexicans, Chinese and Japanese who came to California generations ago say they hear slurs and insults on the street. Some have been threatened. A few have been beaten.

'We are at a point where civil rights, particularly of immigrants, are in danger,' warned Cruz Reynoso, a former California Supreme Court justice who is now vice chairman of the U.S. Commission on Civil Rights.

As it has been with many social movements, California seems to be at the front of a national anti-immigrant wave that is expected to crest as this year's elections approach.

Polarized and angry, the nation has come to a crossroads: Will we remain a haven for the poor of the world, as the Statue of Liberty promises, or will we close the door?

Either way, there will be a price to pay.

A HISTORY OF HOSTILITY

The United States has been at this crossroads before. Almost every decade in the nation's history, a new exodus of immigrants has arrived, and almost every decade there has been a hostile reaction.

In the 1840s, Roman Catholic immigrants from Ireland and Germany were the targets of Protestants who had settled in the country generations earlier. Later in the century, Italians and Jews were greeted with anger. From the time of the Gold Rush through the end of World War II, Chinese and Japanese immigrants endured prejudice that was sometimes legally sanctioned.

Today, the number of people on the move is staggering. A United Nations report issued last year estimated that at least 100 million people, or about 2 percent of the world's population, are international migrants. As the gap has widened between rich nations and poor, migratory pressures have increased, the report found.

And although some nations have tried to crack down, the report concluded that 'where legal channels are closed, migrants will enter by whatever means are available.'

Between 1982 and 1992, 9.5 million foreigners obtained legal permission to call the United States home, according to the Immigration and Naturalization Service. An additional 3.2 million reside here illegally, but experts admit that number is an educated guess.

Those arriving in the United States these days find their new neighbors offer a cool welcome, or no welcome at all.

A Time magazine/CNN poll late last year found that 85 percent of the public wanted tougher federal laws on illegal immigrants. Sixty percent wanted reduced legal immigration. Across the state, polls have found that three of four

The San Francisco Chronicle, MARCH 29, 1994

Californians favor stationing National Guard troops along the U.S.-Mexico border.

Said Annelise Anderson, a senior research fellow at Stanford University's Hoover Institution: "We do have relatively more immigrants that are foreign-born than in the 1950s, and people are aware of it because it is Asian and Hispanic, rather than European."

"Of course, people have always objected to immigrants," she said. "But earlier groups have now been absorbed and now are viewed as part of the population that isn't foreign-born and doesn't strike us as different."

ECONOMIC AND POLITICAL PRESSURES

No single factor explains the profound change in public opinion. Instead, many experts trace it primarily to economic worries, aggravated by news events and political rhetoric.

In November, economist Donald L. Huddle of Rice University asserted that legal and illegal immigrants take thousands of jobs away from U.S. citizens. In 1992, he concluded, 7.2 million legal and illegal immigrants residing in California cost \$ 18 billion more for public services than they paid in taxes.

But in a report released last month, Jeffrey Passel of the Urban Institute in Washington charged that Huddle's research was flawed. Passel reported that immigrants in California actually generate net government revenue of more than \$ 12 billion.

Compounding the disagreement, the Alexis de Tocqueville Institute in Virginia reported last week that immigration does not lead to higher unemployment rates and may even reduce joblessness.

Many economists admit that, in fact, nobody knows exactly what effect the immigrants have had -- for better or for worse.

The truth may well be in the middle. But in the debate over immigration, little middle ground exists.

Last year, in a time of deep anxiety over the state's economy, Governor Wilson took the offensive: He suggested that illegal immigrants cost the state close to \$ 3 billion in public education, health, social and law enforcement services.

Although the statistics were widely disputed, they struck a chord with the public. Polls showed a dramatic improvement in Wilson's popularity, and the governor has continued to stress the immigration issue.

Meanwhile, among some grass-roots activists who are pressing for immigration restrictions, another concern may be as important as the economy, but it is far more politically sensitive: the rise of a multicultural society.

The melting pot is not only full but overflowing, they say, and the dominant culture cannot assimilate so many people from so many different cultures so quickly.

The San Francisco Chronicle, MARCH 29, 1994

"I think every nation is entitled to defend its own culture," says Lynn Young, a coordinator of the Cupertino-based South Bay Citizens for Immigration Reform. "It seems weird to me that some countries come under attack for that. If you say you'd like to maintain Tibetan culture, everybody says that's wonderful."

DMV LAW AN INDICATOR

The passage of last year's DMV bill in California was the sum of these strains of public opinion.

On March 1, the day the new law took effect, the San Francisco DMV office resembled an immigration checkpoint at an international airport. A crowd gathered in front of a desk at the entryway, and anxious applicants slapped down passports and birth certificates and flashed green cards and other immigration documents.

In the first 90 minutes, 17 people were turned away because they were unable to prove legal residency.

Most said they were U.S.-born citizens or legal residents who simply did not bring their birth certificates or immigration documentation with them. Two -- a domestic worker from El Salvador and a tortilla factory worker from Mexico -- conceded they were undocumented.

"I came here to work, not for anything else," said the Mexican worker, identifying himself only as Jose. He said that an hour's wage in the United States is equivalent to a day's pay in Mexico and that his work here helps to support his family back home.

A French biology student at the University of California at San Francisco also was turned away. She panicked when a state employee told her that her French passport was not acceptable and that she could not get her driver's license.

"I do not know what I will do," she said, tears brimming in her eyes.

Even as California awaited the implementation of the DMV law, the federal government and other states also were intervening against illegal immigration.

Florida Governor Lawton Chiles, who contends that illegal immigration is costing his state millions of dollars, has threatened to lead a lawsuit on behalf of his state, California and several others against the federal government for funds to pay the bills. In Congress, at least 150 pieces of legislation are pending to punish illegal immigration or reduce legal immigration.

The federal government already has erected a border blockade in Texas to make passage to El Paso from the adjoining Mexican city of Juarez more difficult. And along the California-Mexico border, some stretches have come to resemble a military zone.

FEAR AND HUMILIATION

The San Francisco Chronicle, MARCH 29, 1994

No one can say yet whether the crackdown has had an effect on the numbers of new illegal immigrants. But among immigrants already living in the United States, the new laws and angry rhetoric have left a profound impression.

While some struggle to mount a political counterattack, immigrants inside the taquerias, Laundromats and neighborhood centers of San Francisco's Mission District talk about their immense fear and humiliation.

Sylvia, an undocumented secretary at a local community center, is the mother of two boys, ages 5 and 6.

"I stopped sending my sons to school," she said. "I did not understand what everybody was talking about, but I kept hearing that the schools were going to be raided by the migra.

"My friends call me at home, and they cry. They will be watching the television and hearing all these things about immigrants and how they are being blamed for all these problems here. And they know it's not true."

What worries many immigrant-rights groups is that the same suspicion easily extends to anyone who looks "different."

Doreena Wong, a hate-violence researcher for the Asian Law Caucus, fears that the climate can lead to attacks against any person of color who is believed to be an immigrant.

"I think the more 'foreign-looking' you appear, the more you're associated with immigrants, and assumptions are made that all immigrants are here illegally," Wong said. "As far as a lot of people are concerned, we're all the same -- we don't belong here. That's what we're worried about."

PRE-ELECTION DEBATE

These are not new issues in the American story. In a nation both populated by immigrants and deeply suspicious of them, the issues are never far from the surface. But many observers believe that the debate -- and the suspicions and the fears -- will become more intense as Election Day approaches this fall.

In California, immigrant groups have begun to stage small protests against the backlash. At the same time, anti-immigrant groups in the state are collecting signatures for a ballot initiative. And politicians are appealing for votes with high-intensity rhetoric.

"It is difficult to introduce any balance into the debate," said Stan Mark, an attorney with the Asian American Legal Defense Fund in New York. "It is an election year, and many politicians see this as an issue that can be effectively exploited."

ABOUT THE SERIES

"Divided We Stand" is a yearlong project examining critical issues surrounding immigration in the United States. This four-part series, "The Immigration Backlash," is based on nearly 150 interviews conducted by

The San Francisco Chronicle, MARCH 29, 1994

Chronicle reporters throughout the United States and in Europe.

Today: A year after concerns over illegal immigration exploded across the front page, California is leading the nation in a crackdown on undocumented immigrants.

* Tomorrow: At the grassroots level, anti-immigrant activists fear economic problems and the rise of a multicultural society.

* Thursday: In Washington, D.C., the anti-immigrant backlash is expected to have an effect on every major social policy debate of the year.

* Friday: New pro-immigrant alliances are emerging from New York to California, trying to fend off growing resentment.

GRAPHIC: PHOTO (7), (1) Men on Tijuana side of the border looked through the fence to Friendship Park in San Ysidro as one man (top right) slipped through, (2) Two members of a Marin County group protested street hiring, PHOTOS BY VINCE MAGGIORA, THE CHRONICLE, (3) A sign warns against trying to Flee against traffic near San Ysidro, (4) A pile of forged documents collected by Medi-Cal investigator Mark Miranda since July 1993, (5) San Francisco DMV employees Edwin Moses and Barbara Christin (at Left) waited to see proof of residence from driver's license applicants, (6) Two Border Patrol agents used a truck-mount

LANGUAGE: ENGLISH

LOAD-DATE: March 29, 1994

Affirmative Action

Justice Submits Brief To Ninth Circuit Supporting Injunction That Blocks Prop 209

Weighing in for the first time in the court battle over California's Proposition 209, the U.S. Department of Justice Jan. 29 urged the U.S. Court of Appeals for the Ninth Circuit to uphold a lower court order that temporarily blocks the state from implementing the measure.

In an amicus brief, DOJ asserted that the preliminary injunction, which prohibits state and local officials from implementing Proposition 209 by eliminating affirmative action programs, will "preserve the status quo pending consideration of plaintiffs' claims on the merits" (*Coalition for Economic Equity v. Wilson*, CA 9, Nos. 97-15030 and 97-15031, 1/29/97).

The district court order does not mandate use of affirmative action and expressly allows officials to repeal particular affirmative action programs "so long as they are doing so voluntarily and pursuant to authority that exists independently of Proposition 209," DOJ noted.

It added that Californians Against Discrimination and Preferences Inc. (CADP), which has asked the Ninth Circuit to stay the lower court's order,

"has not established any significant injury to its interests that warrants disrupting the status quo and overturning the district court's narrow prohibitory order," DOJ argued.

CADP has intervened as a defendant in the suit, which was originally filed by a coalition of civil rights organizations that oppose Proposition 209.

Court Found Probable 14th Amendment Bar

Proposition 209, also called the California Civil Rights Initiative, was approved in a statewide voter referendum on Nov. 5, 1996. It amends the state constitution to prohibit state and local affirmative action programs based on race or gender in public employment, contracting, and education.

After a coalition of civil rights groups filed suit challenging the measure under the 14th Amendment, the U.S. District Court for the Northern District of California on Dec. 23 granted a preliminary injunction blocking implementation of the initiative. Judge Thelton Henderson found that the injunction was necessary to protect the plaintiffs from irreparable injury and found that they showed a "strong probability" that they could prove that CCRI violates the 14th Amendment's equal protection clause.

On Dec. 20, White House press secretary Mike McCurry announced that the Department of Justice would participate in the case in support of the plaintiffs. It is still unclear whether DOJ will seek to intervene as a plaintiff or merely act as an amicus when the district court considers the merits of the case. The department "will monitor the progress of the litigation to determine what further action to take," according to DOJ spokesman Myron Marlin.

Edward Chen, an attorney with the American Civil Liberties Union of Northern California, one of the plaintiffs in the suit, said he is "very pleased" that DOJ has supported their position. His "main concern" is that DOJ express its views

to the court; whether DOJ participates as an amicus or an intervenor is of secondary importance, he said.

'Burdens' Placed On Minorities, Women

In its brief, DOJ argued that under the Supreme Court's decisions in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), a state may not place unusual burdens on the ability of racial or gender groups to enact legislation specifically designed to overcome prejudice.

"Proposition 209, like the ballot initiative invalidated in *Seattle*, singles out measures designed to overcome prejudice for unique and burdensome treatment. Women and minorities seeking narrowly tailored affirmative action programs to respond to discrimination in California must now obtain a state constitutional amendment first, while those seeking preferential treatment on any number of other bases may do so through ordinary state and local political processes. This disparate allocation of burdens violates the equal protection principles set forth in *Hunter* and *Seattle*," DOJ argued.

DOJ Position 'Deeply Regrettable'

Calling DOJ's decision to file the amicus brief "deeply regrettable," California Gov. Pete Wilson (R) said that the Clinton administration "now has the dubious distinction of being the first administration since the enactment of the Civil Rights Act of 1964 to contend that a law prohibiting all race- and gender-based discrimination is itself unconstitutional."

"In light of the federal government's leading role in the 1960s and 1970s in enacting and protecting the civil rights of all Americans regardless of race and gender, it is an historical setback for the Clinton administration to contend that a law can be unconstitutional even if, as stated in [its] brief, 'the state formally treats men and women and members of all racial groups identically,'" the governor said.

Ward Connerly, who headed the CCRI campaign and has formed the American Civil Rights Institute to fight affirmative action nationwide, said: "It is unfortunate that [President Clinton] has aligned himself with those who support preferences. Instead of trying to mend affirmative action, he is defending it."

The Clinton administration has been wrong on every affirmative action case in the last three years, including the *Adarand*, *Hopwood*, and *Piscataway* cases, and is "badly out-of-step ... with the American people on the issue of racial preference," Connerly charged.

At a Jan. 30 press briefing, Deputy Attorney General Jamie S. Gorelick explained that DOJ is not taking issue "with the principle that there should be no discrimination in the workplace or in our schools or elsewhere in our public lives."

Instead, DOJ finds unconstitutional the state's imposing "a special burden on minorities and women" that prevents them from going directly to government institutions responsible for assuring that the government deals with people in a race-neutral manner, Gorelick said.

Proposition 209 "basically says that the political process at the local level that ordinarily operates is not operative for those groups, and that their only remedy is to set aside a statewide referendum," Gorelick said.

Federal Employees**Sen. McCain Introduces Bill To Prevent More Federal Government Shutdowns**

A bill to prevent another federal government shutdown in the event of stalled budget negotiations on Capitol Hill was introduced in the Senate Jan. 29 by Sen. John McCain (R-Ariz).

Co-sponsors of the bill (S. 228) include Sens. Ted Stevens (R-Alaska), Kay Bailey Hutchison (R-Texas), Spencer Abraham (R-Mich), and John Ashcroft (R-Mo).

The bill is designed to prevent "a repetition of the trauma and drama that this country went through when we shut down the government for 27 days" last winter, McCain said at a Capitol Hill press briefing. The combined cost of that shutdown was estimated at \$1.5 billion, he added.

The Government Shutdown Prevention Act would create a statutory continuing resolution that would be triggered only if the appropriations acts do not become law or if there is no governing continuing resolution in place, McCain said.

In the event of another budget impasse, the "safety net" legislation would keep the federal government operating by setting spending at the lowest of the following levels:

- the previous year's appropriated levels;
- the House-passed appropriations bill;
- the Senate-passed appropriations bill;
- the president's budget request; or
- any levels established by an independent continuing resolution passed by the Congress subsequent to passage of the act.

Costs Of Shutdown Recalled

Although legislation of this type has been introduced unsuccessfully in the past, McCain said the experience of the last shutdown was "compelling enough" to allow passage this year. He added that "we are quite often reminded" of the state of constituents, particularly federal employees, during that last shutdown.

"For the first time in 76 years, the Grand Canyon was shut down, and the 40,000 federal employees in my state were put out of work," McCain recalled. Local communities near national parks lost an estimated \$14.2 million a day in revenues from tourism. In addition, "10,000 new Medicare applications, 212,000 Social Security card requests, 360,000 individual office visits, and 800,000 toll-free calls for information and assistance were turned away each day," he said.

The shutdown also created delays in services to "some of the more vulnerable in our society" including 13 million recipients of Aid to Families with Dependent Children, 273,000 foster care children, more than 100,000 children receiving adoption assistance services, and more than 100,000 Head Start children, McCain said.

Rep. George Gekas (R-Pa), who has supported attempts to pass such legislation since 1989, said that support from members of the Senate gives the bill an "excellent springboard" for passage. The involvement of Stevens, in particular, he said, would help to overcome concerns that the

bill would "wrest away" from House appropriations committees' their power to negotiate and form budget provisions each year. Stevens is chairman of the Senate Appropriations Committee.

According to McCain, the legislation most likely will be included in a supplemental appropriations bill that will be the first "must-pass" bill to go through the Senate and the House this year. A hearing on the supplemental bill likely will be held within the next two weeks, Hutchison said.

Study Finds Rental Housing Bias Falling but Still Frequent in Area

By Caroline E. Mayer
Washington Post Staff Writer

A new study shows blacks and Hispanics face discrimination more than two out of five times when they try to rent an apartment in the Washington area.

The greatest discrimination was found in the suburbs, where bias was reported nearly twice as often as in the District, according to a special audit to be released today by the Fair Housing Council of Greater Washington, a private, nonprofit housing advocacy group.

While African Americans and Hispanics encountered discrimination 28 percent of the time in the District, they experienced it in 49 percent of the rental inquiries they made in Maryland and 47 percent of the time in Virginia, the audit showed.

However, the study showed that in the District, Hispanics faced more discrimination than their black or white neighbors. One in three inquiries from Hispanic renters met some form of discrimination, while blacks were treated less favorably than whites in one of every four visits.

The study was based on 163 controlled tests in which a minority applicant visited randomly selected rental properties. Within a couple of hours of the minority's visit, a white applicant, with comparable or sometimes even inferior financial credentials, inquired about apartments at the same site. In 42 percent of the visits, the whites were quoted lower rents, offered better

specials—such as a month's free rent—or told about more apartments that were available to rent.

Despite the findings, the 42 percent rate of discrimination represents a significant drop from the last rental discrimination audit that was conducted by the Fair Housing Council in 1993. At that time, the council found that African Americans (the only group it tested at that time), were discriminated against 57 percent of the time.

"We are making progress, but frankly, even an average 42 percent rate of discrimination is unacceptable," said David Berenbaum, executive director of the Fair Housing Council. "Frankly, looking at the suburban numbers, there's clearly a lot of work to be done."

Berenbaum expressed particular concern at the high rate of discrimination that blacks faced in Fairfax County: They received less favorable treatment than whites in 71 percent of the inquiries they made. "This is an area that's very segregated; this needs to be worked on," Berenbaum said.

Fred Allen, director of Fairfax's Human Rights Commission, agreed.

"The commission will be looking into these issues as a result of these tests to make sure these ordinances are being complied with," Allen said. "The number of cases we actually receive in this office are very few but I think housing discrimination is so subtle that not many people are even aware that they are even a victim. It takes a controlled test to weed it out."

In Montgomery County, blacks were treated less favorably than their white counterparts in 59 percent of their inquiries; in Alexandria, 50 percent, and in Prince George's County, 45 percent. African Americans encountered the least discrimination in Arlington—22 percent of the time—and the District—26 percent.

Although Fairfax rental properties ranked the highest for discrimination against blacks, they posted the best marks in their treatment of Hispanics, where only 20 percent were treated differently than whites. That compares to a 56 percent discrimination rate for Hispanics in Montgomery, 50 percent in Arlington, 36 percent in the District and 33 percent in both Alexandria and Prince George's.

The audit is part of the council's four-year project to monitor housing discrimination in the area. Later this year, the council plans to release studies on discrimination in home sales, against the disabled and against families with children in their search for affordable rental housing. As a result of these audits, Berenbaum said he expects the council will file at least 20 complaints either in court or at the Department of Housing and Urban Development.

The first two were filed two weeks ago at HUD. One was against a Falls Church real estate agent, Jane Fowler of Fowler and Friends Realty. The council's complaint alleged that Fowler made several "inappropriate comments" against minorities and steered testers away from homes owned by certain ethnic groups. Late last week, Fowler said she had not seen the complaint.

"I don't intend to speak about something I know nothing about," said Fowler, who added that it was "unconscionable" that the complaint be released to the public before she was notified.

The second complaint, also filed at HUD, was lodged against the Village at McNair Farms apartment complex in Herndon and the property management company that runs it, Town and Country Management Co. of Baltimore. The complaint alleged that a McNair Farms agent offered prospective white renters

Cont'd

special discounts and a wider selection of apartments than she did to black renters. Town & Country Executive Vice President Michael Rosen said, "I have no comment, whatsoever."

The council's controlled tests were conducted between August and October last year; none of the rental units involved locations where there were any ongoing investigations or complaints of discrimination.

The minority testers were deliberately given higher incomes and better jobs than their white counterparts so that "if there was only one unit available, the minority would be the superior candidate," Berenbaum said.

But often that was not the case, he said. For instance, a Hispanic tester

who asked about a one-bedroom apartment in a Northwest Washington building was told there was only a two-bedroom available; he was encouraged to look at another building that might have what he wanted. Less than an hour later, a white tester met with the same agent and was told about an efficiency in the same building. The white tester also was offered one month's free rent if he signed a 12-month lease.

In Silver Spring, a black tester was told of only one apartment available in the complex she visited. She was also questioned about whether she made enough money to live there and was told she needed to provide proof of her income and that she now pays her rent on time. When a white tester visited 30

minutes later, she was told of two available apartments and was not questioned about her income or current landlord.

In Springfield, both a black and white tester were given similar information when they visited an apartment complex. A week later, however, the white tester received a phone call from the agent offering \$100 off the rent for the first three months. The black tester received no follow-up call.

A step too far

Don't subsidize housing for illegals

There are some government services, such as emergency medical care and public education, that illegal immigrants should receive — for humane reasons and for the good of the nation.

But free or subsidized housing is an entirely different matter. And that's why a new federal crackdown on housing aid going to illegal immigrants is the right move.

Providing medical care for illegal immigrants not only saves lives but also protects all of us from the spread of communicable diseases. Likewise, providing education for illegal immigrant children prevents our nation from having an illiterate underclass.

But subsidized housing merely serves to support illegal immigrants while they're here or to draw them from other countries. More important, it's unfair to the hundreds of thousands of poor Americans who are on waiting lists to move into low-income housing.

The new screening process probably will result in some illegal immigrants losing their homes. That's unfortunate. However, public housing and most other government assistance must be reserved for citizens and legal residents only. We have enough poor people in this country without housing the poor of other countries.

Successful screening will be difficult, however, for the same reason it's difficult to determine a person's residency status. Immigration documents can easily be forged, and so can Social Security cards. For a price, an illegal immigrant living in subsidized housing can probably obtain fake documents that could allow him to remain.

That's another reason why we need either a forgery-proof identification card or a computerized registry of legal workers. Such a registry is being devised as a pilot project to help enforce federal laws against hiring illegal immigrants. Those laws, if enforced, also would be the best deterrent for illegal immigration in the first place.

In a preliminary effort, the San Diego Housing Commission, which offers various kinds of housing assistance to about 25,000 residents, says it has identified about 900 people receiving aid who have questionable Social Security numbers.

But housing officials say they don't expect to find too many illegal immigrants living in subsidized housing. That's because most illegal immigrants stay away from government assistance programs for fear of getting caught and deported. Instead, they live with family or friends or pay market rates for apartments.

The crackdown on illegal immigrants in subsidized housing is just one part of the battle against illegal immigration. Beefing-up the Border Patrol and improving immigration inspection at ports of entry is important to stanching the flow across the border. Vigorous enforcement of sanctions against employers who knowingly hire illegal immigrants will reduce the economic magnet that draws people here in the first place.

Evicting illegal immigrants from subsidized housing and preventing others from acquiring housing assistance won't have the same impact as enforcing employer sanctions. But it's the right thing to do.

Reasonable Accommodation

&

UNDUE HARDSHIP.

Circuit

On Approaches

BY BERNARD E. JACQUES

The Americans With Disabilities Act (ADA) and its predecessor, the Rehabilitation Act, bar discrimination against the disabled in the workplace.¹ To be protected by the ADA an individual must be "qualified," which is defined by the statute as a person, with a condition or disease that affects a major life activity, who can perform the essential functions of the job with or without a reasonable accommodation. In addition, the statute defines discrimination to include the employer's failure to provide a "reasonable accommodation."² The genesis of the employer's obligation to provide a "reasonable accommodation" lies in the regulations issued pursuant to the Rehabilitation Act. Those regulations require the employer to make a "reasonable accommodation to the known physical or mental disabilities unless the accommodation would be an undue hardship."³ Similarly, the ADA absolves the employer from making an accommodation that would be an "undue hardship," which is defined by the statute as "an action requiring significant difficulty or expense."⁴ Both the ADA and the Rehabilitation Act require an employer to make "reasonable accommodations" to enable disabled individuals to work, unless those accommodations are an "undue hardship."

However, the procedural framework for resolving allegations of disability discrimination are more problematic and federal courts are currently wrestling with these questions and not responding with unanimity.

Although the goals of the ADA and the Rehabilitation Act are easy to state — to open employment opportunities that were previously closed by fear or ignorance — and Congress' rationale for requiring employers to make a "reasonable accommodation" is easy to understand, the procedural environment for answering allegations of disability discrimination evoke questions. For example: 1. What criteria are to be used to determine whether an accommodation is "reasonable"? 2. Is a reasonable accommodation any accommodation that does not impose an undue hardship? 3. If a reasonable accommodation is something other than the absence of an undue hardship, must the plaintiff prove that the proposed accommodation is reasonable or can the plaintiff merely identify the proposed accommodation and shift the burden to the employer to prove it is unreasonable?

As an initial matter, it should be noted that federal courts have grafted the shifting evidentiary burdens of production and persuasion created to address other discrimination claims — such as those of race and sex — onto disability discrimination claims. Succinctly stated, the process,

often referred to as the *McDonnell-Douglas* framework, which refers to its early articulation by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, requires a plaintiff to state a *prima facie* case.⁵ That consists of (1) membership in a protected class; (2) an adverse employment decision (3) in circumstances from which an inference of discrimination can be drawn. If a plaintiff successfully states a *prima facie* case, which is not an onerous task, then the burden of production, but not that of persuasion, shifts to the defendant employer who need only articulate a legitimate non-discriminatory reason for the employment decision. If the employer offers a legitimate, non-discriminatory reason for the employment decision, the burden then shifts to the plaintiff to prove by a preponderance of the evidence that the proffered reason given by the employer is pretextual and that the employer's decision was infected by a discriminatory motive.

Although courts that have addressed this issue have borrowed from discrimination jurisprudence, its applicability to disability discrimination cases cannot be mechanical. Factors, such as race and sex, rarely, if ever, are relevant to an employment decision. They do not affect an individual's qualifications or interfere with job performance. But a disability that affects a major life activity can affect an individual's ability to work and may be a relevant factor in some employment decisions. As a result, courts have wrestled with the practical difficulties of stating a *prima facie* disability discrimination case. For example, must a plaintiff demonstrate that a reasonable accommodation is available as part of his or her "prima facie" case? Can an employer merely articulate "undue hardship" as a legitimate non-discriminatory reason or must the employer prove that the proposed accommodation is an undue hardship. Again, federal courts have answered these questions differently.

District of Columbia Circuit

In *Barth v. Gelb*, the plaintiff, a computer specialist who suffered from a degenerative form of diabetes that required the skilled care of several physicians, applied for an overseas position with the Voice of America.⁶ He was denied medical clearance when the agency concluded that he could only serve in posts that had advanced medical facilities, which were limited to three or four assignments from a possible 12 stations. After being denied medical clearance, the plaintiff filed suit alleging that the agency failed reasonably to accommodate him in violation of the Rehabilitation Act.

The Court of Appeals for the District of Columbia began its analysis by noting that there were three separate types of discrimination cases: (1) where an employer denies that a disability affected the decision; (2) where an employer challenges a plaintiff's claim of being a "qualified person" by disputing either that the person can perform the essential functions of the job or disputing that a reasonable accommodation exists which would enable the person to perform the essential functions of the job; and (3) where the employer offers the affirmative defense of "undue hardship."

■ Article in Brief

■ Federal circuit courts are divided over the question of who must prove whether an accommodation is reasonable — plaintiff or employer.

In *Barth*, the employer did not argue that the plaintiff's disability was not a factor in the decision to deny him medical clearance. Nor did the employer argue that there was no accommodation available — the plaintiff could have been assigned to some of the facilities. Rather, the employer argued that placing the plaintiff in employment positions with adequate medical facilities, though not "unreasonable in the abstract," was an "undue hardship."⁷ The employer had posts in large metropolitan areas, as well as in isolated places. As expected, the plaintiff's medical needs could only be met by the posts in the metropolitan areas, which had physicians with the needed specialties. Because of the limited number of available posts with the medical facilities needed by the plaintiff, assigning him exclusively to those posts would, the employer argued, place "additional burdens on the other [employees]" who would have less access to the more desirable positions.⁸ These employees would be required to spend more time in the less desirable posts.

In the District of Columbia Court of Appeals' analysis, the employer raised the affirmative defense of undue hardship which the court held, if raised, becomes the employer's burden of proving. The court contrasted a reasonable accommodation, which it understood as "a method of accommodation that is reasonable in the run of the cases" with "undue hardship," which "focuses on the hardships imposed by the plaintiff's preferred accommodation."⁹ In short, an analysis of "reasonable accommodation" is a generalized view, while a consideration of "undue hardship" is highly fact-specific. In this case, the employer argued that the "reasonable accommodation," though acceptable in the abstract, was an "undue hardship" in these particular circumstances.

The plaintiff argued that the staffing and morale problems cited by the employer were mere "speculative assertions" that failed to establish "undue hardship."¹⁰ He also argued that employers could not consider employee morale in determining whether to grant the requested accommodation. The District of Columbia Court of Appeals disagreed, finding that there was sufficient evidence of staffing and morale problems and holding that although *animus* against the disabled could not be considered by the employer and was not a legitimate non-discriminatory reason for an employment decision, the morale effects of a particular accommodation could be considered. As an example, the court indicated that if a disabled person sought

to move all employees to an underground facility to accommodate that individual's sensitive eyes, the employer could not legitimately consider the resentment over the disabled person's protected status, nor could the employer consider other employees' *animus* toward the disabled. However, the employer *could* legitimately consider and weigh the morale effects of having its employees work underground.

In sum, the D. C. Circuit Court of Appeals views an "undue hardship" as a concept more refined and rooted to the particulars of each separate case than the notion of "reasonable accommodation," which is more abstract and not as anchored to the particular facts. Further, a "reasonable accommodation" need only be identified by a plaintiff to shift the burden to the employer, who must prove that the proposed accommodation is an "undue hardship."

Seventh Circuit

The Seventh Circuit Court of Appeals takes a similar approach. In *Vande Zande v. State of Wisconsin Dep't of Admin.*, the plaintiff, Vande Zande, sought accommodations that her employer argued were unreasonable.¹¹ The plaintiff, paralyzed from the waist down as a result of a spinal tumor, was prone to develop pressure ulcers, which often required her to remain at home for several weeks. She argued that a reasonable accommodation to her disability required her employer to provide her with a desktop computer so that she could work at home, or to excuse her for the sick days she used as a direct result of her disability. Her employer disagreed, insisting that it was unreasonable to allow her to work at home. The plaintiff also argued that the kitchenette in her work area should be adjusted so that she could use it. Although her employer was willing to erect a shelf at the appropriate height, it was unwilling to move the sink because the plumbing was already in place and it would be too expensive to move it. The employer did provide a sink that was accessible to the plaintiff in the bathroom. The plaintiff claimed that when modifying the kitchen sink would cost only \$150, forcing her to use the bathroom sink stigmatized her.

The Seventh Circuit Court of Appeals found all of the plaintiff's arguments unpersuasive and affirmed the trial court's grant of summary judgment. The court reasoned that most organizations provide jobs that require employees to work in teams under supervision and this cannot generally be performed at home. The court held that an employer "is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced."¹² Nor was the employer forced to accommodate the plaintiff by permitting her to be absent without using any of her sick time. The court also found the measures taken by the employer — adjusting the shelf height and having a bathroom sink that was accessible — was sufficient and no further accommodation was necessary. The court concluded that an employer does not have "a duty to expend even modest amounts of money to bring about an absolute identity in working conditions be-



tween disabled and nondisabled workers."¹³

The court's analysis used in reaching these conclusions demonstrates the difficulties courts face in translating the Congressional goal of providing opportunities for disabled individuals into a mechanism for resolving disputes over alleged violations of the law. The Seventh Circuit Court of Appeals begins its analysis noting that the Congressional drafters sought to extend its protection to those who have a disability as well as those who are perceived as having a disability. As the court noted, some disabled persons can perform the essential functions of a job as well as a nondisabled person, but are often denied employment or shunned because of their disabilities. In addition, the ADA also protects those who have a "vocationally relevant disability," that is a disability that may interfere with the person's ability to perform at work and may increase the costs of employing that person.¹⁴ It does so by requiring an employer to make a "reasonable accommodation" to a known physical or mental limitation of an otherwise qualified individual with a disability.

As the court noted, "reasonable accommodation" is not a term that originated with the ADA but rather was stated in the regulations issued under the Rehabilitation Act. The meaning of accommodation is "plain enough"; the employer "must be willing to make changes in its work rules, facilities, terms and conditions in order to enable a disabled individual to work." The meaning of "reasonable" is less clear.¹⁵

Vande Zande, the plaintiff, argued that "reasonable" means apt or efficacious. According to her, an accommodation would be reasonable if it were tailored to the individual's disability regardless of the cost. However, she did acknowledge that cost was a factor in determining whether the "reasonable accommodation" was an "undue burden."

The court was unpersuaded; according to the court, the word "reasonable" is used to "quantify" or "weaken" accommodation. For example, a reasonable effort is less than maximum possible effort, reasonable care is less than maximum possible care, and a reasonable accommodation is interpreted by the Seventh Circuit Court of Appeals as something less than maximum possible accommodation. Although the court does not require a quantification of the costs and benefits of each proposed or challenged accommodation, or insist that the costs can never exceed the benefits even slightly, it does insist that "at the very least, the cost [of the reasonable accommodation] could not be disproportionate to the benefit."¹⁶ An employer is not required to "expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee."¹⁷ The key to the notion of reasonableness is the cost and proportionality involved.

In *Vande Zande*, the court noted that the defendant was the State of Wisconsin, "which can raise taxes to finance any accommodation that it must make to disabled employees," making the state, theoretically, unable to plead undue hardship. Nevertheless, the court ruled that the state must not be "required to expend enormous sums



to bring about a trivial improvement in the life of a disabled employee."¹⁸

The court then distinguished between "reasonable accommodation" and "undue hardship." It noted that "undue hardship" is "an action requiring significant difficulty or expense" and related "undue" to the "benefits of the accommodation to the disabled worker as well as the employer's resources."¹⁹ In linking "undue hardship" to the employer's financial resources, the court considered the costs of the proposed accommodation at two points. The court required the employee to demonstrate that the accommodation "is reasonable in the sense both of the efficacious and of proportional to costs" as part of the *prima facie* case. The court then shifted the burden of proof to the employer "who has an opportunity to prove that upon a more careful consideration the costs are excessive in relation to the benefits of accommodation or the employer's financial survival or health."²⁰

The Seventh Circuit Court of Appeals appears to distinguish reasonable accommodation and undue hardship, incorporating reasonable accommodation into the plaintiff's *prima facie* case. In this circuit, the plaintiff bears both the burden of production and persuasion in reasonable accommodation, which at a minimum requires the identification of an accommodation that is not facially unreasonable. The Seventh Circuit Court of Appeals would then permit the employer "to escape liability if he can carry the burden of proving that a disability accommodation reasonable for a normal employer would break him."

Ninth Circuit

By contrast, the Ninth Circuit Court of Appeals appears to meld reasonable accommodation and undue hardship and place both the burden of production and the burden of persuasion on the employer. In *Mantolite v. Bolger*,²¹ a case decided under the Rehabilitation Act, an epileptic claimed that she was improperly denied employment. The court agreed.

The plaintiff, who had previously worked in private industry without incident, applied for a position with the U.S. Postal Service which would have required her to work near a large sorting machine. As part of the application process, the plaintiff was examined by a physician who diagnosed her condition, noted that she had a *grand mal* seizure once a year and recommended that she not be hired to work with moving equipment. The plaintiff alleged that her condition was controlled through medica-

tion and that working at a sorting machine posed no increased risk to her or her co-workers.

The court, remarking that Congress sought to check "misinformed stereotypes" that served as barriers to employment of the disabled, held that each case required "an analysis of the applicant and the particular job." And each case required the employer to ask two questions: (1) can the individual perform the essential functions of the position without an accommodation or risk to herself and others; if not, (2) can a reasonable accommodation be made without imposing an undue hardship on the employer that would permit the individual to perform the essential functions of the position without risk to self or others.

"[A]n employer has a duty under [the Rehabilitation Act] to gather sufficient information from the applicant and from qualified experts as needed to determine what accommodations are necessary to enable the applicant to perform the job safely." Only after "marshaling the facts" can an employer make a decision regarding the reasonableness of an accommodation. Again, "it is the employer who must make a substantial gathering of the necessary facts" as to whether an accommodation is or is not reasonable.²²

The court concluded that the burden was properly on the employer because the "employer has greater knowledge of the essential functions of the job" and the employer can "look to its own experience or . . . that of other employers who have provided jobs to individuals with [disabilities] similar to those of the applicant." In addition the employer "may be able to obtain advice concerning possible accommodations from private and government sources."²³

The court placed "the burden of persuasion of proving inability to accommodate [on the employer and held that] once the employer presents credible evidence that accommodation would not be reasonably possible, the plaintiff has the burden of coming forward with evidence concerning her individual capacities and suggestions for possible accommodations to rebut the employer's evidence."

The Ninth Circuit Court of Appeals requires the employer, has both greater knowledge of the job as well as greater access to information about possible accommodations, to determine whether an accommodation exists. The Ninth Circuit Court of Appeals also places the obligation on the employer to demonstrate that an identified accommodation is an undue hardship. In contrast to the Seventh and D.C. Circuits, the Ninth Circuit places the burden on the employer of both production and persuasion of both the reasonableness of an accommodation and whether an identified accommodation would be an undue hardship.

Second Circuit

The Second Circuit Court of Appeals in *Borkowski v. Valley Cent. Sch. Dist.*,²⁴ took yet a different approach. Borkowski was a teacher-librarian who, prior to being hired, was in an automobile accident and suffered a head trauma that caused serious neurological damage. As a re-

sult, she suffered from difficulties with memory and concentration and had trouble handling multiple stimuli.

Although at least one supervisor found Borkowski's work as a library-teacher acceptable, two other supervisors did not. Based on the negative evaluations of these supervisors, which faulted Borkowski for poor classroom management skills, the school district denied Borkowski tenure. She sued and alleged that the school district discriminated against her because of her disability by failing to provide her with a reasonable accommodation for her condition. Specifically, Borkowski argued that the school district could have provided her with a teaching aide to help her maintain classroom control.

The Second Circuit Court of Appeals, reviewing its precedent in this area, held that the plaintiff must come forward with evidence demonstrating (and bears the burden both of production and persuasion) that she is "otherwise qualified" for the position in question. A plaintiff cannot be otherwise qualified unless she can fulfill the essential functions of the position with or without accommodation. According to the court, it follows that the plaintiff bears the burden of proving that she can meet the requirements of the position without assistance or that an accommodation exists that enables her to perform the essential functions of the job.

However, the identification of an accommodation by the plaintiff does not make the accommodation reasonable. "An accommodation is reasonable only if its costs are not clearly disproportionate to the benefits that it will produce."²⁵ As to whether the accommodation is reasonable, the court held that the plaintiff bears only the burden of production, which "is not a heavy one. It is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which facially do not exceed its benefits." Having done this, the plaintiff has made out a *prima facie* case, and the burden then shifts to the defendant.

The defendant's burden of proving that the identified or proposed accommodation is unreasonable merges with its affirmative defense of undue burden because both "amount to the same thing." The Second Circuit Court of Appeals concluded that "reasonable" and "undue" are both relational terms modifying accommodation and burden respectively. The analysis looks not merely to the costs involved, but also to the benefits. Unlike the plaintiff, who must merely demonstrate that the identified accommodation meets a rough proportionality between costs and benefits, an employer "must undertake a more refined [cost-benefit] analysis."²⁶ The employer must analyze the hardship imposed through the lens of the factors listed in the regulations, which include the nature of the industry to which the employer belongs as well as the individual characteristics of the employer. If the employer can carry its burden, it will demonstrate that the proposed accommodation is an undue burden and is, therefore, unreasonable.

The court then reviewed the plaintiff's claims using this analysis. It noted that the plaintiff claimed that she was able to perform all of the essential functions of her posi-

tion with an accommodation. The plaintiff, who was deficient in classroom management, insisted that she could perform her job if the school district provided her with a classroom aide to assist in the management of the students.

The court stated that, although intuitively one could conclude that classroom management is an essential function of a library-teacher, the Rehabilitation Act, and presumably the ADA, prohibited such "unfounded reliance on uninformed assumptions," and, instead, required a fact specific inquiry into both the employer's description of the job and how it is actually performed. On the record before it, the court was unwilling to reach a conclusion as to whether classroom management was an essential function of the plaintiff's position, or whether providing the plaintiff with a classroom aide was reasonable.

Rather, the court concluded that the plaintiff had identified an accommodation that would enable her to perform the essential functions of her position — an aide — and, therefore, had shifted the burden to the employer to prove that the proposed accommodation was unreasonable or would eliminate the essential functions of the job. The court also concluded that the plaintiff had established her *prima facie* case and met her burden of production by proposing an accommodation that "falls within the range of accommodations that may, in the general sense, be considered reasonable in light of their costs and benefits."²⁷ Since the plaintiff introduced enough evidence to show that she is otherwise qualified with an accommodation, and that the accommodation is facially reasonable, the burden shifted to the employer to prove that she is not otherwise qualified, or that the accommodation is unreasonable, or an undue hardship. Having failed to do so as a matter of law, the employer was not entitled to summary judgment.

The Second Circuit Court of Appeals, in contrast to the Seventh and District of Columbia Circuits, treats reasonable accommodation and undue hardship as two sides of the same coin. Also in contrast to these Circuits, the Second Circuit merely requires the plaintiff to identify a reasonable accommodation, rather than prove that such an accommodation is reasonable even in general terms.

In conclusion, there are three different approaches to the procedural framework by which claims of disability discrimination will be heard. The Seventh and D.C. Circuits treat reasonable accommodation and undue hardship as two distinct concepts. These Circuits consider the reasonableness of an accommodation in general terms and permit an employer to argue that the identified accommodation would be a undue hardship for that employer. They require a plaintiff to identify an accommodation as part of the plaintiff's *prima facie* case and then shift the evidentiary burden to the employer to demonstrate that the identified accommodation would be an undue hardship. The Ninth Circuit melds the reasonable accommodation and the undue hardship and places both the burden of production and persuasion on the employer. The Second Circuit,

like the Ninth Circuit (but unlike the Seventh and D.C. Circuits) treats reasonable accommodation and undue hardship as essentially the same. Also, like the Seventh and D.C. Circuits (but unlike the Ninth Circuit) it places the burden of identifying a reasonable accommodation on the plaintiff. ■

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Endnotes

¹Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*; Rehabilitation Act, 29 U.S.C. § 701 *et seq.*

²42 U.S.C. § 12102 (2), § 12111 (8), § 12112(G)(5)(A)

³34 C.F.R. § 104.12(A), 45 C.F.R. § 84.12(A)

⁴42 U.S.C. § 12111(10)

⁵*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed.2d 688 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *St. Mary's Honor Ctr. v. Hicks*, ___ U.S. ___, ___, 113 S.Ct. 2742, 2748-49, 125 L.Ed.2d 407 (1993).

⁶2 F.3d 1180 (D.C. Cir. 1993)

⁷2 F.3d at 1187-88

⁸2 F.3d at 1188

⁹2 F.3d at 1187

¹⁰2 F.3d at 1189

¹¹*Vandé Zande v. State of Wisconsin Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995)

¹²44 F.3d at 545

¹³44 F.3d at 546

¹⁴44 F.3d at 541

¹⁵44 F.3d at 542

¹⁶*Id.*

¹⁷44 F.3d at 542-43

¹⁸*Id.*

¹⁹44 F.3d at 543

²⁰*Id.*

²¹*Mantollette v. Bolger*, 767 F.2d 1416 (9th Cir. 1985)

²²767 F.2d at 1423

²³*Id.* quoting *Previtt v. United States Postal Svc.*, 662 F.2d 292, 308 (5th Cir. 1981); quoting Note, *Accommodating the Handicapped, Rehabilitating Section 504 After Southeastern*, 80 Colum.L.Rev. 171, 187-88 (1980).

²⁴*Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131 (2d Cir. 1995)

²⁵63 F.3d at 138

²⁶63 F.3d at 139

²⁷63 F.3d at 141



Special Report

Immigration

NATIONWIDE AUDIT OF EMPLOYERS WHO HIRE TEMPORARY FOREIGN WORKERS TO BEGIN SOON

The Labor Department's inspector general is on the verge of launching a nationwide audit to determine the accuracy of information included on employer requests to hire foreign, skilled workers on a temporary basis.

The purposes of the audit is to determine whether the Labor Department is effectively carrying out its responsibilities under the Immigration and Nationality Act for administering the H-1B program, explained John Riggs, the inspector general charged with audits in the Labor Department's Dallas office. The audit is being tested out of Riggs' office and is expected to be under way in all regions by mid-April.

Altogether, the audit will center on 720 H-1B labor condition applications (LCAs) randomly selected from a total 61,250 filed with the Labor Department in fiscal year 1993, Riggs said. The Immigration Act of 1990 expanded the H-1B visa category for specialty occupations, allowing issuance of 65,000 temporary visas for highly skilled workers annually. The Labor Department recently revised regulations implementing the program in an effort to set tougher standards for those seeking to employ foreign workers (242 DLR AA-1, Special Supplement, 12/20/94).

DOL's "only job" with respect to the H-1B program is to assure that the information on the LCAs is complete, Riggs said. The audit will compare information on those certificates to what is actually taking place in the field, he explained. "How can the department administer the program effectively if it does not know what it is getting is good?"

Riggs acknowledged concerns that the audits are taking the form of compliance reviews that technically fall within the jurisdiction of the Labor Department's Wage and Hour Division. He emphasized that the Labor Department's role with respect to administering the H-1B program pertains to the application process and ensuring that there are no obvious omissions or errors on the LCAs.

Beyond An Audit

However, Elissa McGovern, senior policy analyst with the American Immigration Lawyers Associ-

ation, pointed out March 24 that all of the questions on the OIG questionnaire and those that are being asked when auditors go on site do not deal simply with whether the program is effective, but with whether the employers can verify the information on the LCAs. She also related that it is clear from AILA's discussions with Labor Department officials that findings of noncompliance will be turned over to the Wage and Hour Division for enforcement and that findings of criminal violations will be referred to the Justice Department for action.

Another "unresolved issue," according to McGovern, concerns the type of documentation the auditors are asking for. The auditors are maintaining that they are authorized under the Inspector General Act to seek access to documents, such as nonpublic payroll information, that the Wage and Hour Division can only have access to when it undertakes an actual compliance investigation, which must be based on a showing that there is probable cause to believe a violation exists.

AILA is a staunch proponent of the H-1B program, which, McGovern said, enables U.S. employers to hire workers with skills, knowledge, and expertise that cannot be found in certain sectors of the economy. She charged that the audit of the H-1B program is just the latest in a series of restrictions on the program that go beyond curbing abuses that deny U.S. workers job opportunities. This program benefits thousands of employers, she said. If restricted any further, the ramifications will be severe—particularly with respect to the academic and high-tech industries—in terms of the "loss of jobs that are created by the projects H-1B workers are often central to."

Changes To H-1B Program

When the Labor Department in October 1993 proposed stiffening the program's requirements within its jurisdiction, AILA objected that, despite "rising anti-immigration sentiment and political unpopularity in some quarters, the H-1B program is working, providing benefits intended by Congress" (67 DLR C-1, 4/8/94). It also maintained that DOL's move failed to recognize the benefits the program provides by allowing research and development programs vital to economic competitiveness to remain in the United States, saying "Countless thousands upon thousands of jobs are created directly and indirectly by the H-1B program."

While the final regulations issued a few months ago pose less burdens on employers than originally proposed, an AILA advisory to its members charge that many of the changes are "overly broad and impose additional and complex paperwork requirements—with the potential for significant paperwork violations." It also warns that the Labor Department has the power to initiate an investigation of alleged violations of an LCA in the absence of a complaint and that employers can be fined for improper completion of an LCA.

The audit by the Labor Department's inspector general is independent of the Labor Department's recent move to stiffen its efforts to monitor the program. Nonetheless, it is taking place against the backdrop of Labor Secretary Robert B. Reich's calls for remedies, both regulatory and legislative, to assist the Labor Department in better managing the number and type of "nonimmigrant workers" admitted under the H-1B program and enhance its ability to protect both the foreign workers and similarly employed U.S. workers.

Reich and Maria Echaveste, administrator of the Wage and Hour Division, both have pledged to ensure that employers gain no economic advantage from using temporary foreign workers under the H-1B program instead of U.S. workers. The department has reached a handful of settlements in cases involving the program, including two against computer companies and one against a firm that trained and supplied Polish physical therapists (7 DLR A-8, 1/11/94, 171 DLR A-10, 9/7/94).

Further changes to the program aimed at strengthening protections for U.S. workers remain a possibility, according to an internal memorandum circulated within the Labor Department last year while the finishing touches were being put on the H-1B rules. However, the Labor Department officials charged with studying the issue acknowledged in the October memo that their proposals would be

highly controversial. Employer resistance to initial changes and the current anti-regulatory climate in Congress would appear to confirm this view.

Labor Department officials declined to comment on the status of the H-1B program and its future.

Audit Concerns

The H-1B program by far is the largest of the five or six nonagricultural temporary worker programs administered by the Labor Department, according to Riggs of OIG. Of the total 66,341 applications approved by the Labor Department in fiscal 1993, 62,242 were filed for H-1B workers, he said. Altogether, the Labor Department is responsible for 80,000 of the 140,000 employment-based applications accepted annually. If it accepts and approves these applications, employers then must file petitions with the Immigration and Naturalization Service.

Questions being asked of employers included in the audit concern the alien's work history, annual wages, job description, and skill levels required for the job. Employers also are asked to describe how they located the alien, their reasons for hiring the alien instead of a U.S. citizen, the documentation used to establish prevailing wages for the position and the wage documentation maintained for similarly employed individuals.

Riggs said he expects the audit to be completed in September. In addition to Texas, employers selected for the audit have operations in California, Connecticut, Florida, Illinois, Massachusetts, Minnesota, Missouri, New Jersey, New York, North Carolina, Pennsylvania, and Wisconsin.

The office of inspector general also is auditing the permanent immigration program, which is about one-fifth the size of the H-1B program.

—By Deborah Billing

End of Section

Supreme Court Roundup

Justices Set Aside Reversal of 'English Only' Measure

By LINDA GREENHOUSE

WASHINGTON, March 3 — The Supreme Court today set aside a Federal appeals court's decision that Arizona could not require state employees to speak only English on the job, ordering a state employee's challenge to Arizona's English-only constitutional amendment to be dismissed as moot because the worker resigned seven years ago.

The Justices did not take a view on the merits of what was one of the more closely watched cases on the Court's docket. Instead, they ruled unanimously, in an opinion by Justice Ruth Bader Ginsburg, that because the Spanish-speaking employee had left her state job before the appeals court's 1994 ruling, the Federal courts lacked jurisdiction to consider her argument that the provision violated her First Amendment right to free speech.

The decision today meant that the Arizona Supreme Court will now have a chance to provide an authoritative interpretation of the English-only provision, which was added to the state Constitution in a 1988 voter referendum, and to rule on whether it is consistent with the First Amendment. Another lawsuit, in which several plaintiffs are challenging the provision, is before the Arizona Supreme Court and the possibility remains that the United States Supreme Court will review that court's eventual ruling.

In that respect, the ruling today simply keeps the door open to a future Supreme Court decision on the constitutionality of the "official English" laws that two dozen states have enacted in the last few years. A bill to declare English the official language of the United States, and to repeal existing requirements for providing bilingual material to voters at the polls, died in Congress last year after it was passed in the House of Representatives.

If all the Court had wanted to do today was dismiss the challenge to the Arizona measure because it was moot, however, it could have done so in an opinion of a few sentences or paragraphs. Justice Ginsburg's 35-page opinion did more than that,

essentially providing a road map for how Federal courts should handle challenges to new and untested state laws. In an era in which voter initiatives are increasingly popular as a way of bypassing legislatures, the decision today could prove more significant in the long run than in its application to the controversy at hand.

Justice Ginsburg was pointed in her criticism of how the Federal District Court in Phoenix and the United States Court of Appeals for the Ninth Circuit, which sits in San Francisco, handled this case, from the inception of the lawsuit in 1989 through a final ruling in 1995 — some five years after the case had in fact become moot, under the analysis the Court adopted today.

The lower courts' initial mistake, Justice Ginsburg said, was to refuse a request from the Arizona Attorney General to let the Arizona Supreme Court go first in interpreting the new English-only amendment.

Although the amendment required English to be the language of "all government functions and actions," its meaning was not as clear as that phrase might indicate. The Arizona Attorney General, Robert K. Corbin, took the view that state employees like Maria-Kelly Yniguez, the plaintiff in this case, in fact remained free to conduct business in other languages to "facilitate the delivery of governmental services" to non-English speakers.

But the Federal courts refused either to consider Mr. Corbin's view or to request an interpretive ruling from the Arizona Supreme Court under a procedure that Arizona and most other states make available for such situations.

"Warnings against premature adjudication of constitutional questions bear heightened attention when a Federal court is asked to invalidate a State's law, for the Federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court," Justice Ginsburg said.

The district court, applying its own interpretation of the amendment's sweeping effect, declared it unconstitutional in 1990. After Gov. Rose Moford, who had opposed the referen-

dum, refused to appeal, the Ninth Circuit gave the group that had sponsored the measure, Arizonans for Official English, the right to proceed as appellants in place of the state.

One question in the case today, Arizonans for Official English v. Arizona, No. 95-874, was whether a private group like the amendment's sponsors should ever be given standing to pursue an appeal under such circumstances.

Justice Ginsburg said that while the Court had "grave doubts" about the standing of the private group, it was not necessary to rule definitively on that question because by the time the Ninth Circuit had heard the appeal, the case was moot. Ms. Yniguez had resigned from her state job on April 25, 1990, the day before the appeals court placed the case on its docket. The appeals court did not learn of this development for 17

months, when it was notified by the state. Justice Ginsburg criticized Ms. Yniguez's lawyer for not having informed the appeals court.

"It is the duty of counsel to bring to the Federal tribunal's attention, without delay, facts that may raise a question of mootness," she said.

Even after the appeals court learned of the possible mootness, it went on to decide the case, and declare the amendment unconstitutional, on the theory that Ms. Yniguez still had a claim for damages against the state for the violation of her free speech rights. That theory was incorrect, Justice Ginsburg said.

There were also these other developments at the Court today:

Patent Law

The Court reaffirmed a longstanding tenet of patent law that a patent can be infringed not only by an identical product or process but also by one that is substantially equivalent.

In a unanimous opinion by Justice Clarence Thomas, the Court revisited what is known as the "doctrine of equivalents" for the first time since it described the principle in a 1950 decision.

79

Cont'd

The Court had been asked in the case today, Warner-Jenkinson Co., Inc., v. Hilton Davis Chemical Co., No. 95-728, to overrule the doctrine, but declined.

"Congress can legislate the doctrine or equivalents out of existence any time it chooses," Justice Thomas said.

Nonetheless, the Court overturned a 1995 decision of the United States Court of Appeals for the Federal Circuit here that had applied the doctrine to resolve the case over a filtration process for dye. Justice Thomas said the ruling was being reversed because the appeals court had failed to evaluate several factors in applying the doctrine.

But the Court did not address a second issue: whether such cases should be resolved by a judge or, as happened in this instance, by a jury.

Consecutive Sentences

The Court ruled, 7 to 2, that a mandatory five-year Federal sentence for using a gun in connection with a narcotics crime should be served after a state prison term, rather than running concurrently with the state sentence.

The decision, U.S. v. Gonzales, No. 95-1605, overturned a 1995 ruling by the United States Court of Appeals for the 10th Circuit, in Denver. Justice Sandra Day O'Connor wrote the majority opinion. Justices John Paul Stevens and Stephen G. Breyer dissented.

High Court Test Of 'English Only' Will Have to Wait

Possible Test Case Not Valid, Justices Decide

By Joan Biskupic
Washington Post Staff Writer

The Supreme Court yesterday declined to decide whether states may adopt laws requiring public employees to speak only English, instead ruling that the case of an Arizona worker who said her speech rights were violated should have been dismissed years ago.

The worker, Maria-Kelly Yniguez, was a state employee in 1988 when Arizona voters adopted an amendment to the state constitution making English the official language and requiring all government workers to do business only in English. But in 1990 Yniguez quit her job handling medical malpractice claims against the state and began working in the private sector.

The U.S. Court of Appeals for the 9th Circuit nonetheless allowed her case to proceed and eventually ruled that Arizona's Article 28 violates workers' First Amendment rights. By a 6 to 5 vote, the appeals court also said the law interferes with the ability of residents who do not speak English to receive official information.

Yesterday the Supreme Court unanimously threw out that judgment. In an opinion by Justice Ruth Bader Ginsburg, the court said that Yniguez's claim became moot when she stopped working for the government. "At that point," Ginsburg wrote, "it became plain that she lacked a still vital claim for prospective relief."

The Arizona case had been closely watched because the "English-only" movement has so divided the country between those pushing for multicultural tolerance and those who believe in a common, unifying language. This would have been the first high court test of a measure requiring official English, enacted in some form by more than 20 states.

But the Supreme Court justices sent several earlier messages, most obviously during oral arguments last December, that the Arizona case was riddled with procedural flaws that prevented it from being a good vehicle for a ruling on whether forcing state employees to communicate only in English violates their rights to free speech.

In yesterday's decision finding that the case should have been dismissed in 1990, the high court also expressed "grave doubts" over whether the appeals court was correct to allow the group that had spearheaded the English-only drive to intervene on behalf of Arizona. When then-Gov. Rose Mofford declined to appeal a lower court ruling against the English-only law, Arizonans for Official English intervened and appealed to the 9th Circuit.

Ginsburg noted that while state legislators have been accorded legal "standing" to contest a ruling striking down a statute, the English-only activists in this case are not agents of the people of Arizona in any way. Ginsburg said the court would not definitively resolve the "standing" question, however, because the case already was invalid based of Yniguez's departure from state service.

Throughout the litigation, the Arizona attorney general had maintained that Article 28 required the performance of "official acts" in English but allowed employees to use other languages to deliver government services fairly and effectively. But lower courts refused to accept that interpretation and spurned state efforts to seek a ruling by a state high court on how broadly the law should be construed.

Reading part of her opinion in *Arizonans for Official English v. Arizona* from the bench yesterday, Ginsburg said, "We note . . . that the federal district court and the 9th Circuit might have saved the parties years of litigation had those courts accorded more respectful consideration to the state Attorney General's request to obtain" a definitive state judgment on the breadth of the law.



DATE: 3-4-97
PAGE: 3A

Court skirts the 'official English' issue

Language case is ruled moot and returned to Arizona court

By Tony Mauro
USA TODAY

The Supreme Court sidestepped the controversy over official English laws on Monday, turning an Arizona dispute on the issue back to state courts.

The court's action has no effect on the national campaign to establish English as the language used for most governmental functions.

Laws like Arizona's already have passed in 23 states and are pending in 10 states and Congress. The Iowa Senate debates the issue this week.

An Arizona government employee had challenged the state's 1988 official English ballot initiative, claiming it violated her free speech right to use Spanish and English at work. Her suit was viewed as a crucial test of official English laws.

But the high court ruled that

because the worker, Maria-Kelly Yniguez, left her state job in 1990, the case was moot.

"At that point, it became plain that she lacked a still vital claim," wrote Justice Ruth Bader Ginsburg for a unanimous court.

The court was also concerned that a private group, Arizonans for Official English, had taken on the task of defending the law after then-Gov. Rose Mofford said she would not defend it. Ginsburg said there are "grave doubts" about whether the group had standing to participate in the case.

The issue returns to the Ari-

zona Supreme Court, where a live case is pending that was being held in abeyance until the U.S. Supreme Court ruled. Once the Arizona court decides, the issue could return to the high court in a form that the justices would be willing to take on.

Meanwhile, says Barnaby Zall, lawyer for Arizonans for Official English, the state is expected to continue its policy of requiring official documents to be written in English, while allowing state employees to use other languages in their daily routine.

Also Monday, the court:

► Declined to stop a major class-action lawsuit that accuses Home Depot, the home-improvement chain, of discriminating against women in 10 Western states. Home Depot now must defend itself in a two-stage litigation.

► Let stand a ruling that closed to the press and public a court proceeding related to an Ohio prison riot in 1993. A judge kept the public out of a hearing aimed at reaching a settlement in a civil suit brought by inmates. They had sued the state for overcrowding at the Southern Ohio Correctional Facility in Lucasville.

THE DAILY ITEM

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WHITE PLAINS, N.Y.

FRONT PAGE

SPECIAL REPORT

Too many cases, too few caseworkers

Streamlined EEOC fights to stay above rising tide of bias claims

By Ben Rand
Staff Writer

A1

First her duties changed. Then she got fired. Then a frustrated Annie Johnson went looking for help from the state Division of Human Rights. She never found it. The African-American

computer operator, believing she was treated unfairly, asked the division in 1991 to investigate her employer for racial discrimination.

Three years later, the state agency sent Johnson away with a routine letter finding "no probable cause" to her charge.

Undeterred, Johnson filed her own lawsuit, and earlier this year got a far different response. The federal judge in her trial heard enough evidence of racial bias to

award Johnson, a Yonkers resident, \$6,000 in back pay plus legal fees.

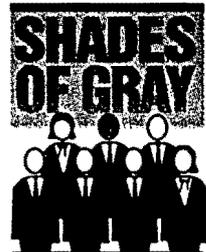
Critics say the 180-degree turnaround in Johnson's case illustrates the weaknesses in the nation's system for enforcing laws against work place discrimination.

Federal and state agencies, acting as gatekeepers for every official charge of discrimination, are being overrun by burgeoning case loads and political and bureaucratic pressures.

The result, according to some: slumping confidence in government's ability to enforce landmark anti-discrimination laws and increasing fears that legitimate and important claims are getting lost.

Conservative Republicans in Congress have gone so far as to suggest that the Equal Employment Opportunity Commission — the federal enforcement agency — be dismantled or at least fold-

Please see BIAS, 8A



Bias in the workplace
Last of 3 parts

NOTE: The following story ran in 12 suburban newspapers owned by Gannett

1/4

Jury Awards \$5.5 Million To Epileptic

EEOC Says Trucker Unfairly Lost Job

By Kirstin Downey Grimsley
Washington Post Staff Writer

A former truck driver who has epilepsy won a \$5.5 million jury verdict in Detroit yesterday after alleging that he had unfairly lost his job and was denied comparable work at a Ryder Systems Inc. subsidiary in Flint, Mich., after suffering a seizure in 1989.

The U.S. Equal Employment Opportunity Commission, which brought the lawsuit on behalf of Thomas Lewis, 45, said in a statement that the \$5.5 million verdict is the largest ever in a disability case and the largest amount ever won by the agency on behalf of a single plaintiff.

The jury awarded Lewis about \$192,000 in back pay, \$960,000 in compensatory damages and about \$4.4 million in punitive damages, which were the amounts sought by EEOC attorneys.

"The jury gave us everything, everything," said EEOC attorney Deborah Barno. She said jurors told her after the verdict they were "baffled by the company's lack of any attempt to accommodate Mr. Lewis in any regard."

Fred Batten, an attorney for Ryder, said the company will appeal. He said Lewis had suffered another seizure last year while driving a truck for another company.

"The very risk we were concerned about in fact occurred," Batten said, adding that officials were "absolutely" surprised by the jury's verdict.

Lewis joined the Ryder subsidiary in 1976, working as a truck driver delivering automobiles to dealerships. He suffered his first seizure in 1989 and lost his position because of state and federal transportation safety guidelines regarding such ailments. Lewis sought to be transferred to a position moving automobiles from the auto assembly line to waiting rail cars, but Ryder subsidiary officials said he was a safety risk and he was not offered another position.

Since then, Lewis has been employed sporadically and still seeks to be rehired at the Ryder subsidiary. Lewis took his case to the EEOC in 1993, bringing a claim under the 1992 Americans With Disabilities Act, which requires employers to attempt to accommodate disabled workers.

Federal caps on damages in such employment claims would limit the amount Lewis potentially could receive to about \$500,000, regardless of the jury's verdict.

Name Alone Can't Prompt Immigration Investigation, Court Says

SAN FRANCISCO, Oct. 22 (AP) — Investigations of people by immigration agents merely because their names sound foreign is unconstitutional, a Federal appeals court ruled on Friday.

The Court of Appeals for the Ninth Circuit also took the unusual step of overturning an order for the deportation of a Nigerian man because it found a serious constitutional violation in the seizure of the man in an apartment building and the search of his room.

The man, Jacob Orhorhaghe, was called to an immigration investigator's attention by a bank employee

because his name sounded Nigerian, the court said.

"One cannot rationally or reliably predict whether an individual is an illegal alien based on the sound of his name," Judge Stephen Reinhardt wrote in the 3-to-0 ruling. "Many if not all Americans have 'foreign-sounding' names, depending on which countries of origin we consider foreign."

On Nov. 8, Californians will vote on an initiative that would require state and local officials, health workers and educators to report to immigration authorities anyone they reasonably suspected of being an illegal immigrant.

The ruling on Mr. Orhorhaghe's case should send a message to those responsible for enforcing the initiative, Proposition 187, said his lawyer, James Mayock.

"The proponents think you know an illegal alien when you see him," Mr. Mayock said. He said the ruling was "a protection for people who might have foreign-sounding names."

He said Mr. Orhorhaghe was married to a United States citizen and was seeking legal resident status.

Mr. Orhorhaghe entered the United States legally in October 1982 on a

tourist visa that expired 18 days later, the court said.

He was living in Oakland in 1986 when his name was referred to an immigration officer by Karen Muth, a Bank of America investigator, who had encountered it during a credit card fraud investigation and thought it sounded Nigerian.

Michael Smirnoff, an investigator with the Immigration and Naturalization Service, decided to investigate Mr. Orhorhaghe after failing to find his name in a computerized list of those who had legally entered the country after January 1983, the court said.

Mr. Smirnoff, Ms. Muth, another immigration agent and a police officer went to Mr. Orhorhaghe's apartment building. Mr. Smirnoff, who was carrying a concealed gun, told Mr. Orhorhaghe that they did not need a warrant, the court said. They opened his briefcase and found documents referring to his expired visa, the court said.

An immigration judge ruled that the search was illegal, but he was overruled by the Board of Immigration Appeals, which ordered Mr. Orhorhaghe deported.

The appeals court overturned that order, saying the case was a rare example of an "egregious" constitutional violation that required the barring of evidence in an immigration case.

Judge Reinhardt said Mr. Orhorhaghe had been investigated by the immigration service solely because of his name. His absence from the list of legal entrants since January 1983 provided no additional evidence that he was an illegal immigrant, Judge Reinhardt said.

Citing a 1975 Supreme Court ruling that barred agents of the immigration service from detaining people because they looked Hispanic, the judge said an investigation prompted by a foreign-sounding name was equally improper and was ultimately based on race or national origin.

Prop. 184: Why Even Polly Klaas' Father Says It's a Big Mistake

Surely there's no one in California who isn't sick to death of violent crime and fed up with repeat offenders. Indeed, roiling frustration with out-of-control crime bubbled over last winter when the "three strikes and you're out" law passed the Legislature on greased skids.

The law doubles prison terms for criminals convicted of a second felony if they have previously been convicted of a serious or violent felony. Criminals who commit a third felony—any one of the more than 500 listed in California law—face prison sentences of up to 25 years or life.

We strongly support longer prison terms targeted on repeat violent offenders, but we opposed AB 971, the legislation that established the "three-strikes" law. As the first wave of "three-strikes" defendants moves through the courts, our worries are being borne out. These early results of AB 971 are why we also oppose Proposition 184, on the Nov. 8 ballot.

The existing law indisputably does some good by locking up the state's most violent repeat offenders, but because it casts such a broad net, scooping up nonviolent as well as violent criminals, it is also doing great economic harm to the state.

Proposition 184 simply repeats what was already approved in AB 971, thus it would do nothing to improve the law. It would not put one additional criminal behind bars nor would it incarcerate anyone for a day more. However, 184 would surely multiply the harm that AB 971 has already caused this once-prosperous state.

That's why Marc Klaas opposed AB 971 and opposes Proposition 184. His daughter, Polly, was kidnaped from her bedroom last year and killed, allegedly by a man with a history of violent crime. It was her murder that pushed through AB 971, a measure that had been floating around Sacramento for some time.

Klaas lobbied in vain for a competing "three-strikes" bill that would have targeted repeat violent felons, such as the man charged with mur-

dering his daughter. Now he wants to defeat 184 because he thinks it would cost too much and would make a bad law worse. He's right.

1. Proposition 184 is unnecessary. The initiative clearly adds nothing new in the way of punishment. And legal experts say it is so poorly drafted that it may unintentionally dilute provisions in the existing law. The initiative's "three-strikes" provisions may not apply to those with juvenile records or with felony convictions in other states.

2. Proposition 184 would make future refinements impossible. The major difference between the existing law and 184 is that it would take a two-thirds vote of both houses to

stealing three steaks to feed his family. And a San Diego man who stole a can of beer could face a similar sentence.

4. Proposition 184 would force California to maintain an expanding prison system that is already well beyond the state's ability to manage properly. California prison population is at 126,000 and is expected to hit 232,000 by the turn of the century. Prison officials project that the state will need 25 more prisons, above the present 28, at a cost of about \$200 million each.

In a four-part series last week Times staff writers Dan Morain, Maria L. La Ganga and John Hurst brought into sharp relief the enormous costs and potential for abuse in the state's ongoing prison construction program. That construction program has generated a maze-like bureaucracy with minimal legislative oversight. Prison construction and operation costs are sky-high and soaring even higher.

A decade ago, California allocated less than 3% of its general-fund budget to prisons; this year it will spend more than 7.5%. The annual prison payroll exceeds \$2 billion. California spends more on prisoners' physical and mental health care—\$372 million—than 36 states spend on their entire prison budgets. Despite paying more in wages than almost any other state, the California Department of Corrections has trouble finding competent guards because the job is as dangerous as it is dull and many facilities are in sparsely populated parts of the state.

The probable effect of the coming bulge of "three-strikes" offenders is extremely worrisome. Full implementation of this law, if it occurs, would necessarily compete for already stressed resources that now go into critical state services. California already has a tough sentencing law on the books. Proposition 184 does nothing except lock us into sloppy, quick-fix "solutions" that don't get at violent crime and may reduce our choices in education, health care and other crucial areas.



PROP. 184

*A Look at Key Issues
on the Nov. 8 Ballot*

■ One in a series

amend 184. The Legislature can amend the existing law with a simple majority. Proposition 184 would make it all but impossible for state legislators to fine-tune the "three-strikes" law. That fine-tuning is already manifestly necessary.

3. Proposition 184 would lock California into a wrongheaded approach to crime control. No one condones petty theft, passing bad checks or possession of small quantities of illegal drugs. Those who commit such crimes should be punished. But the bulldozer approach of the current "three-strikes" law and 184 sweeps "third-strikers" convicted of these crimes into prison for the same terms as murderers and rapists.

Los Angeles County Dist. Atty. Gil Garcetti has already been forced to file 9,000 "three-strikes" cases. The defendants include a Los Angeles man accused of stealing a slice of pizza. A Pomona man could be given 25 years in prison if convicted of

Reno Vows to Expand Vigilance on Civil Rights

By Pierre Thomas
Washington Post Staff Writer

BIRMINGHAM, Jan. 15—Speaking at the site of one of the most hateful acts of the civil rights era, Attorney General Janet Reno promised that the Justice Department will expand its effort to fight against racial discrimination in lending, employment, education and other areas.

On the date of slain civil rights leader Martin Luther King Jr.'s birth, Reno chose the church where four young black girls were killed in a 1963 bombing to call on the nation to confront racial tensions and to broadly outline her policies for President Clinton's next term.

"I fear that what national consensus we have on civil rights may be at risk of unraveling," Reno said before a packed audience at the 16th Street Baptist Church. "... There is today real disagreement about what 'civil rights' ... really means. There are some that think we have gone too far, who think we have already achieved the aims of the civil rights movement. I say that is not so. Some Americans, including some minorities, now question whether integration is still a valid goal."

More often than not, she said, many Americans of different backgrounds and races continue to live in largely separate worlds.

Reno's speech had been billed as her most expansive public comments to date on the issue of civil rights. Sermonic and folksy in delivery, Reno did not detail a laundry list of new programs. Instead, she laid out her assessment of race relations and described the Justice Department's role in grappling with the often-divisive issue of civil rights enforcement.

While signaling that matters of discrimination were a high personal and departmental priority, Reno also sought to allay fears in the civil rights community that the impending departure



BY DAVE MARTIN—ASSOCIATED PRESS

Attorney General Janet Reno outlined Justice Department's goals in fighting discrimination.

of civil rights chief Deval Patrick might mean a retreat on such matters. Patrick is generally regarded as having been an aggressive enforcer of civil rights laws and often came under fire from conservatives.

On affirmative action, Reno bluntly denounced as "misguided" proposals by congressional Republicans and California voters to curtail affirmative action by government.

"The president and I will continue to oppose—at every step of the way—any wholesale ban on affirmative action in federal law," she said. That comment was greeted enthusiastically by the largely black audience.

The attorney general pledged to expand already-increased enforcement efforts in fair housing and mortgage lending. She also announced that the department was studying ways to confront lending discrimination against minority business owners, an issue that has stirred considerable controversy in the past between

banks and regulators trying to monitor their activity.

Reno also vowed to support legal battles to ensure that universities and colleges maintain and improve racial diversity, and to ensure allegations of police brutality will be vigorously pursued.

Although Reno acknowledged that there has been progress on matters of race, gender and other forms of discrimination, she argued that the legacy of an ugly past remained.

"We cannot say we have completed our journey when even today, blacks and Hispanics and in many cases women have a harder time getting into college, renting an apartment, getting a job or obtaining a loan," Reno said in her 50-minute address. "We have not completed our journey when the unemployment rate for black males is still twice as high as it is for white males. ... That's not right."

Referring to the recent rash of fires at predominantly black churches, Reno declared: "We have changed our laws, but we have not always changed our ways. Old habits die hard ... Our challenge is to rediscover our common interests, our common ground, and to remind ourselves of our common future."

Her audience seemed generally pleased that the nation's top law enforcer had come down to talk about civil rights, but some were also leery about whether things would really change.

One member of the audience, Lisa Baldwin, said it was good to hear Reno talking openly about such issues, but added, "I hope it was not all talk."

Reno supports affirmative action

BIRMINGHAM, Ala. (AP) — Attorney General Janet Reno observed the birthday of Martin Luther King yesterday with a promise to push a civil rights agenda that includes strong support of affirmative action.

"I recognize that there are those who believe that affirmative action is unfair," Miss Reno said. "However, the fact that many minorities and women are still struggling at the bottom of the economic ladder suggests that this criticism misses the mark. Society's reality belies all the purported special treatment for minorities."

The attorney general walked this morning through Kelly Ingram Park, a rallying site for civil rights demonstrators in the early 1960s, and toured a civil rights museum. From there, she headed to a nearby church where four black girls were killed in a racist bombing in 1963.

In her hourlong speech at the church, Miss Reno recalled the civil rights violence of 1963 in Birmingham and King's role in leading protests that ended legal segregation in the city.

"Martin Luther King was a man who saw injustice and felt the weight of oppression but refused to be broken by it," she said. "His life embodied and helped to define the true spirit of America — the quest for justice."

She told the standing-room-only crowd that there is disagreement in America today about what the term civil rights even means.

"Some Americans, including some minorities, now question by word or by deed whether integration is still a valid goal," she said.

The New York Times

DATE: 3-11-91

PAGE: D-2

Nationwide Settles U.S. Suit On Bias in Inner-City Areas

Insurer to Invest \$13 Million in Communities

By NEIL A. LEWIS

WASHINGTON, March 10 — The Nationwide Insurance Company, the nation's fifth-largest insurer, agreed today to invest \$13 million in minority communities and to end a series of practices that the Government said discriminated against blacks and poor people and furthered the deterioration of inner-city neighborhoods.

In agreeing to settle a lawsuit by the Justice Department, Nationwide pledged to use the money over six years to help low-income applicants purchase and repair homes and obtain mortgages. In addition, Richard D. Crabtree, Nationwide's president, told reporters that his company would now aggressively market itself in urban areas.

"Strengthening urban neighborhoods is a Nationwide priority," Mr. Crabtree told reporters at the Justice Department, which had charged the insurer, based in Columbus, Ohio, with violating Federal anti-discrimination laws.

Attorney General Janet Reno said: "We don't ask anybody to make a bad business judgment. What we were concerned about is that proper business judgments be made, but at the same time there be no discrimination whatsoever based on race or other inappropriate factors."

Today's news conference was an odd combination of celebration of Nationwide's new promises and a strenuous effort by company officials to play down the accusations. Mr. Crabtree suggested that his company was moving to develop "an urban marketing strategy" independently of the Federal lawsuit.

"As we strive to strengthen our position as a leading insurance provider, the urban marketplace provides an attractive source of business," he said.

Several housing advocacy groups and lawyers representing thousands of blacks who say they were unable to buy full coverage from Nationwide as well as lawyers representing agents who say they lost their jobs for trying to sell policies in minority areas criticized the accord as "too limited," however.

"It does not go far enough either in eliminating discriminatory practices or compensating victims of current and past discriminatory practices," said Shanna Smith, the executive director of the Fair Housing Alliance.

Indeed, the Justice Department agreement provides for no compensation at all for victims of Nation-

wide practices, said Stephen M. Dane, a lawyer in Toledo, Ohio, who is representing 10,000 Toledo homeowners in a class action suit against Nationwide, seeking \$400 million.

Under the agreement, Nationwide did not admit to violating any laws. But the company reached its settlement as it appeared it was losing its battle in the Justice Department suit.

Nationwide had argued unsuccessfully all the way to the Supreme Court that its underwriting practices were not covered by the Fair Housing Act, which makes discrimination in housing illegal. Justice Department officials said it was shortly after the Supreme Court refused to consider Nationwide's challenge to a lower court ruling that the company began to negotiate seriously.

The practices, which Justice Department officials said had gone on for many years, were refusing to write insurance policies for houses more than 30 years old and refusing policies for houses valued at under \$50,000 or with a market value well below what it would cost to replace.

Paul Hancock, the chief of the housing section of the Justice Department's civil rights division, said that those conditions applied to inner-city neighborhoods that are typi-

cally populated by blacks and other minorities and are mostly filled with such old and inexpensive housing. For example, he said that more than 80 percent of the houses in black neighborhoods of Philadelphia fell short of those criteria.

"The reality for most people is that to buy a home, you need a mortgage and to get a mortgage, you need homeowners' insurance," said Isabelle Katz Pinzler, the acting head of the civil rights division.

The nation's two largest insurance companies, State Farm and Allstate, agreed earlier to end discriminatory practices without seeking to challenge the law. Mr. Hancock said that no other company was being investigated for such practices.

Nationwide underwrites a little less than 3 percent of the nation's homeowner policies, according to the Justice Department. State Farm has 25 percent; Allstate, 12 percent; the Farmers Insurance Company, 6 percent and the USAA Insurance Company, which serves active and former military personnel, has a little more than 3 percent.

The \$13.2 million to help refurbish homes and aid in obtaining mortgages will be administered by the Local Initiative Support Coalition based in New York and the Neighborhood Reinvestment Corporation, based in Washington.

Nationwide Insurance Settles Bias Claim

By Pierre Thomas
Washington Post Staff Writer

Nationwide Insurance, one of the country's largest providers of homeowner policies, yesterday said it would invest \$13 million in inner-city neighborhoods as part of an agreement with the Justice Department to resolve claims that the company systematically discriminated against low-income minority communities.

The company also agreed to change the way it underwrites and markets homeowner policies, in what was described as the most comprehensive settlement ever reached with an insurance provider under the federal Fair Housing Act.

Nationwide officials denied any wrongdoing and maintained the agreement was simply reflective of a new attempt to better target an untapped market. "We don't believe that we committed any illegal acts," Richard D. Crabtree, president of Nationwide's property and casualty insurance companies, said during a news conference at the Justice Department. "These [urban] markets represent attractive sources of business for us as we strive to strengthen our position as a leading insurance provider," he said in a company press release.

But a review of the Justice Department complaint filed against Nationwide portrayed the Columbus, Ohio-based insurance provider as a company that had intentionally engaged in discriminatory practices with a "reck-

less disregard for the rights of persons aggrieved by such actions."

Justice Department civil rights attorneys accused Nationwide of developing specific practices that severely limited "the opportunities of minorities to obtain homeowner's insurance." The company's management "instructed sales agents that Nationwide did not desire homeowner's insurance business from neighborhoods with substantial minority populations," the Justice complaint said. "Nationwide conveyed this information through the use of maps as well as oral and written instructions."

In addition, Nationwide discouraged providing certain homeowner insurance policies for homes below a specified value or older than 29 years, Justice officials charged.

In Philadelphia, for example, Nationwide did not offer replacement cost policies on homes valued under \$50,000 or repair cost policies for homes valued under \$45,000, essentially removing entire neighborhoods from access to insurance coverage. In Philadelphia County, 80.9 percent of homes in largely minority communities were valued under \$50,000, 1990 census statistics showed.

Such practices made home ownership in such communities a problematic venture at best, Justice officials said.

"The reality for most people is that to buy a home, you need a mortgage, and to get a mortgage, you need homeowner's insurance," said Isabelle Katz Pinzler, acting assistant attorney general for civil rights. "Without an equal shot at getting this insurance,

the American Dream of owning your own home is just that, a dream."

Under the agreement, Nationwide agreed to inspect the condition of homes to decide if they should be covered, rather than refusing coverage because the residences are too old or fall below a certain value. The settlement also calls for Nationwide:

- To not impose any geographic restrictions that have the effect of barring homeowner insurance in minority neighborhoods.

- To increase insurance coverage through targeted advertising and community outreach.

- To provide \$2.2 million in each of the next six years to assist home buyers in minority neighborhoods with down payments, closing costs, below-market loans, second mortgages and home ownership counseling in 10 cities where the company does business.

Two of the industry's largest companies, State Farm Insurance Co. and Allstate Insurance Co., have agreed to similar changes in underwriting rules following recent conciliation proceedings with the Department of Housing and Urban Development, said Paul Hancock, chief of Justice's housing enforcement section.

"Insurers should make decisions based on ~~risk~~, not race," Attorney General Janet Reno said at yesterday's news conference. "This settlement ensures that homeowners of equal risk, regardless of race or ethnic origin, will enjoy equal access to homeowner's insurance."



Tell me about your course, *Race, Values, and the American Legal Process*. The course examines deliberate choices made between 1619 and 1865 in the American legal system on the issue of race. It soon becomes evident as you read the cases that the process led to the most pernicious option. There's no doubt that white people can plant cotton, hoe tobacco, and work as farm hands, but for some strange reason in this country, only individuals who were non-white were compelled to be slaves. We also look at what happened after the 13th, 14th, and 15th Amendments, with a broad overview up to the *Brown* case. Then we focus on a particular issue. This year we will be looking at a number of voting rights cases.

Why the emphasis on voting rights? You also mentioned that you were in the midst of litigating several such cases. Yes. The most critical issue in America is whether there will be a sharing of power. In 1993 the Supreme Court ruled in *Shaw v. Reno* that the redistricting in North Carolina, which had resulted in increasing from zero to two the number of black representatives from North Carolina in Congress, was presumptively unconstitutional. There have been similar outcomes in other

recent cases, and if these decisions stand and the trend continues, the number of African Americans in Congress will probably be reduced by at least 10 or 15 and maybe 20 — from the present number of 39. In December I filed amicus briefs in *Shaw v. Reno* and a Georgia case, *Miller v. Johnson*, on behalf of the Congressional Black Caucus. I am also chief trial counsel in a Louisiana case where ex-Klansman David Duke could replace a brilliant young African American congressman, Cleo Fields.

African Americans are very successful in the entertainment field. But there's nothing Michael Jordan or Charles Barkley can do to change public policy so that millions of children who currently have no health insurance can be protected. The only environment where you can decide such policy issues is the U.S. Congress. And when you decrease the number of congresspersons who are minorities, you eliminate a core of individuals who are instinctively concerned about injustices having to do with race and poverty.

What about minority representation in the judiciary? Pluralism creates a milieu in which most often both the judiciary and the litigants benefit from

the experience of those whose backgrounds reflect the breadth of the American experience. Justice Sandra Day O'Connor speaks eloquently to this point when she talks about what she learned from Justice Thurgood Marshall's life.

I think President Clinton understands the value of pluralism. The data on his judicial appointments show a substantial number of African Americans, as well as Latinos and women. During the Reagan-Bush years, African American federal judges became an endangered species.

You have been publicly critical of one of your black colleagues on the bench, Clarence Thomas, most volubly in your "Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague" in the *University of Pennsylvania Law Review* in 1992. What prompted you to write the letter, and what has the fallout been? In 1983 Justice Thomas said that "but for affirmative action laws, God only knows where I would be today. These laws, and their proper application, are all that stand between the first 17 years of my life, and the second 17 years." I wrote to him to say that he had acknowledged that these laws made the difference in his ability to enter the arena and to be competitive. And that I thought that since he had made it from Pinpoint, Georgia, to the Supreme Court, he had an obligation not to forget the thousands of individuals who still face extraordinary obstacles. I was concerned that he would forget. His Supreme Court opinions have borne out my worst fears.

I received more than 800 letters in response, and more than 90 percent

were very supportive. A third or more were from whites.

What's your view of the contribution of the NAACP and the significance of a black congressman, Kweisi Mfume of Maryland, becoming president of the organization? A review of its 90-year history demonstrates that no single organization has done as much to eradicate racial injustice as the NAACP. Its success also made a major contribution to the advancement of women. If the NAACP had not won the *Brown* case, you would never have had the 1964 Civil Rights Act, which prohibits discrimination on the basis of gender, race, religion, and national origin.

As for Congressman Mfume, he has won more than 82 percent of the vote in his district. He could have stayed in Congress forever, maybe even becoming a speaker of the house. Yet with this impressive record, he leaves Congress. It indicates his assessment of the NAACP's potential as a national instrument for change.

How does it feel to have participated in the 1963 march on Washington, and how does it feel not to have participated in the Million Man March in October? The 1963 march was the most exhilarating experience of my life. My children, who were then about 8 and 11, were with me, and they heard Martin Luther King's dramatic speech. I was in the midst of a movement that just had so much moral force that I was confident it was going to ultimately succeed, despite all the adversity, despite the fact that critical civil rights acts had not yet been passed. The decision to not participate in the Million Man March last year was difficult. But from what I had read and observed, and from what I heard, I thought that it was going to be primarily a program for the advocacy of Louis Farrakhan's personal agenda. One of the easiest ways to measure who's in control is who speaks and for



Judge Higginbotham

how long. When someone as brilliant and dedicated as [Harvard University] Professor Cornell West is on the platform and is denied the right to speak, and Mr. Farrakhan speaks for two and a half hours, the balance isn't right.

You're known for planning your calendar a year in advance and for maintaining an incredibly ambitious work schedule. What's your agenda for the coming year, and have you slowed down any since leaving the court at 65? Well I still start at five in the morning and work until nine or ten at night. A good thing about Paul, Weiss is that there are secretarial services 24 hours a day, so I often get up at five and dictate onto their system, and they have it back to me in a few hours. My wife and I try to have dinner before nine, and that's a very important respite. I do think that I'm going to have to find a formula to cut back my pace a bit. My first effort will be after these major voting rights cases are finished — I'll try to extricate myself from being lead counsel on future pro bono cases. I hope that I will spend less time on litigating and more on writing.

What are your writing projects? The second volume in my *Race in the American Legal Process* series, *Shades of Freedom*, will be published by Oxford University Press in the next six months. I've tried to make it more than merely an updating of the first volume, *In the Matter of Color*. That book examined race and the American legal process in the Colonial period. The new volume looks at how the legal system develops certain criteria about how black people should be treated. In 1997 and in 1998, I will finish an additional two volumes, one comparing racial similarities between the United States and South Africa, the other on race and the Supreme Court. And then there's the autobiography, which I am anxious to complete. I'm the only survivor of the first five African Americans who were appointed federal judges. I knew them all, and they all said they were going to write autobiographies describing their personal reaction to the challenges they have confronted, the changes they have seen, and the failures that still concerned them. They died without giving us fully their insights. God willing, I'm going to write mine.

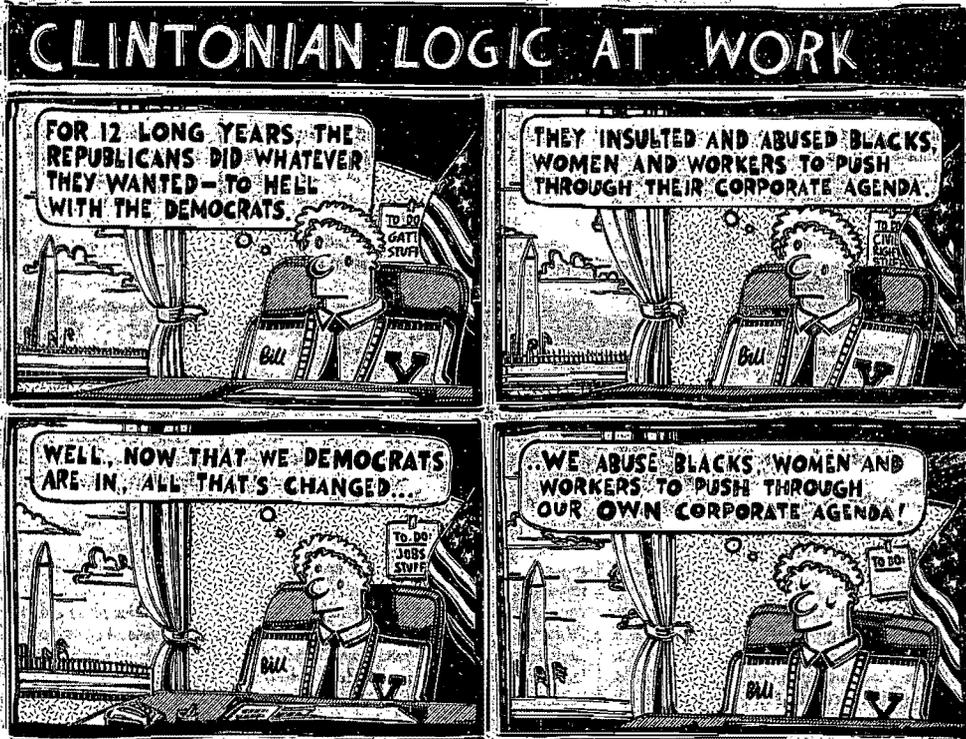
What do you do for fun? My wife, Evelyn, who is also a professor at Harvard, and I watch detective shows, like "Perot" and "Columbo"; we also watch "Murder, She Wrote." And we enjoy having students over for dinner. I played tennis until I developed a slight heart condition several years ago. The cardiologist said he thought I was too aggressive a personality to keep on playing tennis because I did not have, in his view, the restraint not to go for the impossible shot. ~

Interview conducted by Nancy Waring

National Affairs

BACK TO THE BACK OF THE BUS?

Clinton's mixed signals on civil rights



By WILLIAM GREIDER

(W.A.S.H.I.N.G.T.O.N.)

AMONG PROMISES

kept, Bill Clinton can justly boast that in his first year in office he produced a new look for high federal office — a government that does indeed look a bit more like America. By including the office of drug czar, the president counts

five blacks in his Cabinet. Of Clinton's initial appointments to the federal bench — 27 judges so far — nearly a quarter are African American. Overall, 13 percent of the people he has put in top-level federal jobs are black.

Yet there is one key policy position this Democratic president hasn't gotten around to filling: the assistant attorney general for civil rights, the officer responsible for enforcing civil-rights laws. To date, the White House has put forward two nominees — both black lawyers with strong reputations — then backed off each time. Clinton has also not found a chairman for the Equal Employment Opportunity Commission or someone to run the

civil-rights office at the Labor Department. The question is, is all this a reflection of intent or mere incompetence?

The first nominee for the civil-rights post in the Justice Department was Lani Guinier, a University of Pennsylvania law professor and an old law-school friend of both Clintons who was smeared by right-wing critics last spring as a "quota queen." In June, Clinton killed her nomination and, in so many words, declared that her critics had a point. The second failed nominee was John Payton, a former partner in a high-powered Washington firm who now serves as corporation counsel for the District of Columbia government. Despite his credentials, Payton ran into the nagging doubts of some members of the Congressional Black Caucus. In December, the White House took the occasion to dump him, too. A third name is promised soon.

To many civil-rights advocates, this pattern of tentativeness and retreat suggests a cynical convenience grounded in Clinton's New Democrat politics. That sounds right to me. The administration, whether by design or happenstance, has managed to make the volatile question of civil-rights enforcement simply disappear from the agenda.

White House officials naturally object. "That's too cynical," one aide insisted. "You can question our competence but not our commitment." The president, he noted, has spoken out firmly on enforcing civil-rights laws. I asked this aide to cite some examples of Clinton speaking out on such nettlesome matters as affirmative action, voting rights or school desegregation. He said he would get back to me.

Finessing these controversies is a perfect fit with the conservative script that emanated from the Democratic Leadership Council that Clinton helped form in the '80s. Democrats could win, the DLC argued, only if the party repositioned itself as moderate right of center and if it got some distance from major liberal constituencies such as blacks and labor. Looking back at Clinton's first year, that's what he

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National Affairs

seems to have accomplished. He makes warm symbolic gestures of support, but on crucial substantive issues, he backs away.

As short-term politics, the tactic is certainly successful. In the NAFTA debate, Clinton demonized labor and carried the issue with Republican votes. When his poll ratings subsequently improved, White House strategists settled on what I think is a wrongheaded rule of thumb: When the president attacks one of his party's core groups, the public approves. I expect we'll see this gambit again this year whenever Clinton's popularity weakens.

The eventual consequences may be damaging — not just for Clinton and his party but for the nation. Race and racial antagonism are at the core of much of what troubles the United States in the '90s. A president who decides not to confront this is forfeiting the potential to better things and perhaps even contributing to greater division in the future. This is especially disturbing when the president is not a conservative Republican but a Democrat elected with overwhelming black support.

Lani Guinier, whose essays on race and

civil rights were too provocative for Clinton to handle, laments the administration's silence but does not blame Clinton personally. "I see it as symptomatic of a larger problem confronting the country," Guinier says. "I think we're in a state of denial about the issue of race in general and about the continued need for vigilance in enforcing the civil-rights laws. We're denying there's a problem about race. One of the manifestations of this is that those of us who persist in still seeing a problem are accused of hallucinating."

On the Range, Political Forces Still Beat Market Forces

SINCE THE DAY HE TOOK OFFICE, INTERIOR Secretary Bruce Babbitt has talked of his commitment to a "new American land ethic." Among other goals, the new ethic would bring an end to exploitation of public lands by replacing federal subsidies — particularly for mining and ranching — with market forces. The centerpiece of this shift was Babbitt's decision to substantially increase grazing fees on federal lands. Ranchers frequently pay less than half the market value for federal grazing rights, and their stock sometimes endangers other plant and animal species while degrading the land.

Babbitt initially included a grazing-fee increase in the administration's first budget, but Western senators forced the White House to abandon it. Then Babbitt backed legislation that passed in the House, only to be stymied once again by Western senators. Other Western interests have been piling on. The Wyoming Farm Bureau has passed a unanimous resolution calling for Babbitt's resignation. An Idaho group of off-road-vehicle users launched a campaign that tied up White House phone lines with calls for Babbitt's head.

Under attack in late November, Babbitt left

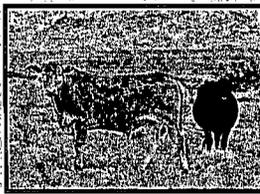
town and headed West — to the source of his troubles. In a series of meetings in Colorado and elsewhere in the region, Babbitt is hoping to find the basis for a new consensus on land policies. Meeting in private small-group sessions in which ranchers, environmentalists and academics search for common ground, he is starting all over again, tending to the grass roots he neglected before first announcing his proposals last year.

UPDATE: Grazing Fees

The linchpin of Babbitt's latest approach is Colorado, where Democratic Gov. Roy Romer has helped the interior secretary forge a working group of disparate interests. Babbitt sched-

uled eight weekly meetings with the group, beginning in late November. The seeds for the group's work were planted in Gunnison County, Colo., where ranchers and environmentalists have put aside years of bitter conflict to unite against encroaching real-estate developers. Their slogan: Cows, not condos.

Babbitt hopes the Colorado talks will yield a compromise plan that can serve as a model



throughout the Western states. One of the keys of Babbitt's effort is to replace rancher-dominated grazing advisory boards, which currently oversee federal range management, with resource advisory councils made up of — like the Colorado group — ranchers, environmentalists and others.

The U.S. government spends about \$50 million more per year administering federal grazing lands than it receives in fees. As a recent study produced jointly by the Wilderness Society and the Environmental Defense Fund shows, overgrazed lands can lead to additional tax burdens when it becomes necessary for the government to protect threatened species under the Endangered Species Act.

But the amount of public money at stake is relatively small considering the intensity of the fight. One source of Western animus is that the value of private land adjacent to federal grazing lands is liable to decrease as grazing fees rise. For some Westerners, the issue is not so much a matter of how much they are willing to pay for grazing rights but how much the value of their private property will be depressed by the change in fees. Babbitt has the authority to set fees with an administrative order. But to avoid a Senate battle over his decision, he will need broad-based support in the West. Without it, raising fees will only ignite a new round of calls for the interior secretary's head.

— FRANCIS WILKINSON

GUINIER'S VULNERABILITY was quite visible and easily exploited by her conservative opponents. In a series of scholarly essays on civil-rights law, she had freely explored some of the deeper maladies of the democratic process, asking whether there are mechanisms that would enable an isolated minority to share in decision making. "Why," she wrote in one essay, "should the 51 percent who win elections have 100 percent of the power? The majority shouldn't always get to win everything, and the people who lose shouldn't always have to lose everything."

For this fundamental insight, she was labeled a radical and rejected without even a hearing. But the thrust of her thinking was not how to wreck democratic consensus but how to perfect it in a multicultural society and make the system work for all. Guinier is articulating new ideas in an honorable struggle under way since the republic's first days.

People who think the struggle is over, that the goal of equality was already achieved during the last 30 years of civil-rights protests and legislation are practicing the denial Guinier describes. Race persists as the obvious subtext for many issues, from welfare reform to crime. Racial stereotypes that have always been a staple of popular culture are now being exaggerated in new formats, from gangsta rap to white-vigilante films. Newspapers report that public schools are becoming segregated by race as both whites and blacks

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Affirmative Action

Ninth Circuit Upholds Stay Of California's Proposition 209

The U.S. Court of Appeals for the Ninth Circuit has upheld an order blocking the implementation of California's controversial Proposition 209 as legal challenges to the anti-affirmative action initiative move through court.

In a three-sentence order issued Feb. 10, the appeals court rejected a bid by backers of the voter-approved initiative to immediately reinstate the measure (*Coalition for Economic Equality v. Wilson*, CA 9, 97-15030, 2/11/97). But the appeals court also said it will consider the merits of lifting an injunction that was imposed in late December later this spring, after additional briefs are filed by the parties.

The Ninth Circuit order came only days after a federal district court judge rejected a similar request by the proposition's supporters, Californians Against Discrimination and Preferences, to implement Proposition 209. The proposal was decisively approved by voters last November, but was immediately challenged in court and has not been put into effect.

Avoiding SeeSaw Approach. In his latest decision refusing to reinstate the initiative while the appeals continued, federal district court judge Thelton Henderson emphasized a "desire to avoid an 'on-again, off-again' approach in this case" (*Coalition for Economic Equality v. Wilson*, DC NCalif, C96-4204, 2/7/97).

"The defendants in the case will soon have the opportunity to present their appeal, on its merits, to a panel of the [U.S.] Court of Appeals," Judge Henderson wrote. "CADP has not persuaded the court that upsetting the status quo prior to that hearing would benefit the public. On the contrary, having considered all the submissions, this court is satisfied that granting the instant motion for stay would not serve the public interest."

Last December, Henderson issued a preliminary injunction against implementation of the proposition, stating that the coalition of civil rights groups that challenged its legality were likely to prevail on their claims (249 DLR A-7, 12/30/96).

An appeal of that order currently is before the Ninth Circuit, where it has been assigned to a panel of three judges: Diarmuid O'Scannlain, Andrew Kleinfeld, and Edward Leavy.

Sets Expedited Schedule. In their Feb. 10 order, those judges refused to lift the injunction until they decide the merits of the case. The panel, all Republican appointees, also scheduled an expedited briefing schedule on the case.

The panel also stated that further appeals from the grant of the preliminary injunction can be submitted on the merits after those briefs are filed later this month. Additional oral argument also will be scheduled, if necessary, the Ninth Circuit said.

Proposition 209 would prohibit the state from discriminating against or granting preferential treatment to any individual or group "on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public con-

tracting." Both supporters of the initiative, led by Republican Governor Pete Wilson, and opponents—including most major civil rights organizations—have vowed to continue their fight over the issue, which is expected eventually to reach the U.S. Supreme Court.

against the employer. See AAA Rules 32(d), 35. As for the arbitrator expenses (whatever they might actually turn out to be), to the extent if any that the arbitral award does not shift them to the employer, they will not necessarily add to the employee's overall dispute resolution expense. The *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship* (endorsed by, among others, the American Arbitration Association, see *supra* n.4), which calls for arbitrator expenses to be shared to the extent feasible by both employer and employee, see ¶ 6, was created with the express goal of "provid[ing] expeditious, accessible, inexpensive and fair private enforcement of statutory employment disputes," *Protocol, Genesis*. There is no reason to believe that result will not occur here.

The majority also rationalizes its contractual modification as a counter to the employer's commanding po-

sition in the employment relationship: "Arbitration will occur in this case only because it has been mandated by the employer as a condition of employment." Maj. Op. at 37. I would suggest that the appellant's claims will be arbitrated, if at all, because each party agreed that the employer could so elect. In any event, if the majority believes that the arbitration agreement was reached under duress or that it is unconscionable, it should say so straight out and declare it unenforceable, as the appellant requests. On the other hand, if the majority truly believes the agreement is enforceable, as it maintains, it should enforce the agreement as written without judicial reformation.

For the foregoing reasons I dissent from the majority's holding that contractually required arbitration is conditioned on the employer's agreement to pay all arbitrator expenses.



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Text

SPEECH BY U.S. ATTORNEY GENERAL JANET RENO ON MARTIN LUTHER KING'S BIRTHDAY, IN BIRMINGHAM, ALABAMA

Civil Rights: A Challenge of Conscience

I am honored to be here at the 16th Street Baptist Church, and I am humbled by the opportunity to speak to you on a day of such special importance: the birthday of Dr. Martin Luther King, Jr. I wish every American could spend the day as I have, walking through the Civil Rights Institute across the street, and rereading some of Dr. King's writings and speeches. Martin Luther King was a man who saw injustice and felt the weight of oppression, but refused to be broken by it. His life embodied and helped to define the true spirit of America — the quest for justice. And he was able to express his outrage and yearning for justice so forcefully and so eloquently, that he reached into America's soul and the nation responded.

Dr. King had the strength of spirit to withstand jail and march in the midst of angry racism and he had the courage to battle hate with love. He never strayed from the path of non-violence, though many of us might have been tempted to had we been faced with the vilification experienced by civil rights workers in those days.

And it was here in Birmingham, and here at the 16th Street Baptist Church, that America witnessed some of the most heroic efforts and the lowest, darkest moments of the struggle. For it was here in this very church, 34 years ago, that an ugly racist attack took the innocent lives of four young girls, attending in their Sunday School class. I am honored that Altha Robertson and Commissioner Chris McNair and Maxine McNair, the parents of two of the girls killed by that bomb, are here with us today. Let me say to you what Dr. King said to you 34 years ago. "Death is not an end" for those four girls. They are living still, in our memory, and their power still moves us.

And it was from this very church, earlier in that same year, that thousands of young people, children really, assembled for a nonviolent demonstration and went to jail to protest segregation. And the next day, when more students and adults went to demonstrate, Bull Connor let loose his dogs, his clubs and his hoses right outside here in Kelly Ingram Park. But those demonstrations broke the back of segregation in Birmingham.

These episodes remind us of the courage of ordinary citizens who daily met with hateful prejudice. Martin Luther King was right when he said that "one day the South will recognize its real heroes."

Let me pause here to recognize one of those heroes here in Birmingham, Arthur Shores, who just left us late last year. As one of the only African American practicing attorneys in Alabama during the 1940's, Mr. Shores was a lone voice in the wilderness defending the civil rights of his people, and he played a critical role during the 1960's when he represented Dr. King and Reverend Fred Shuttlesworth among other civil rights pioneers. He will be missed, by family, friends, and indeed, the entire community.

There is no question that the ideals for which Martin Luther King struggled are the ideals we still strive for today. The goals are the same. Discrimination and naked hatred must be eliminated from our society. Our national creed must always be freedom, justice and equality of opportunity for all Americans.

But there is today real disagreement about what "civil rights" in today's world really means. There are some who think that we have gone too far; who think that we have already achieved the aims of the civil rights movement. There are others who challenge the value and fairness of traditional

civil rights remedies. Some Americans, including some minorities, now question, by word or by deed whether integration is still a valid goal. I fear that what national consensus we have on civil rights may be at risk of unravelling. And efforts to divide us along racial lines, for political advantage or worse, leave many wondering whether we will move forward, or slip backward, in our common struggle for equal opportunity and fundamental fairness.

I say we will move forward. But in so doing, it is not enough to dismiss every criticism as mean-spirited racism, or narrow-minded ignorance. We need to examine ourselves and our world with a critical eye and an open mind. We have to ask the difficult questions and attempt to answer them. We must talk openly about race relations in this country and try to leave the angry rhetoric blind.

We know that not all of our ills are explained by racism and gender bias. But we also know that prejudice, intolerance and discrimination persist today.

Our challenge is to rediscover our common interests, our common ground, and to remind ourselves of our common future. At bottom, the needs of those in the black community, the Hispanic community, the Asian American community are the same as those in the white community: a healthy start, stable and crime free neighborhoods, quality education, supportive families and decent work opportunities. When we step back and look at our situation, we find that there are ways to bring our communities together, to bridge the differences that separate us and to reestablish our commitment to civil rights in America.

One way of doing that is through our personal experiences in interacting with others of different backgrounds — where we live, where we work, where we go to school. Too often, we live in our own insular worlds, with each of us enforcing our own voluntary racial separation. We pass each other on the street or in the shopping mall, but we don't connect as individuals.

A 1995 Washington Post poll found that virtually half of those surveyed did not feel it was important that different racial or ethnic groups should live, go to school, or work together, so long as they were treated fairly. But this attitude comes dangerously close to the "separate but equal" doctrine that was so rightly rejected in *Brown v. Board of Education*. With this separation, we risk a lack of understanding of, and appreciation for, the views and perspectives of others. Dr. King knew that you could eliminate legal segregation and still not achieve integration. True integration, he believed, will be achieved by true neighbors.

To those in the white community who seek the false comfort of living their lives only among others like them, I say they are wrong. And to those in the black community who say they need no part of what they see as a white establishment, I say they are wrong too. We all need each other. Racial isolation, no matter who chooses it, is unacceptable.

This week, especially, I would ask each one of us to reach out to someone on the other side of our racial divide — maybe someone you work with or go to school with but don't really know. This weekend, visit a church or temple with a different congregation, so that this Sunday morning isn't, in Dr. King's words, the most segregated hour in America." Take these small steps in our effort to rebuild a sense of community, where diversity is valued and intolerance is unacceptable.

President Clinton has made it a cornerstone of his agenda for the next term to unify the Nation around its core values.

Civil Rights

Clinton Support For Affirmative Action Is Subject Of Reno Civil Rights Speech

The Clinton administration will continue to support affirmative action during the president's second term and will oppose "any wholesale ban on affirmative action in federal law," U.S. Attorney General Janet Reno said Jan. 15 from Birmingham, Ala., in a speech delivered on Martin Luther King Jr.'s birthday.

Speaking from the pulpit of a historic Baptist church, Reno outlined the Justice Department's civil rights agenda for the next four years, including the administration's efforts to combat discrimination in the workplace. On this front, Reno said the administration will continue its "mend it not end it" affirmative action policy, which was first announced by the president in July 1995.

Reno also addressed the administration's efforts to ensure equal opportunity in education, to expand access to capital to minority businesses, and to prosecute those responsible for the rash of church burnings. She delivered her speech at the 16th Street Baptist Church in Birmingham, which was the site of a bombing in 1963 in which four black school girls attending Sunday school were killed.

Denounces Prop 209

The attorney general held up "affirmative action done right" as the answer to "unequal opportunity in the economy," and reiterated Clinton's opposition to a voter-approved California initiative that would bar affirmative action consideration by the state in education and hiring.

Enforcement of the measure, known as Proposition 209, has been enjoined by a federal judge in a legal challenge to the initiative that Reno's Justice Department has said it will join on the side of civil rights groups—taking a stance directly opposite to a majority of California voters.

Proposition 209 is "both unconstitutional and bad policy," Reno said. "It would prevent local jurisdictions and state agencies from recognizing the need for additional, well fashioned affirmative action measures to overcome the effects of past discrimination and bring minorities into the economic mainstream."

"By singling out race and gender for this distortion of the ordinary political process, Proposition 209 denies equal protection of the laws," according to prepared remarks attributed to Reno obtained from the Justice Department.

Calls Congressional Efforts 'Misguided'

Reno said Congressional efforts to tinker with affirmative action are "misguided and counterproductive," because DOJ is already abiding by the limits placed on affirmative action by the Supreme Court in its 1995 decision in *Adarand Constructors Inc. v. Peña* ((67 FEP Case 1828).

Reno said "the president and I will continue to oppose any wholesale ban on affirmative action in federal law." The administration had "firmly and unequivocally" opposed legislation introduced in the last Congress that would have ended all racial and gender "preferences" in federal hiring and contracting programs (236 DLR AA-1, 12/8/95). Rep. Charles Canady (R-Fla), who sponsored the Equal Opportunity Act in the last Congress, has promised to reintroduce similar legislation in the 105th Congress.

When "affirmative action is done right, there are no quotas, there are no preferences for the unqualified, and the programs end when their objectives have been achieved," Reno said.

Reno said that she herself benefited years ago from a kind of affirmative action when she got her first job as a records clerk in a sheriff's department because her father, a local crime reporter, knew the sheriff. The attorney general said she was denied a job in a large Miami law firm after she graduated from law school because she is a woman.

(Text of the speech appears in Section E.)

He has pledged to bring together the diverse strands of our people and foster an environment of reconciliation and mutual respect. These values are at the heart of civil rights and shape our civil rights agenda for the next term.

Church Burnings

Ironically, perhaps the best recent example of people in this Nation coming together across racial, ethnic and religious differences to confront a common problem has been our collective response to the disturbing rash of church burning over this past year or so. These crimes have traumatized the victim congregations and communities, and stirred the national conscience. Any sort of desecration of any place of worship is among the most despicable of crimes, reaching to the most deeply felt of all American tenets — freedom of religion. But the destruction, particularly by fire, of an African-American church resonates especially deeply in this country, harkening back to that bleak period in our nation's history when the bombing here at the 16th Street Baptist Church was one of many.

It is for these and many more reasons that the President has made it a top priority to prosecute those responsible for these arsons, to prevent future damage to houses of worship, and to help communities and congregations in their efforts to rebuild.

We have deployed over 200 ATF and FBI investigators around the country to investigate these arsons. The National Church Arson Task Force, co-chaired by Assistant Attorney General Deval Patrick and Assistant Treasury Secretary James Johnson, has responded to these crimes by bringing together the FBI, the ATF, Justice Department prosecutors, the United States Attorneys, the Community Relations Service and the U.S. Marshals, in partnership with state and local law officers and prosecutors.

We have achieved striking results. Federal agents have responded to over 300 arsons at houses of worship in the last two years, and many of the incidents investigated have been solved. Through a combination of federal and state arrests and prosecutions, we have made arrests in 31 states and have obtained convictions in 21 states.

There is also a tremendous difference between the fires 30 years ago and today. Church attacks then had tacit support of too many people in the community. Today the reaction has been universal outrage. These attacks are rightly seen as a threat to our common sense of sanctuary. These fires have also generated a tremendous response from our communities — solidarity among followers of many faiths, donations of money and in-kind support (such as church robes and hymnals, pews and pianos), and countless volunteers to help the prevention and rebuilding efforts.

It is so heartwarming to hear a young teenager talk with pride of her trip to the south to help rebuild one of the churches attacked, and to hear her talk of the welcome that she was given by that community. It was wonderful for me to travel down a little old dirt road in South Carolina with the President to see the site of a church that was burned, to see only the beautiful oak tree that half covered the church still standing, and then to go further down that road to the new church that we dedicated. And then to have the people of that community, black and white, come together and speak out with such spirit against the hatred that caused that crime. Haters are cowards; and when they are confronted, they most often back down. It is so important for all America to speak with one voice against the hatred and the bigotry that is sometimes in our midst.

Our experience with church fires shows us, at the very same time, how much we have achieved and yet how much we have left to do.

In many ways we have "made real the promise of democracy." What makes the American dream possible for so many is our commitment to making ours a fair and more equal society, where every American can make full use of his or her potential, and no segment of society is left out.

Unfortunately, we have not always lived up to that commitment. I know that personally. When I graduated from law school in 1963, one of Miami's large firms turned me down — simply because I am a woman. Luckily, I was able to advance in my career, and in 1993, no one told me I couldn't be Attorney General. But so many have shared in the unfortunate experience of discrimination.

In our own generation, we have seen remarkable progress in our efforts to bridge the gap between our ideals and the harsher realities of daily experience for so many citizens. Our national journey has taken us from segregated classrooms to integrated ones; from Jim Crow laws to civil rights laws for women, minorities and persons with disabilities; from literacy tests for voting to minority representation here in Alabama at every level of government, including the mayor of Birmingham and Congressman Hilliard in the Alabama Congressional delegation. And the political inclusion that has been brought about by the Voting Rights Act has led to so much of our progress. Just today, the federal government is announcing additional resources to preserve the historic Selma-to-Montgomery trail that Dr. King and others marched along to dramatize the need for the Voting Rights Act.

But thirty years after the passage of the Voting Rights Act, and forty years after *Brown v. Board of Education*, racial prejudice and the corrosive effects of discrimination are still with us.

We cannot say that we have completed our journey when even today blacks and Hispanics — and in many cases, women — still have a harder time getting into college, renting an apartment, getting a job or obtaining a loan. We have not completed our journey when the unemployment rate for black males is still twice as high as it is for white males. Even college educated black, Hispanic and Asian American men, and women of every race and ethnic background, are paid less than comparably educated, comparably trained, white men. These problems are doubly difficult for black and Hispanic men and women who also have disabilities. Worst of all, reports of violent hate crimes, against minorities and against gays and lesbians, are disturbingly high. If some of the church fires are any indication, hate itself has become more brazen.

We have changed our laws, but we have not always changed our ways. Old habits die hard. Attitudes evolve slowly. And we must do more to open the doors of opportunity so that every individual can share in and fully contribute to America's magnificent bounty.

The Department of Justice is committed to doing our part. Our mission can be simply stated — to enforce the civil rights laws vigorously and faithfully, without fear or favor. It is a task about which I care deeply and have made a high priority at the Department. We have been extremely fortunate in this last term to have Deval Patrick as the Assistant Attorney General in charge of the civil Rights Division. He is one of the finest public servants I have ever known. Deval will be leaving at the end of this month to return to Boston to be with his family. We will all miss his leadership, his vision, his intelligence and his gentleness. And underneath that gentleness is some of the toughest steel I know.

While we will miss Deval, our enforcement of our civil rights obligations will not diminish. It cannot. This Department will be ever vigilant and forceful in bringing our cases. The next four years will see our continued attack on the legacy of discrimination that has created so much inequality and that continues to have a devastating impact on our society.

Let me highlight four areas where I am committed to building greater community and combatting discrimination: fair housing and fair lending, including business lending, employment and affirmative action; education; and building trust between law enforcement and the minority community.

Lending Discrimination

In the next four years, I want to expand our success in the area of fair lending and fair housing. Home ownership has profound significance in this country and is still at the center

of the American dream. Yet, many Americans are kept from that dream when they are denied home mortgage financing or property insurance on account of their race or national origin. For years, disparities were explained in the industry as justified solely by differences in creditworthiness. But the studies over the last several years have laid that to rest. Black and Hispanic applicants for loans are being denied financing at a much greater rate than white applicants with virtually identical qualifications. Some banks have simply not done business in minority neighborhoods, while others charge higher rates or add extra charges to their loans in minority areas.

Our effort to address this problem has been a combination of working with the banking industry to reform their practices and suing banks whose practices evidenced discrimination.

We are not asking banks to make bad loans; we are telling them that here is some business that you shouldn't have overlooked. And we are working with them to train their employees in practices and procedures that ensure that there is no discrimination.

The results of these efforts have been remarkable, in a short period of time. In part due to our work, we have expanded the availability of loans to minorities. Between 1992 and 1995, the number of home loans to minorities grew by more than 100%, twice the growth rate for home loans generally. Here in Alabama, the number of home loans to minority borrowers increased 122% from 1992 to 1995, nearly three times the increase in lending to borrowers in the Alabama market as a whole.

We are also increasing our fair housing activity in Alabama. The Civil Rights Division sent fair housing testers to Montgomery and last summer, we filed a record-setting \$1.8 million settlement for housing discrimination against the owner of a number of apartment complexes in Mobile. We also work closely with the fair housing groups that recently have been established in Birmingham and Montgomery. This type of work is taking place across the country. We will continue to make sure that there is no discrimination in the housing and lending market and that all Americans can pursue their dream of homeownership.

Access to Business Capital

In this next four years, I want to expand our fair lending work into the area of business lending. Access to capital is one of the most formidable barriers to the formation and development of minority businesses. Several studies have shown that minority applicants for business loans are more likely to be rejected, and when accepted, receive smaller loan amounts, than white applicants with identical borrowing credentials. One recent Colorado study found that African Americans were three times more likely to be rejected for business loans than whites, and that Hispanic owners were one and one half times more likely to be denied a business loan.

The Department of Justice is exploring ways that we can effectively confront discrimination in this arena.

Employment/Economy

In the next four years, we will oppose efforts to limit our ability as a society to address unequal opportunity in the economy. We must do more to tap the inherent potential in every one of our citizens. For far too many, the promise of economic opportunity has a hollow ring. All too often we learn of blatant discriminatory conduct in the employment context: discrimination based on race, based on gender or based on sexual orientation. But also there are the more subtle influences of subjective factors making it more likely that we will hire and promote others "like us," with whom we may feel more comfortable. Social ties are often more important than actual experience and qualifications.

Some of the most stark evidence of this type of behavior comes from testing studies, where white males receive 50% more job offers than minorities with the same qualifications, applying for the same job. And the report of the Glass Ceiling

Commission demonstrates that once minorities are in the workplace, their advancement is often hampered by discrimination.

The EEOC is the prime federal agency that sues over employment discrimination in the private sector. The Justice Department has responsibility over discrimination by public employers. But it is important to have a clear picture of discrimination in the workplace so that it can be addressed by the government as a whole.

The reality of current and ongoing discrimination was at the core of the President's decision to continue to support affirmative action. In July of 1995, the President made clear that as a Nation, we will not abandon our commitment to equal opportunity. But he also made clear that we need to refine the tool of affirmative action so that it can be used fairly and effectively to help our society achieve its goal of integration. He directed that we mend, not end, affirmative action.

At the same time, the Supreme Court ruled in the *Adarand* case that when the federal government uses affirmative action, it has to do so in an especially careful way. In writing for the Court, Justice Sandra Day O'Connor recognized the "unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups." She confirmed that, under the Constitution, government has an obligation to address it.

This is one reason why we think California's Proposition 209, which establishes a sweeping ban on affirmative action in the state, is both unconstitutional and bad policy. It would prevent local jurisdictions and state agencies from recognizing the need for additional, well fashioned affirmative action measures to overcome the effects of past discrimination and bring minorities into the economic mainstream. It would prevent victims of racial discrimination and gender discrimination from obtaining relief from local governments and state agencies, short of amending the state constitution. By singling out race and gender for this distortion of the ordinary political process, Proposition 209 denies of equal protection of the laws. A federal judge just enjoined the state from implementing the California initiative. We agree with the court, and the Department of Justice will defend that decision.

It is also why efforts in Congress to curtail affirmative action by the federal government are misguided and counterproductive. The Justice Department, in light of the *Adarand* decision, is already making certain that federal programs now in place are fair and flexible, and meet the constitutional standard. And the President and I will continue to oppose any wholesale ban on affirmative action in federal law.

I recognize that there are those who believe that affirmative action is unfair. They feel they are being forced to pay for others' past sins, and that affirmative action gives special preferences to minority groups and women. However, the fact that many minorities and women are still struggling at the bottom of the economic ladder suggests that this criticism misses the mark — society's reality belies all the purported special treatment for minorities. Concerns about affirmative action must be addressed, but all too often these concerns are based on misperceptions about affirmative action programs: Isolated abuses become the prevailing myth. The abuses can, and will, be fixed. But when affirmative action is done right, there are no quotas, there are no preferences for the unqualified, and the programs end when their objectives have been achieved.

When affirmative action is done right, it ensures equal opportunity. When affirmative action is done right, it corrects for the effects of both past and continuing discrimination. And when affirmative action is done right, it is an important tool in reaching our goal of an integrated society.

One thing we often overlook when we discuss this topic is that, at one time or another, we have all been the beneficiary of affirmative action. I got my first job as a records clerk in the Sheriff's Department in part because my father was the crime reporter at the local paper and knew the sheriff. I remember the many other helping hands that I have been given along the way. Because of our efforts to eliminate discrimina-

tion and to provide equal opportunity to all, our nation's workplaces are much more diverse than they ever were, and our nation's economy is stronger for the effort.

Education

Of course, equal opportunity in the economic sphere can only be achieved if our citizens are prepared to take advantage of those opportunities. In the next four years, the civil rights agenda must also include ensuring that educational institutions are equally accessible to women and minorities.

As a Nation, we have made great strides in broadening opportunities in higher education. Just since 1990, the number of Hispanics enrolled in colleges and universities has increased by 35%. Asian American enrollment has shown a similar 35% increase. Since 1990, African American enrollment in higher education has increased by 16%. The number of minorities graduating from colleges and universities is also rising, which has benefits for all.

Greater integration has meant a better education for all of the students involved. Education depends on dialogue, not just between student and teacher, but between the student and his or her classmates. For over twenty years, our laws have recognized the important value of diversity in education.

Last year, however, a federal appeals court in Texas ruled that this is no longer good law. This is the *Hopwood* case, which ruled that diversity could not justify affirmative action in education. We disagree strongly with that decision. The Supreme Court declined to take the case on procedural grounds, so the issue is still an open one. We continue to believe that if the setting in which students learn looks more like the world—their education will be stronger.

It may also be useful to ask: "What do we mean when we say someone is 'qualified' or 'more qualified' for admission to college or graduate school?" We are making judgments about people before they have had a chance really to do anything. Education is the first rung on the ladder of opportunity. Getting an education is how you get ahead, and I just don't think it make sense to deny that chance to someone based solely on a "one size fits all" paper and pencil test. You have to look, not just at test scores, but at what that individual will bring to the school, and you have to look at what the benefits of integration will bring to society as a whole.

Let me give you just one example of a broader view of merit and the benefits of diversity. A study of University of California Medical School graduates examined where doctors practiced after graduating. A much higher percentage of minority graduates than white graduates practiced in areas that were underserved by the medical profession. Because that Medical School is diverse, California has better medical care.

Abraham Lincoln said that a house divided can not stand and that a nation divided can not stand. I believe so strongly that we can't have a divided nation, one exposed to education and the other not. We have to do more so that every student has access to education. Because that boy who is the first in his family to go to college will likely become a father, and his son or daughter will reap the benefit.

We must also reemphasize quality in education, as well as racial integration, as goals of the post-*Brown* struggle. A place in an integrated classroom is only worth having if it provides our children with a true opportunity to learn. We have to do more to address the inequality among the schools in our communities. It is unfortunately true that, because of economic inequality, predominantly minority schools tend to receive much inferior resources than predominantly white schools. We need to find ways to develop and finance city school systems that will keep families, both black and white, in the public schools.

I know that the answers to these challenges will not necessarily come from the courts. I take some hope, however, from decisions in several states, particularly New Jersey, Connecticut and Texas, that have found under their state constitutions that school districts throughout the state must provide equal financial support to their schools.

4/5

These are daunting challenges. But if 40 years ago those children and their parents in Topeka, Kansas, and Little Rock, Arkansas, and Clarendon County, South Carolina, had the strength and courage to face down an intractable establishment, hell bent on segregation, then I am not ready to say that today's challenges are beyond our grasp — and neither should you.

Criminal Justice Issues

Another crucial item on the agenda for the next four years is an effort to build a greater sense of community and trust between law enforcement and the minority community. There is no other area where the potential for misunderstanding and miscommunication can have such dangerous consequences. Just in the past year, we have seen in St. Petersburg the danger of pent-up frustrations and a breakdown in community relations.

And yet, at the same time, we must recognize that minorities are disproportionately victims of crime. Nothing is more important than a safe environment. The quality of the school a child attends will matter less if she is not safe in getting there or while she is at school. So it is an absolute imperative that we establish better trust, cooperation and communication between the community and the police.

There are several ways we need to do that:

First, through community policing, we must bring law enforcement down to the neighborhood level. The neighbors must be familiar with the police and the police must know the neighbors.

Second, we must continue to encourage diversity in law enforcement. In years past too many police departments had no black or Hispanic police officers, and few if any women officers. Now we have not just men in blue, but women in blue. Not just whites, but people of all colors. People who patrol the neighborhoods they grew up in. People who know the languages spoken there. Men and women our youth can look up to as role models. (Here in Birmingham, . . . (increase in minority Third, we must continue our vigorous enforcement of civil rights laws. This must be combined with additional, effective training efforts.

There are approximately 690,000 law enforcement officers in this country. The vast majority are honest, hard working and law abiding, putting their lives on the line each day in the pursuit of justice. Yet police chiefs and rank and file officers alike tell me that to maintain the confidence of the community, we must take decisive action against those few officers who abuse their power and deny citizens their constitutional rights by the use of excessive force or harassment. The Department of Justice plays a crucial role here, through the use of civil rights prosecutions and criminal sanctions, and our authority to investigate and remedy police departments which engage in a pattern or practice of discriminatory conduct. We will use our criminal and civil authority when the evidence and the law provides for it.

We are also working to assist law enforcement agencies in their training efforts. Our work with local and state authorities and our investigations are designed with one goal in mind — to guarantee the integrity of law enforcement and ensure that those who enforce the law are not above the law.

I also believe we need to critically examine our approach to the crime problem. It should be a more comprehensive approach that includes education, prevention and treatment, along with prosecution and prison. We must let the nation know that we can never build enough prisons if all we focus on is putting away the person who has already committed the crime and not take stronger measures to prevent crime in the first place. And we must start early, with the children, and raise them to have a sense of right and wrong, to develop the Concept of reward and punishment, and to give them a chance to have a safe, constructive future.

Unless we focus on rebuilding our communities around families and children, no amount of prison cells in the world will be enough 18 years from now for all the children that were neglected along the way.

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Conclusion

It is tempting, in an uncertain and rapidly changing world and global economy, to turn inward, to protect what we have and let others fend for themselves. Listening to those who would give us scapegoats for the scarcities that all of us face is as attractive now as it has been for others in other times. But our challenge is to do the opposite — to recognize our common humanity. It is a challenge that has always been at the heart of civil rights: A challenge of conscience.

We must all do our part. As elected officials, as business leaders, as teachers, as parents. Dr. King said once that he

liked "to believe that Birmingham will one day become a model in southern race relations." He hoped that the sins of yesterday "will be redeemed in the achievement of a bright tomorrow." And he had this hope because, "once on a summer day, a dream came true. The City of Birmingham discovered a conscience." If we teach our children about tolerance and understanding, and if we show them in how we live our lives that those ideals are not just Sunday school values, but beacons to live by, that bright tomorrow will come for all of us.

End of Section



1/3

Interview

OFCCP

Wilcher Says Agency Will Meet With CEOs, Watch Systemic Problems In Wake Of Texaco

Employers doing business with the federal government can expect in 1997 a continuation of major initiatives, including targeting federal contractors who have never been inspected, launching "tester" programs in Chicago and San Francisco, and finding corporatewide discrimination, a top Labor Department official told BNA.

The Office of Federal Contract Compliance Programs' efforts to "retool and refocus" the way it determines whether federal contractors are fulfilling affirmative action obligations also includes regulatory changes that are edging closer to completion, according to Shirley J. Wilcher, who heads OFCCP.

In its quest "to find and eliminate discrimination," Wilcher said the agency will reach out to human resource managers who develop corporate affirmative action plans, and, equally important, to chief executive officers and middle managers who must "get the message" that affirmative action is a pro-active approach for preventing workplace discrimination.

Wilcher made her comments in a Dec. 12 interview with BNA where she mapped out the priorities and possible new programs for 1997. OFCCP is the Labor Department agency that enforces several statutes that require federal contractors to implement affirmative action programs and guarantee equal employment opportunity. Wilcher has held the post of deputy assistant secretary for federal contract compliance since February 1994 and said she will continue to serve "at the will of the president."

Eyes Greater Scrutiny Of Corporatewide Practices

The widely publicized Texaco Inc. discrimination case shows the need for the Labor Department to "refashion" the way it inspects federal contractors' affirmative action programs to look for "patterns and practices of discrimination," she said referring to a race discrimination case that was filed on behalf of some 1,500 minority employees at Texaco. The company agreed to pay \$115 million in damages and \$26.1 million in wage increases to settle the charges (222 DLR AA-1, 11/18/96).

Wilcher said the Texaco case reinforces the importance of OFCCP "connecting" more with CEOs, and not just HR professionals. She said she hoped the Texaco case would drive home the point that CEOs must ensure "the message" gets down to the middle manager. To do this, she said the agency is planning to convene a meeting of CEOs to discuss "best practices" and to look at how companies have developed affirmative action programs to

insure managers are held accountable for the programs' implementation.

She said she is intrigued by the notion of OFCCP looking corporatewide for discriminatory practices, not just at single facilities. "Where there are problems corporatewide, as there appear to be in Texaco, I want to begin to look at the entire corporation," which she said means "refashioning" the way OFCCP does compliance reviews. She said she expects the agency will be able to achieve this by making final some regulatory changes that were proposed earlier this year, and through administrative changes.

"The challenge is re-educating and retraining staff to look at discrimination from a systemic standpoint," she said during an hour-long interview.

For the past year, the agency has been working on "a systemic training package" to reflect its shift toward focusing more on identifying system-wide discrimination, she said. This is a departure from the approach taken in past Republican administrations, particularly during the Reagan era, she said. The GOP strategy for OFCCP was to focus primarily on the "individual victim as opposed to the class or system-wide discrimination," she said. As a result, the agency has had to retrain and "retool" and retrain staff to look for patterns and practices of discrimination, she said.

Wilcher said OFCCP's "relative silence" under previous GOP administrations also has forced the agency to "re-educate" federal contractors "even those who should be pretty well versed in our program." She said OFCCP is trying to re-emphasize to the contracting community the differences between federal affirmative action under OFCCP—which she said is aimed at preventing discrimination—versus affirmative action that is called for under Title VII of the Civil Rights Act—which she described as "essentially a remedy" for discrimination. "It's very basic, but people still don't understand that that is a fundamental difference between this program and other affirmative action programs," she said.

Efforts At Texaco, Donnelley

On the issue of Texaco, OFCCP is not a bystander. The agency has conducted compliance reviews in the past and is the midst of conducting another now, she said.

Wilcher said she could not predict when the agency's review of Texaco would be completed. That, she said, depends on the findings and how cooperative Texaco is, she said. OFCCP is working with the Equal Employment Opportunity Commission and the Justice Department "to coordinate," efforts, she said, particularly in the fashioning of affirmative action remedies.

In another highly charged case, involving R.R. Donnelley & Sons Co., OFCCP is still considering

its options, she said. In that case, a group of former employees is seeking \$500 million in damages from the printing giant in a class action race and age discrimination suit filed last month (230 DLR A-6, 11/29/96). Wilcher was on hand during a public forum that the Rev. Jesse Jackson recently held in Chicago to air allegations of race and age discrimination at Donnelley. The company prints telephone directories, magazines, and federal tax forms—the latter making it a federal contractor.

Wilcher described former Donnelley workers' testimony as "heart-rending" and said that OFCCP would "obviously work with whoever chooses to file a complaint" to help resolve any discrimination problems at Donnelley. When asked whether OFCCP was formally investigating Donnelley, Wilcher said the agency was "exploring our options in terms of compliance reviews or complaint investigations."

Wilcher said that "Texaco certainly symbolizes the fact that there continues to be a problem with discrimination in this country." The 1994 election, she said, prompted a debate on whether discrimination still exists and the need for affirmative action, she said "Texaco answers that question very clearly and explicitly." In addition to cases like Texaco, the list of "egregious" cases that OFCCP has compiled also provides "ample evidence that discrimination still exists and it exists in every part of the country."

She said it was "unfortunate" that when the Civil Rights Act of 1991 was signed that the measure did not include giving OFCCP authority to obtain punitive damages. "We're looking into that," she said, adding, "it's certainly on my wish list."

Agency 'On Track' With New Rules

Wilcher said the administration is "on track" with its efforts to change the way OFCCP operates and targets its resources and that she expects to continue to make headway in 1997. Wilcher has proposed revamping current regulations through a two-part proposal, with an eye toward streamlining discrimination and affirmative action obligations.

OFCCP's "tiered" compliance proposal, known as the 60-1 proposal, was published in May 1996 (98 DLR A-1, 5/21/96). The second part, known as 60-2, will more specifically address written affirmative action plans, but it has not been published yet.

Wilcher said OFCCP was pulling together a final 60-1 package for the Office of Management and Budget to approve. The agency hopes to publish an advanced notice of proposed rule-making on 60-2 by mid-January, she said.

The 60-1 proposal essentially would codify the "expedited review" process that OFCCP's Seattle Regional office launched as a pilot program, Wilcher explained. The pilot program involved asking federal contractors to provide information that OFCCP used to determine whether an on-site review is necessary. The OFCCP proposal picks up that theme in that the proposal would "allow us to have a variety of ways of reaching the contractor community." Where OFCCP did not see problems, "we'd move on."

Wilcher said the proposal would be "expanding our reach, but reducing the burden."

She said as soon as the regulatory changes are in place, particularly the 60-1 requirements, the agency "would start in earnest to make the expedited review process a reality nationwide." Wilcher also said the agency planned to meet later with groups of contractors within the same industry "to have a chat about problems that we have seen" for those particular industries.

In the meantime, however, the agency plans to continue to focus its compliance reviews on the areas of "greatest need," she said, including targeting contractors who have never been inspected. Wilcher said these first-time reviews have been among the "most productive" of OFCCP's new initiatives. She said OFCCP has discovered that many contractors wait until a compliance review is scheduled before they focus on their responsibilities under OFCCP regulations.

"An affirmative action plan should be an integral part of the way [contractors] do business," she said. She said reviews at First Alabama Bank and TIMCO "are case studies in what happens when you don't use affirmative action. They were all preventable problems," she said referring to cases on OFCCP's list of egregious discrimination cases (225 DLR A-1, 11/21/96). She said contractors that are unsure of how to comply with OFCCP regulations should get in contact with their regional office or the OFCCP ombudsperson before a review is scheduled. The ombudsperson can be reached at 1-888-37-OFCCP, she said.

Other initiatives that OFCCP will continue in 1997 are the agency's glass ceiling reviews and "special initiatives" from the regions, such as the emphasis on construction in Denver, the "best practices" partnership in the Chicago region, and the "expedited" review process in the Seattle region, she said.

Chicago, San Francisco May Get Tester Programs

Wilcher said she is still considering whether to expand two initiatives launched in Region III, but it appears the question is more when and how to expand the programs—not if. One project involves sending pairs of white and black male job applicants into financial institutions, primarily banks, as "testers" to root out discriminatory hiring practices against black males. The other initiative looks at whether women and minorities are being discriminated against in terms of compensation. The region covers Delaware, the District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia.

The upshot of the tester pilot program, Wilcher said, is that the agency found "anecdotal information that suggested possible discriminatory hiring practices." Wilcher said as a result of the tester program, the agency plans to schedule compliance reviews in workplaces where the agency found "problems." OFCCP also plans to meet with representatives of the banking industry in January "to discuss the overall scope of our findings and to urge more pro-active measures," she said.

Region III Director Joseph DuBray has forwarded an initial report on the tester program,

Wilcher said, which she described as an internal document that will help the national office "craft the next stage."

Wilcher reiterated that OFCCP is exploring whether to expand the tester program to include women and Latinos. Wilcher said the agency is considering a tester program that includes Hispanics in Chicago and a tester program involving women in San Francisco. The industries that OFCCP would target in these tester programs would "depend on the issues of greatest concern." Wilcher said she hopes the tester programs will be launched early next year.

Praises For The 'DuBray Approach'

On the second initiative, Wilcher said she "certainly supports" Region III's "creative" approach for detecting whether women and minorities are paid less than their counterparts. The technique has been dubbed the "DuBray approach" after the regional director who launched it. In that region, OFCCP uses the contractor's own analysis of which jobs are equal or comparable and then examines whether women and/or minorities are employed in those jobs but paid less than men.

Wilcher said the technique "seems to be productive." Using this approach, the region has netted nearly a dozen settlements over the past two years yielding nearly \$2 million in back pay and compensation (192 DLR C-1, 10/4/95). She said some other regions already have been trained on how to use the approach and that eventually all the regions will be provided that training. However, she said a decision on whether to formally expand the program will depend on "our own internal analyses."

Wilcher also said the agency was still in the preliminary stage for deciding whether to include "perks" such as stock options and expense accounts in investigating compensation disparities.

Looking At New Technology, New Congress

Wilcher said the agency is building the "technological infrastructure" needed for the kinds of changes she thinks are needed for the 21st century. She said her goal is to someday have the technology in place that would allow federal contractors to provide OFCCP with information electronically, which she described as "a paperless review." The agency has purchased more computers and doing more of its analysis, such as impact ratios and standards deviations, using computers.

Wilcher said the agency is "taking a hard look" at issues raised by contractors using the Internet and other computerized job banks for obtaining resumes. However, she said OFCCP has no plan of redefining the term "applicant," an area of concern for some contractors.

In a related issue, she defended an approach used at the regional level that involves sending postcards to applicants of federal contractors asking them to identify their race and/or gender.

"One of the most important things is to know who the applicants are," she said. "And unless contractors can find another way of getting at those data, we're having to explore tear-off sheets and other options," she said.

Looking ahead to the new Congress, Wilcher said it was "hard to predict" what the 105th Congress will take up the legislation introduced in the last Congress by Rep. Charles Canady (R-Fla) and then Sen. Robert Dole (R-Kan) that would have essentially eliminated the programs that OFCCP enforces. In light of the publicity surrounding Texaco and other discrimination cases, Wilcher said she hoped lawmakers "would come to understand the importance of affirmative action as a preventive tool."

Wilcher said it would be "astounding" to her if Congress eliminated federal affirmative action requirements for contractors, saying such a move would leave "very few remedies to eradicate problems of discrimination" in the workplace.

Rebuts Alvarez

Wilcher also took the opportunity to rebut several characterizations by management attorney Fred W. Alvarez (238 DLR A-4, 12/11/96).

Wilcher said she had the "utmost respect" for Alvarez, a former EEOC commissioner and Labor Department official, but that he "missed the point" as it relates to affirmative action and OFCCP. "At the OFCCP, affirmative action has always been a pro-active measure, not simply a remedy for discrimination."

She rejected any notion that OFCCP was not "comfortable" enforcing affirmative action because of legal and political debates and she dismissed Alvarez's suggestion that the agency was emphasizing monetary relief as a way to impress the Congress. "The emphasis is on discrimination and eliminating it, which results in monetary relief," she said. "Monetary relief is not an end in itself but only a reflection of the extent of discrimination. My goal is to find discrimination and eliminate it."

Wilcher also took exception to Alvarez's claim that OFCCP under the Clinton administration had been slow in embracing the Bush administration's glass ceiling review initiative. "We've been into the glass ceiling [initiative] since day one," she said. And while she said she would love to be able to do 100 glass ceiling reviews in 1997, as Alvarez predicted, the likelihood is that it will be less than half of that because of budget restraints, she said.

Finally, she said she was "dismayed" that Alvarez would recommend that contractors resist OFCCP efforts to take documents off the premises during glass ceiling reviews. "We have the authority to take data off site and will assert that authority in every case."

—By Pamela M. Prah

End of Section



1/2

News

Age Discrimination**Attention To Federal Waiver Rules Urged By Attorneys Addressing ABA Panel**

NEW YORK—The effective use of waivers and releases is an employer's first line of defense in reducing legal exposure associated with reductions in force, a management attorney said Dec. 10 at a panel on workforce restructuring sponsored by the American Bar Association.

Special attention must be paid to waivers of Age Discrimination in Employment Act claims by employees age 40 and over because the releases must comply with the Older Workers Benefit Protection Act, said management attorney Patrick W. Shea of Paul, Hastings, Janofsky & Walker in Stamford, Conn.

OWBPA codifies the contract-law principle that all releases must be knowing and voluntary, Shea explained. The law includes specific time periods for reviewing and revoking an agreement, he said. The law requires that employers provide information about people eligible and those selected for group exit programs, he said. OWBPA applies both to voluntary exit incentive programs and forced layoffs, Shea said.

Although no federal statute governs releases of non-ADEA claims, if a waiver passes muster under OWBPA, then employers can feel confident that it will be deemed valid for other types of claims, said plaintiffs' attorney Raymond C. Fay of Bell, Boyd & Lloyd in Washington, D.C. Most employers use one release form to address all employment-related claims, he noted.

The attorneys spoke at a two-day program sponsored by the ABA's Continuing Legal Education National Institute.

Negotiated Rulemaking

Congress passed OWBPA in 1990 to ensure that releases of ADEA claims would be knowing and voluntary and to avoid supervision of all releases by the Equal Employment Opportunity Commission, Shea observed.

In its first effort at negotiated rulemaking, EEOC selected a 20-member advisory committee composed of employee and employer representatives and commission personnel to develop a proposed rule. In October, EEOC voted to send a proposed rule through the necessary administrative process. EEOC has solicited interagency comment and a 60-day comment period will commence when the proposed rule eventually is published in the *Federal Register*.

Like OWBPA, the proposed rule is the result of compromise, Shea said, explaining that it addresses some issues in a vague fashion and does not address some highly contentious issues at all. For example, the committee did not address

whether an employee who challenges the validity of a release is deemed to have ratified it if he or she fails to tender back the consideration, whether noncompliance with the OWBPA requirements constitutes an ADEA claim, and whether OWBPA bars mandatory arbitration provisions, Fay said.

Proposed Rule Leaves Some Open Issues

The proposed rule states that the release must be in writing and must specifically refer to ADEA claims, Fay said. It is unclear whether the release can incorporate other provisions by reference or must contain all provisions in one written agreement, Fay said. He also questioned whether OWBPA will affect case law enforcing settlement agreements that have not yet been reduced to writing or signed when attorneys represent to a court or opposing counsel that their client has agreed to the settlement.

OWBPA requires that the release be understandable, and the proposed rule borrows from Labor Department regulations on the Employee Retirement Income Security Act, Fay explained. The language must take into account the level of comprehension and education of typical participants; limit or eliminate technical jargon and long, complex sentences; not be misleading; and present advantages or disadvantages without exaggerating the benefits or minimizing the limitations.

The committee "ducked" on deciding whether a waiver must sometimes be provided in a language other than English, Fay said. It also is unclear whether "understandable" is an objective or subjective standard, he said. While OWBPA prohibits waiver of claims that may arise after the release is executed, Fay said that the proposed rule clarifies that agreements to perform future employment-related actions—such as to retire or leave employment at a future date—still may be enforced.

The statute provides that "the party asserting the validity of a waiver shall have the burden of proving . . . that a waiver was knowing and voluntary." Employers will likely argue that their burden extends only to whether they met the laundry list of OWBPA requirements and that the former employees have the burden to show fraud or duress, Fay predicted.

Additional Consideration For Release

OWBPA requires that a waiver be "in exchange for consideration in addition to anything of value to which the individual already is entitled." The proposed rule provides that an "employer is not required to give a person age 40 or older a greater amount of consideration than is given to a person under the age of 40," solely because of membership in ADEA's protected class.

Fay predicted that employers will argue that any additional consideration is sufficient. Employ-

ees will argue that if an employer customarily offers a particular benefit in severance packages, it cannot be used as additional consideration for a waiver, he said.

The committee members were unable to agree on what happens if the employer terminates a benefits program and later reinstates that package of benefits in exchange for a waiver, according to Fay. They were not willing to compromise on a minimum period of time between the previous offer and the use as consideration for a waiver, he said. Under the proposed rule, if a previously offered benefit was eliminated in violation of law or a contract, it cannot be reinstated as consideration, Fay explained.

Time Periods

OWBPA requires that employees be given 21 days to review an individual waiver agreement or 45 days for a group program. The proposed rule would allow employees to sign early as long as the employer does not induce it, Fay said.

The committee did not address whether employers can withdraw an offer during the employee's review period for nondiscriminatory reasons, such as a drastic business change, or whether employers can offer a group exit incentive program that applies only to the first 100 takers, Fay said. Employers can make an offer contingent on a minimum number of employees signing up, but the effect is to lengthen the review period, he explained.

Each employee has seven days after execution of a release to revoke the agreement. Under the proposed rule, this revocation period cannot be shortened, even by agreement of the parties, Fay said. The agreement does not take effect until expiration of the revocation period.

The proposed rule states that the review time period runs from the date of the employer's final offer and that "material" changes restart the running of the clock, but the parties can agree that changes do not restart the clock, Fay said.

Information Requirements

Shea said that OWBPA's "vague and indefinite" information requirements give him "fits" in advising employers. Both for group layoffs and voluntary exit incentive programs, employers must provide written information regarding which groups of employees are covered, eligibility factors, time limits, the job titles and ages of all individuals eligible or selected for the program, and the ages of those not eligible or selected.

Because courts have found that a group program affecting as few as four employees triggers the information requirements, Shea said, "Employers have to be sensitive when two or more workers are going out the door at the same time for the same reason."

When employees are selected on an individual basis and have an opportunity to negotiate the benefit package, then the employer has a good argument that the information requirements do not apply, he said. However, Shea advised that if in doubt, employers follow OWBPA's information and time-period requirements.

The proposed rule requires that employers must give the information to each employee asked to sign a waiver rather than merely make the information available at a central location. Shea noted that providing such information can be particularly burdensome to employers in large-scale, voluntary exit incentive programs.

2/2

Age Discrimination

Employment Attorneys Offer Advice On Attacking, Defending Layoff Decisions

NEW YORK—Whether employees selected for layoff are older than those retained goes a long way in deciding whether to sue for age discrimination, a plaintiffs' attorney said Dec. 9 at an American Bar Association conference on workforce restructurings.

Often, it is hard to obtain the information needed to decide whether to take an age discrimination layoff case, said plaintiffs' attorney Markus L. Penzel of Garrison, Phelan, Levin-Epstein & Penzel in New Haven, Conn. Penzel said that he looks for evidence that the employer treated employees under age 40 more favorably.

Penzel said he also looks at whether layoff rankings were adjusted to include or exclude particular employees for age discriminatory reasons, whether employees recently were transferred into or out of the targeted unit, whether the plaintiff received high performance evaluations until shortly before the layoff, and whether a new hire took over the plaintiff's job duties.

Penzel added that he seeks evidence of disparate treatment in decisions about redeployment of laid-off workers, observations that all the employees referred to an outplacement center are over 40, and job advertisements describing the same duties. There are no "stray" remarks about older workers and he will not rule out using age-related

remarks made years earlier by the decision-maker, Penzel said.

Attack Individual Layoff Decisions

Plaintiffs' attorneys should examine the former employee's work skills and history and try to identify other employees who should have been laid off instead, Penzel suggested. Instead of questioning the employer's overall justification for a reduction in force, Penzel said that he focuses on why the plaintiff was laid off.

If a laid-off employee has not been asked to sign a release and the initial evidence is not strong, Penzel said he advises the person to wait, mitigate damages by finding other work, and find out who takes over the job duties.

If offered a severance package in return for a release, the employee and attorney have less time to decide whether to pursue an age bias claim, Penzel said. Employees have 21 days for individual terminations and 45 days for group terminations to decide whether to sign a release. He analyzes the age census information employers are required to give employees in group terminations to look for disparate impact on older workers.

Although he has succeeded in having releases deemed invalid, Penzel said that he is less likely to take the case of a laid-off employee who signed a release. Courts are split on whether such individuals must "tender back" the consideration they received from the employer in order to challenge the release.

Depending on the circumstances, it is sometimes good to send the employer a demand letter in an effort to resolve the claims informally, Penzel said. With employers who are unlikely to be receptive, however, he will file an EEOC charge. The employer's written responses to EEOC can be helpful not only in proving the merits but in deciding whether to bring the case at all, he said.

Penzel advised plaintiffs' attorneys who attack the release to include a claim for declaratory judgment under the Older Workers Benefit Protection Act and move quickly for summary judgment and a stay of other proceedings. This minimizes damages claims by the employer if the release is upheld and "clears the deck" of the release issue if the employee wins, he said.

Defending Layoff Selections

Management attorneys should scrutinize each layoff decision and look at overall statistics, not just of employees who are over and under age 40 but also those over 50, 55, and 60, said attorney Susan K. Krell of Jackson, Lewis, Schnitzler & Krupman in Hartford, Conn.

When a company contacts outside counsel at the last minute about layoffs, Krell said the attorney needs to plan for the worst-case scenario and decide which company official will explain the layoffs at trial and what supporting documents can be used. With non-U.S. parent companies, attorneys should beware of "inappropriate" written statements by officials who are not familiar with U.S. anti-discrimination laws, she warned.

1/2

The confusion over civil rights requirements and enforcement

Your Nov. 12 account of the activities of the U.S. Department of Education's Office for Civil Rights (OCR) ("Federal bias watchdog overzealous, some say") is seriously misleading. Indeed, as the article quotes me as saying, "I'm not shy about enforcement," but it should be clear that all actions taken during my tenure have been based on long-standing legal principles consistent with OCR's enforcement responsibilities.

Your article fails to acknowledge that OCR is pursuing a balanced enforcement agenda, focusing on cooperation with state and local authorities, emphasizing prevention over "gotcha" compliance activities and seeking partners in fighting discrimination. We reject a false choice between ignoring and overreacting to civil rights issues, and by working cooperatively, we save taxpayer dollars while remaining focused on protecting the rights of students.

In addition to failing to recognize OCR's common-sense approach to problems of discrimination, your article contains at least three major errors:

First, you suggest that under Title IX, OCR has required schools to transfer athletic resources from male programs to those for female students. Not true. OCR has never required such a transfer. The

requirement is that equal athletic opportunity be provided. OCR's enforcement of the statute has long been guided by a published policy that has remained the same during the Reagan, Bush and Clinton administrations. In 1996, we issued a policy clarification providing more detail and explaining how OCR's long-standing policy interpretation should be applied, but with no change in principles or standards. In fact, this policy clarification was circulated widely for public comment prior to being issued in final form, and those who responded agreed that the clarification helped explain OCR's long-standing policy.

Similarly, policy guidance for student-on-student sexual harassment was published Aug. 14, seeking public comment — covered by Title IX's prohibition on sexual harassment. This guidance is consistent with Chief Justice William Rehnquist's opinion for the Supreme Court in the Meritor Savings Bank case. The guidance clearly and repeatedly states that the age of the students involved needs to be considered. The response has been overwhelmingly positive. For instance, the Maryland Department of Education said the guidance "is very comprehensive and answers many practical questions about ... harass-

ment." The University of Maine characterized the guidance as a "godsend," noting that in "one convenient place [it provides] the clear implications of the ... law."

Finally, I would like to point out that the Bush administration did not rule that race-based scholarships were illegal. While my predecessor, Assistant Secretary Michael L. Williams initially took that position, then-Secretary of Education Lamar Alexander backed away (in the face of a significant negative reaction) in favor of a General Accounting Office review. That GAO report, consistent with controlling Supreme Court case-law, supports the award of scholarships based on race in cases such as those in which it is necessary to remedy the effects of past discrimination.

Civil rights requirements are often misunderstood and, unfortunately, your treatment of these sensitive matters only contributes to the confusion. There will always be critics who deny that real discrimination still exists, but the nation's 60 million students can rely on OCR to be a common-sense advocate for fairness and justice.

NORMA V. CANTU
Assistant secretary
Office for Civil Rights
Washington

Arrested in Southwest in Crackdown on Trade

By JAMES BROOKE

DENVER, Nov. 21 — In the largest crackdown in recent years on the black market trade in eagle parts, agents of the United States Fish and Wildlife Service today carried out raids in Arizona, Colorado and New Mexico, arresting eight men and issuing citations to eight tourist shop owners.

Wildlife Service officials said today that more than 60 bald and golden eagles were shot or trapped last winter in Jemez Pueblo in northern New Mexico in order to feed the clandestine traffic in feathers, wings, tails and talons.

"This time, we have been able to get the people responsible for the killing, not just the ones who were selling the items," Anne-Berry Wade, a spokeswoman for the wildlife service, said today in a telephone interview from Albuquerque, N.M. "This went down now because this is the migratory time for eagles."

Today, five Jemez Indians appeared before a Federal Magistrate in Albuquerque, where they were each charged with violating the Eagle Protection Act, a 1940 statute, and the Migratory Bird Treaty Act, a statute that has protected eagles since 1972. The five men are Mathew Chinana, David Chinana, Johnny Sandia, Harold Chosa, and Carlos Smith.

In Arizona, three Navajo men were arrested on the same charges on the Navajo Indian Reservation, Ms. Wade said. Andy White, Lee Gray and a third, unidentified Navajo man are scheduled to appear on Friday before a Federal Magistrate in Flagstaff.

In today's raids, wildlife agents seized five eagle carcasses, three feet and about 400 feathers. The men charged with killing the eagles face penalties of up to five years in jail and \$250,000 fines for each count.

A warrant is outstanding for an Indian goods trader in Lemitar, N.M., about 50 miles south of Albuquerque.

At Jemez Pueblo, about 40 miles north of Albuquerque, there were no telephones listed for the five men. A woman who answered the telephone at the tribal offices said that tribal leaders traveled to Albuquerque today, leaving instructions that em-

ployees of the tribe were not to talk to reporters about the arrests.

By the end of Friday, wildlife agents expect to have issued misdemeanor citations to about a dozen shop owners, in Tucson, Phoenix and other Southwestern tourist centers, for selling the feathers of protected birds.

The wildlife service's undercover investigation lasted for two years and sought to unravel the black market in eagle parts in the Four Corners area of Arizona, Colorado, New Mexico and Utah. Agents said that carcasses of the bald eagle, the national bird, were offered for sale for \$1,000.

Today's raids come as bird-watchers have recorded a soaring population of the national bird, a powerful raptor known for its distinctive white head, fierce eyes, hooked beak, and

curved talons.

The bald eagle population in the lower 48 states, which numbered as many as half a million in the early 1800's, had dwindled to about 800 in the early 1960s.

Partly to save the bald eagle, the United States in 1972 banned the use of DDT, a pesticide that eagles ingested through river fish. DDT was blamed for weakening shells of eagle eggs, causing widespread reproductive failures.

In 1978, the Wildlife Service listed the national bird as endangered through most of the lower 48 states.

But a quarter-century of habitat protection, prosecution of traffickers, and a ban on DDT has had a marked effect on the bald eagle population. In recent surveys conducted in midwinter, about 12,000 bald eagles have been counted in the lower 48 states. Last year, the wildlife service formally shifted the bald eagle's status to the less critical status of "threatened."

Today, eagles are tourist attractions, with "bald eagle days" held in wildlife refuges across the Rocky Mountain and Plains states during winter months when populations are

in Eagle Parts

highest.

At the same time, wildlife agents increasingly try to suppress the trade in eagle feathers, often sold to tourists as Indian-style fans, bustles, or adornments.

Last year, seven men were arrested in Oklahoma City at a fair where eagle feathers adorned Indian lances, drums and masks.

Early next year, Robert Gonzales, an artist from San Idelfonso Pueblo, is to go on trial in Albuquerque for shooting a bald eagle in February 1995. Religious reasons were cited by Mr. Gonzales, a former Bureau of Indian Affairs guidance counselor in the pueblo, which is on the northern side of the Jemez Mountain range. Wildlife officials counter that he

should have applied for an eagle carcass from the service's National Eagle Repository, outside of Denver.

Prosecutors won a conviction against Juan Maya, a sheep rancher who poisoned, shot and trapped eagles on his Wyoming ranch in the early 1990's. He received a 15-month prison sentence. Last summer, a Utah rancher, Gerald Bertagnole, was sentenced to 30 days in jail and a \$5,000 fine for poisoning eight bald eagles and one golden eagle in the early 1990's.

The biggest previous crackdown came in 1983, when Federal agents issued arrest warrants or search warrants against 50 people, largely Yankton Sioux, in South Dakota and Nebraska.

POSTCARD FROM CYBERSPACE / TERRY SCHWADRON

Freedom vs. Filth on the Internet

Whereas the Supreme Court later this month will hear arguments over the Communications Decency Act, and whereas the justices likely want to hear from one who is looking at the Net, now comes this unsolicited friend-of-the-court brief.

Honorable Justices, thanks for agreeing to settle this issue.

Although some may worry that folks are lining up to publish "indecent" Internet content for children, I happen to agree with the lower court decisions on this question: The law should be overturned because it is overly vague and in conflict with guaranteed freedoms of speech.

And I agree that the law as passed is almost impossible to enforce.

I know that the cases you usually weigh involve great issues of fact and broad issues of policy. By contrast, you ought to be able to settle this one in a single sitting and take the rest of the day looking at what's being published electronically.

For anyone not familiar with the question, the Communications Decency Act would impose penalties of up to two years in prison and fines on individuals who use a computer network in a way that would give minors access to "indecent" material that "depicts or describes, in terms patently offensive as measured by contemporary

community standards, sexual or excretory activities or organs."

I'd argue that the attempt to cleanse the Internet skipped many legal definitions that would make it enforceable or even understandable.

From what I can gather, the fear that children will somehow trip across digital pornography is enough reason for the Congress to run roughshod over constitutional freedoms:

Despite my government's reservations, I thought I should look at the issue directly. So I set out on a journey among triple-X sites.

Needless to say, my computer spit back thousands of choices.

I'll skip naming the destinations, but trust me, if you want raw, in-your-face images, words, movies, sound clips and very specific adult entertainment, the Internet is the place for you.

Most of what the hottest sex sites say is erotic is, well, somewhere between you've-got-to-be-kidding and exhausting just to consider.

Images mostly feature women—mostly white or Asian women—posing or performing in an endless parade of exhibitionism.

There is no mistaking it: This is way

beyond published magazines. It is enough for the faint of heart to stay away. There seemed to be no end to the combinations of coupling and imaginative lurid display.

But somewhere along this electronic route to instant moral decline, I made a discovery.

As many sites as I could call up stopped me and asked me to verify that I was over 18 years old. Often I was asked more than once or twice. Many asked for a credit card or verification from a third party like Adult Check. Only then, supposedly, would I be allowed into steamy inner sanctums of hot adult entertainment. Some sites offered a checkoff to deny access for my children.

Still, once I said I was of legal age, there was no check and no penalty for lying. It's as easy as asking an older sibling to buy beer.

At most sites, there were free sample pictures, small but explicit.

Then I was asked to cough up money. Most of these sites I saw were come-ons for pay-for-sex phone lines, for subscriptions, for the purchase of sex products. These sites are businesses.

For comparison's sake, I decided to check out some other areas that I consider "indecent" to see if there was an equivalent age limit.

Dialing up the Stormfront page or the Aryan Nations page is as easy as asking to see the Los Angeles Times.

No one asked for my age or restricted in any way files that outline how to hate, that suggest that the Holocaust was a hoax or that linked me with like-minded groups.

I searched for information about nuclear bombs without disclosing age and visited a couple of right-wing militia sites without interference.

Now, Honorable Justices, I think there are questions aplenty here that should make you stop this law from taking effect.

Clearly, there is no single standard of what is "indecent," or who should decide.

We don't know what constitutes "community" when information is being shared globally. Certainly Danish standards differ from Saudi standards.

But I'm really struck by the impracticality of it all. We basically want to keep pornography away from minors.

And the pornographers seem to agree. They appear to have decided that they can do business best when they ask for age verification.

I'm left with the question of who is protecting whom.

It sounds a bit like Jonathan Swift, but maybe we can ask the Supreme Court for a more radical, if ridiculous approach. Maybe

the Supreme Court could recommend that rather than this law, Congress instead outlaw lying about age—under penalty of being kept a minor indefinitely.

Apparently the Cook Islands in the South Pacific have just such an arrangement for people who violate environmental laws. If you are caught eating underage crabs, you can be stripped of "adult" privileges by a court.

If as individuals we want help at keeping digital pornography out of the home, there is a plethora of software filters now available, plus Internet access companies and commercial online services that will meet our needs.

The marketplace has considered the question and come forth with alternatives.

Let's recognize the adoption of the Communications Decency Act as salve for politicians who want an easy answer. For me, freedom of expression is sacrosanct; it is a basic tenet of who we are.

A slap at the 1st Amendment does not deserve your support.

Terry Schwadron is editor of Life & Style and oversees latimes.com, The Times' Web site. He can be reached via e-mail at terry.schwadron@latimes.com

121

Dead man voting

He was a Republican Party stalwart in Louisiana who lost his first bid for federal office. But he got a second chance when his victorious opponent was forced out of office amid charges of voter fraud and went on to a long and powerful political career in Washington. The dream of Louisiana senatorial hopeful Woody Jenkins? No, the record of Louisiana Rep. Robert Livingston, now chairman of the House Appropriations Committee.

Mr. Livingston lost narrowly to an organized labor-backed Democrat, Richard A. Tonry, in his 1976 congressional bid. But Tonry had to resign from Congress less than a year later, subsequently pleaded guilty to violations of federal campaign finance law and went to prison. Mr. Livingston then won the seat he holds to this day.

Now it is Mr. Jenkins who claims fraud. As early as this month, the Senate Rules Committee will decide whether to launch an investigation into a host of voting irregularities that he alleges cost him his seat. It wouldn't take many. After leading most of election evening in both statewide vote tallies and in exit polls, Mr. Jenkins wound up losing to Democrat Mary Landrieu by less than 6,000 votes out of some 1.7 million cast. That's less than two votes per precinct statewide.

In particular, Mr. Jenkins alleges that Democrats resorted to massive vote-buying, "phantom" voting, multiple voting and "vote-hauling" to defeat him. There is some independent evidence of abuse.

Investigators for a self-described voter-education group, the Virginia-based Voter Integrity Project, say they have been able to corroborate some of Mr. Jenkins' charges, among them that dead people — or people using their names — somehow managed to cast votes in the election and that the Democrats paid live people to vote.

In Rules Committee filings, Ms. Landrieu dismisses such allegations as "highly suspect and incredible," albeit without flatly denying them. The Jenkins campaign has affidavits (from unnamed people) to the contrary. One claims to have received \$700 as the driver of a van "picking up the people to go down there to vote at least 10 times or more." The driver said his supervisor was paying those in the van to vote and that at one point they had "to pick up some more money because they had run out of money."

Meanwhile, the New Orleans Times-Picayune reports, among other things, that a former assistant city attorney resigned in protest after being told to report for duty at Democratic campaign headquarters on election day rather than city offices. The attorney, who had been willing to campaign for the party on weekends, subsequently received a letter from his obviously bewildered superior, saying, "At no time during my tenure as City Attorney have you indicated

any problem with participating in campaign activities."

Apparently he was not the only victim of this kind of political arm-twisting. According to the Times-Picayune, the police superintendent, the assistant police superintendent and the city fire chief were among a host of 200 city workers assigned to campaign chores with the warning that there would be "consequences" for a failure to cooperate.

Mr. Jenkins himself raises questions that merit further inquiry by the committee, among them:

■ How to account for more than 400 mismatched signatures in 60 precincts — almost seven votes per precinct — in which handwriting in precinct registers does not match that on voter registration applications? (The campaign says it has access to only a fraction of the documents in Democratic strongholds.) Mr. Jenkins says this assessment comes from court-qualified handwriting experts.

■ Why were voting machines in a Democrat-leaning precinct unlocked and open before Jenkins representatives were present, as required by state law? Why were Jenkins representatives denied access to vote totals there?

■ Why has Mr. Jenkins not been given access to all precinct records? In audits of 30 precincts, Mr. Jenkins says he found 144 "phantom" votes, a sum which if extrapolated to the democratic city of New Orleans would mean some 2,100 phantoms!

■ How is it that, according to a computer analysis by the Jenkins campaign, more than 3,000 registered New Orleans voters reside at addresses listed as abandoned buildings by the Housing Authority of New Orleans? Of those 3,000-plus residents, 1,380 actually voted Nov. 5.

Ms. Landrieu claims that there was extensive use of poll-watchers during the Nov. 5 election — making vote fraud impossible — including those working on behalf of a former judge named Morris Reed who was running for district attorney. But Mr. Reed says he neither financed, recruited nor assigned poll watchers, and in fact requested that Attorney General Janet Reno send federal poll watchers, to no avail.

Given the history of vote fraud in Louisiana and the allegations of Mr. Jenkins, perhaps U.N. observers ought to be sent to Louisiana for the next election. But in the meantime, the Senate Rules Committee has to ensure the last one was fair.

The good news for Democrats is that the head of the committee is John Warner, whose most partisan jabs have always been reserved for his fellow Republicans. But even Mr. Warner ought to find unnerving the abuses reported in Louisiana. The committee should investigate Mr. Jenkins' claims, if not for his sake then for the sake of Louisiana voters, who deserve much better than they appear to be getting.

The Washington Times

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PAGE: A12

■ **GOVERNMENT DISCRIMINATION:** What can Air Force and Justice Department officials have been thinking of when they ordered that Jews and people with Jewish-sounding names be kept off a government project in Saudi Arabia?

That is a clear violation of the law forbidding U.S. companies from participating in the Arab boycott of Israel and Jews. It is no secret that Saudi Arabia — and other Arab countries — have long denied visas to Jews, and sometimes even to people who merely had an Israeli visitor's visa stamped in their passport.

Some believe that has begun to change somewhat, in light of improved U.S.-Saudi relations, as well as Middle East peace treaties. And in any case, in this instance the impetus for the anti-Semitic move didn't even come from the Saudis. It was an Air Force colonel who suggested excluding Jews and "Jewish-surnamed personnel." And it was approved by someone at Justice.

Thus a proposal for a job in Saudi Arabia by an outside contractor, CACI, Inc., contained a proviso that "No Jews or Jewish-surnamed personnel will be sent as part of the Document Acquisition Team because of cultural differences between Moslems and Jews in the region."

At least one Jewish employee who was turned down for the project has been paid for his pain. CACI got a fine of \$15,000 and had to sign a statement apologizing for assuming that "orders from two federal government agencies" were legal and for following them.

As to the Air Force and Justice Department, they too have apologized and promised in future to obey the law.

Which is what they should have done in the first place.

Jury Acquits Former Official At State Dept. of Visa Fraud

By William Branigin
Washington Post Staff Writer

A former high-ranking State Department official was acquitted yesterday of charges that he conspired to commit visa fraud while serving in senior positions in Washington and the Philippines.

John Adams, 57, was found not guilty after a three-day jury trial in Concord, N.H. Having served as deputy assistant secretary of state for visa services in Washington and

"He was authorized to issue visas, and [he acted] within his authority."

— Attorney Harry Starbranch

consul general in Manila, he was the highest-ranking U.S. diplomat to be charged with such an offense. He had faced up to 10 years in prison if convicted.

Adams was arrested in December after a year-long joint investigation by the State Department's Bureau of Diplomatic Security and Office of Inspector General.

An indictment announced by U.S. Attorney Paul M. Gagnon charged that Adams illegally issued a U.S. visa in Manila to a Thai

woman, Lalita Prasertadisorn, who was the wife of a personal friend and had been previously rejected by the U.S. Embassy in Bangkok for lying on her application. Adams advised her to get a new Thai passport in a slightly different name to foil a computer check and issued tourist visas to her and six other Thais in December 1993, the indictment charged.

Adams's attorney, Harry Starbranch, said after the verdict, "What Mr. Adams did was not a crime. He was authorized to issue visas, and [he acted] within his authority. There was nothing corrupt about that."

Starbranch said Lalita had been improperly denied a visa when she had applied previously and that she returned to Thailand after visiting the United States on the visa issued by Adams. Starbranch said he did not know what had happened to the other six Thais, whose visas were not at issue in the trial.

U.S. and Thai diplomats said three of the six were young Thai women who discovered upon arriving in New York that they were to be forced into prostitution. They managed to flee to the Thai consulate in New York and were later repatriated, the officials said.

"Anything about Thai prostitutes just didn't come into the picture" at the trial, Starbranch said. "There were no allegations that [Adams] had anything to do with that."

Adams was sent back to Washington in mid-1994 when his tour in Manila was cut short. He retired in January 1995 and moved to New Hampshire.

U.S. Will Review Reform Law for Schools

By MATTHEW PURDY

The Justice Department said it will review changes that the State Legislature made in the New York City school system in December, to determine if they violate the Voting Rights Act.

In a letter to state officials released yesterday, Isabelle Katz Pinzler, the acting assistant attorney general for the civil rights division, said that certain provisions of the law that shift power from the city's 32 elected local school boards to Rudy Crew "result in the de facto replacement" of those boards. The letter asked that all of the changes in the organization of the schools be submitted to the Justice Department for approval.

Federal lawyers could go to court to stop the changes if they determine that the provisions of the law violate the rights of minority voters. Simon Gourdine, the general counsel to Schools Chancellor Rudy Crew, said he believed the request by the Justice Department was procedural and that "we think, on the merits, this bill is very sound."

The issue, Mr. Gourdine said, is whether the shift of power away from the boards has the effect of disenfranchising the elected commu-

Critics say a law takes away local control; New York disagrees.

nity school boards.

The new law alters the election process for the school boards, but the more controversial changes involve stripping the boards of the power to unilaterally hire superintendents and other district officials. In particular, the new law gives the chancellor the power to choose a superintendent based on a list submitted by the local boards. He can also reject an entire list and request a new set of names.

School officials are particularly interested in a quick resolution of any dispute with the Justice Department, since the selection process for several local district superintendents is under way and Mr. Crew is eager to use his new powers to influence those decisions. A meeting between Mr. Crew and Justice Department officials is scheduled for next week. Lee Douglass, a department spokeswom-

an, said that the department had no comment on the letter.

Stephen Louis, the senior legislative counselor in the city Corporation Counsel's office, said that after the law was passed, city and state officials submitted some provisions of the bill to the Justice Department for "pre-clearance," or approval, to implement them. But the provision submitted for approval dealt largely with the more technical changes in electing the local boards.

Mr. Louis said that those provisions had not been submitted for approval because city and state lawyers felt they did not raise issues related to the Voting Rights Act.

Mr. Gourdine said that the law allows officials to remove some power from an elected board, but that "you just can't take the board and totally remove all of its powers." Lawyers from the city and the school district contend that the boards will remain an important part of running the schools, but opponents of the law have argued that the changes nullify the voice of voters.

The letter from the Justice Department warned that without Federal approval of the law, any changes being made in the operation of the schools based on the new law "are legally unenforceable."

Va. Asks High Court to Save Majority-Black Congressional District

By Ellen Nakashima
Washington Post Staff Writer

RICHMOND, March 7—Virginia will appeal a federal court ruling that the state's only majority-black congressional district is invalid because race was the main factor used to draw its boundaries, Attorney General James S. Gilmore III (R) said today.

A three-judge panel last month scrapped Virginia's 3rd District, which meanders 225 miles in southeastern and central part of the state and resulted in the election of Virginia's first black U.S. representative in more than a century, Democrat Robert C. Scott, of Newport News.

Gilmore, who filed a notice of appeal today with the U.S. Supreme Court, argued in his brief that Virginia had a "compelling interest" in creating the 64 percent black district in 1991 to fulfill requirements of the Voting Rights Act of 1964.

He said he also hoped the Supreme Court would give Virginia more direction in redrawing the district, even if it takes the case and rules against the state.

"If we're going to draw fair, equitable lines that will survive future lawsuits, we need clear guidance," Gilmore said. "We hope the Supreme Court will give us this guidance, whatever the outcome."

Scott, who was elected to Congress in 1992 with 79 percent of the vote and who won earlier races for the state House in mostly white districts, said the appeal "preserves our legal options."

But he urged the General Assembly to begin redrawing the districts now in case the appeal fails, so candidates who want to run next year will know where the lines are.

Gilmore's decision was praised by officials

of the NAACP Legal Defense Fund and the American Civil Liberties Union, codefendants in the suit. They said they will file an appeal on Monday.

A spokesman for Gilmore said politics played no part in his decision, although political analysts said the appeal might help the attorney general as he campaigns for governor this year.

Redrawing the 3rd District's lines would hurt Republicans, they predict, because it would place more black residents—most of whom vote Democratic—in neighboring congressional districts.

Two of four adjacent districts are held by Republicans.

"It is obviously in the best interests of [Gilmore's] party that the district stay as it is, because to redraw the lines would probably strengthen Democratic congressmen in neighboring districts and thereby make it

more difficult for Republicans to win those seats," said political scientist Thomas R. Morris, president of Emory and Henry College in Southwest Virginia. "With an elected attorney general, one cannot help but factor in partisan considerations when a decision is made on this sort of topic."

The move also should appeal to black voters in an election year, Morris and others said.

"It appeals to two factions," blacks and Republicans, said former governor L. Douglas Wilder, the state's first black elected governor and a strong proponent of the majority-black district. "It would be considered politically savvy."

Both Democrats and Republicans said they see little chance that the appeal will succeed, given that the Supreme Court has ruled as recently as last year that such "ma-

jority-minority" districts in Texas and North Carolina were unconstitutional.

"It's just going to cost the commonwealth a lot of money without any real possibility of winning," said Donald Moon, a co-plaintiff in the lawsuit and chairman of the 3rd District GOP.

State legislature committee chairmen said they may begin work this summer to come up with proposals for new district boundaries, although they said they aren't sure whether a special legislative session would be called to approve new districts this year.

Del. Marian Van Landingham (D-Alexandria), who chairs the Virginia House committee that would work on any redistricting plan, said she wants to wait to begin work until the Supreme Court rules in two similar cases that are now pending, involving districts in Florida and Georgia.

Those decisions are expected by June 30.

Va. 'black district' case to go to Supreme Court

By Andrew Cain
THE WASHINGTON TIMES

RICHMOND — Virginia Attorney General James S. Gilmore III will ask the U.S. Supreme Court to review a federal court ruling that Rep. Robert C. Scott's majority-black 3rd Congressional District violates the equal protection clause of the Constitution.

Mr. Gilmore will file the appeal in May to get further guidance on how state legislators should redraw Mr. Scott's 64 percent black district that stretches for 225 miles from Richmond to Hampton Roads.

A three-judge federal panel in Richmond ruled Feb. 7 that in 1991 Virginia lawmakers racially gerrymandered Mr. Scott's district in violation of the equal protection clause of the Constitution.

"There is little doubt that to establish a safe black district, the Virginia legislature drew a district with bizarre geographical boundaries," U.S. District Judge Robert

Merhige wrote.

Virginia is seeking "a clarification of the court's opinion as to what is necessary to come into compliance," the Republican attorney general said.

The ruling could affect seats in the majority-black districts in the state Senate and House of Delegates "so we have to be very sensitive and concerned about good lawyering on this," Mr. Gilmore said.

Mr. Scott, 49, the state's first black member of Congress since Reconstruction, called the appeal "a move to preserve the legal options of Virginia citizens." But in the same breath, he urged lawmakers to draw new boundaries without waiting for guidance.

"Attorney General Gilmore believes an appeal is the next logical step in this matter," said Mr. Scott, who is not up for re-election until 1998.

"While we go through this process, I hope the state legislature will craft new lines and adopt a

plan that will render an appeal to the U.S. Supreme Court unnecessary."

An appeal buys Virginia time, Mr. Gilmore said. It will prevent state legislators from tinkering with the lines before the Supreme Court rules this summer in two similar cases in Florida and Georgia.

Gov. George F. Allen does not appear in any hurry to call a special redistricting session. Once the court has ruled, Mr. Allen wants to hold public hearings in Hampton Roads and Richmond before lawmakers start drawing new lines.

"As much as I'd love to get in there and do my creative cartography, my greater concern is doing it right and legally and also looking out for the taxpayers of Virginia," the Republican governor said.

"Let's not waste taxpayers' money just screaming around down here with a General Assembly session," Mr. Allen said.

That means Virginia's next governor, probably either Mr. Gilmore or Lt. Gov. Donald S. Beyer Jr., a Democrat, may preside over the redistricting in the session that begins next January.

Wenatchee abuse-case figures turn to governor

By Valerie Richardson
THE WASHINGTON TIMES

The people once accused of child-sex abuse in Wenatchee, Wash., yesterday launched a telegram campaign aimed at persuading the freshman governor to investigate what they have described as a police-driven "witch hunt."

The Rev. Robert Roberson, the pastor who was acquitted of running a child-sex ring at his small Pentecostal church, said the accused hope to flood the office of newly elected Democratic Gov. Gary Locke with telegrams calling for a state investigation into allegations of misconduct by police, social workers and prosecutors.

Meanwhile, Republican state Sen. Pam Roach announced

Wednesday formation of a legislative subcommittee on civil rights that will look into instances of possible civil-rights abuses such as the Wenatchee case.

"We don't have a formal agenda yet ... but certainly Wenatchee is one of those that will be at the top of the list," said Republican state Sen. Joseph Zarelli, who will chair the panel. "Let's put it this way: It's one of the things that has driven us to this."

While he stopped short of calling for a formal probe into the Wenatchee charges, the announcement came as welcome news to the accused, who have spent the past two years lobbying unsuccessfully for a state or federal probe.

In February 1996, Attorney General Janet Reno rejected a request by Gov. Mike Lowry for a

federal investigation of civil-rights abuses. Mr. Lowry could have pursued the matter by calling for a state prosecutor but declined.

With the election of Mr. Locke in November, however, Mr. Roberson and his supporters are optimistic they will receive another hearing from state officials.

"We may have an ally once again in the governor's office with someone who really has the key to unlock the truth," said Mr. Roberson. "With the lawsuits coming up, we believe now is the prime time for the state to come aboard and help us. We've got to put a stop to it."

At least three civil-rights lawsuits have been filed by those accused of child sexual abuse, including one filed by Mr. Roberson, his wife and eight others who were

eventually acquitted or had the charges against them greatly reduced.

The telegrams are being sent via Western Union at a reduced rate. Addressed to the governor, they read:

"I am deeply concerned about the alleged violations of civil rights by Child Protective Services and law enforcement agencies in connection with the 'Wenatchee Sex Ring' investigations.

"Senator Zarelli's Law and Justice sub-committee on Civil Rights is looking into these issues statewide, but it lacks authority. Governor Locke, only you can appoint an independent prosecutor to Chelan and Douglas counties who can convene a grand jury investigation ... Can I count on you?"

Helping organize the campaign free of charge is Jay Otis, chief executive officer of GMS Communications Network in Sacramento, Calif. Mr. Otis said he is donating his time and resources because he underwent a similar ordeal as a child when social-services workers separated him from his parents.

"As a child, I had the same situation," said Mr. Otis. "So I do this for people in trouble."

More than 50 children were placed in foster care during the Wenatchee probe after their parents were accused of participating in a child-sex ring. All but one of the 28 adults found guilty, each of whom had court-appointed attorneys, are still in jail, while those who hired private attorneys saw their charges dismissed or greatly reduced.

U.S. Court Ruling Revives Challenges To Logging Curbs

By a WALL STREET JOURNAL Staff Reporter

WASHINGTON — A federal appeals court cleared the way for renewed challenges to the Clinton administration's Northwest logging restrictions.

The move means that the timber industry can pursue yet another lawsuit against the logging restrictions, which have sharply reduced cutting in Northwestern forests to help protect spotted owls and other wildlife. It could also spur new lawsuits from environmentalists, who don't think the restrictions go far enough.

The U.S. Court of Appeals ruling revives a suit filed by a timber industry group, the Northwestern Forest Resources Council, in 1994 in U.S. District Court in Portland, Ore. In the original case, Judge Thomas Penfield ruled that the suit could not proceed in his court, and should be filed in a separate federal court in Seattle that was already hearing challenges to the Clinton plan.

The appeals court disagreed, and said that Judge Penfield's ruling improperly denied the timber group's right to have its case "heard on the merits."

The Clinton logging plan has withstood numerous legal challenges, and several resource attorneys said the odds of its losing now are long. The timber group's suit alleges that the Clinton administration violated procedural requirements and ignored information that would have led to a less restrictive logging plan.

In an unusual twist, the Native Forest Council, a grass-roots forest-advocacy group in Portland, had filed briefs with the appeals court supporting the timber group's position. It plans a lawsuit of its own, arguing that had the Clinton administration not violated procedural requirements and ignored information, it would have allowed even less logging.

Asides

Clinton Rules

It must be bad enough for the White House having to deal with a new contributor eruption every day. But now the headaches of the first term are returning. On Friday, a federal appeals court resurrected the spotted owl controversy. Plaintiffs for the logging industry want to argue that if the gov-

ernment had followed the procedures set out in its own plan, more logging would have been allowed. But an environmental group says if you follow the procedures as written, less logging would be done. We're for both sides, on the assumption that whatever the rules were, the Clinton Administration undoubtedly failed to play by them.

Wildlife in Congress

THE CONGRESSIONAL Republicans put it about last year that they were backing off the harsh environmental positions that cost them support among voters after the 1994 elections. But they have left in charge of the important environmental committees members who seem not to have gotten the word. The latest example involves Chairman Don Young of the House Resources Committee. He has reintroduced legislation that mercifully failed last year whose effect would be to vitiate if not destroy the national wildlife refuge system. Interior Secretary Bruce Babbitt testified the other day that he would recommend a veto if the bills were sent to the president in their present form. He'd be right to do so; this one is a no-brainer.

The under-appreciated network of 509 refuges is larger than the national park system. Unfortunately, it has never been as well managed. As the name implies, the refuges are supposed to be held in reserve for wildlife. That doesn't mean no other activities—hunting, fishing, even grazing—can take place. But those should be incidental to the main purpose.

Over the years, the Interior Department has often failed to observe that distinction. It fell into the habit

of letting interest groups use the refuges to the detriment of the wildlife for which they ostensibly had been created. In 1993, in response to a lawsuit, the new Clinton administration agreed to begin the overdue process of weeding out these incompatible uses. The backward-looking legislation by Mr. Young would push in the opposite direction and elevate these other uses—hunting and fishing are the prime examples—into purposes of the refuge system, right alongside wildlife protection. Mr. Babbitt described it as a perversion that “scrambles the crucial distinction between ‘purpose’ and ‘use’ ” and would lead to chaos. Among much else, he observed that the bill apparently would give competing users the right to take one another to court. “The combinations” of possible lawsuits “are nearly as numerous as the lawyers looking for work,” he said. Rather, the government should be allowed to do well the basic job of providing protection; “then there will be ample opportunity for compatible recreation uses which depend on diverse and abundant wildlife.”

“In wildlife refuges, the conservation needs of wildlife [ought to be] paramount,” the secretary said. You might think that would be self-evident.

"TALK ABOUT CLEAN AIR PROBLEMS!"



Looking for More Than Advice

By Al Kamen
Washington Post Staff Writer

Shortly before he left office as secretary of labor last January, Robert B. Reich had a visit from Andrew M. Cuomo, President Clinton's choice to be secretary of housing and urban development. It seems Cuomo wanted to borrow some ideas from Reich on how to run a Cabinet office. It now seems he wants to borrow a whole lot more.

Since then Cuomo has been sending out feelers to old Reich staff members about coming to work for him at HUD. This week Todd Howe, who once worked for Cuomo's father in New York state and has served in a number of high-level jobs at Labor, announced he was going to HUD to work as Cuomo's deputy chief of staff. Department sources say he may take a number of other Labor staff members with him.

Nancy Kirshner, director of intergovernmental affairs at Labor, was interviewed by Cuomo this week for a similar job at HUD, and Susan King, assistant labor secretary for public affairs, is still reported under consideration for a similar post at HUD.

Hazardous Waste

■ This notice went around Tuesday at the Department of Energy:

"We are cordoning off certain restrooms at the Forrestal Building. We have discovered air in some of the plumbing lines. This can cause urinals to explode and toilets to expel both gas, water, and sewage. Please be extremely careful when flushing toilets and urinals!"

And exactly how are we to be more careful?

A DOE spokesman wasn't sure, though he said two people had been injured, apparently by exploding urinals, "but I don't know the extent of their injuries." The restrooms were brought back into service later that day.

Now we know why Sen. Pete V. Domenici (R-N.M.) is a bit suspicious of all those assurances by DOE that there won't be any hazard from that nuclear waste they want to bury in the West.

Career Moves

■ White House aide Ira Magaziner's bid for the undersecretaryship for international trade may have stalled somewhat in recent days, sources say, and other strong candidates remain very much in the running for that job, including: Robert Liberatore, a former aide to Sen. Robert C. Byrd (D-W.Va.) and college roommate of former White House counsel Jack Quinn who now heads the Chrysler office here; Joshua Gotbaum, assistant treasury secretary for economic policy; and former Commerce and congressional aide Edward J. Black, who runs the Computer & Communications Industry Association.

Drug control policy director Barry R. McCaffrey has named Hoover Adger Jr.—associate professor of pediatrics at the Johns Hopkins University School of Medicine and deputy director for adolescent medicine at the Johns Hopkins Hospital—to be deputy director of the Office of National Drug Control Policy.

Kerry Scanlon, after 10 years with the Washington Lawyers Committee for Civil Rights, another five at the

NAACP Legal Defense and Educational Fund and more recently in the Justice Department's civil rights division, is going private, starting a new practice at Kaye, Scholer, Fierman, Hays & Handler, where he'll be counseling companies on civil rights matters and doing plaintiffs work as well.

Calvin Mitchell, a former foreign service officer who was in the National Security Council press operation and then handling press inquiries at Treasury, is moving to New York to be director of communications and spokesman at the United Nations for Ambassador Bill Richardson.

A Little Help

■ In the "How's that again?" category, there was Clinton touring tornado-damaged areas Tuesday in College Station, Ark., running into 6-year-old Vernita Peaster, who says, "You make the laws."

To which Clinton replied: "I do. I abide by the laws and I make the laws. Congress has to help me." We're sure Congress will do everything it can.

Fowler's 'Pen Pal'

■ U.S. Ambassador to Saudi Arabia Wyche Fowler calls to say that his friendship with a 24-year-old Scottish physiotherapist was nothing more than "an innocent, friendly correspondence" and that he has not seen her since they met on a train in England last summer, when he was en route to his post in Riyadh.

Fowler's call Friday came in response to a column item that day about a letter he wrote the woman in which he spoke of his efforts to get Saudi permission for strikes against Iraq and his views of the Saudis in general.

What happened, he said, was that he left his coat behind on the train and the woman called the embassy later to find out how to send it to him. Thus began a correspondence of four or five letters back and forth mostly to try to get the coat back after it appeared to have been lost in transit.

There were a few telephone calls, he said, but those were mostly to discuss legal action against British tabloids that implied in November that he and the woman were having a romance.

After legal fees "well into five figures," he said in his call from Jeddah, he got a retraction from the tabloids and an apology for any implication that he was "acting improperly."

As for his discussing his ambassadorial activities, Fowler said, "I was answering her questions" and she was interested in the country because her father works in Riyadh.

"All I said [in the letters] was what had been in every newspaper" about the airstrikes. Of his views of the Saudis, "I wrote the same thing to 40 of my friends."

Fowler said he supposed the woman "was trying to keep me as a pen pal," but "I saw nothing [untoward] about it."

Now, he said, he's worried that Senate Republicans would "use this" to block his eventual confirmation—he's a recess appointee to the job.

And he never did get his coat back.

118