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[Justice, Department of - Confirmation Briefing Materials]

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- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a)(5) of the PRA]
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- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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AMERICANS WITH DISABILITIES ACT

DRAFT

1. Enforcement

Question: Since the Americans with Disabilities Act went into effect, the Civil Rights Division has received an enormous number of complaints, but has filed few lawsuits. What are your views on the Division's enforcement of the Act, and how do you plan to direct the Division in handling this vast number of complaints?

Answer: I plan to continue the efforts already begun by the Clinton Administration. Recently, the Department has taken an increasingly energetic role in enforcing this new law in filing suits that seek significant penalties. I plan to continue the Justice Department's important technical assistance efforts to educate both individuals with disabilities about their rights and covered entities about their obligations under the statute. ADA enforcement is a priority for this Administration as demonstrated by the fact that Attorney General Reno recently allocated additional personnel to the Civil Rights Division for its ADA activities.

AMERICANS WITH DISABILITIES ACT

2. Title III Refusals

Question: Under Title III of the ADA, the Civil Rights Division has refused hundreds of complaints that it has decided not to investigate. What can you do to change this?

Answer: While the Department cannot serve as the attorney for every individual who has a valid complaint, we should be as responsive as possible to individuals who complain that they have been the victims of discrimination. I plan to review the current enforcement strategy and priorities and will make any adjustments that appear necessary. In addition, individuals do have a private right of action independent of the government's enforcement program. Under my leadership, the government will participate as amicus curiae in private litigation where appropriate.

AMERICANS WITH DISABILITIES ACT

3. Disaster rebuilding

Question: There have been recent reports that compliance with the ADA will frustrate the rebuilding efforts after the Los Angeles earthquake or, at the very least, create significant additional costs. Can the Department waive the ADA requirements in this kind of emergency situation?

Answer: Those fears are truly unfounded and based on misinformation. ADA compliance will certainly not hinder rebuilding efforts in Los Angeles. For many businesses, the work will involve total reconstruction or major alterations. When Congress enacted the ADA, it found that adding accessibility features caused little, if any, additional cost at the new construction stage or when major alterations are involved. [And no, the Division has no authority to waive the requirements -- check]

CRIMINAL

4. Expanding Protections under Criminal Civil Rights Laws

Question: Do you favor an amendment, as passed by the Senate in H.R. 3355, that would extend the protections of 42 U.S.C. Sections 241 and 242 to any "person in" the United States rather than protecting "inhabitant[s] of" the United States?

Answer: The Civil Rights Division has taken a position favoring that change. I agree with that position because all persons physically present should receive the protections of these laws.

Background: H.R. 3355 contains such an amendment to resolve a conflict that has arisen within the courts of appeals over who is deemed to be an "inhabitant." In United States v. Otherson, 637 F.2d 1276 (9th Cir. 1980), cert. denied, 454 U.S. 840 (1981), the Ninth Circuit held that illegal aliens intending to stay in the United States for an indeterminate period were protected by the term "inhabitant," which it interpreted to "include all persons, without exception, present within the jurisdiction of the United States." Id. at 1285. Subsequently, however, the First Circuit, in United States v. Maravilla, 907 F.2d 216 (1990), held that a money courier who entered Puerto Rico in the morning and intended to leave that same afternoon, but was murdered, did not qualify as an "inhabitant" of the United States.

CRIMINAL

5. Death penalty in civil rights laws

Question: Do you favor efforts to add a death penalty to 18 U.S.C. Sections 241, 242, 245, and 247?

Answer: The Department of Justice has not formally taken a position on this issue. If I am confirmed, I intend to look into this issue. Civil rights prosecutions often involve sensitive investigative problems that would be exacerbated if those asked to cooperate with the investigation knew that the perpetrators would be subject to the death penalty. If the availability of the death penalty -- which would not apply in many cases -- undermined the overall effectiveness of our efforts to prosecute civil rights crimes, I would be seriously concerned.

Background: The Department has not opposed the death penalty for violations of these statutes, which form the basis for civil rights prosecutions of law enforcement officers who use excessive force and of perpetrators of hate crimes based on the race, ethnicity, or religion of the victim. In the Division's view, however, authorizing the death penalty for violations of these statutes may harm our enforcement effort for the following reasons:

- 1) It would hinder already difficult investigations by discouraging fellow police officers and hate group associates from cooperating in seeking the truth. Police "codes of silence" and shared beliefs of hate crime perpetrators already impede our ability to prove cases. The specter of a death sentence would only make it more difficult to secure cooperation from witnesses necessary to obtain convictions.
- 2) In prosecutions of police officers, jury nullification is a serious problem. Jurors have a natural tendency to identify with the officers and to dislike the victims. Juries would be even more reluctant to convict police defendants if the penalties were more severe than those already provided.
- 3) Finally, under the proposed amendments, the standard for imposing the death penalty would not be sufficiently clear. As amended, these civil rights statutes would authorize the death penalty if "death results." No premeditation would be required. Proposed section 3591, on the other hand, permits imposition of the death penalty only if the defendant caused the death of a person intentionally. We are concerned that this language, combined with the "death resulting" language of the statutes, may lead to confusion on the part of juries faced with reconciling the civil rights statutes with section 3591 and increase the likelihood that guilty defendants will be acquitted.

CRIMINAL

6. Racially Motivated Violence

Question: Section 245 of Title 18 prohibits racially motivated interference with certain "federally protected activity" such as going to school, voting, participating in state-funded or federally-funded programs or activities, or utilizing public facilities. Do you think that racially motivated street crimes fall within the language of Section 245? If not, do you think that the Congress should amend Section 245 to prohibit random racially motivated street crimes?

Answer: I think that racially motivated street crimes pose a very serious problem, and recognize that there are some who believe that Section 245 may not provide a basis for a federal prosecution of such conduct. The Division will consider whether Amendment of Section 245 may be necessary to clarify that such crimes are prosecutable as federal felonies.

Background: The Department is considering whether to propose amending Section 245 to make the intentional infliction of bodily harm because of animus based on the victim's race, color, religion, national origin, gender, disability, or sexual orientation a federal crime.

In any event, the Criminal Section has pursued a couple of cases recently -- one in Cicero, Illinois, and one in New Jersey -- on a theory that interference with someone because of race and because they are using a street or sidewalk is a violation of Section 245 (b) because a street or sidewalk is a facility administered by a local government. The Department had not previously prosecuted cases under that theory because Ramsey Clark, in 1968, told Sam Ervin that the language of the bill that became Section 245 was not intended to cover such situations.

CRIMINAL

7. First Amendment and Cross Burning

Question: How do you reconcile prosecuting people who burn crosses with the First Amendment's free speech protections?

Answer: The Civil Rights Division prosecutes cross burning cases under two statutes, 18 U.S.C. 241 and 42 U.S.C. 3631. These two statutes have been successful in prosecuting offenders who burn crosses at their victim's residences, thus interfering with the victim's fair housing rights. The Supreme Court has made clear that while the burning of a cross includes an expressive component, threats and intimidation are not protected expression under the First Amendment.

Background: The Civil Rights Division generally prosecutes cross burning cases under two statutes, 18 U.S.C. 241 (conspiracy to injure, oppress, threaten, or intimidate individuals in their exercise of federally guaranteed rights), and 42 U.S.C. 3631 (interference with housing rights through force or threat of force)

To convict under either statute, the government must show that the defendant willfully threatened or intimidated a victim, because he or she was exercising his or her rights. Under Section 3631, the government must also show that the defendant used force or threat of force. While the burning of a cross includes an expressive component, threats and intimidation are not protected expression under the First Amendment. Rankin v. McPherson, 483 U.S. 378, 386-387 (1987); Boos v. Barry, 485 U.S. 312, 325 (1988). The government must, of course, prove that the cross burning was intended to be a "true 'threat'" rather than merely "political hyperbole," or expression of views. Watts v. United States, 394 U.S. 705, 708 (1969). This distinction requires a case by case examination of the facts. Generally speaking, however, the burning of a cross at a Klan rally at an isolated location would be regarded as protected expression, while the burning of a cross in the yard of a black family living in a predominantly white neighborhood, by defendants who had expressed their desire to drive the family out of their home would be unprotected, and therefore criminal conduct under both Section 241 and Section 3631.

CRIMINAL

8. R.A.V. and cross burning

Question: How does this analysis square with the Supreme Court's decision in R.A.V. v. City of St. Paul, Minnesota, 112 S. Ct. 2538 (1992)?

Answer: In R.A.V., the Court stated that "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." The Division's prosecution of cross burners does not raise R.A.V. concerns because the federal statutes are designed to prohibit threats, intimidation, or interference with individuals exercising their federally guaranteed rights, not because they have expressed racist views. Thus, there is no First Amendment violation.

Background: In R.A.V., the Supreme Court struck down, as violative of the First Amendment, a municipal ordinance that prohibited certain expression "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." 112 S. Ct. at 2541.

The Supreme Court accepted the Minnesota Supreme Court's interpretation of this ordinance as applying only to "fighting words," which generally are not protected by the First Amendment. 112 S. Ct. 2542. But, because the ordinance was applicable only to such expression based upon "race, color, creed, religion or gender," the Court declared it to be an impermissible content-based restriction on speech. Id. at 2543-2545, 2547-2550. The Court distinguished the ordinance, which was directed at expression, from "laws directed not against speech but against conduct," but which might "incidentally" reach expression. Id. at 2546. As examples of such laws, the Court listed a number of civil rights statutes, including the prohibition of sexual harassment in Title VII and in EEOC's regulations, 42 U.S.C. 2000e-2; 29 C.F.R. 1604.11 (1991); as well as 18 U.S.C. 242; and 42 U.S.C. 1981 and 1982. As the Court stated, "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." Thus, where the government prosecutes cross burners, not because they have expressed racist views, but because they have threatened, intimidated, or interfered with individuals exercising their federally guaranteed rights, there is no First Amendment violation.

CRIMINAL

9. 8th Circuit and cross burning

Question: How do you reconcile the government's cross-burning prosecutions with the recent en banc decision from the Eighth Circuit, United States v. Lee, 6 F.3d 1297 (1993)?

Answer: The reversal of the conviction in Lee resulted from specific problems with the jury instructions in that case. The government's prosecutions in other cases are consistent with the Eighth Circuit's holding in Lee that the jury can convict a defendant if the government shows that he or she burned a cross with the specific intent "to threaten" or "at least to cause [the viewers of the cross burning] to reasonably fear the use of imminent force or violence."

Background: In Lee, the Eighth Circuit reversed a Section 241 conviction in a cross-burning case on First Amendment grounds. At trial, the jury instructions defined the terms "threaten" and "intimidate" broadly, to include "a variety of conduct intended to harm, frighten, punish, or inhibit the free action of other persons." The instructions stated that these terms do not require "a threat of physical force or the intimidation of physical fear." The plurality opinion held that this definition "relates to the communicative impact and emotive impact of speech on its audience," and would "criminalize a great deal of conduct, some of it pure speech, which does no more than forcefully state a view that others find revolting or appalling." 6 F.3d at 1300, 1301. The plurality held that, on remand, the jury should be instructed that it could convict Lee only if it found that his

actions were done with the intent to advocate the use of force or violence and were likely to produce such action; or that Lee intended to threaten the residents of the Tamarack Apartments, or at least intended to cause residents of the Tamarack Apartments to reasonably fear the use of imminent force or violence. 6 F.3d at 1304.

CRIMINAL

10. DoJ litigation and cross burning

Question: What is the Department doing in the Supreme Court or the courts of appeals regarding this issue?

Answer: There are currently three cases that are pending in the courts of appeals in which the government is defending cross burning convictions against First Amendment challenges. In addition, there are two cases in which petitions for certiorari are pending in the Supreme Court. If confirmed, I will be certain that the Division continues to actively defend its cross-burning prosecutions at the appellate level.

Background: There are three cases in which the defendant(s) were convicted and which are now pending in the courts of appeals. The first is United States v. J.H.H., L.M.J., & R.A.V. (8th Cir. argued Oct. 12, 1993). This case involves the same incidents and one of the same defendants as R.A.V. v. City of St. Paul. In this case, however, the defendants were charged, as juveniles, and convicted of violating 18 U.S.C. 241 and 42 U.S.C. 3631. The other two cases on appeal are United States v. Stewart, No. 92-6988 (11th Cir.) and United States v. McDermott, Nos. 93-2952, 93-3014 (8th Cir.) (argued January 10, 1994).

The defendants in United States v. Hayward, 6 F.3d 1241 (7th Cir. 1993) have filed a petition for certiorari seeking review of the Seventh Circuit's affirmance of their convictions under 42 U.S.C. 3631 and 18 U.S.C. 844(h)(1). Defendants burned two crosses on the driveway of a home occupied by a white family that had entertained black guests in their home. On appeal and in their petition, they challenge their Section 3631 convictions as violative of their First Amendment rights, relying principally on the Supreme Court's decision in R.A.V. They also claim that Section 844(h)(1), which provides a mandatory additional penalty of five years imprisonment for anyone who uses fire in the commission of a federal felony, should be limited to cases of arson and is inapplicable to cross burnings. Even though we prevailed below, we expect to acquiesce in the petition because we believe that both questions are of sufficient importance that the Court should resolve them now.

The defendant in United States v. Lee has also filed for cert., contending that the Eighth Circuit erred in remanding his case for retrial. We expect to file an opposition telling the Court that Lee's contention that there is insufficient evidence to warrant a retrial is incorrect and does not merit review. We filed our own cert. petition in Lee on February 4, 1994, limited to the question of the Eighth Circuit's reversal of Lee's conviction under Section 844(h)(1). There is a conflict between the Eighth and Seventh Circuits on this issue. We

suggested to the Court that it hold our petition in Lee pending its decision on this question in Hayward. (See Significant Cases and Investigations at 13-14).

CRIMINAL

11. Enhanced Penalties for Violations of Criminal Civil Rights Laws

Question: Do you support legislation that would enhance the penalties for violations of 18 U.S.C. 241, 242, 245, 247, and 42 U.S.C. 3631 if such violations included the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire or resulted in over \$100 of property damage ?

Answer: The Department has taken a position in support of such legislation, and I agree with that position.

Background: The Department supported S. 1697, introduced in the last Congress by Senator Specter. That bill, which would have amended 42 U.S.C. 3631 (interference with housing rights), passed in the Senate, but was not acted on by the House. Senator Specter has reintroduced that bill. Section 2903 of H.R. 3355 has a similar provision, although it would not enhance penalties for over \$100 property damage. At present, unless an additional crime can be charged, some serious hate crimes are punishable only as misdemeanors. This legislation would allow felony prosecutions.

We presently use 18 U.S.C. 844(h)(1), which provides a mandatory five-year penalty for use of fire in the commission of a federal felony, in our cross burning prosecutions, if the defendants are also charged with violating Section 241, which is a felony. There is a split in the circuits as to the applicability of Section 844(h)(1) to these prosecutions, however. We are urging the Supreme Court to resolve this split by granting certiorari in Hayward v. United States, No. 93-1063. (See Q & A about current cross burning/First Amendment litigation in the Supreme Court and courts of appeals.)

DISPARATE IMPACT

12. Justification for disparate impact analysis

Question: What is the justification for so-called "disparate impact" analysis, under which practices can be illegal based on a disproportionate impact on racial or other groups even without proof of any discriminatory intent? Isn't the purpose of civil rights protections to prevent intentional discrimination and produce a color-blind society? Do you support disparate impact theory?

Answer: I support and will enforce the laws enacted by Congress in this area. Congress has repeatedly passed legislation in employment, housing, voting, and other areas providing that practices which have a discriminatory effect and cannot be adequately justified are illegal. This includes the overwhelming vote by Congress to pass the Civil Rights Act of 1991 reaffirming the Griggs disparate impact standard, which was signed by President Bush.

Congress and the courts have accepted disparate impact analysis for several reasons. First, as the Supreme Court has explained, Congress' anti-discrimination laws are directed at consequences, not simply motivation. Where practices have serious discriminatory effects and no adequate justification, they perpetuate the effects of past discrimination and seriously injure victims even if not directly motivated by prejudice or ill-will. As many employers themselves testified before Congress in connection with the 1991 Act, the Griggs rule has actually benefitted employers by causing them to eliminate arbitrary job barriers, such as height and weight requirements that unfairly excluded women and Asian-Americans from serving as police officers, and adopt better job selection procedures. In addition, in this day and age, disparate impact is important because of the problems in many cases of proving intentional bias. As one court explained, "clever men may easily conceal their motivations", and only a careless landlord or employer who wants to discriminate will leave clues in this day and age. Each case must be examined on its own merits, but enforcing the laws and regulations that prohibit practices with unjustified discriminatory effects is an obligation that I as a law enforcement officer will take seriously.



DISPARATE IMPACT

13. Methods of proof

Question: How is disparate impact proven? Can disparate impact be proven just by showing, for example, that the percentage of women in an employer's work force is less than the percentage in the employer's metropolitan area?

Answer: Disparate impact cannot be proven in that manner. In fact, in areas such as employment and voting, Congress has specifically provided that disproportionate results alone are not sufficient. While the precise method of proof varies by statute and type of case involved, in general it must generally be proven that a particular practice or group of practices has a significant discriminatory effect on a particular group of individuals; for example, the fact that a height-and-weight requirement excludes 85% of women who apply for a job but only 15% of men. Even if that is proven, the practice would generally be illegal only if it cannot be justified as sufficiently related to business, housing, or other purpose or, in the case of voting, based on an evaluation of the totality of the circumstances. Proof of overall disparities are at most evidence that can be submitted and are not sufficient in themselves. In some cases, they do not even constitute relevant evidence; for example, in employment, the disparity would have to be between the employer's labor force and the relevant labor market, not the entire metropolitan area. [Note: this is a very generalized explanation and should yield to specifics re particular areas like housing, voting, employment, etc.]

DISPARATE IMPACT

14. National Merit Scholarship claim

Question: A claim was recently filed with the Department of Education asserting that the National Merit Scholarship exam is discriminatory because more boys qualify than girls. Is this sufficient to prove disparate impact?

Answer: I am not familiar with this particular claim, and I am hesitant to comment about it since it is pending before the Department of Education. In general, DOE has the primary enforcement role in this area, but the Supreme Court has ruled that practices with discriminatory impact in programs that receive federal funds can be prohibited by federal regulations. In the area of education, DOE has provided that practices by recipients of federal funds that have significant discriminatory impact on the basis of race, national origin, or sex are improper unless they can be justified educationally.

EDUCATION

15. Minority scholarships

Question: The Department of Education has recently issued a notice of final policy guidance on the subject of race-based scholarships, which concluded that, contrary to the draft guidelines issued under the previous Administration, such scholarships are permissible under many circumstances. Do you agree with these guidelines? Will the Division be guided by them in its activity on this issue? What do you expect the Division's role to be in this area?

Answer: The Department of Education has primary responsibility in this area, since it is responsible for administrative enforcement of Title VI of the 1964 Civil Rights Act, which prohibits racial discrimination by institutions receiving federal financial assistance. The Division would become involved in any cases brought by or against the federal government in court, including possible participation in cases as amicus or intervenor. Although I have not studied the guidelines in detail, I have reviewed them briefly, and I understand that career attorneys in the Division provided input on them. In general, the guidelines effectively clarify how colleges can use financial aid to promote equal educational opportunity, campus diversity, and access of minority students to postsecondary education without violating anti-discrimination laws and in accord with applicable court decisions.

Background:

In summary, the Feb. 23 Department of Education guidelines provide that:

- 1) A college may award financial aid based on race-neutral economic or other disadvantaged status, even though such awards may go disproportionately to minority students, since the educational justification for such scholarships is sufficient to justify any disproportionate impact;
- 2) A college may award financial aid based on race where authorized by federal statute (e.g. Patricia Roberts Harris Fellowship);
- 3) A college may award financial aid based on race if there is a strong basis in evidence that it is necessary to overcome past discrimination by colleges in the state, whether or not there has been a formal finding of bias;
- 4) A college may use race as a criterion in awarding financial aid in order to increase diversity if the use is a narrowly tailored means of achieving the diversity standard, including such factors as the adequacy of alternatives, the extent, duration, and flexibility of the racial classification, and the burden on others;
- 5) A college may use race-targeted privately donated funds to the extent permitted

under the above guidelines; and

6) Historically black colleges may participate in student aid programs of third parties that target financial aid to black students (e.g. UNCF) which are not limited to students at such colleges, and can use their own funds for race-targeted aid to the extent permitted under the above guidelines.

The guidelines have generally been praised by the education community and criticized by conservative groups which have challenged minority scholarships in court.

EDUCATION

16. Are scholarships consistent w/ fairness?

Question: Consistent with fairness and equality of opportunity, how can you defend the idea of granting scholarship dollars to some students and not others based on race?

Answer: My responsibility is to defend and enforce the laws enacted by this Congress and the regulations and other administrative actions of the federal government. The DOE guidelines carefully set forth the limited circumstances under which race may be taken into account in financial aid decisions, where they in fact can promote fairness and equality of opportunity. Such scholarships must have a purpose which the courts have ruled is permissible, such as remedying past discrimination or promoting educational diversity. They must also be narrowly tailored to accomplishing their goals, which means that they must be flexible, used where alternatives will not work, and avoid burdens on others. As a recent GAO study found, such scholarships account for less than 5% of scholarship dollars but are highly effective in attracting and retaining minority students. Congress itself has authorized minority scholarships, such as the Patricia Roberts Harris fellowship.

Background:

- 1) The use of race in scholarship decisions does not necessarily mean minority-only scholarships. The guidelines encourage scholarships in which race is one among many factors in making such decisions, similar to the type of admissions plan approved in dicta in Bakke, and state that minority-only scholarships should generally be used to promote diversity only when Bakke-type programs are not adequate alternatives;
- 2) The use of race in scholarship decisions would not necessarily benefit only minority groups. The guidelines specifically note that an historically black college might award race-targeted aid to white students to promote diversity.

EDUCATION

17. Litigation of minority scholarship issue

Question: Has the Division litigated the issue of minority scholarships in court?

Answer: The Division has been involved in such litigation. In the case of Podberesky v. Kirwan, the Division filed an amicus brief supporting the University of Maryland's Banneker Scholarship Program, which awards merit-based scholarships to black students as part of a plan to remedy prior discrimination submitted to the Department of Education. The Division's brief in federal district court maintained that the scholarships were permissible to help overcome the effects of such past discrimination. The court agreed and rejected a challenge to the program. The case is now on appeal.

EDUCATION

18. Busing

Question: If you are confirmed, will you support busing as a remedy for school segregation?

Answer: If confirmed, I will faithfully enforce the law in the area of school desegregation, as I am required to do. As the Supreme Court clearly stated almost 40 years ago in Brown and subsequent decisions, illegal intentional segregation and all its vestiges must be eliminated, root and branch, in our public schools. We have made enormous progress in this area and provided more equal educational opportunity to countless students since then, using many desegregation remedies, such as redrawing boundary lines, magnet school programs, voluntary transfers and, where it has been necessary, mandatory student reassignment or "busing." Effective school desegregation has been supported by the Division on a bipartisan basis, and should be in the future as well. I do not think it is likely that we will have occasion to seek mandatory reassignment as a remedy in new cases at the Division, particularly since any areas where such a remedy could be needed have probably long since been subject to litigation and since other types of remedies have been used successfully in recent cases. The Supreme Court has clearly stated in the Swann case, however, that it would be improper to rule out completely and categorically in advance mandatory reassignment as a remedy, so it would be improper for me as a law enforcement officer to do so. Each case must be looked at individually and on its own merits, with the objective of faithfully following the law.

Background: Mandatory busing has been used relatively rarely, only in districts where most children are transported anyway for reasons unrelated to desegregation or where students have been transported away from schools closer to home in order to preserve segregation. Neither busing nor any other remedy may be ordered unless there has been a court finding of intentional segregation. As the House Subcommittee on Civil and Constitutional Rights found in 1982, where busing has been used and school officials have "made the effort to make desegregation work", as in Charlotte-Mecklenberg, such remedies have been successful. The Subcommittee also found "compelling" evidence that desegregation has contributed to improved student achievement. In a shift from past Division policy under Republican and Democratic administrations, the Division beginning in 1981 affirmatively stated that it opposed and would not seek mandatory reassignment as a remedy, despite Supreme Court decisions such as Swann to the contrary.

EDUCATION

19. Magnet schools

Question: What is your reaction to the recent charges that the Department of Education is withholding release of a report on magnet school programs that allegedly shows that such plans are no more effective than other desegregation remedies and that the federal government is not enforcing the requirement that federal magnet school funds be used to promote desegregation?

Answer: I am not familiar with the study or the charges at this point, other than having heard press reports. I understand that the Department of Education is still completing research on the study and plans to release it in several months, and I look forward to reviewing it and discussing it with DOE officials. In general, the evidence indicates that magnet schools can be a useful desegregation tool in some cases but, as with all remedies, must be evaluated on a case-by-case basis.

Background: The public charges have been raised by David Armor, one of the researchers hired several years ago to work on the study, and who has in fact previously been employed as an expert witness by opponents of desegregation. The study examines desegregation efforts in 600 school districts from 1968 to 1989. According to a Feb. 16 USA Today report, it concludes that all desegregation plans did improve racial balance, but that magnet plans were no better than others, and that some federal magnet funds are essentially being used to improve the quality of schools but are not promoting integration. DOE officials have stated that the criticisms are unfounded, and that Armor's research has methodological flaws and more work is needed.

EDUCATION

20. Unitary status-I

Question: The Supreme Court has made clear that a court should not be supervising desegregating school districts forever, and should strive towards returning control to local authorities. Yet there are many cases involving the Division where districts have been subject to court order for almost 30 years. If confirmed, what action will you take in this area?

Answer: My responsibility is to enforce the law in this area as set forth by the Supreme Court. The Court ruled in Green v. County School Board and subsequent cases that once a court has found illegal, intentional segregation in a school district, the court should retain jurisdiction until the district has fully desegregated and achieved "unitary status." As the Court explained recently in the Oklahoma City v. Dowell and Pitts v. Freeman cases, it is not sufficient for a district to comply in good faith with a desegregation order; in order to become unitary, it must also prove that it will not return to its former discriminatory ways and that the "vestiges" of segregation have been eliminated to the maximum extent practicable. I will carefully follow these principles in each case. Local school districts can judge for themselves whether they wish to seek to change a desegregation order or remove themselves from court jurisdiction altogether; the Division will carefully evaluate each such request, as well as any requests from parents or students for further desegregation relief, utilizing these principles on a case-by-case basis, and will participate in litigation accordingly as needed.

Background: Although these principles have generally been followed throughout the history of the Division, the Division argued unsuccessfully beginning in 1981 that a district should be able to achieve unitary status and end desegregation remedies based on no more than "good faith" implementation of a desegregation order. In 1987-88, in a number of Georgia districts where the Division had filed desegregation suits, it started proceedings to have districts declared unitary, even though most of the districts themselves opposed the action. This strategy of affirmatively seeking to dismiss cases ceased under the Bush Administration.

EDUCATION

21. Unitary status - II

Question: In your view, if there are any all-black schools in a district subject to desegregation, does that mean that the district is not unitary and that busing or other desegregation remedies must continue?

Answer: Not necessarily. The answer depends largely upon whether the all-black schools are legally considered "vestiges" of segregation. The Supreme Court has clearly stated that in order to be unitary, a district must eliminate racial disparities or identifiability attributable to past discrimination with respect to all aspects of its operation, including student assignment, faculty, other staff, physical facilities, transportation, and extracurricular activities, as well as such factors as quality of education and segregation in housing caused by school segregation. This must be evaluated carefully on a case-by-case basis. For example, a district would not be responsible for racially identifiable schools which result solely from demographic changes, but would be responsible if the racial identifiability is traceable to past discrimination. Even if the district remains responsible, busing or other desegregation orders can be modified if they are not effective or for other reasons, and we will consider such modifications as needed on a case-by-case basis in accord with the principles recognized by the courts.

Background: Some advocates have proposed all-black or all-male schools for educational purposes. Such a proposal was found to violate Title IX's prohibition against sex discrimination in Detroit. Deliberately one-race public schools at the elementary or secondary level would similarly violate Title VI and the constitution.

EDUCATION

22. Spending as a remedy/ Ct ordered taxes

Question: In some desegregation cases, large amounts of funds have been required to be spent to renovate schools, decrease class size, and other educational improvements in the name of desegregation. What is your position on these types of remedies? Will the Division support them?

Answer: Although I cannot comment on any particular case, I regard my role as enforcing the law of school desegregation, which in some cases authorizes and indeed requires such remedies to eliminate the vestiges of segregation. The Supreme Court ruled unanimously in Milliken v. Bradley in 1977 that illegal segregation may cause educational vestiges, such as lower minority student achievement because of the recognized harmful effects of segregation, and approved the ordering of compensatory educational programs to help remedy them. Such relief also helps remedy the continued deprivations suffered by minority students in some districts that did not even meet the "separate but equal" standard after Brown. In addition, improvements may be approved as part of a magnet school program to make schools more attractive and promote integration. Such remedies have been ordered against local districts and, in some cases, against state governments partly responsible for illegal segregation. When used effectively, they can make a direct contribution to improving educational opportunity for children harmed by past segregation. The Division will consider the use of such remedies must be carefully on a case-by-case basis, with remedies approved that are effective, authorized or required by the courts, and carefully tailored to combating the vestiges of segregation.

Background: Although the Division has rarely been involved, a number of courts have ordered such remedies, such as in St. Louis and Kansas City. In the Kansas City case, the Supreme Court ruled that judges may order the funding of such remedies, but should not directly order tax increases except perhaps as a last resort. The remedial order in the Kansas City case has engendered recent criticism, including a recent 60 Minutes report, with critics charging that more than \$1 billion has been spent without significant increases in student achievement or integration. Defenders respond that the criticisms are distorted and that the plan has produced real improvements. A claim of this nature (on a much smaller scale) is set for trial this year in a case originally brought by the Division in Yonkers, although the Division has not been involved in the "educational vestiges" claim against the state in that case.

EDUCATION

23. Desegregation across district lines/ Yonkers

Question: Do you support desegregation across district lines between cities and suburbs? What about school desegregation claims based on government discrimination in housing as in Yonkers?

Answer: I will follow the law and the bipartisan tradition of effective civil rights enforcement in these areas. In Yonkers, a case pursued vigorously under both Republican and Democratic administrations, the court ruled that liability may be based in part on governmental conduct such as placement of public housing that causes illegal housing segregation and in turn promotes school segregation. Remedies aimed at desegregating both schools and housing can be and have been ordered in such cases, and can work well in tandem. The Supreme Court ruled in Milliken v. Bradley in 1973 that desegregation across district lines is required where there is proof of illegal segregative conduct that crosses district lines or has effects in more than one district. Some of the most effective desegregation in the country has been metropolitan in nature, as in Charlotte-Mecklenberg.

EDUCATION

24. Continuing problem of school segregation

Question: Do you believe school segregation and inequality of educational opportunity is still a serious problem in this country?

Answer: Yes. Recent studies have documented that many minority students attend racially isolated, high poverty schools and suffer from serious inequality of educational opportunity. Even within schools that have formally been desegregated, there are reports of in-school segregation. Inequality of opportunity on gender and other grounds continue to be reported. Where such conditions violate the Constitution and the laws enacted by this Congress, my job is to enforce them.

Background: A December, 1993 study for the NSBA documented an increasing and "very high level of segregation for minority students", with over 1/3 attending virtually all-minority schools. The study also found that a child in an "intensely segregated school" is 7 times more likely to be in a "high poverty school than a child in an integrated school", leading to substantial inequality of educational opportunity. Anecdotal reports also document serious in-school segregation problems; see q&a below.

EDUCATION

25. In school segregation

Question: What will you do about the problem of in-school segregation? Is it illegal for a school to use a test for educational placement purposes just because it may have the statistical effect of referring more minority students than white students for special education help?

Answer: The Department of Education has had primary responsibility in this area, but my responsibility will be to work with DOE and to pursue litigation in court where necessary to enforce the law in this area. Particularly in districts with a history of segregation, the use of ability grouping, testing, special education placement, some magnet programs, and differential discipline has sometimes produced serious problems of segregation within schools. This may be a vestige of segregation in districts with a history of segregation; for example, teachers may need training to deal effectively and on a nondiscriminatory basis when exposed for the first time to students of different backgrounds. Under DOE Title VI regulations, it may be in some cases that the use of a test or other practice that disproportionately impacts on minorities may violate the law, but only if there is not a good educational justification for the practice. This issue requires careful review on a case-by-case basis.

Background: A Feb. 18 USA Today report provides a good example of such problems. In a Rockford case, a magistrate judge has submitted a report on in-school segregation problems resulting largely from use of ability tracking, stating that the district "Committed such open acts of discrimination as to be cruel and committed others with such subtlety as to raise discrimination to an art form." For example, students in "gifted" classrooms within predominantly minority schools were almost all white, and they reportedly used separate classrooms, separate bathrooms, and sometimes separate entrances from minority students.

EDUCATION

26. Race-conscious teacher assignment

Question: What is your view of race-conscious assignment of teachers? Didn't the Division recently claim in court that such assignment was improper?

Answer: I will follow the law established by the courts in this area. Green and other decisions have long recognized that eliminating racial identifiability of faculty is an important part of desegregation, and this may sometimes require race-conscious reassignment of faculty to eliminate faculty segregation at some schools. It is true that in 1989 the Division participated in a challenge to such a plan in Stone v. Prince George's County. That court ruled, as the Division suggested, that the method of computing racial identifiability should be modified, but upheld the plan as revised. We will follow the law as established in that and other cases in this area.

EDUCATION

27. Education of children of illegal immigrants

Question: What is your view of a recent proposed amendment to the Elementary and Secondary Education Act that would deny federal aid to children of illegal immigrants?

Answer: Although I have not studied the issue, it is my understanding that the Administration has opposed the proposal. There are constitutional limits in this area as well; the Supreme Court ruled in Plyler v. Doe that it is unconstitutional for a state to deny education to children of illegal aliens.

Background: Controversies continue in this area, and concerning education of children with limited English proficiency, bilingual education, etc. While DOE has primary responsibility, the overall principle is that LEP children must receive equal educational opportunity, generally geared towards improving their English proficiency (whether a particular program is bilingual, English-as-a-second language, etc.).

EDUCATION

28. Equal Access Act/ Student prayer clubs

Question: Concerns have recently been expressed about the violation of students' civil rights on religious grounds. In particular, the Department has been asked to investigate the alleged denial of civil rights of students who have apparently been denied the right to form Bible clubs under the Equal Access Act. What action do you intend to take in this area?

Answer: I am not familiar with the specific facts of this request and cannot state what action would be appropriate. We will take appropriate action to investigate and enforce all civil rights laws where we have jurisdiction; it is not clear to me what if any jurisdiction the Division has in this area. To the extent that this issue involves First Amendment freedom of religion issues, it is important that both the First Amendment provision protecting free exercise of religion and the clause protecting church-state be protected.

Background: On Feb. 16, the American Center for Law and Justice held a press conference at DOJ claiming that 80-plus districts were violating rights under the Equal Access Act and calling for investigation and action by DOJ and DOE. It is questionable whether federal jurisdiction exists in this area; the EAA specifically provides that it is to be enforced by private litigation, there is no grant of authority to DOJ, and alleged violations by districts appear not to be based on discrimination between religions but instead a dispute over free speech rights under EAA applicable to all religious or political groups. In addition, as the National School Boards Association has stated, the ACLJ itself appears to be misinterpreting and overreaching in its interpretation of EAA in its claims.

EDUCATION

29. Desegregating Institutions of Higher Education

Question: What efforts do you propose to take to resolve the long-standing litigation over college desegregation?

Answer: If confirmed, I would continue the efforts of the Division in working with the parties in cases that are currently pending in Alabama, Louisiana, and Mississippi to reach agreement on a desegregation plan for those states' institutions of higher education under the standards outlined recently by the Supreme Court in Ayers v. Fordice, 112 S. Ct. 2727 (1992). Of course, if we cannot settle these cases, we will vigorously litigate to protect the Equal Protection rights of students in those states.

Background: Several states have reached accords with the Department of Education, and only three states -- Alabama, Louisiana and Mississippi -- are in active litigation with the Civil Rights Division. The Alabama case is on appeal from district court rulings requiring the adoption of desegregation plans. The Louisiana and Mississippi cases have been returned to the district court for additional proceedings required by the Supreme Court's decision in Ayers v. Fordice, 112 S. Ct. 2727 (1992), and we expect to complete district court proceedings in those cases this year.

Now that the Supreme Court has established guidelines for determining whether college systems remain segregated, the cases are close to resolving the question of liability and, where liability is found, beginning the remedial process.

EDUCATION

30. Methods for desegregating colleges

Question: What steps would you take to desegregate colleges?

Answer: If I am confirmed, the Division will pursue remedies that ensure that students' choices in selecting among state colleges and universities are affected by legitimate educational and social considerations divorced from the segregated heritage of some of these schools.

Background: Obviously, the primary focus in the question of desegregating colleges is the realization that students choose to attend college where they want to, and may not be directed by the state or federal court only to a particular school. As the Supreme Court said in Fordice, however, states that previously designated schools by race must ensure that students' choices today are not affected by remnants of the dual system which directed students to schools on the basis of skin color and forbade attendance at others for the same reason. The Division is committed to ensuring that public colleges are maintained in such a way that students' choices are no longer affected by racial directions from the state, and neither black nor white students should be directed to schools because one school is historically "white," and remains white today, and one is historically "black" and remains black today. Rather, we want to ensure that students' choices are affected by legitimate and non-discriminatory educational and social considerations.

EDUCATION

31. Role for traditionally black colleges

Question: What do you see as the role for those colleges which were originally designated for black students?

Answer: I think that the historically black colleges play a crucial role in the education of this nation's young people, and believe that they have been, and continue to be, an integral part of the higher education environment benefiting students of all races. Furthermore, in order to shed the image that these schools are appropriate only for black students, they should be assigned educational roles which will enable them to broaden their student base, so they may become integrated schools in the future, with an important historical heritage of minority education.

Background: The Division envisions that all states will maintain those colleges which were originally designated for blacks, and ensure that today they are an integral part of their current system of higher education, and are given the wherewithal, both financially and academically, to compete with other schools for students of both races. The problem in many of these states is that state officials historically have refused to assign to these schools educational responsibilities beyond service to the black community. These schools must be assigned educational roles which will enable them to broaden their student base. The Division's goal is to achieve remedial plans which end segregated and racially exclusive public colleges in this manner -- that student choices should be dictated primarily by the educational program rather than by the race of the student body.

EDUCATION

32. Plans that would close historically black colleges

Question: Would you oppose remedial plans which ordered the closing of historically black schools?

Answer: While it is difficult to make a categorical statement about plans that have yet to be provided, I would almost certainly oppose a proposal to remedy segregation by closing historically black schools. It would, however, require close review and assessment of a specific plan.

Background: The Department has stated in the past that a remedial plan should not unfairly burden the black community. There are remedies which would permit historically black schools to broaden their student base beyond the black community. New course offerings, and cooperative programs with neighboring white schools, are some of the educationally sound methods which would create for these colleges the promise of an ability to attract students of all races.

EDUCATION

33. Constitutionality of black colleges

Question: Do you think some schools can remain predominantly black and still be constitutional?

Answer: Yes. A state college or university may primarily enroll black students and still be constitutional as long as the state does not hold out the educational institution as appropriate only for black students, and as long as the state has taken action throughout its system to eliminate the vestiges of segregation.

Background: The fact that a college's enrollment may be mostly black does not mean that the school has been limited unfairly by the state to the function of enrolling only black students. The Division would have to look carefully at such an instance to see that the academic offerings and financial support for the school are such that the college does have an appeal to students of both races, and are not designed to limit the appeal of the school only to black students. What we want to avoid is a state holding out a college as appropriate only for black students, and discouraging enrollment by others.

EDUCATION

34. Virginia Military Institute (VMI)

Question: Will you continue the Civil Rights Division's efforts to make the Virginia Military Institute (VMI) accept female students when VMI's rigorous military training program has been so successful and very few women could possibly be interested in the program?

Answer: Yes, I will. I believe, as the Division has advocated, that women have a right to equal educational opportunities, including the right to a state-supported military education as provided to men. The Fourth Circuit agreed with the Division's position on this as it relates to VMI. Last spring, the Supreme Court denied VMI's petition for certiorari in this case.

Background: The case began when the Justice Department received a complaint from a female high school student who wanted to be considered for admission to VMI. The school -- a public college -- obviously has an admissions policy that is discriminatory on its face against women. The Division determined that neither the school nor the state had a sufficiently important interest that would justify denying women the distinct benefits of VMI's program. The Fourth Circuit agreed with the Division, and in May 1993 the Supreme Court declined to hear the case.

Throughout the litigation, the Justice Department's position has been that a state cannot simply offer important educational benefits to one gender but not the other. The record shows that hundreds of women have contacted VMI concerning admissions, so it is not fair to say that few women would be interested [347 inquiries between fall 1988 and summer 1990]. Moreover, the record shows that some women can do everything that VMI requires -- e.g., the physical training -- so that it also not fair to say that the VMI program is something only for men.

Currently the case is in the district court on remand. The defendants have submitted a remedial plan to the district court. That plan calls for the creation of a separate program for women at Mary Baldwin College (called the "Virginia Women's Institute for Leadership"), to which VMI will provide programmatic support, faculty, and facilities. The district court is scheduled to conduct an evidentiary hearing on the proposed plan sometime early next year. The Division has opposed the plan, asserting that it does not come close to offering women the VMI-type experience. The Division also asserted that because the plan is inadequate, VMI must admit women. If the court approves the plan as proposed by VMI, this of course would raise the issue of the validity of separate-but-equal in the gender context, which we would then have to consider (the Division has not taken a position on that issue thus far because it has not been squarely presented).

EDUCATION

35. The Citadel

Question: And what about The Citadel, the only other school in the country like VMI? I understand the Justice Department is now going after The Citadel to force it to accept women.

Answer: If confirmed, I will see to it that the Division's work in The Citadel matter continues as well. Although the Division did not file the initial complaint against The Citadel, the Division has intervened in the case and is pursuing elimination of The Citadel's gender based discriminatory admissions policy.

Background: The Division did not instigate the Citadel case (Faulkner v. Jones), although in the case of Citadel, like VMI, the Division had received complaints from women seeking admission. Since the Division had received complaints, and because a private action had been filed against the Citadel, the Division was allowed to intervene in the pending case.

Faulkner is now attending day classes at The Citadel under a preliminary injunction. Last fall, the Fourth Circuit affirmed the district court's preliminary injunction that admitted Ms. Faulkner to day classes pending resolution of the case on the merits (Faulkner filed the motion for a PI). The Supreme Court denied defendants' motion for a stay of the preliminary injunction. The Division participated in the appeal as appellee.

As for the merits, the private plaintiff's motion for summary judgment is pending, and a hearing is scheduled on that motion in February 1994.

Like VMI, Citadel's admissions policy discriminates on its face against women. Consistent with the current policy of the Division, the Department does not believe that the school or the state has a sufficient justification for denying women the benefits of The Citadel's program.

ENVIRONMENTAL JUSTICE

36. Definition

Quesiton: What is Environmental Justice?

Answer: In the broadest sense, environmental justice means that all communities, including poor and minority communities, receive environmental protection.

ENVIRONMENTAL JUSTICE

37. Importance

Question: Why is Environmental Justice important?

Answer: For years, researchers have collected evidence suggesting that the poor in general, and minorities in particular, suffer disproportionately from exposure to toxic pollution and that the environmental needs these communities are not being fairly addressed. It is important for federal agencies and the Department of Justice to further investigate these issues.

ENVIRONMENTAL JUSTICE

38. Function

Question: What does President Clinton's Executive Order do?

Answer: The Order does four things:

- 1) it creates a federal work group that will be responsible for coordinating federal policies and projects to promote environmental justice;
- 2) it requires federal agencies to develop a strategy for achieving environmental justice, including specific short-term projects with deadlines;
- 3) it prohibits federal agencies from conducting federal activities that affect human health or the environment in a manner that has the effect of discriminating on the basis of race, color, national origin; and
- 4) it requires better data collection by federal agencies on the effects of environmental burdens on minority and low-income communities.

ENVIRONMENTAL JUSTICE

39. Justice Department Role

Question: What is the Justice Department doing to carry out the mandate of the President's Executive Order?

Answer: So far, the Department has done the following things:

- 1) Appointed Gerald Torres to lead the Department's efforts in developing an environmental justice strategy in coordination with ENRD.
- 2) Developing a system for identifying ej cases.
- 3) Working with EPA on a joint litigation plan.

ENVIRONMENTAL JUSTICE

40. Civil Rights Division Role

Question: What role does the Civil Rights Division have in executing the President's Executive Order?

Answer: The Civil Rights Division has a supporting role in achieving environmental justice. We will cooperate with the Environment Division as the plan is developed for the Justice Department according to our obligations under the Executive Order. In particular, the CRD must help ensure that the nondiscrimination mandates of the Order and the accompanying memorandum are fulfilled.

ENVIRONMENTAL JUSTICE

41. Is this environmental affirmative action?

Question: Isn't this just a form of environmental affirmative action?

Answer: Of course not. The Executive Order and the Justice Department strategy, at least what I know of it, is aimed at achieving the simple goal of delivering on the promise of environmental protection to all Americans. This requires that we evaluate our enforcement efforts to ensure that we are achieving that goal.

ENVIRONMENTAL JUSTICE

42. Can the initiative be effective?

Question: If this isn't affirmative action, how can the EJ initiative be effective?

Answer: By enhancing the ability of affected communities to participate in decisions that have an impact on them, we ensure that the enforcement effort takes account of the needs and interests of those communities.

ENVIRONMENTAL JUSTICE

43. Not in my backyard syndrome

Question: Won't this just result in another form of the "Not in My background syndrome?" Won't this kill jobs in the neighborhoods that need it most?

Answer: Absolutely not. Community participation and equal enforcement of the environmental statutes merely ensures that all concerns are accounted for and that the diverse interests of the communities are also respected. To assume that this process will chase jobs away is to sell those communities short. I know from my life experience that the African American community shares most of the same concerns of any American community. Protection of jobs and public health--if that goal can be achieved anywhere--can be provided in those neighborhoods too.

ENVIRONMENTAL JUSTICE

44. Legal methods for enforcement

Question: What laws are used to achieve environmental justice?

Answer: There are at least 4 ways to legally enforce environmental justice:

- 1) environmental statutes such as the Clean Water and Air Acts and the Safe Drinking Water Act;
- 2) environmental statutes with public participation components, such as the National Environmental Policy Act;
- 3) Civil Rights statues such as Title vi of the Civil Rights Act of 1964; and
- 4) the Constitution: 5th and 14th Amendments.

ENVIRONMENTAL JUSTICE

Summary of the Executive Order

On February 11, 1994, President Clinton signed the Executive Order on Environmental Justice. The order, intended to address growing concern and evidence that certain racially distinct or disadvantaged communities suffer disproportionate exposure to environmental hazards, has essentially four elements:

- 1) it creates a federal work group on environmental justice that will be responsible for coordinating federal policies and projects to promote environmental justice;
- 2) it requires federal agencies to develop a strategy for achieving environmental justice, including specific short-term projects with deadlines;
- 3) it prohibits federal agencies from conducting federal activities that affect human health or the environment in a manner that has the effect of discriminating on the basis of race, color, national origin; and
- 4) it requires better data collection by federal agencies on the effects of environmental burdens on minority and low-income communities.

AT the same time, the President signed a Memorandum to Federal Agencies directing them to implement and enforce provisions of certain laws with environmental justice components: National Environmental Policy Act, Title VI of the Civil Rights Act, and the Emergency Planning and Community Right to Know Act.

Background

A 1983 General Accounting Office (GAO) study found that three of four major landfills are located in predominantly black communities where citizens live disproportionately below the poverty line. This study, and protests where hazardous waste sites have been located in disadvantaged and minority neighborhoods, prompted the United Church of Christ (UCC) to conduct a nationwide study to determine if hazardous waste sites have been disproportionately located in those neighborhoods. The UCC's 1987 report concluded that race is the most significant variable associated with the location of commercial hazardous waste facilities. Dr. Benjamin Chavis, then director of the UCC, labeled this phenomenon "environmental racism." The terms environmental justice and environmental equity are used to describe the same issues.

The UCC study marked the beginning of widespread inquiry into environmental justice issues. These issues gained greater prominence in January, 1990 when academicians and civil rights leaders convened the Michigan Conference on Race and Incidence of Environmental Hazards. Since 1990, developments in environmental justice have come in essentially three areas: 1) research, investigation, and publicity by interest groups and academicians, 2) proposed legislative reform by Congress, and

3) federal agency investigation.

Legislative Proposals

In 1992, then Senator Al Gore and Congressman John Lewis introduced the Environmental Justice Act of 1992. This bill provided for the listing of the total weight of toxic chemicals present in each county, the designation of the 100 counties with the highest total weight as Environmental High Impact Areas, and the prohibition of further sitings of toxic facilities in these identified areas. The Gore-Lewis bill was the first environmental justice proposal, but it has been followed by numerous other efforts to address the issue in the 103rd Congress. This year, Congressman Lewis and Senator Max Baucus introduced the Environmental Justice Act of 1993 which, closely tracks the previous bill of the same name. In addition, Congresswoman Cardiss Collins (D-Illinois) introduced the Environmental Equal Rights Act of 1993, which would give "environmentally disadvantaged" communities the right to go to court to block the siting of additional waste facilities. Another bill, the Environmental Health Equity Information Act, would the Agency for Toxic Substances and Disease Registry to collect and maintain information on the race, age, gender, ethnic origin, income level, and education level of persons living in communities adjacent to contaminated sites.

Federal Activities

As a result of the increased awareness of environmental inequities, the Administration also has become actively involved in environmental justice issues. In 1992, EPA issued a Report on Environmental Justice, created the Office of Environmental Equity, and appointed Dr. Clarice Gaylord as the head of that Office. Recently, EPA Administrator Carol Browner listed "environmental justice" as one of four priorities for her term at EPA. In addition to internal efforts to address environmental inequities, EPA convenes an interagency working group that meets periodically to discuss environmental justice issues.

On Earth Day, President Clinton announced that EPA and the Department of Justice would "begin an interagency review of federal, state, and local regulations and enforcement that affect communities of color and low-income communities with the goal of formulating an aggressive investigation of the inequalities in exposure to environmental hazards." Subsequently, the President signed the Executive Order on Environmental Justice.

Criticisms

Critics of the environmental justice movement are fearful of further impediments to the siting of facilities; stigmatization of distressed communities; departure from scientific, risk-based approaches to environmental priorities; and discouragement of economic development where it is most needed.

Status:

Federal agencies currently are in the process of responding to the Executive Order.

Department position:

The Department participated substantially in the development of the Executive Order. Attorney General Reno's statement upon issuance of the Executive Order is attached.

Judiciary Committee Members Interest/Positions:

Senator Moseley-Braun (D-Illinois) has a strong interest in the issue of environmental justice. A dispute over the construction of a hazardous waste incinerator in the predominantly black South Side of Chicago (Mosely-Braun's home) was among those that defined the environmental justice movement. Mosely-Braun also is likely to be aware of the bill introduced by Congresswoman Collins, a fellow member of the Illinois delegation.

Several western Senators, including Alan Simpson (R-Wyoming) and Hank Brown (R-Colorado), have indicated their opposition to the Executive Order, ostensibly because they believe that the order departs from risk-based environmental decisionmaking, stigmatizes disadvantaged communities, and further discourages economic development where it is most needed.

HOUSING

45. History of lending discrimination cases

Question: What is the Division's history with respect to lending discrimination cases?

Answer: Home mortgage lending discrimination has been illegal since the passage of the Fair Housing Act 25 years ago, and other forms of lending discrimination have been illegal since the 1975 passage of the Equal Credit Opportunity Act. Before the fall of 1992, the Civil Rights Division had brought only a handful of lending cases, mostly involving consumer lending; several involved refusals to lend on Indian reservations.

HOUSING

46. Recent lending discrimination cases

Question: What recent cases has the Division brought, and what are they about?

Answer: United States v. Decatur Federal Savings and Loan. The first major case was against Decatur Federal Savings & Loan, an Atlanta thrift institution. The Complaint was filed on September 17, 1992, alleging that the lender had engaged in a pattern or practice of discrimination against blacks -- by conducting its marketing, advertising, and branching activities in such a way as to avoid dealing with black applicants and by applying stricter underwriting standards to those black home-seekers who did apply for loans. The case was settled by the simultaneous filing of a Consent Decree, through which the lender committed itself to a variety of reforms and agreed to pay one million dollars in compensatory and punitive damages to 48 black applicants whom the United States had identified as victims of Decatur's discriminatory practices.

United States v. Blackpipe State Bank. The next case was filed on November 17, 1993, against the Blackpipe State Bank in Martin, South Dakota, alleging that for many years the lender had discriminated against Native Americans by refusing to make any loans secured by collateral that might be subject to tribal court jurisdiction. This case was resolved by entry of a Consent Decree on January 21, 1994. Prior to settlement, the United States amended its Complaint to add an allegation that the lender had charged Native Americans greater interest rates and finance charges than those charged to whites. Among other things, the lender agreed to create a compensation fund of \$125,000 and to advertise to locate past rejected applicants who may be eligible for compensation.

United States v. Shawmut Mortgage Company. On December 12, 1993, the United States filed a Complaint, along with a contemporaneous Consent Decree, against the Shawmut Mortgage Company, one of the largest home mortgage lenders in New England. The suit alleged that, from January 1990 through October 1992, Shawmut had discriminated against black and Hispanic applicants for home mortgage loans by failing to provide them with the same level of assistance it provided to white applicants in obtaining and documenting the qualifying information necessary to an underwriting decision on their loans, and by applying more stringent underwriting standards to them than were applied to whites. The defendant agreed to set up a compensation fund of \$960,000 for victims of discrimination. Once the victims have been identified, each will be entitled to an award of between \$10,000 and \$15,000.

When the Attorney General announced the filing of the suit, she emphasized that the United States had not sought punitive damages against Shawmut, because the lender had undertaken a self-examination of its lending practices

and had taken effective action to bring about reform prior to the initiation of the Department of Justice investigation. At the same time she met with leaders of the mortgage lending industry and encouraged them to detect and correct their own discriminatory practices before the Department of Justice arrived. She also met with leaders of civil rights organizations that have an interest in this area, told them of her commitment to end lending discrimination, and sought their assistance and advice on ways to proceed.

United States v. First National Bank of Vicksburg. This suit and settlement agreement were filed together on January 21, 1994. The United States alleged that the Mississippi lender discriminated against blacks seeking unsecured home improvement loans by charging them higher interest than was charged whites. Under the agreement, the Vicksburg bank will pay about \$4,400 each to 170 black borrowers. During the period January 1990 through July 1993, the victims were charged, on loans averaging about \$2,000, between four and eleven percentage points more, on a per annum basis, than were white borrowers.

HOUSING

47. Development of lending discrimination cases

Question: How were these cases developed?

Answer: Decatur and Blackpipe were developed through investigations by Civil Rights Division personnel; Shawmut and Vicksburg were referrals from the Federal Reserve Board and the Office of the Comptroller of the Currency, respectively.

Decatur involved a massive amount of records analysis, and it illustrates the difficulty and complexity of proving disparate treatment in underwriting. After being frustrated in making comparisons among several hundred white accepted and black rejected application files (mainly because each applicant presented unique financial and personal characteristics), we hired an expert statistician to conduct the kind of analysis the Division had often used in employment cases. After photocopying more than 2,000 loan files and key-punching all the loan applicant variables, the expert developed a statistical model that, using about 20 variables, best predicted applicant acceptance. Then, controlling for the variables, he was able to ascertain that race correlated with denial to a statistically significant extent. He also use a model to describe the standards actually applied to white applicants and identified black victims by comparing their qualifications to this model.

Shawmut was based in part on similar methodology. Its loan files had been part of the Boston Fed's study of 1990 lending practices in the Boston area. The study, released in October 1992, was based on loan file information (an expansion of the data reported under the Home Mortgage Disclosure Act to include detailed financial and personal information about applicants) from over 1,200 files from 131 lenders. The authors' conclusion was similar to that of our expert in Decatur. The Fed referred the matter to us because Shawmut had enough loans in the study to do a separate analysis, which indicated that race was significantly related to loan denial. However, our case against Shawmut was also based on the lender's own review of its files, from which it concluded that white applicants who "did not meet all underwriting standards" (i.e., were not perfectly qualified) were more likely to receive loans than were similarly situated minority applicants.

The two most important things the Civil Rights Division has learned from these cases and the Boston Fed study are that a substantial majority of all applicants have small-to-serious problems with their qualifications (such as credit history or excessive debt) that must be explained away or offset by compensating factors, and that assistance from the lender's employees in documenting all qualifying information (or overlooking flaws) is commonplace in the home loan application process. There are innumerable opportunities for

the exercise of discretion, and, with careful analysis, the discriminatory exercise of discretion can be detected.

HOUSING

48. Why so few referrals of lending discrimination cases

Question: Why hasn't the Civil Rights Division received more referrals from the four federal bank regulatory agencies?

Answer: In December 1991 Congress amended the Equal Credit Opportunity Act to require the bank regulatory agencies to refer a matter to the Attorney General when they have reason to believe that a lender has engaged in a pattern or practice of discrimination in lending. That legislation, plus the October 1991 release of HMDA data for 1990 (revealing for the first time the severity of the differences in loan denial rates between whites and minorities), the Boston Fed study, and the Decatur case, became a wake-up call for the agencies as well as the mortgage lending industry. Over the past two years the agencies have revamped their compliance investigation techniques and provided their examiners with extensive training on how to conduct investigations of lending discrimination. (Much of this training has been done with the assistance of senior members of the Housing and Civil Enforcement Section.)

Shawmut was the first major referral (in December 1992), and Vicksburg the second (in November 1993). As the agencies have improved their investigations, the pace of referrals has increased. The Civil Rights Division is now reviewing referrals involving lenders in California and Texas, and the agencies have advised of several other matters in the pipeline.

HOUSING

49. Further lending discrimination cases?

Question: Do you expect an increase in activity in this area, and does the Civil Rights Division have adequate resources to meet a demand for more lawsuits?

Answer: The Department expects a significant increase in agency referrals. The publicity generated by the lending suits and the revelations of the HMDA reports have begun to generate citizen complaints in this area. In addition, the Housing Section is in the midst of three major investigations of lenders in Miami, Chicago, and Washington, DC. In November 1993 the Attorney General announced that mortgage lending discrimination was her highest civil rights priority and that she had authorized a one-third increase in the staff of the Housing Section. She also said that she would seek to free up Section resources by asking the United States Attorneys to become involved in the litigation of housing discrimination cases the Department must bring upon referral from HUD.

HOUSING

50. Effects Test and the Fair Housing Act

Question: Will the Department adopt an "effects test" as a method of proving a violation of the Fair Housing Act?

Answer: Yes. Virtually every court of appeals that has addressed the issue has adopted a form of effects standard, similar to the standard widely accepted in employment discrimination cases, for determining a Fair Housing Act violation. The Attorney General recently announced that the Department will utilize all legal theories approved by Congress and the courts to establish Fair Housing Act violations, including disparate impact.

Background: Wherever possible, the Department under the previous Administrations refrained from taking a stand on the standard of proof under the Act, relying in most instances on adequate evidence of intentional discrimination to prove cases. In an amicus brief filed in the Supreme Court in 1988, in Town of Huntington, New York v. Huntington Branch, NAACP, No. 87-1961, however, the Department expressed the official view that intentional discrimination must be shown to prove a violation of the Act. Most recently, in a speech delivered to the HUD National Fair Housing Summit on January 21, 1994, the Attorney General stated publicly that the Department will utilize all legal theories approved by Congress and the courts to establish Fair Housing Act violations, specifically including the disparate impact theory.

HOUSING

51. Group home location

Question: Do you support the Department's position that group homes for alcoholics and drug addicts should be able to locate in single family residential neighborhoods, regardless of zoning laws?

Answer: The Department has argued that the Fair Housing Act protects the rights of handicapped individuals to live in the housing of their choice, free of discrimination because of their handicap. Current drug users are not included in the definition of "handicapped," and thus are not protected by the Act. Former drug abusers and alcoholics, however, are covered by the Act, and the Department has argued that these individuals should be allowed to live in group homes for the handicapped located in residential areas. Where local zoning laws prevent the handicapped from locating in such areas, the Department has argued that municipalities violate the Fair Housing Act if they deny a request by handicapped individuals for a reasonable accommodation of such rules.

Background: The Division has brought several group home cases on behalf of Oxford House, a national organization that sets up group homes for recovering alcoholics and former drug abusers. When Congress passed the Anti-Drug Abuse Act in 1988, it provided federal funding for group homes based on the Oxford House model, recognizing that such housing can provide the missing link in recovery from addiction. Our cases typically challenge zoning actions by municipalities which block operation of the home for prohibited reasons -- either through intentional discrimination or the exclusionary effect of neutral zoning rules on group homes. These group home cases have generally been quite controversial given the opposition that they generate in communities where they are located.

United States v. City of Edmunds (9th Cir.), is a particularly important case that raises the issue of whether zoning rules limiting the number of unrelated persons who may live together -- rules that often operate to exclude group homes for handicapped people -- are exempt from coverage under the Fair Housing Act. The Eleventh Circuit has already held that such rules are exempt, and should it become the accepted interpretation of the Act, it will have a significant adverse impact on our efforts to fight discrimination against group homes for handicapped persons. The Ninth Circuit heard oral argument in January.

Another important group home case is Smith & Lee Associates, Inc. & United States v. City of Taylor (6th Cir.), in which we just filed a petition for rehearing and suggestion for rehearing en banc. On December 30, 1993, a divided panel of the Sixth Circuit reversed the district court's finding of

liability under the Fair Housing Act and remanded the case for further proceedings. The district court concluded that the City had engaged in handicap discrimination in violation of the Act by refusing to allow Smith & Lee Associates to operate an adult foster care home for 12 elderly, disabled residents in a single-family residential neighborhood. On appeal, the panel reversed the district court's factual findings that the City had failed to make a reasonable accommodation in its zoning practices and had engaged in intentional discrimination. The panel concluded that the Taylor City Council had no authority under its existing zoning ordinance or under state law to make the accommodation requested by Smith & Lee. Our petition for rehearing argued that under the Supremacy Clause, state and local governments are required to make changes in their zoning laws to comply with federal law.

IMMIGRATION/ INS

52. Racial discrimination in INS

Question: There have been recent newspaper articles regarding race discrimination, with respect to African-Americans, in the ranks of Officer Corps (border patrol agents, immigration inspectors, immigration examiners, criminal investigators, and detention and deportation officers) and senior management positions at the INS. Are you familiar with these allegations?

Answer: Yes. There is presently pending an administrative EEO class action complaint filed by Norris Potter III on behalf of all African-American officer corps employees at the INS. Mr. Potter is an investigator in the INS Los Angeles district office. Basically his complaint alleges that class members were denied promotions to supervisory positions and had been retaliated against due to their race -- African-American.

IMMIGRATION/ INS

53. Conyers report

Question: Are you aware of the March, 1993, request by Congressman John Conyers, Jr., to the INS to conduct a systematic investigation into promotion, hiring, and treatment practices of the INS? This request was based in part on INS employment figures indicating the lack of African-Americans in any key management positions within the agency, despite the large numbers of such positions.

Answer: Yes. As a result of this request the INS assembled a Task Force, in April, 1993, to conduct a study on the recruitment, hiring and promotion practices of the INS with regards to African-Americans. This report was completed in June, 1993, and submitted to Congressman Conyers. The report basically found, among other things, that:

- 1) African-Americans are underrepresented in most Officer Corps occupations and in all occupations at the supervisory and managerial levels;
- 2) there is a lack of awareness, by those officials who recruit, hire and promote, of the INS Affirmative Action Plan;
- 3) over recent years there has only been a limited effort to target, recruit, or hire African-Americans at entry level grades in most officer corps occupations;
- 4) employees distrust the INS EEO complaint process because of a lack of confidentiality, fear of reprisals, and frustration at the length of time required to resolve complaints.

The report made numerous recommendations to address the problems uncovered by the Task Force and the agency is presently working towards ensuring that its recruitment, hiring and promotion policies and its EEO program is fair and effective with respect to all employees. Examples of what the INS has done to remedy some of the problems are:

- 1) Senior managers throughout the INS have received mandatory EEO training;
- 2) The INS is conducting targeted recruitment nationwide to increase minority representation in the applicant pools for Officer Corps occupations;
- 3) The INS is finalizing an Affirmative Employment Program Plan which will focus on targeted recruitment of minorities and women; and,
- 4) The INS has established an EEO Advisory Council to provide input to the INS Commissioner regarding the effectiveness of the employment and training processes of the INS.

IMMIGRATION/ INS

54. Discrimination against Haitians

Question: Are you aware of the allegations alleging that the INS discriminates against Haitians due to the differential manner in which certain Cubans and Haitians are treated?

Answer: Yes, allegations have been made alleging discrimination. However, this appearance of discrimination stems from the fact that: (1) the Cuban Adjustment Act of 1966 provides for special treatment to certain Cuban nationals; and (2) Cubans under final orders of exclusion and deportation cannot normally be removed from the United States because the Cuban government has refused to accept their return.

IMMIGRATION/ INS

55. Excessive force of border patrol

Question: Are you aware of the public criticism regarding the INS law enforcement components that they, particularly the Border Patrol, use excessive force in the course of their enforcement activities?

Answer: Yes. The INS, through its Office of Internal Audit, requires a comprehensive report of the circumstances surrounding each allegation of abuse or use of excessive force. In addition, the INS and the United States Attorneys' Offices have undertaken a project to identify officers that have used excessive force or that foster improper attitudes towards the safety and rights of aliens. In appropriate circumstances, action has been taken and will continue to be taken against these officers. In addition, the INS has established a Civilian Advisory Panel in order to remove barriers to persons who have legitimate complaints, and to establish a forum from which the INS Commissioner can learn the views and concerns of the community. In addition, the Civilian Advisory Panel affords local communities with a forum to present their concerns to the agency.

LEGISLATION

56. Pattern or practice suits v. police officers

Question: Do you support giving the Attorney General authority to bring a civil action to redress "a pattern or practice of conduct by law enforcement officers that deprives persons of rights, privileges, or immunities, secured or protected by the Constitution or laws of the United States." The Senate-passed crime bill would do so. The crime bill introduced by Rep. Craig Washington would add a private right of action.

Answer: I support authorizing the Attorney General to bring such suits. We are all aware of the difficult circumstances that law enforcement officers frequently face. It is, therefore, essential to exercise such authority carefully. Many police departments have internal grievance mechanisms that allow police departments to respond in the first instance to allegations that they have mistreated individuals. Development and use of these internal procedures is to be encouraged. But, where law enforcement organizations fail to respond to a pattern of complaints or persist in a practice that denies citizens federal rights, the Attorney General should have authority to step in to vindicate those rights.

LEGISLATION

57. Elimination of intent standard to prosecute police

Question: It has been proposed (H.R. 3315) that Congress enact a new statute permitting prosecution of a law enforcement officer acting under color of law who "subjects any person to force exceeding that which is reasonably necessary to carry out a law enforcement duty." This proposal would eliminate the specific intent standard that now applies to prosecutions of law enforcement officers pursuant to 18 U.S.C. 242. Do you favor elimination of this mens rea requirement?

Answer: I do not support elimination of the mens rea requirement, but I would like to explore with Congress ways to clarify the current specific intent standard announced in Screws v. United States, 325 U.S. 91 (1945). It is my understanding that jury instructions given pursuant to Screws have unnecessarily complicated the issue of the law enforcement officer's state of mind. Boiled down, the standard basically requires that the law enforcement officer knew at the time that the force used was excessive. Law enforcement officials generally resort to force in moments of stress based on snap judgments regarding the danger they face. These judgments can be difficult and should result in federal criminal liability only when the official acted with knowledge that the force applied was excessive.

LEGISLATION

58. Legislation on Access to Abortion Services

Question: The Senate and the House have both passed legislation protecting access to abortion and other reproductive health services. Although there are some differences in the bills, they are likely to be resolved in conference. How do you intend to implement the new law?

Answer: The Attorney General will make the final decision as to which part of the Department of Justice will have responsibility for enforcing the new law. Because the Civil Rights Division pulled the laboring oar in the development of the legislation and in assisting congressional consideration of the bills, I would expect that the Division will play a role in the enforcement effort. If so, I can assure you that the law will be enforced vigorously to protect women seeking abortions and the people who provide them. I can also assure you that the law will be enforced with due regard for the right of individuals to express their beliefs in legitimate ways.

Background: The Attorney General has endorsed this legislation and took a personal role in developing and supporting it. The bills would authorize criminal penalties and civil remedies against individuals who use force, threats of force, physical obstruction, or destruction of property to deny women access to reproductive health services or to interfere with those who provide such services.

Although the Department supports new legislation, we have also attempted to use existing federal law, to the extent possible, to protect women seeking abortions. While the Supreme Court severely restricted the scope of 42 U.S.C. 1985(3) in Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993), the Civil Rights Division has taken the position in a filing in the Tenth Circuit, in Women's Health Care Services v. Operation Rescue -- National, No. 91-3250 (10th Cir.), that there remain circumstances pursuant to which Section 1985(3) may still apply to some activities of anti-abortion activists. In addition, the Department filed a brief in the Supreme Court in National Organization For Women v. Scheidler, No. 92-780, arguing, as the Court recently held, that RICO can apply to the activities of anti-abortion groups that engage in racketeering activity.

LEGISLATION

59. Legislation to Overturn Presley v. Etowah

Question: Do you support legislation to overturn Presley v. Etowah County Commission, 112 S. Ct. 820 (1992)?

Answer: In Presley, the Department of Justice, under the prior Administration, filed a Supreme Court brief arguing that certain changes in the decisionmaking authority of officials should be subject to preclearance under the Voting Rights Act. I support that position and intend to explore how the Court's decision to the contrary can be overturned effectively.

Background: The Attorney General has announced the Department's support of legislation to overturn that decision. The United States' brief in Presley argued that changes in the power of elected officials affect the power of a citizen's vote and should be subject to preclearance pursuant to Section 5 of the Voting Rights Act when the changes reallocate decisionmaking authority, such as the power to spend, tax, legislate, and control road, bridge, and other transportation projects. Therefore, the Department has long supported the view that such changes should be submitted for Section 5 preclearance. Although Rep. Edwards introduced legislation addressing Presley, there has been little interest in it lately.

LEGISLATION

60. Legislation to Overturn St. Mary's Honor Center v. Hicks

Question: Do you support legislation to overturn the Supreme Court's decision in St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993)?

Answer: It is likely that Hicks will make it more difficult for victims of intentional discrimination to win relief. Although the Department has not yet taken a formal position, I believe some legislation may be needed to address this problem.

Background: Sen. Metzenbaum has introduced legislation, S. 1776, that would overturn Hicks by using the language of prior Supreme Court cases. Pursuant to the bill, a complainant could prevail by showing either that "a discriminatory reason more likely motivated the respondent," or "the respondent's proffered explanation is unworthy of credence." Thus, the complainant would not have to show, as Hicks holds, that the proffered explanation was not only a pretext, but was a pretext for discrimination. Courts have read Hicks to require that complainants produce direct evidence of discrimination. That requirement undermines the rationale behind the McDonnell Douglas prima facie case, which is that direct knowledge of the defendant's true intent often lies uniquely with the defendant and he must come forward and state his real reason or be held liable.

LEGISLATION

61. Violence Against Women Act

Question: What is your position regarding the Violence Against Women Act, which has been passed by the Senate?

Answer: I, like the Attorney General, support this legislation.

Background: As the hearings conducted before this Committee clearly demonstrated, violence against women is devastating not only to the direct victims, but to those who know them and to society as a whole. The threat of violence seriously restricts the freedom of women and deprives them of an equal opportunity to function in our society. The bill has a number of positive aspects, including grants to increase the safety of women and to provide education regarding violence against women; enhanced penalties for sex crimes; authorization of a national commission on women; amendment of the Federal Rules of Evidence to restrict the use of reputation or opinion evidence regarding the plaintiff's past sexual behavior in civil cases involving accusations of sexual misconduct and to disallow evidence regarding a victim's clothing in a criminal prosecution to show that the victim invited the attack; new protections against spousal abuse; and education and training for judges and court personnel.

The bill also provides a new cause of action in federal court for crimes motivated by gender. The Act correctly recognizes the scope of the problem and the inadequacies of state law in providing redress for women faced with violent acts. Some questions have been raised regarding the need for a new federal cause of action to provide civil remedies for crimes motivated by gender. Yet, the Committee has documented the inadequacies of state law in providing such remedies. To the extent that the problem is one of defining the conduct to be covered, the Division would work with the Committee to attempt to develop acceptable language.

LEGISLATION

62. International Convention

Question: The International Convention on the Elimination of All Forms of Racial Discrimination and a similar convention addressing discrimination against women were submitted to the Congress for ratification by the Carter Administration, but were never considered. Does the Clinton Administration intend to resubmit those treaties. If so, what do you think of attempting to deal with civil rights issues through such vehicles.

Answer: I expect that the Administration will resubmit both Conventions for Senate consideration. I think that ratification of these documents by the United States is long overdue. This country has led the world in developing a legal framework for addressing discrimination based on gender and race. These Conventions draw heavily on that framework. Anything we can do to advance worldwide the elimination of discrimination and promote opportunity without regard to race or gender is extremely important.

NATIVE AMERICANS

63. Civil rights of Native Americans

Question: What can the Department do to ensure that the civil rights of Native Americans are protected?

Answer: In 1968 Congress enacted the Indian Civil Rights Act (ICRA). ICRA extends to tribal government certain of the limitations on government authority contained in the Bill of Rights. In Santa Clara Pueblo v. Martinez, however, the Supreme Court held that ICRA created no private cause of action against tribal authorities in federal court. This holding, in effect, undermined ICRA by eliminating the remedies necessary to protect the rights accorded by ICRA.

Let me explain Martinez in a bit more detail. In that case, the Court found that one of the policies that informed ICRA -- the furtherance of tribal self-government -- precluded implying a private cause of action in ICRA. Given the goals of ICRA, the Court held that claims concerning tribal compliance with ICRA should be pursued in tribal court to avoid interference with a tribe's ability to maintain itself as a politically distinct entity.

Thus, one avenue to protect Indian Civil Rights in the wake of Martinez is to devote resources to the strengthening of tribal courts and legal services on reservations. The Department has just such an opportunity thanks to the recently enacted Indian Tribal Justice Act. We should also remember that tribal authorities are probably not the primary threat to the civil rights of Indians. As with other minorities, Native Americans are subject to many forms of discrimination. The Civil Rights Division must be vigilant in its efforts to protect Indians from such discrimination.

NATIVE AMERICANS

64. Native American Free Exercise of Religion Act

Question: What is your view on the Native American Free Exercise of Religion Act of 1993 (NAFERA), S. 1021, and what can the Department of Justice do to protect the religious rights of Indians without a NAFERA-like statute?

Answer: The First Amendment protects the religious liberty of all Americans, regardless of their religious beliefs. The Department and the Civil Rights Division are committed to ensuring that Native Americans will be adequately protected in the observance of their faiths. The protection of the recently enacted Religious Freedom Restoration Act (RFRA) --which overturns Employment Division v. Smith by requiring that the government satisfy the compelling interest test even when burdens on religious exercise are imposed by neutral laws. These protection should extend to practitioners of Native American religions as well as practitioners of other religions. Therefore, the First Amendment rights of Native Americans are protected by both the Constitution and RFRA. I can assure you that the Department will continue the work necessary to safeguard the religious liberty of all Americans.

NAFERA will provide much needed clarification of the application of the First Amendment and RFRA to sacred Indian sites on government land. Specifically, NAFERA would in many situations require the government to accommodate Indian religions that hold sites on federal lands sacred, thereby overturning Lyng v. Northwest Cemetery Protective Association. The Department is actively involved in discussions with the tribes on the sort of changes that can be made in the bill without undermining Indian religious rights.

NATIVE AMERICANS

65. Laws in "Indian Country"

Question: The phrase "Indian Country encompasses all land within the limits of any Indian reservation. At the turn of the century, Congress permitted non-Indians to assume ownership of lands on reservations. Therefore, there are large numbers of non-Indians in "Indian Country." This raises the question of whether non-Indians are subject to the regulatory authority of tribes.

In those situations in which non-Indian businesses or lands are taxed or otherwise regulated by tribes, the non-Indians feel that they are subject to taxation without representation. The problem is exacerbated by the fact that the non-Indians are also subject to taxation and regulation by the state. A similar issue arises over questions of tribal or state control of hunting and fishing rights. Can the Department do anything to alleviate these conflicts?

Answer: This is one of the thorniest problems in Indian law -- how to balance the United States' responsibility to protect the sovereignty of tribes without needlessly undermining state authority or injuring non-Indians.

The Attorney General and the Secretary of the Department of the Interior have convened a joint working group to explore, among other issues, the problem of overlapping jurisdiction in Indian Country. The goal of the working group is to provide the federal government with the tools to unravel these knotty problems.

Because this is an extremely complex problem, one that is probably not susceptible to a single solution, the best course in many situations might be to provide an incentive for states and tribes to enter into compacts that resolve these issues in a way that best suits the facts of the particular situation.

NATIVE AMERICANS

66. Gaming

Question: Now that the D.C. Circuit has upheld the National Indian Gaming Commission's regulations, what action is the Department going to take to ensure that illegal tribal gaming operations are brought into compliance?

Answer: The D.C. Circuit's recent decision in the Cabazon case should remove any remaining doubts about the legal status of video pull-tabs and other popular video gambling devices under the Indian Gaming Regulatory Act. We are working with the U.S. Attorneys and the tribes to ensure that Congressionally enacted limitations on such gaming are respected and that non-complying tribal gambling operations are brought into compliance peacefully and in a brief but reasonable time.

There are two important components to federal-tribal relations. One is the government-to-government relationship we maintain with these semi-sovereign entities, and the other is the responsibility the federal government has to the tribes for their well-being and protection. It is against this background that Congress enacted the Indian Gaming Regulatory Act (IGRA) in 1988. The Act is a complex system of regulation and oversight designed to allow tribal governments to raise needed revenue and to shield tribal gambling operations from criminal infiltration. The Act also recognizes and attempts to accommodate the legitimate interests of states in the regulation of certain forms of gambling within their borders.

Many states and tribes have negotiated compacts under the IGRA that appear to be working well. But of course, not everyone is happy with the balance struck in the IGRA, and there are legal concerns about the tribal-state compacting process as a result of the 11th Circuit's recent decision in Seminole Tribe v. State of Florida (holding that the IGRA compacting process violates states rights under the 11th amendment.) The tribes, states and federal government are working with the Senate Select Committee to address these concerns.

RACE-CONSCIOUS REMEDIES

67. Minority Contracting Plans

Question: What is the Department's position on race-conscious remedies, such as set-asides and hiring and promotion goals?

Answer: Consistent with the Supreme Court cases, race-conscious remedies may be appropriate where Congress has authorized or required such relief to remedy racial discrimination. Also consistent with Supreme Court cases, courts may order race-conscious measures in certain circumstances to remedy the effects of past discrimination.

Background: The Supreme Court ruled in Fullilove v. Klutznik, 448 U.S. 448 (1980), that Congress, pursuant to its powers under the 14th Amendment, may enact race-conscious measures to remedy historic discrimination in federal contracting, without requiring agencies or states that receive federal funds to make independent findings of discrimination in the regions or in the sectors where the federal funds for promulgating the federal contracting plan are utilized. In Fullilove, and more recently in Metro Broadcasting v. FCC, 110 S. Ct. 2997 (1990), the Supreme Court has stressed that greater deference is due Congress's determination of a remedial plan than that of a state-sponsored program. The Division has relied heavily on the principles of Fullilove to defend federal minority and female contracting plans in instances where the respective plans are sufficiently tailored to the achievement of the goals contemplated by Congress.

With regard to court-ordered remedies and public employers' voluntary affirmative action plans, the Department has taken the position (most recently in the Birmingham firefighters' case in an 11th Circuit brief on remand from Martin v. Wilks) that race-conscious relief may be justified where there is "a firm basis for believing remedial action is necessary." Johnson v. Transportation Agency, 480 U.S. 616, 652 (1987) (O'Connor, J., concurring). The relief, however, should "exten[d] no further than necessary to accomplish the objective of remedying" racial imbalances (citing United States v. Paradise, 480 U.S. 149, 166 (1987)). [Need fuller discussion, including Croson. Check with J. Silverstein for Payton draft responses].

SPECIAL LITIGATION

68. Criticism of section

Question: There has been criticism that the Civil Rights Division has not been sufficiently aggressive in its enforcement of the Civil Rights of Institutionalized Persons Act. In particular, it has been perceived as reluctant to litigate. What are your plans?

Answer: The Civil Rights of Institutionalized Persons Act contains vitally important guarantees that I intend to enforce vigorously. It authorizes the Department to sue to redress conditions of confinement in institutions -- including prisons, jails, nursing homes, and facilities for individuals with disabilities -- that offend the Constitution or laws of the United States. Congress built into the Act requirements of notice and negotiation. This is a difficult area because the correction of conditions of confinement frequently involves the expenditure of large sums of money by state or local government. While I would, if confirmed, give states and localities every opportunity to correct conditions, if they do not do so expeditiously, I will not hesitate to authorize litigation.

SPECIAL LITIGATION

69. Mississippi jail investigation

Question: What are you doing about the high number of suicides in Mississippi jails over the past few years?

Answer: The Criminal Section of the Civil Rights Division opened an investigation into 48 suicides that took place in Mississippi jails over the past 5 years. That investigation is still a pending matter within the Justice Department -- and so I would not be able to comment further.

Background: At about the same time that the State of Mississippi was holding hearings on this issue, the Attorney General was going through her Senate confirmation. During her confirmation, she indicated that she would direct the Justice Department to look into this matter. In addition to the ongoing criminal investigation, the Justice Department launched civil investigations into the conditions at 18 jails throughout Mississippi.

At the end of last year, we issued findings letters that concluded that none of them met up to constitutional standards. We have entered into discussions with all of the jails to resolve the concerns that we raised in our findings. In fact, on March 1, we reached an agreement with one of the 18 jails -- Jones County Jail -- that requires it to upgrade conditions and build a new facility by 1995.

VOTING RIGHTS ACT

70. "Results" Standard

Question: Do you support the "results" standard under section 2 of the Voting Rights Act? [or any question about Voting Rights and non-intentional discrimination]

Answer: You are referring to the "totality of the circumstances" standard adopted by Congress and signed into law by President Ronald Reagan in the 1982 Amendments to the Voting Rights Act.

When you use the word "results," this standard does not mean particular results in terms of electoral success. It does not mean proportionate representation. The word "results" was used by Congress as a shorthand way of referring to the "totality of the circumstances" standard adopted in the 1982 amendments. Those amendments were adopted with broad bi-partisan support in the Congress. In the Senate leading proponents of the 1982 amendments were Senator Kennedy and Senator Dole, so it was very broadbased.

The answer is yes, I support the "totality of the circumstances" standard adopted by Congress in 1982.

The "totality of the circumstances" standard was developed by a number of federal courts in the South who were faced with real facts, real people and real life situations where African Americans were being denied meaningful political participation. Those local federal judges reached the conclusion that they needed a tool to address these problems in addition to the intentional discrimination standard of the Constitution. A large number of federal judges, all facing concrete situations in different communities across the country, came to the same conclusion. A body of law was developed as one judge built upon the thinking of a prior judge. That body of law came to be known as the Zimmer factors, referring to a case decided by the Fifth Circuit Court of Appeals that summarized the factors that most courts found helpful in judging local political realities under the "totality of the circumstances."

The Zimmer body of law was rejected by the Supreme Court in its 1980 decision in the Mobile, Alabama case -- Mobile v. Bolden. Congress then conducted an in-depth consideration of whether to amend the Voting Rights Act to overturn the Mobile case and restore the law under Zimmer. In the early 1980's, Congress held numerous days of hearings and delved deeply into the facts and legal reasoning that had resulted in the development of the Zimmer body of law. Congress re-examined the conclusions and wisdom of the federal courts. Congress also heard new testimony about problems of

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Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

VOTING RIGHTS ACT

71. Shaw v. Reno

Question: Do you agree with the Supreme Court's decision in Shaw v. Reno?

Answer: Shaw v. Reno was a constitutional decision. In our Constitutional system, the Supreme Court has the final say on the meaning of the constitution. Whether I agree with it or not, I will comply with the decision because my job is to enforce the law, not to make the law.

My understanding of Shaw v. Reno is that it is one of a series of cases addressing the constitutional boundaries of race-conscious affirmative action in a variety of contexts. Whether the context is voting, employment, education or some other area, the Constitution has been consistently interpreted to require that race-conscious measures adopted by state or local governments be supported by a compelling justification and be narrowly tailored to achieve that compelling justification. I have no problem with the application of that general constitutional standard in the voting rights/districting area. I believe that in appropriate cases, state and local governments will be able to show a compelling justification and narrow tailoring with respect to districts drawn to meet the requirements of the Voting Rights Act. The Department is currently involved in several such cases.

VOTING RIGHTS ACT

72. Shaw v. Reno/single-member districts

Question: Have the 1982 Amendments in some cases been applied in a way that results in proportional representation (or racial gerrymandering, etc.)? For example, the districts in Shaw v. Reno have been described as a bug splattered on a windshield and as the Interstate Highway District. (Possibly holding up pictures of districts).

Answer: The Shaw case is currently in litigation and I think that it, like all other voting rights cases, should be decided on the facts, after all of the evidence has been presented. [I have not been involved in the litigation of the Shaw case and was not involved in the Department's recent decision to seek to participate in that case as amicus curiae.]

I can give you my general views on the issues raised by the Shaw case. My understanding is that, wholly apart from any voting rights remedy considerations, the attractiveness or artistic appeal of a district's shape has never been a strong factor in judging voting districts. I have been informed that there are many majority-white districts drawn by states after the 1990 census and are currently in use that look very similar to the districts challenged in Shaw, Hayes and possibly other cases. It may appear to some that the use of unattractive shape is attacked only when it happens to be a majority-black district. In my view, a better way to judge a district than shape is whether its residents have a community of interest. It has been argued that the so-called Interstate Highway district in Shaw meets the community of interest criterion by joining residents of urban areas into one district. I suppose that the court will have to decide whether that is true as a matter of fact.

With regard to the facts of the Shaw case, my understanding (based on the materials I have seen about the Department's participation in that case), is that two compact, attractively-shaped majority-black congressional districts could have been drawn in North Carolina. When the State did not do that, the Justice Department in the Bush Administration objected under section 5 on the ground that there appeared to be discriminatory intent -- that is a motivation to deny African Americans representation based on race. You may want to disagree with the Bush Administration's decision about intentional discrimination. I have not reviewed the documentation of that decision, but I have been informed that the facts were carefully studied and that the Bush Administration reached that conclusion.

What happened next, according to what I have been told, is that the State still did not want to create the two compact, attractively-shaped districts, so it instead created the two districts that have been challenged. As set out in the

Department's recent amicus brief, it appears that the so-called "bizarre" shapes are likely to be explained by traditional, non-racial political factors, such as protection of incumbents.

You also might be interested to know that the districts challenged in Shaw apparently are not segregated. I understand that they are the most integrated districts in the State, with roughly 60 percent African American voters and 40 percent white voters.

Background: The Bush Administration objected to North Carolina's failure to create two majority-black districts, finding that this failure likely resulted from an intent to discriminate on the basis of race.

VOTING RIGHTS ACT

73. Lani Guinier/Cumulative Voting

Note: Always refer to Lani as Professor Guinier.

Question: Do you agree with Lani Guinier that the Voting Rights Act requires cumulative voting -- an unusual system in which voters can give two or more votes to one candidate?

Answer: The meaning of Professor Guinier's writings has been widely debated and people have reached very different conclusions. I am not deeply familiar with her writings and am not here to explain what Prof. Guinier meant in those heavily-footnoted articles. Without taking a position on whether you have accurately characterized Prof. Guinier's views, let me tell you what my views are on voting rights remedies.

I approach voting rights, like other issues, from a fact-oriented, practical perspective. First, I look to see whether there is a problem and what is the nature and scope of that problem. Where there is a problem, for example where the "totality of the circumstances" indicates that African Americans or another protected minority group, have been denied an equal opportunity to participate in the political process and elect representatives of their choice, then I look for a remedy that works, that is effective. The law gives the affected jurisdiction the first right and responsibility to propose a remedy. Both as a private litigator and as AAG, if confirmed, my approach is to work with the parties. Often, if you are open-minded and creative, you can come up with win/win solutions that allow all parties to achieve as many of their goals as possible. I think that my record in settling many cases with creative compromises demonstrates my approach.

On cumulative voting, I have never personally been involved in a case where that remedy could have been considered. Since my general approach is a case-by-case, fact-oriented one, I cannot give you an abstract description of how I would evaluate that remedy. I can tell you that in all cases I am open to consideration of any remedy that works to solve the problem at hand. I understand that the Justice Department, in Republican and Democratic Administrations alike, has found cumulative voting to work in some cases. I would not rule out any remedy, particularly one that has been found by persons of good faith in both political parties and by the courts to be effective.

Background: Federal courts have approved alternative voting arrangements, such as

cumulative and limited voting;² DOJ during the Bush Administration pre-cleared limited or cumulative or mixed voting systems adopted in at least 35 jurisdictions since 1985³ and in three cases DOJ during the Reagan Administration agreed to settle lawsuits by allowing jurisdictions to employ limited voting for at-large elections.⁴ Pennsylvania requires that county commissions and judges be elected by limited voting. Cambridge, Massachusetts uses a cumulative voting system. New York City's community school boards use a variant of this system. Last year North Carolina's legislature authorized the study of "modified at-large systems," such as limited or cumulative voting. The National Civic League have endorsed such a system in its model city charter.

You say that cumulative voting is "an unusual system" and that it gives each voter more than one vote. I understand that, apart from several Voting Rights consent decrees, there are several local governments that have chosen, entirely voluntarily, to adopt cumulative voting systems or variations thereof, because they believe it is the best form of government for them, based on their local conditions and goals. I have been informed that Cambridge, Massachusetts is one such locality. Although cumulative voting gives each voter more than one vote, it gives all voters the same number of votes. So it treats everyone equally. In addition, it is race neutral. It does not encourage or require explicit racial lines; it lets all voters choose how to allocate their votes among all candidates.

²Three Alabama cases are cited in attached memo on Limited and Cumulative Voting/Supermajority Systems, pp. 1-2.

³The 35 jurisdictions are listed in the attached memo, footnote 10, page 2.

⁴The 3 cases, all apparently settled in 1988, are listed in the attached memo, footnote 11, page 2.

VOTING RIGHTS ACT

74. Lani Guinier/Presley case

Question: Do you agree with Lani Guinier that the Supreme Court's decision in Presley v. Etowah County represents a "lynch[ing]" and that in this decision "six members of the Supreme Court engaged in unjustifiable judicial activism on behalf of local white majorities."⁵

Answer: As I have said before, I am not Prof. Guinier and do not purport to have a full understanding of her positions and views. I will be glad to give you my impressions of the Presley case, however. Presley is a case of statutory interpretation, so the question was discerning Congress' intent in section 5 of the Voting Rights Act. The Court was divided 6-3, with Justices Stevens, White and Blackmun dissenting, so it is evident that reasonable persons can disagree on what Congress intended in this situation.

In the Presley case as I understand it, the Supreme Court held that Section 5 of the Voting Rights Act does not apply to discrimination by white commission members against newly-elected black commission members, even where the black commission members were elected as the result of a Voting Rights Act remedy. The Supreme Court described the facts of the Presley case as "pernicious discrimination." [check this] Two counties in Alabama that have particularly gruesome records of racism had been governed by all-white county commissions as long as anyone could remember, even though each county had a substantial African American voting population. Under the old system, each commissioner individually had responsibility and control for certain public works and projects, such as road maintenance, within his district. A single commissioner could, for example, decide who to hire or contract with for public works projects. After a voting rights lawsuit resulted in the election for the first time in recent history of African American representatives, the holdover commission in each county, including the white representatives who had just lost their seats, changed the rules. In one county, the responsibilities of the individual commissioners were shifted to an appointed Administrator, who was white, and in the other county, the duties were taken over by the commission as a whole. The African Americans who had just won the right to elect representatives of their choice saw that right immediately become an illusion, as the newly-elected representatives were stripped of their powers.

The Bush Administration argued in the Presley case that section 5 of the Voting Rights Act covers this type of situation. The Court rejected the Bush Administration's position, opting for a clear, bright line that once the election is over and the winner takes office, Section 5 does not apply to what happens

⁵The Philadelphia Inquirer, Feb. 2, 1992.

to that official in office. Whether the Supreme Court was right or wrong, Congress has the ability to change the law to make its intent clear. Attorney General Reno has indicated that this Administration will support legislation to overturn the Presley decision. I intend to work with Congress to develop legislation that works to remedy this problem in an effective and reasonable way.

Background: The Department of Justice in the Bush Administration filed a brief taking the position that certain changes in the decisionmaking authority of officials should be subject to preclearance. The Supreme Court rejected this argument 6-3, with Justices Stevens, White and Blackmun dissenting.

VOTING RIGHTS ACT

75. Lani Guinier/supermajority remedies

Question: Do you agree with Lani Guinier that supermajority remedies, essentially a minority veto, should be required by the Voting Rights Act? [may also be phrased as minority veto]

Answer: Without addressing whether you have accurately characterized the views of Lani Guinier, I will give you my understanding of supermajority remedies.

First, as with any problem, I will try to be creative in seeking remedies to voting rights violations that meet the needs of all parties as much as possible. I would rule out no remedy in the abstract, but would take each situation on a case-by-case basis.

I have been informed that a supermajority requirement was approved by both a federal court and the DOJ in the Reagan Administration in the Mobile v. Bolden case. In that case it takes five out of seven members of the City Council to pass a motion. Since there are four whites and three blacks on the City Council, it forces whites and blacks to work together because at least one black or two whites must crossover and vote for a motion supported by all members of one race. It seems like a creative remedy for what, admittedly, is a case of extreme racial division that existed in that City.

Background: Supermajority requirement approved by Reagan Administration and federal court in Mobile v. Bolden. (5 out of 7 City Council members required to pass motion.)

VOTING RIGHTS ACT

76. Motor voter implementation

Question: What are your views regarding the implementation of the National Voter Registration Act of 1993 (Motor Voter)?

Answer: I support vigorous enforcement of Motor Voter, which Congress enacted to increase the numbers of citizens eligible to vote in elections for federal office. In addition to allowing voters to register when they apply for a driver's license, key provisions of the law provide for registration at state agencies (such as public assistance offices) standard voter forms, mail-in registration, and procedures to ensure accurate voter rolls are kept.

VOTING RIGHTS ACT

77. Motor voter fraud

Question: Some argue that Motor Voter invites voter fraud. How do you respond?

Answer: That issue was heavily debated by Congress and, in fact, the law contains several provisions (e.g. Section 8) that specifically address voter eligibility. While it is impossible to ensure that no fraud will occur, the law strikes a careful balance between the goal of registering new voters and having accurate voter rolls.

VOTING RIGHTS ACT

78. Motor voter and state laws

Question: Some states, like New Hampshire, are considering bills to enact election-day voter registration and are making their laws retroactive in order to avoid complying with Motor Voter's procedures. What do you think of this?

Answer: Motor Voter exempts from compliance states that, prior to March 11, 1993, had election-day registration or no registration for elections for federal office. Efforts to gain exemptions must be closely scrutinized by the Department since Motor Voter is very clear about what states must do to comply. States take a clear risk if they fail to follow its requirements.

MISCELLANEOUS

79. Race and Gender Diversity in Jury Selection

Question: The Rodney King beating prosecutions focused renewed attention on the importance of race in selecting juries. A case involving gender exclusion is pending in the Supreme Court. Do you think that race or gender should play a role in the selection of juries?

Answer: I do not think that parties should be allowed to exclude anyone from a jury because of either race or sex. The Supreme Court has already held, in Batson v. Kentucky, 476 U.S. 79 (1986), that race cannot be the basis for peremptory challenge. I agree with the position recently taken by the Department in the Supreme Court that challenges based on gender should be treated the same way as challenges based on race.

Background: The Supreme Court heard oral argument on November 2, 1993, in J.E.B. v. State of Alabama, ex rel. T.B., No. 92-1239. This was a paternity suit brought in state court on behalf of the mother. The putative father, invoking Batson, registered an objection to the plaintiff's use of peremptory challenges to remove all men from the jury. In Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court held that although a defendant has no right to a jury composed in whole or in part of persons of his own race, a defendant can make a prima facie case of discrimination in the use of peremptory strikes where he can show that the prosecutor used them for the purpose of excluding members of the defendant's race. The trial court in J.E.B. refused to apply Batson in the context of purposeful exclusion of men from juries.

In a brief as amicus curiae, and in oral argument, the United States argued generally that there is a history of discrimination against women in jury selection similar to the history of racial discrimination in jury selection. Once the absolute discretion of the peremptory challenge was limited by Batson, it was clear that discrimination on the basis of gender was no more defensible than racial exclusion.

MISCELLANEOUS

80. Retroactive Application of the Civil Rights Act of 1991

Question: What are your views as to the retroactive application of the Civil Rights Act of 1991 to pending cases?

Answer: The Department has taken the position supporting the retroactive application of the Civil Rights Act of 1991 to pending cases. I support that position.

Background: On April 30, the Solicitor General filed a brief amicus curiae on behalf of petitioners in Landgraf v. USI Film Products, Inc., and Rivers v. Roadway Express, Inc. The Solicitor General argued that the Act applied to claims that were pending on the date of enactment, relying on the text of the Act and the presumption that new procedural and remedial statutory provisions apply to pending cases, in accord with the Court's 1974 decision in Bradley v. Richmond School Board. These cases are still pending.

PHOTOCOPY
PRESERVATION

MEMORANDUM

TO: THE ATTORNEY GENERAL

FROM: [Illegible]

SUBJECT: [Illegible]

On April 30, the Solicitor General filed a brief on behalf of petitioners in Richard School Board v. United Brotherhood of Carpenters and Joiners of America. The brief argued that the Act applies to cases that were pending on the date of enactment, relying on the text of the Act and the presumption that new procedural and remedial statutory provisions apply in pending cases in accord with the Court's 1974 decision in Ex parte. [Illegible]

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