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OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

LRM NO: 3229

FILE NO: 1649

12/6/95

LEGISLATIVE REFERRAL MEMORANDUM

Total Page(s): 25

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DEADLINE: 4pm Wednesday, December 06, 1995

SUBJECT: JUSTICE Proposed Testimony RE: HR2128, Equal Opportunity Act of 1995

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: The attached testimony is for a House Judiciary Subcommittee hearing on H.R. 2128 on Thursday, December 7th. The witness will be Deval Patrick, Department of Justice, Civil Rights Division.

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MEMORANDUM**

LRM NO: 3229

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SUBJECT: JUSTICE Proposed Testimony RE: HR2128, Equal Opportunity Act of 1995

The following is the response of our agency to your request for views on the above-captioned subject:

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draft



Department of Justice

STATEMENT

OF

DEVAL L. PATRICK

ASSISTANT ATTORNEY GENERAL

CIVIL RIGHTS DIVISION

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

REGARDING

H.R. 2128; THE EQUAL OPPORTUNITY ACT OF 1995

ON

DECEMBER 7, 1995

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to appear today to present the views of the Administration regarding H.R. 2128, titled the "Equal Opportunity Act of 1995." While legislative titles are not generally matters of great import, this one is ironic, if not distressing, because beneath its promising title this bill does nothing to address the enormous problems that face the overwhelming majority of people who are denied equal opportunity. It ignores those who because of centuries of discrimination -- discrimination that no reasonable person denies persists today -- have been denied opportunities to obtain a decent education, compete equally for jobs, participate in the political process and generally partake fairly of the bounty of this magnificent nation.

Instead, this bill focuses on a few, very limited remedies that the Congress and prior Administrations, as well as this one, have tried to implement to overcome this nation's shameful history of exclusion based on race, ethnicity and gender. By completely prohibiting otherwise lawful and flexible affirmative action and categorically rejecting several decades of Supreme Court precedent imposing reasonable limits on affirmative action, this bill attacks remedies that have evolved as a modest, helpful response to the deep intransigence of institutions peopled by those who persist in viewing African Americans, Hispanics, Native Americans, Asians and women as less deserving of jobs, business opportunities and places in universities. When by every measure of social well-being members of racial and ethnic minority groups and women lag far behind white males, when study after study

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shows that enforcement of the antidiscrimination laws alone has not leveled the playing field between dominant white males and other citizens, when affirmative action -- done the right way -- represents one sensible, restrained tool available to help our society achieve its goal of integration. This bill would set us all back. The Administration strongly opposes it.

There is a fallacious tendency to speak of affirmative action as if it is a single thing. So, let's start by getting our terms straight. Affirmative action encompasses a range of remedies. At one end of the spectrum are efforts to reach out to traditionally excluded individuals -- whether women or minorities -- and to recruit talent broadly in all American communities. This might include providing technical assistance to enable women and minorities to take advantage of opportunities. Affirmative action in the military after the Vietnam War -- the very initiative that helped expose Colin Powell's many talents -- is an example of this sort of measure. Hardly anyone opposes efforts to cast a broad net, and offer training -- or so I thought before H.R. 2128. For it would prohibit even outreach if its success or value was in any respect measured against a numerical goal.

At the other end of the spectrum, masquerading as affirmative action, lie quotas: hard and fast numbers of places in school or the workplace specifically reserved for members of certain groups, regardless of qualifications. Nearly everyone opposes quotas, including the President and 11 Federal courts have rejected such measures and Federal law -- both in Executive

Order 11246 and by statute make quotas unlawful. See e.g. The Civil Rights Act of 1991, P.L. 102-166. To the extent that H.R. 2128 purports to prohibit "quotas," it adds nothing that doesn't already exist in Federal Law.

In the middle between these extremes lies a range of activities that might be called "affirmative consideration," in which race, ethnicity or gender is one factor that is considered among others in evaluating candidates who are qualified. This form of consideration does not guarantee success based on race, ethnicity or gender. Rather, it emphasizes a full range of qualification and is characterized by flexibility. This is the form of affirmative action that was supported by early proponents and has consistently received the support of Republicans and Democrats. Indeed, no Federal law of any kind mandates that anyone make decisions on the sole basis of race or gender.

The law has consistently supported "affirmative consideration." From its first examination of an affirmative action program on the merits, in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), the Supreme Court has consistently endorsed consideration of race as one factor among many in contrast to reliance on race as the sole basis for a decision. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 508 (contracting program failed strict scrutiny in part because it made "the color of an applicant's skin the sole relevant consideration"). The same has been true with respect to gender: See Johnson v. Transportation Agency, 480 U.S. 616 (1987) (upholding an affirmative action plan in employment under which a

state agency considered the gender of applicants for promotion as one factor in the decision).

In Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995), the Court extended strict judicial scrutiny under the Constitution to federal programs that use racial or ethnic criteria as a basis for decisionmaking. It did not, however, invalidate altogether such reliance. It simply held that consideration of race or ethnicity in decisionmaking must be narrowly tailored to serve a compelling interest, imposing on Federal initiatives the same exacting analysis the Court imposed on state and local initiatives some years ago.

Courts have developed a series of inquiries by which to evaluate affirmative action programs in order to ensure that consideration of race, ethnicity or gender is narrowly tailored to achieve its purpose: (1) whether race-neutral measures were considered and would prove equally effective; (2) whether the program is properly limited in scope and flexible, as demonstrated, for example, by the existence of a waiver provision; (3) whether race is relied upon as a necessary factor in eligibility or whether it is used as one factor among others in the eligibility determination; (4) whether any numerical target is related to the number of qualified minorities in the applicable pool; (5) whether the duration of the program is limited and whether the program is subject to periodic review; and (6) whether the program burdens nonbeneficiaries inappropriately.

In July, President Clinton spoke at the National Archives to reaffirm his commitment to the eradication of invidious discrimination and its persistent effects. He recounted movingly the enormous changes that he has witnessed since his childhood in Arkansas, but he concluded, as we all must, that the job is not close to completion. As the President stated, affirmative action was born as a compromise -- as a middle course between simply declaring discrimination unlawful and proclaiming victory (a course that would have accomplished little) and the imposition of draconian penalties on employers and others for failure to achieve rigid and inflexible quotas. Instead, we opted for a middle ground that permits affirmative action where it is flexible, respects merit and does not unnecessarily burden the expectations of nonbeneficiaries.

As a matter of policy and law, the President committed to mend, but not end affirmative action. He directed federal agencies to review programs and to reform or eliminate any program that:

- (1) creates a quota;
- (2) creates preferences for unqualified individuals;
- (3) creates reverse discrimination; or
- (4) continues after its equal opportunity purposes have been achieved.

He also committed to root out fraud and abuse in Federal procurement programs, such as where white-owned companies get minority-owned firms to front for them.

Since the President's address and the release of the White House's Affirmative Action Review in July, the Department of Justice has been spearheading an effort to review federal affirmative action programs to ensure their compliance both with the law and the President's policies. Associate Attorney General John Schmidt testified before a joint hearing of this Subcommittee and its Senate counterpart in September to describe those activities. That careful review continues. In our view, this deliberate, intensive focus on each federal affirmative action program, during which the actual operation and practical effects of the program can be assessed, is a far more responsible way to proceed than to declare an end to any effort whatsoever, as H.R. 2128 does, whether it is legal under current law or not.

As you are aware, our review has resulted in the termination of one significant program in the contracting area -- the use of the so-called "Rule of 2" by the Department of Defense. We will announce other changes as conclusions are reached. We fully accept that some changes will be required by Adarand, and the President's policy. Where problems exist, we all have to face them without flinching and correct them. But problems in the management or design of this or that program should no more require us to abandon the principle of affirmative action than problems in defense procurement should require the Air Force to stop buying planes or the election of undistinguished congressmen should require us to abandon democracy. I would have hoped that the committee would work more deliberately -- together with the Department of Justice -- to root out the most serious inequities

and inefficiencies in specific affirmative action programs. Instead, H.R. 2128 would simply abrogate any duty the Federal government ever had to build opportunity to those who have been denied it for so long.

Turning to the legislation that is the immediate subject of this hearing, H.R. 2128 is not only misdirected as a matter of priorities, but it is such a blunt and extreme measure that it would work substantial harm. It is inconsistent with decades of Supreme Court precedent, would eliminate numerous federal statutes and executive orders and curtail the battle against discrimination on the basis of race, gender and ethnicity. It would do all of this without a deliberate and intensive examination of affirmative action programs.

Overview

H.R. 2128 seeks broadly to limit federal affirmative action programs. The bill's operative provision states that "[n]otwithstanding any other provision of law," no entity of the federal government "may intentionally discriminate against, or may grant a preference to, any individual or group based in whole or in part on race, color, national origin, or sex, in connection with" federal contracting or subcontracting, federal employment, or "any other federally conducted program or activity." The bill also prohibits the federal government from "requir[ing] or encourag[ing] any Federal contractor or subcontractor to intentionally discriminate against, or grant a preference to, any individual or group based in whole or in part on race, color, national origin, or sex," id. at § 2(2), and it prohibits the

federal executive branch from "enter[ing] into a consent decree that requires, authorizes, or permits" any of those forbidden activities. Id. at § 2(3). Under the bill, "preference" includes "use of any preferential treatment and includes but is not limited to any use of a quota, set-aside, numerical goal, timetable, or other numerical objective." Id. at § 8(3).

The bill incorporates several specific exceptions to its broad provisions. Most notably, the bill exempts certain outreach and recruitment efforts. Specifically, the bill does not purport "to prohibit or limit any effort by the Federal Government * * * to recruit qualified women or qualified minorities into an applicant pool for Federal employment or to encourage businesses owned by women or by minorities to bid for federal contracts or subcontracts, if such recruitment or encouragement does not involve using a numerical objective, or otherwise granting a preference, based in whole or in part on race, color, national origin, or sex, in selecting any individual or group for the relevant employment, contract or subcontract, benefit, opportunity, or program." H.R. 2128, section 3(1). A similar safe harbor allows the federal government to encourage federal contractors or subcontractors to engage in the same kinds of recruitment efforts. Id. § 3(2). However, this exemption does not apply if a recruitment or outreach program uses any kind of numerical benchmark, even for hortatory or tracking purposes; its value, therefore, is substantially limited.

The bill also includes three other exceptions under the rubric of "rules of construction." First, the bill does not purport "to prohibit or limit any act that is designed to benefit an institution that is a historically Black college or university on the basis that the institution is a historically Black college or university." Id. § 4(a). Second, the bill does not purport to limit action taken pursuant to Congress's powers relating to Indian tribes or pursuant to a treaty between the United States and an Indian tribe. Id. § 4(b). Third, the bill does not purport to limit any sex-based classification if sex is a bona fide occupational qualification, if the classification "is designed to protect the privacy of individuals," or if the classification is dictated by national security. Id. § 4(c).

As the above description indicates, the reach of H.R. 2128 is quite broad and would wreak significant change. The bill's prohibitions would apply retrospectively; they would invalidate any existing law or regulation that does not comply with the bill's requirements. The substantive provisions of the bill would apply to any federal contracting or subcontracting, federal employment, or "federally conducted program(s) or activit[ies]." Because this last category does not appear elsewhere in the law, its meaning and breadth are unclear.

On the other hand, the bill's prohibition against intentional discrimination, taken at face value, is quite unnecessary and, in reality, potentially counterproductive. Such discrimination is already prohibited by the Constitution and

numerous federal statutes. Although we do not so read the bill, it is sufficiently vague that it could be construed to supersede, for example, the prohibition against employment practices that are not job related that was enacted by Congress in 1991. In addition, the bill explicitly cuts back on existing protections against sex discrimination by introducing a series of new exceptions including a vague and open-ended exception "to protect the privacy of individuals."

Analysis

H.R. 2128's flat prohibition against consideration of race and gender is a rejection of the compelling need to remedy the effects of past and present discrimination. It is inconsistent with principles developed by the Supreme Court and with numerous enactments of Congress and executive branch orders.

Just last Term, in Adarand Constructors, Inc. v. Peña, supra, the Court recognized the appropriateness of considering race as a means of overcoming our nation's continuing legacy of discrimination. As Justice O'Connor, writing for the Court, stated: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." Id. at . . . Rather than prohibit consideration of race, the Court held that reliance on race would be subjected to strict scrutiny. That scrutiny, however, permits consideration of race where it is justified by a compelling interest. This bill would prohibit all

such consideration, regardless how compelling the interest supporting it might be. It would be inconsistent with the principle recognized long ago by Justice Powell that government has a "substantial interest that legitimately may be served by a properly devised * * * program involving the competitive consideration of race and ethnic origin." Regents of the University of California v. Bakke, 438 U.S. 265, 320 (1978). H.R. 2128 would severely disable government in its ability to address the practice and lingering effects of racial discrimination.

Similarly, the Court has held that consideration of sex is appropriate if it "serves an important governmental objective" and is "substantially related to the achievement of those objectives." J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419 (1994); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982). H.R. 2128 would prohibit consideration of sex, regardless how important the governmental objective in doing so might be. H.R. 2128 would curtail efforts to address discrimination against women.

The bill's assault on the use of numbers is an extreme reaction to an overstated danger. By defining "grant a preference" to include "any use of a * * * numerical goal, timetable, or other numerical objective," the bill would reject principles developed by the Supreme Court, eliminate federal statutes and overturn Executive Order 11246, none of which mandate decisionmaking on the basis of race or gender.

Goals and timetables have been used as measures to cure discrimination since the Nixon Administration. Their use has been approved by the Supreme Court as a proper means of overcoming imbalances in traditionally segregated job categories. See Johnson v. Transportation Agency, 480 U.S. 616 (1987). They are indispensable as measures of progress in eliminating discrimination and, contrary to the fears of some, the use of goals and timetables does not lead inexorably to quotas.

Indeed, the bill's prohibition against quotas, like its prohibition against intentional discrimination, is superfluous. Rigid and inflexible measures that look only to race or gender in disregard of qualifications are unlawful. They have been firmly and repeatedly rejected by the President. Executive Order 11246 expressly rejects the use of quotas, as does the Civil Rights Act of 1991. Likewise, the caselaw does not tolerate quotas. Consideration of race or ethnicity can survive court scrutiny only if it is properly tailored. That tailoring includes consideration whether it is flexible and respects qualifications. Indeed, even though the Supreme Court has approved strong race conscious relief, it has never approved relief that depended solely and inflexibly on race. See United States v. Paradise, 480 U.S. 149 (1987) (upholding requirement that Alabama Department of Public Safety promote one black state trooper for every white trooper promoted, noting that the relief was flexible because it could be waived in the absence of qualified candidates).

Unlike quotas, goals and timetables represent a flexible and sensitive approach to curing traditional exclusion. They leave discretion with the employer to select means including outreach, recruitment, and, where appropriate, the competitive consideration of race or gender as one factor. In all instances, they must be achieved without unduly burdening others.

In many areas of life, we use numbers to measure progress toward success. Whether it is in tracking sales, profits or success in batting a baseball, we look to numbers to measure how well we are doing and to establish our aspirations. It should be no different in measuring equal opportunity.

A principal example of the importance of goals and timetable in combatting discrimination is Executive Order 11246, which would be eliminated by H.R. 2128. Under the Executive Order, federal contractors and subcontractors with contracts of at least \$50,000 a year must maintain a written affirmative action program. The contractor's plan must include goals for the hiring of minorities and women if there appears to be a problem with the contractor's hiring practices. The goals, however, must not operate as quotas -- indeed, the Executive Order expressly prohibits the use of quotas -- and contractors are not required to engage in any form of preferential hiring. Contractors are required only to make a good faith effort to meet the goals, and they can satisfy that requirement by a variety of strategies, including recruitment and outreach. H.R. 2128 prohibits even this limited use of a "numerical objective" as a way of measuring

progress. It would, therefore, eliminate one of the most successful measures ever adopted to promote equal opportunity in employment. The use of numerical goals in the Executive Order dates back to the Nixon Administration and has received bipartisan support ever since. Elimination of Executive Order 11246 would curtail the fight against discrimination and strike a devastating blow to the achievement of equal opportunity.

The bill's fear of goals would also result in elimination of the affirmative action program that has proved successful in expanding employment and promotion opportunities in the military. Affirmative action in the military focuses on outreach, recruitment and training. By directing its efforts at assuring that a qualified pool of minority and female candidates for promotion exists, the military's program serves the objective of equal opportunity. Although the services set numerical goals for promotions, they do not set up those goals as rigid requirements, and they do not sacrifice merit criteria to meet those goals. As a result, minority and female promotion rates often diverge considerably from the numerical objectives. But because H.R. 2128 treats any use of a numerical objective as a "preference," even the military's merit-based affirmative action program would be invalidated.

Current law sets government-wide overall national goals for minority and female participation in government procurement. Specifically, the law sets a goal of 5% for small disadvantaged businesses and 5% for women-owned businesses. These goals are

flexible; they establish an objective or benchmark rather than a requirement. Indeed, Mr. Chairman, you quite commendably voted to enact these goals just a year ago in supporting the Federal Acquisition Streamlining Act. H.R. 2128 would eliminate these goals. Because the bill eliminates any affirmative recruitment program that contains a numerical objective, it would also invalidate any outreach program tied to the government-wide procurement goals.

Most notably, the bill would eliminate the government-wide Section 8(a) program, which accounts for about 2.7 per cent of all government procurement. See 15 U.S.C. 637(a). The Section 8(a) program provides sole-source or limited competition contracting for small businesses operated by socially and economically disadvantaged persons. As part of the effort to review and revise federal affirmative action programs, the Administration is now examining the 8(a) program and will soon announce reforms to strengthen the program and ensure that it is targeted on individuals who have suffered discrimination. Yet, H.R. 2128 would simply sweep this highly beneficial program away.

Similarly, because the bill reaches federal contractors, its prohibition against the use of goals and timetables would reach deep into the private sector.

The bill would exempt "any act that is designed to benefit" Historically Black Colleges and Universities. Thus, the government-wide program of promoting cooperation with these institutions (see Executive Order 12876) would appear not to be

eliminated by the bill. However, the exemption's limitation to "any act" designed to benefit historically black colleges may prevent administrative initiatives to aid these institutions; specific statutory authorization may be required.

The bill contains no similar exemption for minority-serving educational institutions, which also are the focus of statutory and Executive Branch programs of support. See Executive Order 12900. At least 13 federal agencies currently administer programs that target aid to these institutions. For example, the Department of Education's program of Grants to Hispanic-Serving Institutions would not be exempted from the bill's substantive provisions. Under this program, the Department provides grants to schools with a certain percentage of disadvantaged Hispanic students. See 20 U.S.C. 1059c. Because race is a factor in determining the beneficiaries of the "federally conducted" grant program -- and not merely in determining what the beneficiaries can do with the grant money -- the Grants to Hispanic-Serving Institutions would be eliminated by H.R. 2128.

Neither the judicial process, nor the antidiscrimination enforcement machinery escapes the sweep of H.R. 2128. It would prohibit the federal government from entering into a consent decree that "requires, authorizes, or permits any activity prohibited by" the substantive provisions of the first section of the bill. Thus, neither the Civil Rights Division of the Department of Justice, nor the Equal Employment Opportunity Commission could sue a private employer who was a federal

contractor (presumably the suit would not have to relate to the contract) and enter into a consent decree based on the contractor's discrimination (which must be approved by a court) that would contain numerical relief -- even if that relief were limited to a goal in bringing excluded minorities or women into a pool from which applicants would be selected without regard to race or gender. This provision would strip the federal government of a significant tool for enforcing the laws that prohibit discrimination on the basis of race, ethnicity and gender. It would also promote litigation by making it necessary for the government to proceed to trial in order to obtain necessary remedies.

This same provision would also promote litigation and curtail the enforcement of antidiscrimination laws by prohibiting the federal government from entering consent decrees containing numerical relief in suits filed against it. Unfortunately, the federal government occasionally finds itself in the position of a defendant and must have the ability -- when it recognizes its own errors -- to settle litigation in a manner that provides full relief for a class of victims. This bill would strip the federal government of that ability.

Many other beneficial statutes and programs would be eliminated by H.R. 2128's blunderbuss approach to affirmative action. It is not our purpose to catalogue them. Rather, the point is that the approach of H.R. 2128 is flawed. There is no justification for eliminating programs wholesale, particularly

without knowing what many of them do or how they do it. The Administration is in the midst of a very thorough, searching examination of affirmative action programs that has already shown results. That process should be allowed to run its course without interference.

More fundamentally, the impact of H.R. 2128 would be to devastate the federal government's efforts to redress discrimination and promote inclusion of members of excluded groups. The federal government, to which minorities and women have had to turn for protection and redress, would no longer be the leader in promoting opportunities for its citizens. This bill represents a full-fledged retreat from our commitment to achieve an integrated society. That would be a fundamental and disastrous change. That has been a national commitment for only the latter half of my young life: give us the tools and we will finish the job.

In all candor, Mr. Chairman, it is a peculiar set of priorities that would allow this Subcommittee -- the womb of the great civil rights laws that have provided hope for the long suppressed minorities and women of this country -- to spend its precious time on this bill.

It has become fashionable -- indeed a necessary exercise in political correctness -- to profess opposition to discrimination based on race, ethnicity or gender. These professions of opposition to discrimination are important, but they must be backed up by actions. All too often we hear these statements as

perfunctory preludes to efforts to reduce opportunities for those traditionally excluded from the full benefits of American society. This Subcommittee has yet to turn its attention in this Congress to the full range of discriminatory barriers faced by minorities in securing housing or the credit necessary to purchase it, gaining employment, obtaining a decent education, or in dealing with the daily indignities that minority citizens face in shopping malls, department stores or something as basic as getting a taxi to stop and pick us up.

So, Mr. Chairman, I am encouraged that this Subcommittee has turned its attention to the subject of equal opportunity, but I challenge you to join in a partnership with the Administration and with the American people to take on the full range of issues that we face. Take up legislation to broaden Title II of the Civil Rights Act of 1964 to prohibit discrimination in retail establishments and by providers of basic services such as taxi cabs. In a particularly blatant recent incident, a cab company in Springfield, Illinois, posted a notice advising drivers not to pick up black males. There is no federal remedy for this outrage. Nor is there a federal prohibition that addresses the plight of the black youth who recently was forced to take off the shirt that he had previously purchased at an Eddie Bauer store and leave the store in his undershirt. Only when he returned to the store with a receipt was he allowed to have his shirt.

Give us the full jurisdiction that we need to combat the scourge of racially motivated hate crimes that continues to

terrorize our citizenry. Recently, we obtained convictions in our prosecution of three men in Texas who talked about how good life would be without blacks and then drove into a predominantly black section of town "hunting" African Americans with a sawed-off shotgun, eventually shooting three African Americans at point-blank range.

Hold hearings to examine ways to desegregate public schools -- or at least to share sufficient resources with minority children trapped in impoverished and segregated schools so that they will have a decent chance in life. Unlawful segregation persists. Mr. Chairman, two-thirds of all African American children still attend segregated schools. Over 50% of African American children and 44% of Hispanic children live in poverty, compared to 14% of white children. And over one-half of all African Americans live in inner-city neighborhoods where schools are starved for basic resources. Any yet, in 1993, a cash-poor district spent a million dollars to expand an all-white elementary school rather than send white students to a predominantly black school that was one-third empty and only 800 yards away from the white school. In a recent case that we handled, school buses were travelling down the same roads, one bus picking up white children and taking them to the white school and one bus picking up black children and taking them to the black school.

Hold hearings to examine the continuing plague of discrimination that slams the doors to housing shut in the faces

of minority applicants across the country. Discrimination in housing continues to limit not only housing opportunities for minorities, but suppresses job opportunities and contributes to school segregation. In a recent investigation, we discovered that a 300 unit apartment building in Ohio simply refused to rent to African Americans. In spite of numerous qualified applicants, no apartment had ever been rented to an African American. In one recent case, we found that blacks were being steered to the back of the building -- to a section that was all black.

Hold hearings to examine the persistence and effects on a viable, open democracy of racially polarized voting, which requires that minority candidates compete for election with virtually no white votes in many parts of the country.

Examine continuing discrimination against minority and women applicants for employment. In one case in your home state, Mr. Chairman, we found that a police department had not hired a single black officer in 30 years. The police department threw applications from African Americans in the trash and was led by a chief who routinely referred to African Americans as "niggers." In a Louisiana correction center, we found a policy that required women to score 15 points higher on a written test to qualify for employment and a practice that resulted in the hiring of a man who scored 29 points below a woman applicant and had a prior arrest record and no high school diploma. The recently released final report of the Glass Ceiling Commission, which was created at the initiative of Senator Dolc, documents the near exclusion

of African Americans, Hispanics, Asians and women from advancement in many of the corporations of this nation. The Commission found that white males hold nearly 97% of senior management positions in Fortune 1000 industrial and Fortune 500 service industries. African Americans hold only 0.6%, Hispanics hold 0.4% and Asians hold 0.3%. Women hold less than 3% of such positions.

And, Mr. Chairman, look at the manner in which justice is administered and the legacy of resentment and alienation that it has bred in too many jurisdictions. While we all owe a deep debt of gratitude to the women and men who serve in law enforcement, recent incidents such as the beating of Rodney King and the trial of O.J. Simpson, featuring the revelations regarding the racism of Mark Fuhrman, highlight a deep seated problem in the way that many minority communities and law enforcement officials relate to each other.

And give the Department of Justice, the Equal Employment Opportunity Commission and other agencies the support they need to address these problems. Undertake these efforts, Mr. Chairman and Members of the Subcommittee. Join us in this partnership and we can transform our statements of opposition to discrimination and our commitment to equal opportunity into actions and results.

But H.R. 2128 adds nothing. Should be presented to the President for signature, I will recommend strongly that he veto it, and I fully expect that he will.

Thank you.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

LRM NO: 3226

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12/6/95

LEGISLATIVE REFERRAL MEMORANDUM

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SUBJECT: LABOR Proposed Report RE: HR2128, Equal Opportunity Act of 1995

DEADLINE: 4pm Wednesday, December 06, 1995

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: A House Judiciary Subcommittee is scheduled to hold a hearing on H.R. 2128 on Thursday, December 7th. We expect to receive Justice (Deval Patrick) testimony, today, for OMB clearance.

DISTRIBUTION LIST:

AGENCIES: 31-Equal Employment Opportunity Comm. - Claire Gonzales - 2026634900
61-JUSTICE - Andrew Fols - 2025142141

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Jim Murr

**RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM**

LRM NO: 3226
FILE NO: 1649

If your response to this request for views is simple (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet.

If the response is simple and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
- (2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Ingrid SCHROEDER 395-3883
Office of Management and Budget
Fax Number: 395-3109
Branch-Wide Line (to reach legislative assistant): 395-3454

FROM: _____ (Date)
 _____ (Name)
 _____ (Agency)
 _____ (Telephone)

SUBJECT: LABOR Proposed Report RE: HR2128, Equal Opportunity Act of 1995

The following is the response of our agency to your request for views on the above-captioned subject:

- _____ Concur
- _____ No Objection
- _____ No Comment
- _____ See proposed edits on pages _____
- _____ Other: _____
- _____ FAX RETURN of _____ pages, attached to this response sheet

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.draft

The Honorable Charles T. Canady
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
U. S. House of Representatives
Washington, D.C. 20515

Dear Chairman Canady:

I am writing to give you the views of the Department of Labor on your bill, H.R. 2128, the Equal Opportunity Act of 1995.

As you are well aware, President Clinton has ordered a full review of all Federal affirmative action and equal opportunity programs. Led by the Justice Department, this review is intended to ensure that all affirmative action efforts meet four criteria: that all quotas are prohibited, that all illegal discrimination, including reverse discrimination be prohibited, that preferences for unqualified applicants be prohibited and that programs that have met their goals be terminated. While this review has not yet been completed, the President has restated his commitment to the goal of equal opportunity for all Americans.

However, H.R. 2128, while entitled the Equal Opportunity Act, would prevent many of the equal opportunity activities that the Department of Labor's Office Of Federal Contract Compliance Programs (OFCCP) currently undertakes. It would seriously and negatively impact on equal employment opportunity in the workplace.

As H.R. 2128 purports to do, Executive Order 11246, enforced by the Department of Labor's OFCCP, already bans discrimination. OFCCP prohibits discrimination based on color, race, religion, sex, or national origin by all non-exempt Federal contractors and subcontractors with regard to any employment selection decisions -- including hiring, promotion, salary, termination or lay-off.

H.R. 2128 would prevent the use of numerical recruitment goals for qualified candidates for jobs. While the OFCCP does not mandate quotas -- in fact, quotas are prohibited in OFCCP regulations -- if the outreach efforts have no measurable or tangible objectives, there would be no way to measure the good faith efforts of Federal contractors.

H.R. 2128 also mistakenly equates preferences with all numerical goals, regardless of the actual use or purpose of the goals. As enforced by the OFCCP, goals are not rigid and inflexible quotas which a contractor must meet. Rather, goals are targets or objectives which serve as benchmarks against which

contractors can measure their progress toward achieving equal employment opportunity. The OFCCP regulations specifically prohibit quota and preferential hiring and promotions under the guise of affirmative action numerical goals. Contractor goals do not create set-asides for specific groups, nor are they designed to achieve proportional representation or equal results. On the contrary, "goals and timetables" were added to the OFCCP's regulations in order to give Federal contractors a tool for focusing and measuring equal opportunity efforts to increase the pool of qualified women and minorities. The goal setting process has proven to be an effective way for contractors and the OFCCP to determine if contractors are making good faith efforts to recruit and retain qualified minorities and women.

H.R. 2128 would also ban specific recruitment goals and outreach if the recruitment efforts involve any quantitative objectives. Recruitment has been an effective tool through which women and minorities have moved into non-traditional entry level positions, as well as managerial and executive level corporate positions. Specific goals are developed by Federal contractors in order to measure good faith efforts - not as a means of quota hiring.

OFCCP does not measure a contractor's compliance by whether it actually achieves its goals, but by whether it has made good faith efforts to do so. You would be interested in knowing that the OFCCP recently reissued its policy statement prohibiting employment quotas.

H.R. 2128 would have an especially negative impact on the employment opportunities for women. The legislation would permit women to be excluded from certain job categories based purely on their gender. The legislation reinforces stereotypical thinking that women are not suited for certain positions, rather than allowing individuals to compete on the basis of merit.

The OFCCP requirements prevent discrimination. The preventative approach embodied in the affirmative action requirements avoids unnecessary litigation and prevents the emotional and financial damage to aggrieved individuals caused by discrimination. The Executive Order requires Federal contractors and subcontractors, as a condition of their government contracts, to take affirmative action to ensure that all employees and applicants are treated without regard to race, color, religion, sex, or national origin. Contractors with 50 employees and contracts of \$50,000 or more are required to develop and implement a written affirmative action program for each establishment. As part of the program, the contractor conducts a self-analysis and sometimes establishes goals, as may be appropriate. Because of the OFCCP requirements, companies are reconsidering discriminatory salary and promotion procedures; firms are adopting employee development initiatives; more minorities and women are being

employed in non-traditional jobs; and the "glass ceiling" is finally being broken. As we approach the 21st century, this Nation cannot afford to turn back the clock on its efforts to afford full access and equal employment opportunity to all its citizens.

The Labor Department's OFCCP would be happy to work with you to ensure that our mutual goal of equal opportunity is achieved in a way that permits all of our citizens to participate to the fullest of their ability. Unfortunately, H.R. 2128 does not help us reach that goal.

Thank you for the opportunity to share these views with you.

Sincerely,

Robert B. Reich

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

224
LRM NO: 2024

FILE NO: 1159

7/18/95

LEGISLATIVE REFERRAL MEMORANDUM

Total Page(s): 23

TO: Legislative Liaison Officer - See Distribution below:
FROM: James JUKES (for)
Assistant Director for Legislative Reference
OMB CONTACT: Ingrid SCHROEDER 395-3883
Legislative Assistant's line (for simple responses): 395-3454

SUBJECT: JUSTICE Proposed Testimony on Civil Rights Division Authorization and Oversight

DEADLINE: 4:30pm Tuesday, July 18, 1995

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: Please note the discussion of the Adarand decision on pp.13-14.

If we do not receive your comments by the above deadline we will assume that you have no comment on the testimony.

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213-Equal Employment Opportunity Comm. - Claire Gonzales - (202) 663-4900
328-HHS - Sondra S. Wallace - (202) 690-7760
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DRAFT TESTIMONY, AAG PATRICK
HOUSE CONSTITUTION SUBCOMMITTEE HEARING, 7/20/95

July 17, 1995

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to appear before the Subcommittee to present the authorization request for the Civil Rights Division for Fiscal Year 1996.

For Fiscal Year 1996, the Division has requested \$65.304 million. This represents an essentially flat line budget: we have requested no enhancements, we have absorbed modest FTE cuts and we have made savings in procurement and retirement benefits. At the same time we have taken on substantial new responsibilities under the 1994 Crime Bill, the National Voter Registration Act (NVRA), and the Freedom of Access to Clinic Entrances Act (FACE). This request, we believe, is the most responsible balance to strike in these times between a viable program and fiscal restraint.

Because this is my first opportunity to testify at an authorization hearing, I'd like to provide the subcommittee a bit of background. Too often, the work of the Civil Rights Division is mischaracterized or misunderstood in the public arena. At our core, we are a law enforcement agency, dedicated to full and fair enforcement of laws enacted by the Congress. It is as simple and straightforward as that.

The Civil Rights Division is the primary agency in the federal government charged with enforcing specific federal civil rights laws which have been assigned to us by the Attorney General. Most of these laws originated here in this Subcommittee. These laws prohibit discrimination on the basis of race, color, religion, sex, national origin, and disability, among others. Their protections extend to such activities as voting, education, employment, housing, the use of public accommodations, and access to reproductive health services.

The need for vigorous enforcement of civil rights laws is as great as ever. Regrettably, discrimination on the basis of race, ethnicity, religion, gender, and disability persists in this country: not just the effects of past discrimination, but current, real-life, pernicious discrimination. Last year, for example, the government received over 91,000 complaints of discrimination in employment alone. In the Civil Rights Division, we filed record numbers of cases last year in many areas and opened thousands of new investigations.

No decent American could be other than astonished and saddened by the incidents of injustice, unfairness, and even violence motivated by race, ethnicity, religion, gender or disability that cross my desk daily. These unfortunate occurrences still block access for far too many individuals to the bounty of opportunity that America has to offer. My job --

and the job of all of us in public life -- is to strive to ensure that individuals have an opportunity to accomplish according to their abilities and can achieve in ways that are commensurate with their efforts. We all look forward to the day when unlawful discrimination is a thing of the past, but in spite of considerable progress, progress of which this country should justly be proud, that day has not yet arrived in our country.

Until just 40 years ago, America was racially segregated by both law and custom. Even after Brown v. Board of Education, it was many years before the nation began undertaking steps to eradicate Jim Crow in its most pernicious form. Efforts to address racial and ethnic discrimination against other Americans, many of whom have been on this continent for centuries, are also comparatively recent. And while there have been striking gains, the struggle of women to gain entry into many areas of employment and education traditionally closed to them continues.

The progress we have made on all of these fronts is extraordinary; America is a model to the world. That is a thing for all Americans to celebrate and be proud of.

But examples of the discrimination that still occurs in this nation abound. In March, we indicted three men in Lubbock, Texas, who, according to the indictment, drove to the predominantly black section of that city hunting African

Americans, lured three black men to their car, and then shot them at close range with a short-barreled shotgun. The three defendants passed the shotgun around and allegedly each took a turn shooting a black victim.

In February, two Missouri men pled guilty to criminal civil rights violations after driving into a black neighborhood of St. Louis, again hunting for African Americans to victimize. From the front seat of their car, while someone in the back seat videotaped their actions for amusement's sake, the two white men sprayed more than fifty African Americans with a high-pressure fire extinguisher so strong it knocked some of the victims to the ground.

White officers in a city police department in Florida admitted that the police department did not hire a black applicant for 30 years, routinely threw applications from blacks in the trash, and regularly used racial epithets in the workplace, up to and including the Chief of Police himself.

In a Louisiana corrections center, the policy of not hiring women was unusually blatant. The minimum passing score on the required written examination was 90 for men, but 105 for women. In fact, one woman scored 100 on this written exam in April, 1987, but was disqualified, while a year later, a male applicant

scored a 79 and was hired despite the fact that he had a prior arrest and did not have the required high school diploma.

In a California case not long ago, two young Hispanic couples with steady employment decided to move, literally, across the tracks into a condominium in a better neighborhood free of gang activity and drug traffic. When the condominium manager discovered that Latino residents were moving in, he told the real estate agent that he did not welcome their presence because Latinos were "given to multiplying." He said he did not want his building to become like the barrio across the tracks. Instead of suffering the pain of raising a family in such an ugly environment, the couples began their housing search anew, and carried with them the intense pain of prejudice and rejection. All they wanted was to raise their family in a decent place, like any other parent I know.

In order to combat these compelling cases of discrimination, the Civil Rights Division's primary responsibility is to litigate cases of discrimination on behalf of the United States. Civil rights offices in other Departments, such as Education and HHS, are responsible for administrative enforcement of certain civil rights laws, and we work closely with these other offices to avoid duplication and to maximize our enforcement resources. In many cases, they have responsibility for evaluating claims under certain statutes, first, and trying to work out an agreed

resolution. If that fails, the matter is then referred to the Department of Justice for litigation.

Over the past several years, the Division has taken on major responsibilities for enforcing new laws passed by the Congress. Since 1994, the Division also includes the Office of Special Counsel for Immigration Related Unfair Employment Practices. While these new responsibilities were accompanied by some additional resources, the Division has done far more with fewer resources than in prior years. I am very proud of the work of the employees of the Division -- they have taken on these new responsibilities with gusto and work extremely hard. The quality of their legal work is very high and reflects their dedication.

The Division also works closely with the 94 United States Attorneys and their Assistants on both criminal and civil matters. For example, we recently entered into a new understanding with the United States Attorneys to enable them to handle more criminal civil rights law enforcement independently, thus increasing the reach of civil rights law enforcement.

We also initiated and recently signed a memorandum of understanding with the National Association of Attorneys General (NAAG), the organization of state attorneys general, which will facilitate joint federal/state initiatives in the areas of housing discrimination, discrimination against individuals with

disabilities, hate crimes, and lending discrimination. Through our renewed relationship, we are also working out a protocol for how we can most cooperatively deal with each other when we are adverse parties in a case.

Let me briefly review some of the highlights of the Division's substantive work over the last year.

Criminal

The Division remains strongly committed to the vigorous prosecution of criminal violations of the civil rights laws. In Fiscal Year 1994, the Division filed 76 new criminal cases charging 139 defendants -- both record numbers. The Criminal Section's 90.2% success rate last fiscal year was its second highest in history.

The Division doubled the number of defendants charged in cases of race-motivated violence (73). For example, in Indiana, four Ku Klux Klan members were charged with conspiring to interfere with the housing rights of a black couple who were assaulted in their apartment. The defendants yelled racial slurs and threats, broke windows, struck one of the victims with a stick and fired a gun at the victim's front door. After one conviction and three guilty pleas, the four Klan members received substantial prison sentences ranging from 90 to 264 months. In

the State of Washington, three white-supremacist Skinheads pled guilty to conspiracy in the fire bombing of an NAACP office and a gay bar. Two of them also pled guilty to several explosives and firearms violations stemming from the fire bombings.

In addition, the Division obtained convictions against several law enforcement officers for physical and sexual assaults against suspects and prison inmates.

Finally, we obtained a conviction under the Freedom of Access to Clinic Entrances Act (FACE) against Paul Hill for the brutal slaying of a physician and his escort at a reproductive health services clinic in Pensacola, Florida. We have brought criminal FACE cases against more than a dozen defendants who engaged in blockades, threats, and acts of force designed to prevent access to reproductive health services, while carefully balancing and consistently respecting the right of abortion opponents freely and peacefully to express their views.

Housing and Public Accommodations

The Division has made attacking housing and lending discrimination, under the Fair Housing Act and other laws, one of its highest priorities. In Fiscal Year 1994, the Division filed a record 176 new cases under the amended Fair Housing Act. That

exceeded the previous record -- set in the prior fiscal year -- by nearly 40%

As a result of our new fair housing testing program -- the first of its kind in any federal agency -- we have obtained extensive injunctive relief and a pool of over \$1 million to compensate proven victims of discrimination in a number of cases.

We have also obtained effective settlements against redlining and other discriminatory lending practices in six major cases involving lending and insurance institutions. These settlements will provide compensation for approximately 350 individual victims of discrimination, as well as injunctive relief to prevent such practices from recurring in the future.

Working with private plaintiffs, the Division joined in the settlement of major public accommodations litigation against the Denny's restaurant chain. In addition to substantial monetary relief for individual victims of discrimination, the settlement included significant provisions to prevent future discrimination.

Voting Rights

One of the Division's most important missions is to ensure that all Americans enjoy a full and effective right to vote, free from unlawful discrimination under the Voting Rights Act.

The Division is tully and vigorously enforcing the National Voter Registration Act (NVRA) -- the so-called "Motor Voter" law. Thanks in large measure to its passage and our enforcement, the average increase in voter registration since last year at this time is about 500%. In nine states, almost one million newly registered voters were added during the first six months of 1995 alone. We have successfully defended Congress's authority to enact the NVRA, and we have vigilantly sought injunctions against the few states that have chosen to defy the law. NVRA litigation is currently underway in California, Illinois, Pennsylvania, South Carolina and Virginia. In the California, Illinois and Pennsylvania cases -- the only ones yet decided by district courts -- we obtained orders declaring the NVRA constitutional and directing the state to implement the law. The Seventh Circuit Court of Appeals upheld the district court decision in Illinois.

In fulfilling our preclearance responsibilities under Section 5 of the Voting Rights Act, and our affirmative litigation responsibilities under the amended Section 2 of the Act, we have sought to ensure that the redistricting plans adopted following the 1990 census did not deny minority voters an equal opportunity to elect the candidates of their choice. We also brought a number of successful cases to enforce the minority language provisions of the 1992 Voting Rights Amendments, and

have organized a special Task Force within the Voting Section to address that effort.

On June 29, the Supreme Court decided Miller v. Johnson, in which we joined with the State of Georgia in defending a redistricting plan against claims that it was an unconstitutional so-called "racial gerrymander." In Miller, the Court held that where race was the "predominant" factor in the drawing of congressional districts, strict scrutiny would apply, thus apparently extending strict scrutiny beyond "bizarrely shaped" districts -- as the Court held in Shaw v. Reno -- to all redistrictings in which race is a factor so predominant that it subordinates other traditional districting considerations.

But, on the same day, the Court dismissed a challenge to congressional redistricting in Louisiana on standing grounds, agreed to hear arguments next term in redistricting cases from Texas and North Carolina, and held summarily that California congressional and state house redistricting plans -- with over 50 majority-minority districts -- was constitutional. We plan to remain active in these ongoing cases, to ensure that minority voters are able, without discrimination, to fairly participate in the electoral process and have the chance to elect candidates of their choice.

Disability Rights

The Division has placed a high priority on fully enforcing the Americans with Disabilities Act (ADA), a comprehensive civil rights law for people with disabilities. We have created a new Disability Rights Section, which will handle most of the Division's responsibilities for enforcing the laws protecting the rights of people with disabilities, including the ADA's provisions regarding nondiscrimination in public employment, access to government services, and access to public accommodations.

Since the beginning of the Clinton Administration, through an aggressive enforcement program, we have been successful on over 250 occasions -- through settlements, judicial decrees, or other means -- in improving access for disabled Americans. For example, we entered into formal settlement agreements with the cities of Los Angeles and Chicago in which the cities agreed to take major steps to make their 911 emergency telephone services more accessible to people who use telecommunication devices for the deaf.

The Division has also sought to promote voluntary compliance with the ADA by providing technical assistance regarding the Act's requirements and engaging in extensive outreach efforts. Our purpose is to demonstrate how reasonable and effective this law is by design and in practice. For example, we have operated a toll-free ADA Telephone Information Line, which receives more

than 2,000 calls per week. We have placed an ADA Information File in 15,000 public libraries and universities throughout the country. We have mailed letters to the mayors of the nation's 250 largest cities, providing information regarding effective communication requirements for 911 emergency telephone services. And finally, we have distributed over 90,000 ADA Questions and Answers Booklets nationally.

Employment Discrimination

The Civil Rights Division is responsible for enforcing Title VII of the Civil Rights Act of 1964 with respect to state and local governments. During the Clinton Administration, we have filed 38 new lawsuits charging both individual discrimination and patterns or practices of employment discrimination. In that same time, we have also obtained orders providing injunctive and make-whole relief for over 2,000 identified victims of discrimination. We still see examples of rank discrimination based on race and gender in public employment and we intend to keep this focus sharp.

The Division defended a constitutional challenge to the Department of Transportation's subcontracting compensation clause. That case, Adarand v. Peña, was decided by the Court on June 13. Although the Court's holding was disappointing, it certainly does not signal the end of affirmative action. The

Court has now set forth the standard to meet in those types of cases, the strict scrutiny standard. Although the Administration argued for a different standard of review under the law, the strict scrutiny standard leaves considerable room for carefully crafted affirmative action programs.

I'd like to emphasize for the Subcommittee an important aspect of Adarand that is too often ignored. The Court expressly rejected the notion that strict scrutiny is "strict in theory, but fatal in fact," noting that as recently as 1987 every member of the Court had endorsed consideration of race in crafting a remedy for discrimination.

The Adarand decision -- which supports the notion that government can continue to conduct affirmative action programs, but cautions that it must do so thoughtfully and carefully -- does not conflict with the Administration's careful review of affirmative action programs to ensure that they remain warranted and are carefully tailored to satisfy their purposes.

Educational Opportunities

The Civil Rights Division continues to be committed to eliminating the vestiges of segregation in elementary and secondary education as well as in state institutions of higher education.

In the past year, we obtained a judgment that will desegregate the schools in Darlington County, South Carolina. We also entered into a consent decree regarding our claim that the Randolph County, Alabama, school district -- where a high school principal threatened to cancel the prom if interracial student couples planned to attend -- was violating longstanding desegregation orders.

We also continued our challenges to the separate higher education systems in Mississippi and Alabama, and we entered into a consent decree desegregating Louisiana's public university system for the first time in history.

On June 13, the Supreme Court decided Missouri v. Jenkins, a challenge to the Kansas City school desegregation case. The Court held that attempting to attract white students back into Kansas City from suburban school districts was not a legitimate predicate for requiring the State to fund programs designed to improve educational quality. The Court held that, to the extent that salary increases, educational improvements and capital improvements within Kansas City were designed to make the district more attractive to white suburban students, they would not be permissible as part of a court-ordered plan absent a finding of an interdistrict violation. The Court also stated that standardized test scores should not be used in most instances to measure the extent that educational deficits have

been remedied because too many factors unrelated to the effects of segregation on achievement affect test scores.

While we were disappointed with the Supreme Court's decision, it is not -- and we will not read it to be -- a devastating blow to our efforts to remedy the vestiges of segregation in education. We believe that the decision will not have a major impact on the Department's efforts to desegregate public schools.

Special Litigation

The Division remains firmly committed to protecting the civil rights of institutionalized persons, under the Civil Rights of Institutionalized Persons Act.

In cases challenging conditions at facilities for the mentally disabled in Pennsylvania and Tennessee, we entered into settlements which will ensure that more than 450 residents will be placed in more appropriate community-based programs and facilities. We also settled a case involving the Howe Developmental Center in Tinley Park, Illinois. This settlement, which provides for periodic monitoring by a panel of experts, will improve conditions for the Center's 800 disabled residents.

Earlier this month we entered into an agreement with District of Columbia officials to correct systemic deficiencies in the delivery of care and treatment to patients at D.C. Village, a nursing home housing approximately 250 individuals. The agreement addresses the most serious, life-threatening problems at the facility.

In response to widespread allegations of unlawful conditions, including a high incidence of suicide, we investigated 18 city and county jails throughout Mississippi. The majority of these investigations have resulted in comprehensive consent decrees.

The Special Litigation Section is responsible for enforcing the pattern or practice police misconduct provisions contained in last year's Crime Bill. The Section is also responsible for civil enforcement of FACE. We have brought actions in six states, seeking injunctive relief, damages and civil penalties against individuals who have engaged in obstructive blockades of reproductive health facilities, and who have threatened violence to those who provide abortion services.

Coordination and Review

The Coordination and Review Section's activities have been refocused on improving and reinvigorating the government-wide

enforcement, under Executive Order 12250, of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and similar provisions of law that prohibit discrimination on the basis of race, color, national origin, sex, religion, and age in programs receiving Federal financial assistance.

The Section currently is implementing an action plan to promote the effective, consistent and efficient enforcement of Title VI and related statutes, as required by Executive Order 12250. This plan includes activities to develop and coordinate policy and compliance program development; to provide technical assistance and training; to promote interagency information-sharing and cooperative efforts (including the publication of a quarterly civil rights periodical); and to monitor and evaluate individual agency compliance and enforcement programs.

The Section also assumed major new responsibilities for ensuring that the Department's own recipients of Federal financial assistance provide their programs and services in a nondiscriminatory manner.

Office of Special Counsel

Since Spring 1994, the Civil Rights Division has been home to the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). OSC was created to enforce the

provision of the Immigration Reform and Control Act of 1986 which prohibits discrimination in hiring, recruiting, discharging or referring an individual for a fee because of national origin or citizenship status. It also investigates allegations of document abuse and retaliation as a result of the Immigration Act of 1990.

OSC receives and investigates charges of immigration-related employment discrimination and then determines whether the charges may be dismissed or settled or warrant filing an administrative complaint. OSC also conducts independent investigations, including possible pattern or practice violations. OSC may file a complaint with an administrative law judge seeking a cease and desist order and, where appropriate, back pay, civil monetary penalties, or both. When the administrative law judge finds a violation and orders relief, OSC may file an action in federal court to enforce the order.

In addition, OSC conducts an outreach and education program aimed at educating employers, potential victims of discrimination and the general public about their rights and responsibilities under the law's antidiscrimination and employer sanction provisions. As part of this program, OSC administers a grant program, and OSC staff participate in public outreach activities.

Mr. Chairman, that summarizes our activities over the past year. Let me say that the nation is blessed to be served by dedicated, professional and effective career staff in the Civil Rights Division. These are the folks who produce the ideas, not just the briefs, focusing on real problems in real people's lives rather than mere abstractions. They work extremely hard and extremely well. And I am honored to serve with them.

Let me close by observing that some in Congress have professed strong opposition to discrimination, yet, at the same time, have pushed legislation and amendments to cut back civil rights law. I believe these members when they say they are for strong civil rights laws. But I cannot understand how these same members can propose cutting back fundamental and long standing protections, such as the Attorney General's authority to bring cases against a pattern or practice of discrimination under the Fair Housing Act. I do not believe you can have it both ways. In order to oppose discrimination in theory, you must have vigorous enforcement in fact, and you need a strong and effective array of tools to address the problem.

I hope this testimony gives the Subcommittee a sense of the scope of the work of the Civil Rights Division. As the primary law enforcement agency for civil rights matters in the federal government, and based on the rising numbers of complaints, we could surely do more and ask for more to support that. But in

PATRICK DRAFT TESTIMONY, 7/17/95

PAGE 21

this time of budgetary constraints, we have crafted our authorization request carefully and in a balanced way to provide effective civil rights enforcement. I believe we can sustain and to some extent build upon our enforcement program with this essentially flat 1996 request. And I believe we should. I ask for your support in fully granting this request.

Thank you for the opportunity to testify this morning. I look forward to answering any questions you may have.