Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Carol H. Rasco to Donsia Strong re: EEOC Hearing (1 page)	6/1/1994	P5
002. memo	Donsia Strong to Carol H. Rasco re: EEOC Hearing (2 pages)	6/1/1994	P5
003. memo	Claire Gonzales to Donsia Strong et al re: Background on Religious Harassment Guidelines Issue (4 pages)	5/26/1994	P5 8000
004. draft	Background on Proposed Consolidated Harassment Guidelines (7 pages)	5/25/1994	P5 8001
005. memo	Donsia Strong to Katherine Darwin re: EEOC (1 page)	6/7/1994	P5 8002

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9592

FOLDER TITLE:

[Harassment - Religious and Consolidated Guidelines] [1]

ds60

RESTRICTION CODES

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 advice 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]
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E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

01-Jun-1994 02:46pm

TO: Donsia Strong

FROM: Carol H. Rasco
Economic and Domestic Policy

CC: Stephen C. Warnath

SUBJECT: RE: eeoc hearing

First, I didn't understand the paragraph about legislative affairs.

Because EEOC is indeed independent I am very reluctant to say much definitively. It seems to me a memo seeking direction should be written in consultation with General Counsel's office to Mack and/or Phil Lader. There are apparently many people who have on occasion stirred the pot on EEOC....I'm not sure to whom it belongs.

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

01-Jun-1994 02:25pm

TO: Carol H. Rasco

FROM: Donsia Strong
Domestic Policy Council

CC: Stephen C. Warnath

SUBJECT: eeoc hearing

Steve and I have been working on possible issues to be discussed in an EEOC confirmation hearing.

One of the issue which is not waiting for a confirmation hearing is the consolidated harassment guidelines. These guidelines would provide guidance to employers as to their responsibilities and workers as to their rights as relates to the categories protected by Title VII (race, religion, national origin or sex, age color or disability). Previously guidelines had been promulgated for national origin and sexual harassment. The past Commission sought to establish guidelines for racial haressment and was persuaded to issue consolidated guidlelines which would provide guidance for all the protected categories.

Recently, the religious right has stepped up its campaign against the guidelines and persuaded Sen. Heflin to schedule a hearing on June 9. As you know, there is no Clinton Administration chair in place and the current holdover chair is very reluctant to appear.

The guidelines were intended to merely clarify or explain existing harassment law. The religious right may see this as an attempt to squelch their free exercise of the religion. Indeed, some of the issues taken with the guidelines have merit. However, to the extent that the guidelines do clarify current law and provide necessary guidance we should support them.

We probably do not want to back away from the guidelines because all of the other protected categries and other religions are fully vested in this matter and alerted their Hill supporters.

We have asked Leg Affairs to contact Heflin to see if this is something we have to do right now. Lorraine beklieves Public Liasion is the lead on EEOC and is checking with reluctant to move without first talking with them. Pub Liasion is working on chair selection.

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We agree with EEOC that they should continue to prepare testimony which explains the intent of the guidelines and concedes where it is wrong. Steve and I agree that the guidelines will be reviewed anew by the new commission when seated. Therefore, the testifier can take all suggestions and suggest that the guidleines will be reviewed further and released for comment upon revision.

In addition, our old friend Rep. Wolf is threatening to hold up the Appropriations bill (which creates all other probs). The subcomm. markup is nest week with full markup the following week. The chief staffer has suggested a compromise which we think is fine-- that a rider be included prohibiting the adoption of the guidelines until a commission is seated.

We need guidance on who should be testifying, who would be willing to talk to the incumbent to coax him into appearing (OMB? EEOC is an independent agency --counsel is looking at how much the WH can push), when we may possibly have a chair (I understand we're at the last rounds), and if our strategy for approps is ok. We made need Phil Lader to get involved. You may recall he resolved the last issue.

And we were having such a fine day.

Thanks

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8080

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

May 26, 1994

MEMORANDUM

TO: Donsia Strong, Domestic Policy
Stephen Warnath, Domestic Policy
Eric Senunas, Legislative Affairs
Daryl Hennessy, OMB

FROM: Claire Gonzales, OCLA, EEOC CEG

SUBJECT: Background on Religious Harassment Guidelines Issue

I am sending this memorandum and the attached material to provide you with background on the controversy surrounding the EEOC's Proposed Consolidated Guidelines on Harassment. I think that the narrative history prepared by the Office of Legal Counsel (OLC) will give a thorough understanding of the Commission's activities regarding the Guidelines, as well as the growing opposition from the conservative Christian movement. I have also included the following informational material that may be helpful to you:

- The Proposed Consolidated Guidelines on Harassment as originally published in the Federal Register on October 1, 1993.

- The notice of the extension of the comment period on the Guidelines published in the Federal Register on May 13, 1994.

- Fact Sheet on the Proposed Consolidated Guidelines.

- Draft Questions and Answers, prepared by OLC for John Osthaus, Staff Assistant for the House Appropriations Subcommittee on Commerce, Justice, State and Judiciary.

- Draft Op-ed by OLC, responding to criticism of the inclusion of religion in the Guidelines.

I have also included some documents generated by members of Congress on this issue to give you some idea of activity on the Hill.

Finally, the following is my summary of the current political situation involving this issue.

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House

The opposition in the House is being led by Representatives Howard "Buck" McKeon (R-CA), Frank Wolf (R-VA), and, most recently, Richard Armey (R-TX). Congressman McKeon is responsible for a sign-on letter dated February 15, 1994, to Chairman Gallegos, in which more than forty representatives expressed their concern about the inclusion of religion in the Proposed Guidelines and urged that religion be deleted. Congressman Howard Berman inadvertently signed the letter and has since disassociated himself with it. (Copies of both the McKeon letter and Berman's later letter are inclosed.)

Congressman McKeon submitted a "Sense of the House" resolution yesterday, May 25, 1994, and we understand that approximately 100 representatives have signed on in support.

McKeon held a press conference on the resolution this afternoon at 1:30 p.m.. Approximately 25 to 30 members joined him, including Senators Howell Heflin and Robert Bennett. Congressman Charles Canady (R-FL), who is a member of the Judiciary Subcommittee on Civil And Constitutional Rights, announced that he would seek a hearing on this issue before that subcommittee.

As the OLC memorandum discusses in more detail, Congressman Wolf strenuously objected to the inclusion of religion in the Guidelines at the March 24 EEOC Appropriations Subcommittee hearing. Congressman Wolf is not on the Commerce, Justice, State Subcommittee, but is on the full Committee; he joined the panel for this hearing specifically because of this issue. He has not backed away from his position and has indicated that he intends to pursue the matter at the full Committee mark-up which is expected in early June.

Elizabeth Thornton (Acting Legal Counsel), Dianna Johnston (Associate Legal Counsel and the principal staff attorney for this issue), Kassie Billingsley (Acting Director of Management), and I met with John Osthaus, Staff Assistant for the Appropriations Subcommittee on Thursday, May 19, at his request to discuss strategies for addressing the problem. Mr. Osthaus is very concerned that Congressman Wolf will successfully delay or restrict EEOC's appropriation.

Congressman Armey is somewhat of a latecomer to the issue, but he has been actively working on it during the last week. He has generated a lot of media interest out of Texas and he circulated a letter on the issue on Tuesday, May 24 (a copy is included).

I have spoken with and provided material to staff from both the Education and Labor Subcommittee on Select Education and

Civil Rights (Owens) and the Judiciary Subcommittee on Civil and Constitutional Rights (Edwards) about this issue. They are prepared to assist in any way they can, and Owens' staff offered to hold a hearing in early June if that would be helpful. (McKeon offered an amendment on the issue at the Ed & Labor mark-up of the Federal Employee Fairness Act and Owens committed to having a hearing on it some unspecified time.)

The focus in the House is obviously Appropriations full Committee mark-up.

Senate

In the Senate, Senators Howell Heflin and Charles Grassley are taking the lead. Heflin and Grassley are Chair and Ranking Minority Member of the Judiciary Subcommittee on Courts and Administrative Practice. They are asserting that subcommittee's jurisdiction of administrative issues as the basis for a hearing planned on the issue scheduled for Thursday, June 9.

Elizabeth Thornton, Dianna Johnston, and I met with staffers for Heflin, Grassley, Don Nickles, and someone from the GOP Policy Group (?) on Monday, May 23, to discuss the Guidelines. Heflin and Grassley's staff seems to be much more moderate than the people on the House side, although it is clear that both senators are very interested in this issue.

I have spoken with and sent material to Jeff Blattner (Kennedy) and Jayne Jerkins (Simon) and they both have spoken with Heflin's Judiciary counsel, Winston Lett. Getting Heflin to back off a hearing does not seem to be an option now. Lett has assured the other staffers that the hearing will be balanced and that both Heflin and Grassley will probably be satisfied with revision of the Guidelines rather than deletion of religion. (It is important to note that Grassley is very good on Israel/Jewish issues and the Jewish groups have been working with his staff on this matter.)

Jayne Jerkins is going to speak with Judiciary staffers for Metzenbaum and Mosely-Braun to make sure that they are aware of this issue. Both senators should be helpful.

The critical issue in the Senate is the June 9 hearing. At our meeting on Monday, Grassley's staffer, Shannon Royce, told us that they planned to call someone from the EEOC to testify.

EEOC

Based on the past few weeks, it appears that only Chairman Gallegos would vote in favor of the Proposed Guidelines as currently written. Both Commissioner Tucker and Vice-Chair

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Silberman have objections to the Proposed Guidelines, but for different reasons.

I am concerned about who would testify on behalf of the Commission at any hearing in the near future. It does not seem like a particularly good idea to have either Chairman Gallegos or career staff shoulder this responsibility, especially not at this time.

This continuing controversy and the upcoming public hearings on the issue obviously have ramifications for the pending confirmations. It may be too late to defuse the situation on the Hill, but we still need some guidance on how to proceed and whatever assistance the White House could provide.

One last thing that I forgot to mention earlier, some of the groups generating this activity include the Traditional Values Coalition, Concerned Women for America, the Christian Coalition, the Christian Life Commission of the Southern Baptist Convention, and the Family Research Council.

Please call me if you have any questions. I look forward to discussing this matter further with each of you. Thanks.

relhar.cvr
5/26/94-2:30pm

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DRAFT

OLC Draft Op-ed

8001

Last fall, the Equal Employment Opportunity Commission published for public comment Proposed Guidelines on Workplace Harassment. It did so in order to promote public awareness of the fact that existing law prohibits more than sexual harassment. Although public awareness that sexual harassment is unlawful is at an all-time high, there is not similar awareness that it is unlawful to harass employees because of their race, color, religion, national origin, age or disability or to harass people in a nonsexual way because of their gender. Some public commentary and several thousand recent letters to the Commission reflect some fundamental misunderstandings about the purpose of issuing the Proposed Guidelines and about their intended scope, particularly with regard to religion.

First, some commentors mistakenly take the Proposed Guidelines to be the first application of harassment law to religion. In fact, religious harassment has been unlawful for years. In 1964, Congress enacted Title VII of the Civil Rights Act, which provides that employers may not discriminate in "terms, conditions or privileges of employment because of . . . race, color, religion, sex, or national origin." Courts have long ruled that this language means that it is unlawful to harass employees on any of the listed bases, including religion. The Commission's intent in issuing the Proposed Guidelines was not to create new law, but to fill the information gap and to inform workers and employers of their **existing** rights and obligations.

The second, and related, misunderstanding is that the Commission intends to stifle religious expression in the workplace. Critics have asserted that under the Guidelines individuals would be prohibited from wearing crosses or yarmulkes, keeping a Bible on their desks, or inviting colleagues to church because such actions might be deemed offensive to someone with different religious views. Certainly, the Commission had -- and has -- no such intent. Indeed, the Commission has sued employers who have not allowed employees to exercise their faith in such ways.

The antidiscrimination laws are violated only when conduct is hostile or denigrating on the basis of race, color, religion, gender, national origin, age or disability. The conduct must be so severe or pervasive that a reasonable person would deem it to create a hostile or abusive work environment. Obviously, none of the above examples meets that definition.

In the past few months, the Commission has received thousands of letters from people calling for deleting religion from the Guidelines. That is an option that the Commission will consider. The implications of deleting religion from the Guidelines must, however, be fully explored. Religious harassment happens. For example, in one recent case, a Jewish employee of the D.C. Superior Court was directed to collect money for a charity drive because Jews were supposedly skilled with money, and was told that the cost of Germany's reconstruction was high because it had a high gas bill during the Holocaust. In another case, an Islamic employee was

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repeatedly lectured and given unfavorable remarks in his performance ratings because he wore a pin representing his Islamic faith. Such actions clearly violate the law.

Many who would delete religion from the Guidelines say that including religion is unnecessary because existing law adequately protects against harassment in such cases. Existing law also prohibits race, national origin and non-sexual gender harassment. But employers can only adhere to the law -- and employees vindicate their rights under it -- if they know what the law says. The purpose of the Guidelines is to impart knowledge. In the Commission's view, the goals of the civil rights laws, including promoting work environments that are hospitable to people of diverse backgrounds, are achieved as much -- or more -- through education as through litigation.

The original period for commenting on the Guidelines has been reopened until June 13, 1994. In any final Guidelines, the Commission would no doubt clarify its explanation of the law in an effort to anticipate and avoid misinterpretation.

Background on Proposed Consolidated Harassment Guidelines

- On October 1, 1993, the Commission published a Notice of Proposed Rulemaking in the Federal Register promulgating **Proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability**, 58 Fed. Reg. 51,266 (Oct. 1, 1993). The comment period ran for sixty days from October 1, 1993 through November 30, 1993.

- The impetus for the Guidelines was a proposal by a former Commissioner to issue Guidelines on racial harassment because, at the time, the EEOC had promulgated guidelines for only sexual and national origin harassment (separate guidelines for each type). While the public was being educated by the media about sexual harassment, little or no information was disseminated about other types of of unlawful workplace harassment. Furthermore, the Americans with Disabilities Act had been enacted during this period, adding yet another basis of prohibited employment discrimination and, by extension, harassment.

  The Commission found mounting evidence that the public did not understand or was confused about the issue of workplace harassment. Specifically, there seemed to be a widespread lack of knowledge that legal prohibitions on harassment apply to all of the bases covered by the laws that EEOC enforces: race, color, religion, gender, national origin, age and disability. The Commission determined that Consolidated Guidelines would be an appropriate means of educating the public about what constitutes unlawful harassment.

- In drafting the Proposed Consolidated Guidelines, EEOC's Office of Legal Counsel (OLC) sought to consolidate twenty years of judicial and Commission precedent, the existing national origin and sexual harassment Guidelines, and the Commission's Policy Guidance on Sexual Harassment that was issued in 1990.

- The fundamental principle of existing workplace harassment law is a recognition that when employees are subjected to unwelcome conduct that severely or pervasively denigrates or shows hostility toward their race, religion, gender, national origin, age or disability it can create an environment that interferes with the ability to work (the "hostile environment" theory).

  As indicated by the above description of what constitutes unlawful harassment, the typical scenario involves an employee being subjected to taunts and epithets that focus on the employees race, religion, etc.

- The Guidelines were intended to explain and interpret existing law, not to create new law. The Commission does not have substantive rulemaking authority under Title VII and, therefore, cannot issue rules implementing Title VII that have the force or effect of law.

- The Commission published the Proposed Guidelines for public comment to solicit input from all interested parties. During the original comment period last fall, EEOC received a total of 86 comments.

  Among the comments received by the Commission were a few that focused on whether the inclusion of religion in the Proposed Guidelines violated the First Amendment's guarantee of free exercise. OLC staff immediately began to explore the First Amendment issue as soon as it received comments on it, going so far as to consult with the American Civil Liberties Union.

- Shortly after the close of the first comment period, several op-ed pieces were published in various newspapers around the country that misconstrued the Proposed Guidelines to ban religion from the workplace entirely.

- A number of religious groups began to contact Commission staff to discuss whether it would be appropriate to remove religion from the Guidelines. On February 24, 1994, Elizabeth Thornton, Acting Legal Counsel; Dianna B. Johnston, Assistant Legal Counsel; and other OLC staff attorney/advisors met with an ad hoc coalition of interested groups represented by Forest Montgomery, Counsel for the Office of Public Affairs, National Association of Evangelicals; Steven McFarland, Director of the Center for Law & Religious Freedom, Christian Legal Society; and David Wagner, Director of Legal Policy, Family Research Council, as well as Robert Peck, Legislative Counsel, American Civil Liberties.

- The notes from the meeting reflect the coalition's concern that the Proposed Guidelines are overly broad and ultimately would force employers wishing to avoid liability to ban religion from the workplace entirely. The coalition suggested that religion should be removed from the Guidelines. They also stated that this issue was important to them and that if the Commission did not adequately respond, they could effectively shut the agency down by flooding us with mail and phone calls.

- Beginning in March, the Commission started to receive a large volume of mail and telephone calls expressing dissatisfaction with the inclusion of religion in the Guidelines. This activity has escalated dramatically since the Commission voted to extend the comment period. On Monday, May 16th, EEOC received over 2700 letters; on May 23, 5000 pieces were received. On May 25, so many calls came in that they "crashed" the agency's voice mail system. The Office of Communications and Legislative Affairs has had to hire extra temporary staff and obtain additional telecommunications equipment to handle the extraordinarily high number of calls and correspondence on the issue.

- On March 18, 1994, OLC staff met with another group of religious and civil liberties organizations that believe it is important to keep religion in the Guidelines. Among those attending the meeting were Elliot M. Mincberg, Legal Director for People for the American Way; J. Brent Walker, General Counsel for the Baptist Joint Committee; Mark J. Pelavin, Washington Representative of the American Jewish Committee; Gary M. Ross, Congressional Liaison and Associate Director for the General Conference of Seventh-day Adventists; Richard T. Foltin, Legislative Director and Counsel for the American Jewish Committee; and Michael Lieberman, Associate Director/Counsel of the Anti-Defamation League of B'nai B'rith.

  These groups argued that removing religion from the Guidelines would send the wrong signal to employers and may suggest that religious harassment is not covered by Title VII. They also suggested that problems with vagueness in the Guidelines could best be solved by including specific examples of what does and does not constitute religious harassment. (These groups are now actively working with key members of Congress to rebut the activity on the Hill.)

- At the EEOC's March 24 hearing before the House Appropriations Subcommittee on Commerce, Justice, State and Judiciary, Congressman Frank Wolf expressed strong dissatisfaction with the Guidelines' inclusion of religion and threatened to obstruct passage of or restrict the Commission's appropriation if religion is not deleted from the Guidelines.

- In early April, Chairman Gallegos and staff met with Congressman Howard P. "Buck" McKeon and several other members of Congress who were concerned about the inclusion of religion in the Guidelines. These members expressed concern that the Guidelines conflict with the First Amendment and would have a chilling effect on religious expression in the workplace. They urged the Commission to consider all comments received (even after the formal comment period closed) and requested that any revisions to the Proposed Guidelines be published for an additional comment period.

- On May 10, the Commission voted to officially reopen the comment period for an additional 30-day period, which ends June 13, 1994. The notice of extension was published in the <u>Federal Register</u> on May 13, 1994, and states that the

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Commission extended the comment period "in order to give all parties an opportunity to express their views."

- Commission staff believe that commentors have raised some valid concerns. Three points have emerged has the principal elements of the critics' argument.

  - In defining harassment, the Guidelines include a section that refers to conduct that "[o]therwise adversely affects an individual's employment opportunities." [§1609.1(b)(1)(iii)]. This language was taken directly from the Guidelines on National Origin harassment, which have been in effect since 1980. Critics are correct, however, in stating that case law has not used this language and its meaning is not clear. (They use this point to make their case that the Guidelines go beyond a mere restatement of current law.) OLC staff believe that this language is duplicative and, therefore, no substantive ground would be lost by deleting this provision.

  - A significant portion of the criticism focuses on the Guidelines' articulation of the "reasonable person" standard used in determining whether a hostile work environment exists. [§1609.1(c)] The Guidelines' standard for "reasonable person" allows "consideration of the perspective of persons of the alleged victim's race, ..., religion".

    The critics argue that this may be interpreted to mean that conduct will be judged from the subjective, and everchanging, perspective of the complaining party. Further, they contend that the standard is so subjective and vague that wary employers will prohibit any religious expression in the workplace rather than risk offending anyone.

    In drafting this standard, the Commission's intent was to retain an objective standard while taking account of historical discrimination aimed at various groups. It was not intended to provide for the hypersensitive employee who may be offended by the slightest action. Given the amount of controversy generated by this provision, however, it is clear that the language should be revised to more accurately reflect the intended meaning.

  - The final and overarching concern is the interaction of the Guidelines and the First Amendment right of freedom of religious expression. Many critics are particularly concerned that the Guidelines conflict with the recently enacted Religious Freedom Restoration Act (RFRA). RFRA generally provides that the government may not substantially burden free exercise, even by a neutral rule, unless the government presents a compelling interest and does so using the least restrictive means. RFRA had not passed when the Guidelines were originally published for comment. OLC is currently analyzing the effect of RFRA on the proposed Guidelines.

- Commission staff acknowledge that some of the concerns that the Guidelines might be misinterpreted and construed too broadly are well taken. From the outset, the EEOC staff agree that many of these concerns should be addressed in any final Guidelines by, for example, questions and answers that make clear what is and is not permitted.

- Most of the individuals who have contacted the EEOC and Congress have been badly misinformed about the content, purpose, and effect of the Guidelines. The misinformation ranges from regulations prohibiting employees from wearing religious insignia at work to the Commission enacting new laws to ban religion in the workplace.

- It is apparent that one of the underlying concerns of the conservative Christian groups is the effect of the Guidelines on religious proselytizing in the workplace. Under existing legal principles there is little doubt that, under some circumstances, persistent proselytizing after notice that it is unwelcome could rise to the level of unlawful harassment.

Prepared by EEOC Office of Legal Counsel
May 25, 1994

relhar.mem
cg:5/25/94-9:00pm

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8802

EXECUTIVE OFFICE OF THE PRESIDENT

07-Jun-1994 03:52pm

TO: Katherine L. Darwin

FROM: Donsia Strong
Domestic Policy Council

CC: Carol H. Rasco
CC: Stephen C. Warnath
CC: Paul R. Carey
CC: Tracey E. Thornton

SUBJECT: eeoc

Phil,

Cheryl Mills has informed me that the WH should not direct EEOC commissioners to testify. She recommends that we send a letter detailing the importance of the EEOC taking this opportunity to provide its view on this important issue, if the WH wants to act on this matter.

I understand that Mr. Gallegos would not testify even if you (Phil) personally called.

According to Paul Carey, the Executive Director, a career employee, is expected to testify at this point. This would still be a less than ideal circumstance because it underscores the fact we have no Chair and adds to the negative atmosphere on the Hill.

OLeg Affairs will continue to work with Sen. Heflin's staff for a postponement.

I don't believe there is anything for you to do at this time. Thanks for your attention to this matter.

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001. note	Marvin to Cheryl/Donsia (1 page)	n.d.	P5 8003
002. memo	Melissa Cook to Donsia Strong re: Federal Employee Fairness Act (2 pages)	1/4/1994	P5
003. memo	Ingrid Schroeder to Jennifer Palmieri (1 page)	7/27/1993	P5
004. draft	Chairman EEOC to The Honorable John Glenn (1 page)	7/20/1993	P5
005. letter	Jesse Brown to Leon Panetta (6 pages)	6/2/1993	P5
006. memo w/attachments	Transition Materials - Harassment (45 pages)	12/11/1992	Personal Misfile
007. letter	Edwin Dorn to Gordon Adams (2 pages)	9/21/1993	P5

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9589

FOLDER TITLE:

[Federal Employee Fairness Act]

Dana Simmons

ds59

RESTRICTION CODES

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Cheryl/Donsia--My thoughts on our compromise

1) Institue a paragraph requiring EEOC to determine in writing, for all cases where agency discrimination was found, whether referral to the Office of Special Counsel would be appropriate.

2) Increase time for federal employees to file complaints to 180 days; look at suggested timetables in Glenn bill for compromise on timetable for decision.

3) Require mandatory counseling for up to 60 days inside the agencies, provide that, should no resolution be reached, agencies may conduct fact-finding and attempt to mediate or conciliate with the complaining employee (perhaps attach time limit for that process?)

4) Lodge all decision-making with the EEOC ALJ.

I think we should try to turn this around asap. Paul Carey called me to inquire about our progress. Marvin

Complaint Processing activities Reports to EEOC

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

Route Slip

To: Donsia Strong	Take necessary action [ ]
	Approval or signature [ ]
	Comment [ ]
	Prepare reply [ ]
	Discuss with me [ ]
	For your information [ ]
	See remarks below [ ]

From: Melissa Cook Date: January 4, 1994

Remarks:

Enclosed is the information you requested on S. 404, Federal Employee Fairness Act of 1993 (also H.R. 2721).

To date, the Administration has not taken a position on this legislation. The only document that the Administration has sent to the Hill regarding this issue was the enclosed EEOC letter dated June 10, 1993, stating that the Administration was still reviewing the issue.

We never cleared EEOC's report supporting S. 404 or Justice's report opposing this bill (see enclosures LRMs # I-511 and #I-585). Agency comments on each report are attached to the appropriate LRM. In addition, two additional letters from EEOC (dated October 4, 1993) and Justice (September 1, 1993) regarding each other's positions are enclosed.

EEOC has sent us for clearance its report supporting H.R. 2721 (see enclosed draft dated November 18, 1993). The EEOC report on H.R. 2721 is basically the same as the one it submitted for clearance on S. 404. We have not yet circulated EEOC's report on H.R. 2721 and are awaiting guidance from Jennifer Palmieri and Paul Carey as to how to handle this report. We expect Justice and the other major Federal agencies to oppose the EEOC report, just as they did EEOC's report on S. 404. Consequently, unless the Administration plans to come to closure on this issue, it is unclear what the value would be of circulating the EEOC report on H.R. 2721.

For your information, I have enclosed a draft letter (with a cover route slip to Jennifer Palmieri dated July 27, 1993) that OMB prepared for EEOC to send to the Senate Governmental Affairs Committee regarding the Administration's position on S. 404. The letter, however, was never given to EEOC because we never received the go ahead from White House Legislative Affairs. At the time, White House Legislative Affairs felt that it was best to be silent on this issue.

In my files, I have additional information on S. 404 and H.R. 2721. I have Army testimony from October on H.R. 2721 that was never cleared because at the time OMB and White House Legislative Affairs Offices decided that the Administration was not ready to take a position on this bill. I also have testimony on H.R. 2721 that was given by the Civil Rights Commission before the Select Subcommittee on Education and Civil Rights and reports on S. 404 that Merit Systems Protection Board and the Senior Executives Association sent to the Senate Committee on Governmental Affairs. I also have additional DOD views on S. 404 and H.R. 2721 that the Department sent to Gordon Adams. Please let me know if you would like to see any of these documents.

If I can be of further assistance, please let me know.

cc:
Janet Forsgren

We never received go ahead from Paul Carey, so this letter was never given to EEOC. WH Legislative Affairs felt it was best to be silent on the issue at that time.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO: Jennifer Palmieri

- [ ] **Take necessary action**
- [ ] **Approval signature**
- [ ] **Comment**
- [ ] **Prepare reply**
- [ ] **Discuss with me**
- [ ] **For your information**
- [ ] **See remarks below**

FROM: Ingrid Schroeder

DATE: July 27 ,1993

REMARKS

Attached is a draft letter for the EEOC to send to the Senate Governmental Affairs Committee regarding the Administration's position on S. 404, Federal Employees Fairness Act. The draft letter was prepared by OMB. After your review, we will ask the EEOC to send the letter to the Hill. The letter has already been circulated within OMB and reflects the policy position decided by Belle Sawhill and Phil Lader. It also reflects the policy position that we have previously discussed with Paul Carey, who has been handling the issue in White House LA. Janet Forsgren has a call into Paul to reaffirm that this position is acceptable to him.

=> please note the comments on the top of the page.

On June 24, 1993, S. 404 was ordered reported by the Governmental Affairs Committee. At this point the Administration has not yet taken a position on this bill.

I would appreciate if you would give me your comments on this draft letter as soon as possible, since we expect the Committee report to be filed shortly.

Per Jennifer the EEOC letter is fine; send it off. 8/19/93 [illegible]

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Never Sent over to EEOC or to the Hill.

July 20, 1993

The Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
Washington. DC 20510

Dear Chairman Glenn:

This letter follows up on our June 10, 1993, letter in which we promised to provide the Administration's views on S. 404, the "Federal Employees Fairness Act."

As stated in our June 10th letter, the Administration continues to support the Committee's goals of improving the administrative processes associated with the Federal equal employment opportunity system and facilitating the fair and prompt resolution of complaints issued through the system.

The Administration conducted a thorough review of S. 404. Comments were received from over 10 Federal agencies. Based on that review, the Administration believes that the current 1614 regulations should be fully implemented and evaluated before further reform efforts are pursued.

Implementation of the 1614 regulations began on October, 1, 1992. These regulations allow employees who have filed complaints in their agency the opportunity to file directly with the Equal Employment Opportunity Commission if their agency does not act on their complaint within 180 days. These regulations are designed to give employees recourse if their agency is not addressing their complaint in a prompt and efficient manner. With less than nine months of experience under the regulations, it is premature to determine whether they are fulfilling the intended goal.

Thank you for the opportunity to express our views on this very important issue. Be assured, that if the 1614 regulations are found to be deficient, the Administration will work with the Congress to address changes that may be necessary to improve the system.

Sincerely,

Chairman
Equal Employment Opportunity
Commission

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THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

JUN 2 1993

The Honorable Leon Panetta
Director, Office of
Management and Budget
Attention: Assistant Director
for Legislative Reference
Washington, D.C. 20503

Dear Mr. Panetta:

This is in response to your request for the views of the Department of Veterans Affairs on the Equal Employment Opportunity Commission's comments on S. 404. The Department supports enactment of S. 404 with certain modifications. For your convenience, we have organized our comments to mirror those submitted by the Commission and include our own comments with regard to both specific features and costs associated with the bill.

I. MAJOR COMMENTS ON STRUCTURE AND PROCESS

(1) Expand Opportunities for Informal Resolution. While we are in general agreement with the comments in I.(1), we emphasize the Commission's point about the number of complaints which have historically been resolved informally and strongly urge that precomplaint counseling be made mandatory, rather than optional. Mandatory counseling would not only reduce the number of formal complaints, it would help define the issues and assure that the Federal employee receives notification of all prescribed procedures and deadlines that apply under Section 717.

(2) Establish More Realistic Procedural Time Frames. We concur with the substance of I.(2) which is that many of the procedural time limits are unrealistic. However, in addition to those time frames which the Commission suggests should be changed, we note that a respondent (agency) is given only three (3) days to notify the Commission of the filing of a complaint and recommend that a period of fifteen (15) days would be more reasonable.

(3) Provide Meaningful Stay Provision. We agree that the stay provisions in the bill have no application to the process that is being created and that the issue will be moot by the time an administrative judge receives the case. If authority is granted to the Chairman of the Commission, or designee, to stay actions upon petition of the complainant, the bill [illegible]

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provide for some criteria in determining when such stays should be granted. We further recommend that such stays only be permitted in the most unusual or egregious cases. Otherwise, stays will become the rule rather than the exception, thus preventing agencies from quickly taking actions necessary for efficient operation, such as terminating employees for serious misconduct or incompetence.

(4) Allow "Withholding of Pay." We disagree with the Commission that a provision for withholding pay as a means of enforcement should be included in this proposed legislation. This heavy-handed measure is unnecessary as this Department has never declined to implement an order of the Commission. Moreover, implementation is the responsibility of the agency, not of an individual employee.

II. TECHNICAL COMMENTS

We agree with items (1), (2), (3), (7), and (8) in the "Technical Comments" section of the report. We disagree with, and offer the following comments concerning, the remaining technical comments.

(4) and (9) Identification of Alleged Discriminating Official and Referrals to Special Counsel. We do not believe that the alleged discriminating official's (ADO) due process rights will be adequately protected by the referral to the Special Counsel. If the Commission's suggestions are accepted, even though ADOs will not be identified in the administrative proceeding by the administrative judge, there will nevertheless be a presumption of guilt and need for discipline without the ADO ever having had the opportunity to participate in the proceedings. This presumption of guilt arises since the Special Counsel would be bound, per the Commission's suggestion, by the finding of discrimination. Hence, the only matter to be decided would be the degree of punishment to be imposed on the ADO. The ADO under such circumstances would have absolutely no meaningful due process rights.

The hearing is the only stage at which the ADO would have a meaningful opportunity to participate in the development of the record regarding the question of whether or not discrimination occurred. The bill properly provides for ADO participation at this stage and this provision should not be changed. The bill, however, is unclear as to the extent of that participation. We believe it should clarify that the ADO will be permitted to appear and be represented at all sessions of the hearing, and be permitted the same right to examine and cross-examine witnesses and present evidence as the other parties.

(5) Clarification of Conciliation Requirements. We agree that conciliation requirements should be clarified, but disagree with the Commission's recommendation that it have sole discretion to appoint a conciliator. Mediation is successful where both parties are committed to the process, and we support the use of alternative dispute resolution where mutually agreed upon.

(6) Standard of Review of AJ Decisions. While we agree with the Commission that the standard of review in last year's H.R. 3613 is preferable to both S. 404 and H.R. 1111, we nevertheless believe that the appellate review standard should be the same as the standard used by the administrative judge in determining the case, which is the same standard presently applied by the Commission in its review (i.e., the preponderance of the evidence standard). In addition, the administrative judge's findings of fact should not be conclusive. This would be appropriate if decisions were being issued by administrative law judges. However, given the grade structure of the Commission's administrative judges, and the wide variance in the quality of their decisions, we believe that the Commission should not be bound by their findings of fact.

(8) Reporting Requirements. We disagree with the Commission and approve S. 404's deletion of reporting requirements. Under the proposed legislative scheme, the agencies have virtually no control over case processing and no ability to reduce processing time.

III. OPERATIONAL IMPACT AND BUDGET CONSIDERATIONS

We defer to the Commission concerning cost estimates for implementation. However, we have comments on whether the costs associated with certain provisions of this legislation are justified. Along with other new measures, such as provisions for compensatory damages, this bill involves significant cost increases over the current discrimination complaint process. We believe the bill costs should be reevaluated closely with respect to the primary Administration goal of deficit reduction. The values served by this bill must be balanced against the values served by fiscal prudence.

(1) Paid Leave. The expanded authorization for paid leave for employees is unwarranted and subject to costly abuse. Paid leave should be limited to an employee's attendance at his or her own deposition and all court hearings. It is not necessary for the complainant to attend every deposition. Nor is it clear what ordinary and legitimate undertakings would warrant meetings with counsel or how they would be verified. Agencies

would be reluctant to question the reasonableness of paid leave requests for fear of instigating a new complaint, and attorneys could not admit that a meeting never occurred, thereby exposing a client to disciplinary action.

(2) Class Complaints. The provision allowing an administrative judge to rule that an individual complaint may be expanded to a class complaint effectively promotes class complaints, a costly alternative to individual complaints which require a class agent and qualified representative. Additionally, the Commission should not have the authority to force participation in a class complaint, thereby interfering with and frustrating the intention of the employee to file an individual complaint.

(3) Judgment Fund. Requiring the agency to pay all awards, fees, costs and interest is contrary to well established policy and the existing statutory scheme. The Judgment Fund was created for the purpose of paying awards in litigation against the Federal Government and that source of funds should be continued. In light of new provisions for compensatory damages, the use of agency funds to pay litigation judgments could impair the agency's ability to carry out its mission. The agency should pay only amounts associated with administrative actions.

(4) Other Litigation Expenses. Allowing the administrative judge and the Commission to award "other litigation expenses" to the prevailing party is overly broad and ambiguous. It could be construed to encompass enormous expenditures incurred by an attorney, thereby encouraging representatives to spare no expense in litigating these claims. To the best of our knowledge, this expansion of reasonable attorney's fees to include unlimited litigation expenses is unprecedented.

(5) Mandatory Counseling. The Commission concludes that without mandatory counseling there will be a marked increase in the number of formal complaints. This is a significant cost increase which could be avoided simply by continuing the most successful aspect of the present system, that is, a counseling requirement.

(6) Conciliation Costs. The Commission does not include cost estimates for conciliators because they may not be used. If conciliators are used in every case at a cost of $400 to $1,200 per case, the potential costs are staggering.

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IV. ADDITIONAL POINTS

Since your office is formulating an Administration position on S. 404, we believe additional points not raised in the proposed Commission report should be considered. We offer the following additional comments.

(1) Administrative Judges. Given the bill's stated purpose of improving the quality and reliability of final agency decisions, we recommend that administrative law judges, not administrative judges, render these decisions. Based on our experience with the present cadre of administrative judges used by the Commission, there would not be any assurance of consistent, high quality decisions.

(2) Subpoena. It is unnecessary and redundant to grant the administrative judge subpoena power to compel production of documents and information, or attendance by witnesses. This will prolong the administrative process when there has never, in our experience, been a problem obtaining cooperation from the agency with respect to requests for documents or witnesses.

(3) Dismissal. S. 404 provides for the dismissal of claims which are frivolous and those which fail to state a nonfrivolous claim for which relief may be granted. Although we fully support these grounds for dismissal, we point out that there are other grounds for dismissal set forth in pertinent EEOC regulations which should be included in S. 404. We, therefore, recommend that the following additional grounds for dismissal be added to the bill: the claim states the same claim pending before or decided by the Commission; the claim fails to comply with the 180 day time limit for filing a complaint; the claim is the basis of a pending or decided civil action in a United States district court in which the Federal employee is or was a party; the Federal employee raised the matter in a negotiated grievance procedure that permits allegations of discrimination or in an appeal to the MSPB; the claim alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory; the Federal employee has rejected an agency's certified offer of full relief; and the Federal employee cannot be located after reasonable attempts to do so have been made. We further recommend that the bill provide that the respondent agency be explicitly given the right to move for dismissal and the right to appeal from an adverse decision or to file an exception to preserve the agency's rights on appeal.

(4) Amendments to the ADEA. Despite the proposed amendments to the Age Discrimination in Employment Act (ADEA), age discrimination complaints will continue to receive

different treatment. Exhaustion of administrative remedies will not be required and there is no outside time limit for filing the notice of intent with the Commission. ADEA complaints should be treated the same as other types of complaints and complainants should not be permitted to bypass the administrative process. If not, then there should be an outside time limit on the filing of the notice with the Commission, such as 180 days--the same as for filing a complaint.

We appreciate the opportunity to provide comments on the proposed Equal Employment Opportunity Commission Report on S. 404.

Sincerely yours,

Jesse Brown

Jesse Brown

JB/br

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C. NSD Stevens Hobon

PERSONNEL AND READINESS

ASSISTANT SECRETARY OF DEFENSE

4000 DEFENSE PENTAGON
WASHINGTON DC 20301-4000

SEP 21 1993

Dr. Gordon M. Adams
Associate Director for National Security
and International Affairs
Office of Management and Budget
Washington, DC 20503

Dear Dr. Adams:

The Senate Governmental Affairs Committee reported out S.404, The Federal Employee Fairness Act of 1993. The House Education and Labor, Post Office, and Civil Service Committees are considering a similar bill, H.R. 2721, with the same title. We urge the Administration to oppose the bills at this time.

Both bills overhaul Equal Employment Opportunity Commission (EEOC) Federal employee discrimination complaint procedures. Clearly, complaint processing can be improved. However, the Department of Defense (DoD) administrative procedures are effective in protecting employee rights and enforcing equal employment opportunity policies. Moreover, to expedite complaint processing, we are consolidating Military Department investigatory staffs under OSD. DoD is therefore interested in any changes in EEOC procedures that affect agency programs.

The bills address perceived shortcomings in EEOC as well as agency policies. The EEOC, however, recently addressed some of these concerns in its revised regulations at 29 C.F.R. Part 1614 which went into effect in October 1992. While DoD supports a more effective and efficient employee complaint system, the new EEOC policies should be evaluated before enacting remedial legislation.

While we agree with the goal of fairness, the proposed legislation would undermine effective personnel management. If the Administration decides to support this legislation, it should be modified to require use of expedited agency counseling and investigations before EEOC acts. Additionally, allegations should be raised in a timely manner, within 60 to 90 days. Authority to stay personnel actions should be grounded on clear standards, providing agencies an opportunity to show adverse impact on agency operations. Lastly, in light of the increased authority of the EEOC to issue binding decisions as proposed by the bills, an agency should be able to appeal adverse rulings in an appropriate court. Such appeals would be subject to the Department of Justice clearance in order to balance broader governmental interests.

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I hope that the Department's views will be helpful as your office prepares the Administration's position on these measures.

Sincerely,

Edwin Dorn

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Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Arlene Davis to Thomasina V. Rogers re: exception (2 pages)	8/19/1992	P5
002. memo	To David Liss, Jim Sober re: memo (12 pages)	5/3/1994	P5 8804
003. report	Wrenn Litigation (1 page)	n.d.	P6/b(6)
004. report	McGovern v. Gallegos and EEOC (1 page)	n.d	P6/b(6)
005. report	Wallace v. Gallegos (1 page)	n.d.	P6/b(6)
006. letter	Sheila Owsley to Robert Bernard (2 pages)	4/12/1994	P6/b(6)
007. letter	Johnny Mata to Evan Kemp Jr. (2 pages)	2/17/1993	P6/b(6)
008. note	Discrimination in EEOC Houston Office (1 page)	n.d.	P6/b(6)
009. report	Jackson v. Gallegos (1 page)	n.d.	P6/b(6)
010. report	Terry v. Kemp (1 page)	n.d.	P6/b(6)

COLLECTION:

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Stephen Warnath (Civil Rights)
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FOLDER TITLE:

[Equal Employment Opportunity Commission Confirmation Briefing Materials] [3]

Dana Simmons

ds79

RESTRICTION CODES

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 advice 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]

TO: David Liss
Jim Sober

8804

CONFIDENTIAL

PRIVILEGED ATTORNEY-CLIENT COMMUNICATION

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Memorandum

Subject	Date
EEOC and AFGE Council of EEOC Locals No. 216 (FLRA decisions, Nov. 2, 1993, Feb. 3, 1994)	May 3, 1994

To	From
The Solicitor General	Paul R.Q. Wolfson

TIME

The FLRA's order denying reconsideration of its earlier order was entered on February 3, 1994. EEOC has filed a protective petition for review. No briefing schedule has been set, but the FLRA may file a motion to dismiss for lack of jurisdiction by May 16, 1994, and EEOC needs to know how to respond to that motion.

RECOMMENDATIONS

The EEOC recommends petition for review. The Civil Division recommends petition for review. I recommend petition for review on only one issue, whether the putative arbitrator was validly selected (or, to put it another way, what standard of review the agency and the court should apply to an arbitrator's determination that he was validly selected).

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QUESTIONS PRESENTED

The underlying dispute concerns the EEOC's unilateral implementation of a performance appraisal review system (PARS) governing EEOC employees. In a grievance proceeding brought by the union, the arbitrator effectively ruled that EEOC's refusal to bargain over the PARS violated its collective bargaining agreement (CBA) with the union, which required EEOC and the union to "meet and confer * * * to develop and mutually agree to a comprehensive appraisal and/or evaluation procedure."

However, the questions proposed for review do not concern the substance of this decision by the arbitrator per se, but rather a tangle of procedural and jurisdictional issues raised by the arbitrator's action.

1. EEOC contends that the arbitrator lacked jurisdiction over the grievances brought by the union, because the union selected him unilaterally, and over the EEOC's objection that the union was attempting to select the arbitrator under the wrong provision of the CBA. On appeal, the FLRA rejected the EEOC's contentions, and affirmed the arbitrator's decision that he had been validly selected pursuant to the CBA. The FLRA employed the deferential standard of review usually applied in appeals from arbitration awards. The issue on review would be whether the FLRA should have applied this deferential standard of review, or whether the FLRA (and the courts) should decide de novo whether the arbitrator had jurisdiction. In addition, EEOC believes that even if a deferential standard of review is appropriate, the FLRA misapplied it here.

2. EEOC also contends that the arbitrator lacked jurisdiction over the union's grievances because the union had previously filed unfair labor practice (ULP) charges with the FLRA on the same issues. 5 U.S.C. 7116(d) provides that "issues which can be raised under a grievance procedure may * * * be raised under the grievance procedure or as an unfair labor practice * * * , but not under both procedures."

3. EEOC also contends that the FLRA should have disqualified the arbitrator for bias.

4. In addition, there may be an issue as to whether the court of appeals has jurisdiction over EEOC's petition for review. 5 U.S.C. 7123(a) vests the courts of appeals with jurisdiction over petitions for review of FLRA orders. The statute precludes review

of FLRA orders reviewing arbitral awards, but then excludes from this preclusion orders "involv[ing] an unfair labor practice."

STATEMENT

EEOC and the union entered into a CBA on June 18, 1991. Article 22 of the CBA provides that the "performance appraisal/evaluation procedures agreed to by the Parties shall provide, to the maximum extent possible, an accurate and objective evaluation of job performance." The same article also provides that the parties shall "meet and confer" to "develop and mutually agree to" a performance appraisal system. A separate memorandum of understanding (MOU) between EEOC and the union established a Joint Labor-Management Committee to discuss and develop means of implementing a performance appraisal and review system.

Although the process got off to a good start, by September 1991 the EEOC and the union were already at odds over the development of the PARS, with EEOC claiming that the union was refusing to cooperate and attempting to bargain over non-negotiable issues.[1] On September 26, 1991, EEOC unilaterally completed the performance appraisal plans and forwarded the handbook to the union for bargaining over impact and implementation. These negotiations were also fruitless, and, on December 17, 1991, EEOC declared the parties to be at deadlock and submitted its last best offer on impact and implementation.

EEOC then asked the union to participate in choosing a mediator/arbitrator to resolve the dispute over impact and implementation of the PARS. EEOC maintained that this mediator/arbitrator was to be chosen, pursuant to Article 8 of the CBA, from a list of fifteen supplied by the Federal Mediation and Conciliation Service (FMCS). Article 8 generally provides for the union and the agency to negotiate over impact and implementation only of substantively non-negotiable matters, including "changes resulting from the exercise of rights reserved to Management," and

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[1] According to EEOC and the Civil Division, the substance of performance appraisal systems are non-negotiable under federal-sector labor law. Nevertheless, it does seem as though the CBA literally requires the parties to negotiate over the substance of the agreement as well as its impact and implementation (which would be negotiable). EEOC contends, however, that its obligation under the CBA was only to "meet and confer" about the PARS, and not to negotiate substance.

then provides for mediation/arbitration if the negotiations reach deadlock. According to EEOC, this mediation/arbitration is a somewhat experimental alternative-dispute resolution program, more flexible and less legalistic than the traditional grievance/arbitration system found in many CBAs.

The union claimed that the dispute had to be resolved through a more conventional grievance/arbitration procedure by a panel of three arbitrators, to be chosen pursuant to Articles 43 and 44 of the CBA. Article 43 provides for grievances and arbitration "[w]here disputes arise concerning the interpretation or application of [the CBA.]" The union contends that this section is applicable because the underlying dispute concerns Article 22 of the CBA, which purportedly sets forth the parties' obligation to agree on a PARS. Article 44 provides for a panel of three arbitrators to be selected, through the use of sequential strikes by the parties, from a different list of fifteen supplied by FMCS. The parties failed to reach any agreement on this issue.

The union, purporting to exercise its rights under Article 44, thereupon struck 12 names from the list of 15 FMCS arbitrators and wrote to the remaining three persons, advising them that they had been unilaterally selected as arbitrators. Two of the three refused to serve, stating that the union could not unilaterally select arbitrators in this manner. FMCS also declined to cooperate by appointing an arbitrator to a panel unilaterally selected by the union. However, the third national arbitrator chosen by the union, Joseph Lazar, accepted the selection and agreed to act as arbitrator, despite the EEOC's objection that it did not recognize him as validly selected under the CBA. EEOC refused to participate in any proceedings before Lazar.

Meanwhile, the union filed a series of ULP charges with the FLRA based on the failed negotiations. First, the union charged that EEOC had acted in bad faith when negotiating Article 22, which allegedly obligated it to negotiate with the union over the PARS, a matter that the EEOC claims is non-negotiable. (December 3, 1991, ULP charge) Second, the union charged that EEOC had refused to continue bargaining over the substance and/or the impact and implementation of the PARS. (January 23, 1992, ULP charge) A third ULP charge, similar to the second, was also filed but later withdrawn. (March 27, 1992 charge) Finally, the union charged that EEOC, by refusing to cooperate in the process of striking arbitrators from the Article 44 list, had denied its employees a full grievance and arbitration procedure. (April 29, 1992, ULP charge)

All the ULP charges not withdrawn by the union were dismissed by the FLRA, but the reasons for these dismissals are not crystal clear. As to the December 3 charge, the FLRA General Counsel concluded that EEOC had not violated its obligations under the statute and the agreement, and that EEOC had in fact "met and conferred" on the PARS. But the ruling also states that the charge was dismissed because it involved a matter of contract interpretation, and because the "appropriate remedy is obtainable through the dispute resolution mechanisms of the disputed agreement." The January 23 charge was clearly dismissed on the merits. The FLRA Regional Director's response to the April 29 charge, that EEOC had denied its employees an arbitration mechanism by refusing to strike under Article 44, can charitably be described as murky. On the one hand, he seemed to dismiss the charge on the merits, pointing out that the EEOC was ready and willing to strike under Article 8 and 44 at the same time. On the other hand, he also stated that he would refuse to issue a complaint because the dispute concerned a matter of contract interpretation and should be resolved under the parties' contractual dispute resolution mechanism. It does not seem to have occurred to him that the parties' inability to agree on such a mechanism was the whole problem.

The union also proceeded to bring a series of grievances before putative arbitrator Lazar. First, the union contended that EEOC breached Articles 8 and 22 of the CBA, and also the MOU, when it abandoned the Joint Labor-Management Committee and invoked impact and implementation negotiations while negotiations on the substance of the PARS were still ongoing. (April 1, 1991, grievance) Second, after the union requested that the agency state its position concerning performance plans for specific job positions and submit them to the now-defunct Joint Committee, and the agency refused, the union grieved, contending that the agency had violated Articles 8 and 22 of the CBA, as well as the MOU. (May 7, 1992, grievance) A third grievance (May 14) was basically a reprise of the May 7 grievance, for different job positions.

Now the fun begins. Lazar informed the union and the agency that he would first hold a hearing on whether he was validly selected as an arbitrator. In what strikes me as a colossal blunder, the EEOC refused to attend this hearing. Lazar then issued an interim award in which he held that he was properly selected under Article 44, and that the agency was obligated to participate in the procedure of striking arbitrators. Lazar held that the union had both the right and the power to strike, and that EEOC could not strip the union of its right and power by its non-

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cooperation. While Lazar recognized that the CBA specifically provides that the "Parties" (plural) shall do the striking, he held that all preconditions required for selection had been satisfied, and EEOC, having abandoned the procedure at its peril, was estopped from objecting to the union's unilateral exercise of its right to strike. The EEOC filed exceptions to the interim award to the FLRA, which dismissed the appeal as interlocutory.

Lazar then proceeded to rule in the union's favor on every point in its grievances. He found that the union had made every good faith effort to have harmonious meetings with the agency, and that there was, in fact, no deadlock or impasse over the PARS when the agency declared one. He also found that the CBA constrained management prerogative in the development of the PARS through its use of the terms "meet and confer"; that EEOC had violated its duty under the MOU to "collaboratively develop a new [PARS]"; that EEOC had violated the CBA when it declared an impasse and tried to exercise its rights under Article 8; that EEOC had also violated its duties under the MOU and the CBA when it refused to participate in the arbitration; and that, in effect, the PARS unilaterally implemented by EEOC was void and had to be resubmitted to the Joint Committee. Lazar also retained jurisdiction over any dispute concerning the interpretation of his award -- which means that he has jurisdiction over every union grievance that may be brought about any performance-related management action. EEOC reports that the union is prepared to grieve virtually every performance-related matter to Lazar and has begun to do so; naturally, Lazar is expected to favor the union.

EEOC appealed to the FLRA, raising essentially two arguments. First, EEOC argued that Lazar had no jurisdiction at all, because he was invalidly selected by the union. Second, EEOC argued that Lazar's consideration of the union's grievances was barred by 5 U.S.C. 7116(d), which, as mentioned above, provides that the union may raise a matter by ULP charge or by grievance, but not both.

The FLRA rejected both arguments. As to Arbitrator Lazar's assertion of jurisdiction, the FLRA applied the deferential standard of review usually applied in appeals from arbitral awards, and concluded that Lazar's ruling had indeed drawn its essence from the CBA and was not irrational, implausible, unfounded, or in manifest disregard of the CBA. As to the ULP/grievance issue, the FLRA first concluded that the ULP charges and grievances were not based on the same factual predicates. According to the FLRA, the ULP charges did not concern the Agency's actual implementation of the PARS, but rather its refusal to negotiate over the PARS. (In support of this point, the FLRA noted that the ULP charges were filed before the PARS was actually implemented.) The FLRA also concluded that the ULP charges and grievances did not rely on the same underlying legal theories, since the legal theory advanced in the grievances was that the agency had violated its contractual obligations under the CBA and the MOU, not its statutory duties.

The FLRA also rejected the EEOC's request for reconsideration and a stay of its order. It rejected EEOC's assertions that it had applied the wrong standard of review to the arbitrator's assertion of jurisdiction, and that an arbitrator cannot arbitrate his own employment because of self-interest. It also rejected EEOC's contention that the grievances did not, in fact, concern the implementation of the PARS but rather concerned the agency's failure to bargain. Finally, it rebuffed EEOC's argument that Lazar was actually biased as untimely raised.

DISCUSSION

This case is truly an unholy mess. When I first reviewed the materials, I had a fair amount of sympathy for the agency, which definitely appears to have been dealing with an unreasonable and very aggressive union. On the other hand, the EEOC has to a substantial degree brought these difficulties down on its own head, through its non-cooperation with Lazar. In addition, while the agency may well be right that the dispute over the PARS should have been resolved under Article 8, not Article 44, the CBA is not unambiguous on this matter, and it is also not clear to me why the agency had so much at stake in this issue.

Nevertheless, I recommend appeal on at least one issue, because at least one legal issue presented is unsettled and of considerable significance, and the impact on the agency of the FLRA's order is dramatic. The agency needs a performance appraisal system, but now it is in disarray and the union is making management's life unbearable by grieving every adverse disciplinary action to Lazar. As of this point, probably only a unilateral imposition of a PARS can extricate the agency from this morass (renegotiations seem doubtful), but that can only come about through reversal of the FLRA's order by the court of appeals.

1. <u>Selection of Lazar as Arbitrator.</u>

In reviewing Lazar's assertion of jurisdiction, the FLRA applied the traditional deferential standard of review applicable on appeals from arbitral awards, considering only whether Lazar's interpretation "failed to draw its essence from the agreement." As the Civil Division points out, it seems most odd to apply this standard of review in the context of the arbitrator's confirmation of his own selection. In the first place, the arbitrator has a financial interest in the outcome. Second, the deferential standard of review is justified on the ground that the parties have agreed to the arbitration, but here the question is the prior one of whether they have so agreed.

While there is no case law on this precise issue, the argument would be that the FLRA should decide the arbitrator's jurisdiction de novo because 5 U.S.C. 7122(a)(2) authorizes the FLRA to overturn the arbitrator's award "on * * * grounds similar to those applied by Federal courts in private sector labor-management relations." In private-sector labor law, the question whether an arbitrator has jurisdiction over an issue is decided by the court, not the arbitrator. See AT&T Technologies v. Communications Workers of America, 475 U.S. 643 (1986); Local Union No. 637, IBEW v. Davis H. Elliot Co., 13 F.3d 129 (4th Cir. 1993). Although this case presents a wrinkle (not whether the issue is arbitrable, which it clearly is, but how it is arbitrable and by whom), the policy considerations are similar.

In addition, there is a fair argument that, even if the FLRA applied the correct standard, it reached the wrong result. Article 44 suggests that the parties must participate jointly in selection of arbitrators. Lazar concluded that the agency had waived its right to object to the union's unilateral selection of arbitrators, but this is a most doubtful interpretation of the agreement, especially since a separate section of the CBA allows for such unilateral selection of arbitrators by one party on minor, local disputes. The negative implication is the parties did not intend to allow unilateral selection of national arbitrators with jurisdiction over major disputes, as took place in this case.[2]

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[2] One might well ask, however, what the union was supposed to do if the EEOC simply refused to cooperate. The union did file a ULP charge, which the FLRA Regional Director dismissed because it raised issues of contract interpretation. This dismissal was not subject to further review by the FLRA or the courts. Turgeon v. FLRA, 677 F.2d 937 (D.C. Cir. 1982).

2. Arbitral Jurisdiction Barred by Prior ULP Charges.

The Civil Division also suggests, somewhat more tentatively, that the agency petition for review on the ground that the arbitrator was barred from ruling on the grievances by 5 U.S.C. 7116(d), which requires the union to elect between the remedies of grievance and filing a ULP charge. There are several difficulties here.

First, the FLRA concluded that the union's ULP charges and grievances were not based on the same facts, because the ULP charges involved the refusal to negotiate, while the grievances involved the unilateral implementation of the PARS. Even under the arbitrary and capricious standard, I agree with the Civil Division that this distinction slices the sausage a bit thin. In addition, Lazar did not actually rule that the implementation of the PARS was illegal under the CBA, nor did the union's grievance actually raise this issue directly. The problem is that, at least as to the December 3, 1991, and April 29, 1992, ULP charges, the FLRA General Counsel arguably dismissed them because they concerned facts that should have been raised via the grievance procedure. It is more than a bit harsh then to say that the union could not invoke the grievance procedure because it had previously filed a ULP charge, especially because the union could not obtain further agency or judicial review of this dismissal. Turgeon v. FLRA, 677 F.2d 937 (D.C. Cir. 1982). Under the governing standard, a grievance is barred by 5 U.S.C. 7116(d) as duplicative only when "the decision to file the ULP charge was within the discretion of the aggrieved party," AFGE Local 1411 v. FLRA, 960 F.2d 176, 177-178 (D.C. Cir. 1992), and the union could argue that its decision to file the ULP was not within its discretion.[3]

Second, as the Civil Division points out, the union did not actually file a grievance regarding EEOC's refusal to strike. It is therefore very unlikely that Lazar's "interim award" confirming his own selection as arbitrator could be overturned as duplicative, since it was not based on a grievance at all.

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[3] However, AFGE may be to the contrary. In that case, the union filed a ULP charge, which the Regional Director dismissed in the erroneous belief that the same facts had been raised in a prior grievance proceeding. The employee then tried the grievance route, but the FLRA ruled her grievance barred because the same facts had been raised in the ULP charge. The court of appeals affirmed.

The main problem on the other side of the scale is that it may be more difficult to argue that the court of appeals has jurisdiction unless the issue of duplication is raised. The court of appeals has jurisdiction under 5 U.S.C. 7123(a)(1) if the FLRA's order reviewing an arbitral award "involves an unfair labor practice." At one level, there is no doubt that the order literally "involves" an unfair labor practice. In particular, the FLRA's conclusion that the grievance was not duplicative of the ULP charge required it to compare the substance of the grievance to the substance of the ULP charge. See Overseas Education Association v. FLRA, 824 F.2d 61, 71 (D.C. Cir. 1987). But, within that order, the FLRA's specific ruling on Lazar's selection of himself did not require it to consider the substance of the ULP charges. Thus, if the court of appeals reviews this jurisdictional matter strictly, there is a danger that it may conclude that there is no jurisdiction because the part of the order under review does not involve a ULP charge. Nevertheless, a literal reading of the statute would lead to the result that the court of appeals has jurisdiction.

In summary, I recommend against raising the issue of duplicativeness; but if the issue is raised, I recommend confining the challenge based on duplicativeness to the substance of Lazar's award (i.e., not to challenge Lazar's selection of himself on the ground of duplicativeness).

3. Lazar's Bias Against the Agency. The Civil Division suggests arguing that Lazar should have been disqualified as biased because his fees have been excessive, he has disingenuously expanded his jurisdiction, and he has refused to disqualify himself despite receiving a letter of disqualification from the agency. The FLRA dismissed these contentions as raised in an untimely fashion, and they do not make out a compelling case of bias. (In particular, the letter of disqualification must be signed by both parties to be effective.) I therefore recommend against renewing this challenge in the court of appeals.

Case: "PARS" Litigation with the Union (Arbitration and C.A. 94-1168 (D.C. Cir.)

Factual Background: On April 15, 1993, Joseph Lazar, an arbitrator, issued an award against the agency. That award was that EEOC had violated the collective bargaining agreement (the "CBA") and a memorandum of understanding ("MOU") between EEOC and the Union when EEOC implemented an appraisal system ("PARS") for EEOC employees who were bargaining unit members. Lazar concluded that the CBA and the MOU required that the parties to the CBA meet and confer on the terms of an appraisal system. Lazar ordered that the parties, through its Joint Labor-Management Relations Committee, renegotiate the appraisal system, and if no agreement were reached, the status quo would apply. Prior to the implementation of the PARS, no appraisal system existed.

Lazar's authority has continuously been at issue. The CBA gave the authority to select an arbitrator to both parties; there was no provision for a unilateral selection. Notwithstanding, the union unilaterally selected Lazar and two other arbitrators, in the face of opposition from the agency's Employee and Labor Relations Division ("ERLD"). Lazar was the only one of three arbitrators to agree to function, in light of the unilateral nature of the selection process. The Federal Mediation and Conciliation Service refused to certify Lazar. ERLD objected to Lazar's naming himself, and opted not to participate in his proceeding where he concluded he was a proper arbitrator. The agency did not participate in the PARS arbitration. Following that ruling, ELRD notified the Office of Legal Counsel of this matter and asked that exceptions be filed to Lazar's decision finding that he was the National Arbitrator. ELRD's memorandum is attached. The agency filed exceptions to Lazar's ruling on the PARS, based mostly on Lazar's absence of authority as arbitrator and on other technical grounds, with the Federal Labor Relations Authority ("FLRA"). FLRA denied the exceptions, as well as a petition for reconsideration.

Status: Appeals of arbitration-related decisions are limited. The Department of Justice has nonetheless filed a petition for review of the FLRA decision with the United States Court of Appeals for the District of Columbia Circuit. That appeal is pending. In addition, EEOC and the union are currently briefing to Lazar issues dealing with relief for those the union claims have been affected by the PARS.

Key Points:

- the Solicitor General has not acted on the recommendation of the Justice Department to appeal (internal SG recommendation attached);

- the appeal is subject to various challenges, including whether the government may properly invoke the jurisdiction of the circuit court in this case.

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001. briefing paper	Maximum Weight Standards and Title VII (1 page)	n.d.	P5 8805
002. letter	Elizabeth M. Thornton to Maria Echaveste (10 pages)	12/2/1993	P5 8006

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FOLDER TITLE:

[Equal Employment Opportunity Commission Confirmation Briefing Materials] [2]

Dana Simmons

ds70

RESTRICTION CODES

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

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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]

8105

Maximum Weight Standards

I. Issue

Can a violation of Title VII be established when male and female flight attendants of the same height are subjected to different maximum weight standards? (The airlines do not allege that the differentials are safety based).

II. Background

A. This office has sent a memorandum to the Commissioners proposing that EEOC investigators and attorneys be instructed to disregard the guidance in Subsection 621.5 of the Compliance Manual. That subsection appears to require investigators to dismiss without investigation any charge raising a sex-based challenge to maximum weight standards. That instruction is contrary to the position EEOC has been taking in recent litigation.

B. We have been meeting with attorneys in the Office of General Counsel who have been involved in ongoing EEOC litigation in which this agency is challenging certain airlines' use of sex-based weight tables for flight attendants. EEOC recently entered into a settlement with USAir under which that airline will abandon the use of weight tables for a period of three years, and will be able to restore the standards after that time only through negotiations with the flight attendants' union.

C. Ultimately, this office will probably want to draft an enforcement guidance setting forth the Commission's policy on maximum weight standards. However, at the present time the issue is being addressed only in the context of EEOC litigation.

D. Some points to be considered in an enforcement guidance on the issue of maximum weight tables:

1. EEOC can take the position that differential weight standards for male and female flight attendants constitutes disparate treatment and may have an adverse impact based on sex, age and race.

2. Since flight attendants are predominantly female, it could be argued that even unisex weight standards for flight attendants violate Title VII, if no weight standards are applied to predominantly male jobs which also involve public contact.

Note: Concern has been expressed that if we take the position that airlines must dispense with maximum weight standards, airline hiring officials may substitute subjective appearance standards that are equally discriminatory but more difficult to challenge.

8106

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

DEC 2 1993

Maria Echaveste, Administrator
Wage and Hour Division
U.S. Department of Labor Room S-3502
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Interim Final Rule Implementing the Family and Medical Leave Act of 1993

Dear Ms. Echaveste:

The U.S. Equal Employment Opportunity Commission (EEOC or Commission) is providing these comments in response to your request for comments about the interim final rule (rule) implementing the Family and Medical Leave Act of 1993 (FMLA). The Commission is interested in the interaction between the FMLA and Title I of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. 12101 et seq. (ADA) and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq. (Title VII). We look forward to further coordination regarding several of the issues raised in this letter.

I. COORDINATION OF THE FMLA AND FEDERAL ANTI-DISCRIMINATION LAWS

From our perspective, the most important section of the interim final rule describes the relationship between the FMLA and the federal employment discrimination laws. See 29 C.F.R. 825.702. We have been receiving an increasing number of inquiries from employers needing immediate guidance about how to coordinate their compliance with the FMLA, the ADA and/or Title VII. Given this need, we recommend that the final FMLA rule address this subject in somewhat more detail than the interim final rule. We recommend clarifying section 825.702, and addressing a variety of unanswered questions, as set forth below.

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A. The FMLA Does Not Modify or Affect Federal Employment Discrimination Laws

Section 825.702(a) begins with a sentence that virtually restates the FMLA statutory language about federal discrimination laws.[1] It states:

> Nothing in FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability.

29 C.F.R. 825.702(a). One of the questions being raised by employers is whether the 12-week annual allotment of FMLA leave means that it is an undue hardship under the ADA for employers to provide more than 12 weeks of medical leave per year as a reasonable accommodation. We recommend stating in the final rule that the FMLA's 12-week annual ceiling for leave does not mean that more than 12 weeks of medical leave per year under the ADA automatically imposes an undue hardship on employers.[2] Employers considering whether medical leave in excess of 12 weeks per year would impose an undue hardship under the ADA should consider the request in light of all the factors listed in the ADA regulatory definition of undue hardship, including the employer's financial resources, the net cost of the leave, and its impact on business operations. Employers evaluating undue hardship need not disregard the cost and disruption of FMLA leave already taken by an employee.[3]

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[1] See section 401(a) of the FMLA.

[2] The FMLA legislative history explains that the FMLA leave requirement is "wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA]. . . . The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection." S. Rep. No. 3, 103d Cong., 1st Sess. 38 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 40.

[3] The ADA (unlike the FMLA) considers the burden on the employer for purposes of evaluating the feasibility of employee medical leave. Indeed, cost and disruption to the employer are directly relevant to the factors listed in the ADA's regulatory definition of undue hardship, and FMLA leave would result in some amount of cost and disruption to the employer even though it is viewed as an entitlement. In addition, considering the impact of FMLA leave when determining whether additional leave would be an undue hardship under the ADA does not deny qualified individuals with disabilities their ADA rights in addition to their FMLA entitlement. Under the ADA, these individuals may receive

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B. Employers Must Comply with Whichever <u>Statute Provides Greater Rights to Employees</u>

Section 825.702(a) continues with a sentence that presumably interprets the "modify or affect" language:

> An employer must therefore comply with whichever statute provides the greater rights to employees.

29 C.F.R. 825.702(a). Our first concern is that this language could be misconstrued to mean that an employer does not have to comply with the statute that happens to provide <u>lesser</u> rights to employees. This confusion may arise from the use of the word "comply," as employers are never relieved of their obligation to comply with the law -- any and all applicable laws -- even as they coordinate their actions under the FMLA and the federal employment discrimination laws. For purposes of clarification, we recommend deleting the reference to compliance, and instead directing employers to provide leave under whichever statute provides the greater rights to employees.

Our second concern is that it is unclear from section 825.702 <u>how</u> employers are to coordinate their actions under all applicable laws (FMLA, ADA, Title VII) and provide leave under "whichever statute provides the greater rights to employees." Does this mean that employers are to provide leave first under the statute providing the greater rights (<u>e.g.</u> usually FMLA) and then under the statute providing lesser rights (<u>e.g.</u> usually ADA)? Does it mean that employers simultaneously must offer employees rights under both laws (<u>e.g.</u>, FMLA and ADA or Title VII)? If employers must simultaneously offer employees rights under both laws, must employers also allow employees to pick and choose the "greater rights" from each law and at the same time to ignore the less favorable aspects of each law?

Any consideration of these questions must include an evaluation of the differences between the FMLA and the ADA regarding medical leave. The FMLA allows 12 weeks of leave in any 12-month period, but the ADA allows an indeterminate amount of leave as a reasonable accommodation barring undue hardship. The FMLA requires employers to continue the employee's coverage under any group health plan on the same conditions as coverage would have been provided if the employee had been continuously employed during the period of leave, but the ADA does not require continuation of health insurance unless employees without disabilities receive

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additional medical leave as a reasonable accommodation to the extent it does not impose an undue hardship on the operation of their employer's business. This is a right which is not available to persons who are not qualified individuals with disabilities.

continued health insurance under the same circumstances.[4] The FMLA allows employers to reassign seriously ill employees on intermittent leave or a reduced leave schedule to alternative positions, but the ADA allows reassignment only if the employee cannot perform the essential functions of the position. Finally, the FMLA requires employers to reinstate all non-key employees returning from medical leave into the same or equivalent positions, but the ADA directs employers to consider whether reinstatement into the same position imposes an undue hardship on the operation of the business.

We would like to schedule a meeting in the near future to discuss the interplay between the FMLA and federal employment discrimination laws. As the preceding discussion demonstrates, this section raises complex issues that need to be resolved in a way satisfactory to both of our agencies so that much-needed guidance can be provided to employers.

C. <u>Remedies</u>

Finally, section 825.702(a) addresses the availability of remedies. It states:

> When an employer violates both FMLA and a discrimination law, an employee may be able to recover under either <u>or both</u> statutes.

29 C.F.R. 825.702(a). (Emphasis supplied.) The statement about recovery under both statutes is ambiguous, as the discussion in the interim final rule does not consider the principle that relief under two laws is available only to the extent that double relief is not awarded for the same loss.[5] For example, when plaintiffs prevail on both Title VII and Equal Pay Act (EPA) claims,[6] "remedies must be tailored so as to give the plaintiffs the benefit of having prevailed on both claims but avoid duplication." <u>Grove v. Frostburg National Bank</u>, 549 F. Supp. 922, 946 (D. Md. 1982)(awarding plaintiffs one-time their backpay; entering an injunction under Title VII against defendant; and also awarding EPA liquidated damages to some plaintiffs, pre-judgment interest to another plaintiff, and Title VII adjustments to benefits where

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[4] Health insurance is analyzed under the ADA rules governing benefits, not reasonable accommodation. A leave of absence from work to receive medical treatment is a reasonable accommodation.

[5] <u>See</u> Robert Belton, Remedies in Employment Discrimination Law 101 (1992).

[6] The remedial provisions of the Equal Pay Act are those of the Fair Labor Standards Act, 29 U.S.C. 201, <u>et seq.</u> (FLSA). The FMLA will be enforced using FLSA procedures.

appropriate). See also Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 445 (D.C. Cir. 1976)(stating, in addition, that when remedies coincide the claimant should be allowed to utilize whichever avenue of relief is desired), cert. denied, 434 U.S. 1086 (1978). We recommend clarifying this language in the final rule and taking an approach similar to that taken by the courts in the above-cited cases.

II. OTHER POLICY ISSUES

A. ADA "Undue Hardship" and FMLA "Substantial and Grievous Economic Injury"

Additional policy issues arise by virtue of the overlap between the FMLA and federal employment discrimination laws, especially the ADA. One of these involves the exception for "key" employees to the FMLA requirement of reinstatement to employment, and how it relates to the ADA standard of undue hardship. The FMLA interim final rule requires restoration to employment when an employee completes a family or medical leave, except that "key" employees need not be restored if their restoration would cause "substantial and grievous economic injury" to the employer's operations.[7] The FMLA rule explains that "substantial and grievous economic injury" is established if restoration of a key employee "threaten[s] the economic viability of a firm" or otherwise causes "substantial, long-term economic injury."[8]

By comparison, the ADA allows an employer to consider whether medical leave or reinstatement of any qualified individual with a disability would impose an undue hardship on the operation of the employer's business.[9] The ADA regulations define "undue hardship" to mean "significant difficulty or expense" and enumerate the factors to be considered at 29 C.F.R. 1630.2(p).

The discussion in the FMLA interim final rule solicits comment on "whether further regulatory guidance" is needed about "the degree of hardship" contemplated to prove "substantial and grievous injury" and the factors to be considered in evaluating this injury.[10] We think that it would be helpful to enumerate specific factors to be considered and, more importantly, to clarify that "substantial and grievous economic injury" under the FMLA is different from "undue hardship" under the ADA. We recommend that "substantial and grievous economic injury" is a higher standard

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[7] 29 C.F.R. 825.218(a).

[8] 29 C.F.R. 825.218(c).

[9] 29 C.F.R. 1630.9(a).

[10] 58 Fed. Reg. 31,806 (1993).

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than "undue hardship." As a policy matter, the FMLA standard creates an exception limited to reinstatement of "key" employees, but the ADA standard provides a measure of the reasonableness of any accommodation. Moreover, the FMLA interim final rule defines "substantial and grievous economic injury" as "substantial, long-term economic injury,"[11] which by its terms is more severe than the ADA standard of "significant difficulty or expense."[12]

B. <u>FMLA and ADA Confidentiality Issues</u>

Another important issue raised by the interim final rule concerns the ADA and the FMLA medical confidentiality requirements.[13] The discussion in the FMLA interim final rule itself states that these provisions are similar.[14] They both require separate files, confidential treatment, and have three virtually identical regulatory exceptions.[15]

In our view, however, the ADA confidentiality requirements cover more types of employee medical information than the FMLA requirements. If you agree with this assessment, we would recommend that the ADA rule control as to employee medical information because it provides "the greater rights to employees."[16] The ADA statute and rule require that "[i]nformation

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[11] 29 C.F.R. 825.218(c).

[12] 29 C.F.R. 1630.2(p). <u>See</u> Appendix to Part 1630 -- Interpretive Guidance on Title I of the Americans with Disabilities Act ("Section 1630.2(p) Undue Hardship"). <u>See also A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act</u> (Technical Assistance Manual), par. 3.9 at p. III-12 - III-16 (discussion of undue hardship).

[13] 29 C.F.R. 1630.14(b)(1), (c)(1), and (d)(1) (ADA); 29 C.F.R. 825.500(e) (FMLA).

[14] 58 Fed. Reg. 31,808 (June 4, 1993).

[15] Although ADA and FMLA have the same confidentiality exceptions in their regulations, the EEOC's Interpretive Guidance on Title I states that employers also may provide information from post-offer medical examinations to state workers' compensation offices or second injury funds, and also to health insurers. <u>See</u> Appendix to Part 1630 -- Interpretive Guidance on Title I of the Americans with Disabilities Act, section 1630.14(b) (Employment Entrance Examination).

[16] <u>See</u> <u>supra</u> discussion of 29 C.F.R. 825.702(a) of interim final rule (requiring employers to comply with whichever law -- FMLA or federal anti-discrimination law -- provides the greater rights to employees).

. . . regarding . . . medical condition or history" of an applicant or employee be maintained in separate medical records or files and be treated confidentially.[17] The FMLA interim final rule, by contrast, requires separate files/records and confidential treatment only for those "[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members . . . ."[18] The issue is whether the reference in the ADA rule to "information" concerning medical conditions or histories is broader than the reference in the FMLA interim final rule to "records or documents" regarding medical certifications and histories. For example, information relevant to FMLA medical leave and provided by an employee to his employer in conversation (but not in writing) would be protected as medical information under the ADA, but might not be protected under the FMLA because it is not a "record or document" and also might not be viewed as a medical history. Our recommendation would be that this information be kept confidential.

A question also has arisen about whether covered employers must have two separate files for confidential ADA and FMLA material, or whether employers may have one file for both laws. Clearly, it would be far more practical for employers to have one confidential medical file for both laws. We are concerned, however, that this may not always satisfy the ADA confidentiality requirements. For example, a qualified individual with a disability may apply for FMLA leave for a reason unrelated to his or her disability, and want to maintain the confidentiality of all information already provided for ADA purposes about the disability. As another example, EEOC and Department of Labor investigators are not required to maintain the confidentiality of employee medical information relevant to the other agency's laws. We would like to coordinate on this issue with the goal of preserving ADA confidentiality rights and obtaining language to this effect in the FMLA rule.

C. <u>FMLA Medical Certification Form</u>

The model FMLA "Certification of Physician or Practitioner" (certification) at the end of the interim final rule is a medical inquiry and therefore must be job-related and consistent with business necessity under the ADA.[19] "Job-related and consistent with business necessity" means that it must relate to the particular job and to the impact of a particular disability or illness on an employee's ability to perform his or her essential

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[17] <u>See</u>, <u>e.g.</u>, 42 U.S.C. 12112(c)(3)(B); 29 C.F.R. 1630.14(b)(1).

[18] 29 C.F.R. 825.500(e).

[19] 29 C.F.R. 1630.14(c).

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job functions.[20] The model FMLA certification typically asks questions that are limited to the ability of the employee to do the job or to other information that is strictly necessary to evaluate a request for FMLA leave.

We are concerned, however, that questions 5 and 6 may be too broad. Question 5 asks for the "[p]robable duration of condition." If the serious health condition is also a disability, the literal answer to this question could be many years or even the remainder of the employee's life. The intent here does not seem to be to identify long-term disabilities, so we recommend that question 5 be limited to refer to the "[p]robable duration of condition <u>for which this leave is requested</u>." Both the employer and the employee have an interest in not disclosing a disability. An employer is subject to the full range of ADA obligations once it knows that an employee has a disability. An employee would not want to unnecessarily disclose disability-related information.

Question 6 is overbroad for the same reasons. We recommend revising Question 6 to seek information about the "[r]egimen of treatment to be prescribed <u>for which this leave is requested</u>."

III. <u>OTHER REFERENCES TO TITLE VII OR THE ADA</u>

A. <u>Title VII Issues</u>

1. **Successors in Interest**

The FMLA interim final rule also includes Title VII and ADA references that need clarification but do not involve new policy questions. First, the discussion in the FMLA rule relies in part on Title VII precedent for its interpretation of "successors in interest."[21] This discussion, however, categorically excludes consideration of whether the successor had "notice" of pending complaints. Although exclusion of "notice" is understandable if a complaint arises in the first instance against a successor employer (as it would if the successor declined to reinstate an employee after a leave),[22] successor liability under the FMLA may involve issues other than failure to reinstate by a successor employer.

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[20] <u>See</u> Technical Assistance Manual at 4.3 (defining "job-related and consistent with business necessity" as the standard for evaluating qualification standards, tests or other selection criteria under the ADA).

[21] <u>See</u> discussion of 29 C.F.R. 825.107 ("successors in interest").

[22] We suggest explaining the significance of the citation to <u>Horton v. Georgia-Pacific Corp.</u>, 114 Lab. Cas. (CCH) par. [illegible],010 (E.D. Mich. 1990).

situations may arise in which FMLA complaints are pending against a predecessor employer and the question is whether a successor employer may be liable. In these cases, notice to the successor employer is a relevant consideration, and we recommend adding a statement to this effect in the final rule. If this is not done, we recommend stating that the rule departs from established Title VII precedent in this respect.

2. Replacement of Unpaid FMLA Leave with Paid Leave

Another provision in the FMLA interim final rule that has Title VII overtones is the section explaining the circumstances under which employers may require, or employees may request, replacement of unpaid FMLA leave with accrued paid leave.[23] Under Title VII, men and women must have the same opportunities for replacing unpaid FMLA leave with accrued paid leave. One question that may attract particular attention is when unpaid FMLA leave to care for a newborn child may be replaced with paid leave. Although the FMLA interim final rule is not problematic in this regard,[24] we recommend adding a brief statement about Title VII principles to remind employers that they must apply these complex rules in a non-discriminatory manner.

B. <u>Use of ADA Terms</u>

The FMLA interim final rule defines terms with reference to the ADA, for example, "physical or mental disability"[25] and "essential functions."[26] The interim final rule simply cites the

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[23] <u>See</u> 29 C.F.R. 825.207, 825.208.

[24] As we understand section 825.207, its effect would be to prevent new mothers from substituting paid sick leave for unpaid childcare leave beyond the period of recovery following childbirth (assuming the child is healthy), and similarly to prevent new fathers from substituting paid sick leave for unpaid leave to care for their healthy newborn children. Also, the mother and father would have the same opportunity to use earned or accrued paid vacation, personal or family leave. Assuming this is the correct interpretation, it does not conflict with Title VII.

[25] <u>See</u> 29 C.F.R. 825.113(c)(2).

[26] <u>See</u> 29 C.F.R. 825.115. Under the FMLA interim final rule, an employee may take medical leave if he or she is unable to perform "essential functions" of his or her job due to a serious health condition. We suggest citing to the specific ADA rule that defines "essential functions" (29 C.F.R. 1630.2(n)) rather than to the entire ADA regulatory scheme. Some employers may argue that reference to the entire ADA regulatory scheme means that employees should be entitled to medical leave only if they cannot perform

entire ADA rule, e.g., 29 C.F.R. Part 1630. We recommend revising these references to cite specific sections of the ADA rule. In addition to providing more focused guidance for employers, the revised citations would close any potential loopholes created by references to the entire ADA regulatory scheme.

For example, the FMLA interim final rule defines "mental or physical disability," as used in the FMLA definition of son or daughter "age 18 or older and 'incapable of self care because of a mental or physical disability'" with reference to the ADA.[27] It cites the entire ADA rule rather than providing specific definitions for the component terms of "physical or mental impairment that substantially limits one or more major life activities."[28] Employers may argue that this reference to the entire ADA regulatory scheme creates a question about whether an adult child currently engaging in the illegal use of drugs would be "disabled" for purposes of the FMLA, because the current illegal use of drugs is not an ADA disability. This, in turn, raises the question of whether parents could take FMLA leave to care for these adult children. Specific citations to the pertinent ADA regulations would foreclose any ADA-based (and presumably incorrect) argument that "physical or mental disability" in this context would not include the current illegal use of drugs.

We will be contacting you in the near future to set up a meeting to discuss the FMLA, the ADA and Title VII. In the interim, please feel free to contact me at 202-663-4638 or Irene L. Hill, Assistant Legal Counsel for Coordination, at 202-663-4689.

Sincerely,

Elizabeth M. Thornton

Elizabeth M. Thornton
Acting Legal Counsel

cc: J. Dean Speer

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essential job functions with or without a reasonable accommodation. A citation to the specific definition of "essential functions" would make it clear that reasonable accommodation is irrelevant.

[27] See 29 C.F.R. 825.113(c).

[28] Id. at 825.113(c)(2).

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Thomasina V. Rogers to Robert J. Funk re: Request for Legal Opinion (10 pages)	n.d	P5 8007

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Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9593

FOLDER TITLE:

[Equal Employment Opportunity Commission Confirmation Briefing Materials] [1]

Dana Simmons

ds69

RESTRICTION CODES

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]

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

b(1) National security classified information [(b)(1) of the FOIA]
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8307

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

MEMORANDUM

DRI

Attachment 3

TO: Robert J. Funk
Chief of Staff

3 of 3

FROM: Thomasina V. Rogers
Legal Counsel

SUBJECT: Request for Legal Opinion

This responds to your request for a legal opinion on the following issues: (1) what matters must be conducted in open session, closed session, or by notation vote under the Government in the Sunshine Act; (2) when must the Commission utilize the notice and comment procedure under the Administrative Procedure Act; (3) what authority does the Commission have for issuing procedural and substantive rules; and (4) in what circumstances will courts give deference to agency statements of policy. Our response follows in that order.

1. The Government in the Sunshine Act

Section 3 of the Government in the Sunshine Act, 5 U.S.C § 552b, requires that meetings of federal agencies headed by a body whose members are appointed by the President and confirmed by the Senate shall be open to the public. The Sunshine Act does not require meetings be held in order to conduct business but rather requires that if meetings are held they be open to the public, subject to certain exemptions. Railroad Comm'n of Texas v. United States, 765 F.2d 221 (D.C. Cir. 1985); Amrep Corp. v. Federal Trade Comm'n, 768 F.2d 1171, 1178 (10th Cir. 1985), cert. denied, 475 U.S. 1034 (1986).

The general presumption of openness can be defeated if discussion is reasonably likely to fall within an exemption to the Sunshine Act. Public Citizen v. National Economic Comm'n, 703 F.Supp. 113 (D.D.C. 1989). Exemption 10 permits closure of meetings which concern agency participation in pending or anticipated litigation or the disposition by the agency of particular cases of formal adjudication. This exemption is appropriate in cases where the Commission is discussing whether to litigate private sector cases or determining how to adjudicate a decision before the Office of Federal Operations. Moreover, exemption 3 permits agencies to close meetings where they would disclose matters specifically exempted from disclosure by statute. With respect to decisions as to whether to litigate private sector charges, the Commission is precluded by the confidentiality provisions of Title VII, Sections 706(b) and 709(e), 42 U.S.C. §§ 2000e-5(b), 2000e-8(e), from disclosing the identity or nature of the charges to the

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public. Section 706(b) provides that:

> Charges shall not be made public by the Commission...Nothing said or done during and as a part of the [Commission's informal endeavors at resolving charges of discrimination] may be made public...

Additionally, section 709(e) of Title VII provides :

> It shall be unlawful for any officer of the Commission to make public in any manner whatsoever any information obtained by the Commission pursuant to its authority under this section [to investigate charges of discrimination and to require employers to maintain and submit records] prior to the institution of any proceeding under this title involving such information.

Disclosure of information about Title VII charges not yet in litigation in an open meeting would violate these Title VII provisions. Therefore, decisions on whether to litigate private sector charges must either be made in closed meetings or by notation vote.

Agencies are not prevented from making decisions by notational voting rather than by gathering at a meeting for deliberation and decision. Amrep Corp. v. Federal Trade Comm'n, supra at 1178; Common Cause v. Nuclear Regulatory Comm'n, 674 F.2d 921 (D.C. Cir. 1982); Communications Systems, Inc. v. Federal Communications Comm'n, 595 F.2d 797 (D.C. Cir. 1978). In upholding the FCC's use of notation voting, the D.C. Court of Appeals stated:

> Notation voting enables Government agencies to expedite consideration of less controversial cases without formal meetings and following the other strictures of the [Sunshine] Act. If all agency actions required meetings, then the entire administrative process would be slowed--perhaps to a standstill. Certainly requiring an agency to meet and discuss every trivial item on its agenda would delay consideration of the more serious issues that require face-to-face deliberation. Clearly Congress did not intend such a result.

Communications Systems, Inc. v. Federal Communications Comm'n, supra at 801. The Court, in analyzing the legislative history and intent of the Act, clearly determined that the Sunshine Act did not preclude the use of notation voting for the disposition of routine matters.

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2. Application of the APA to Commission Rulemaking and Policy Statements

In providing executive departments and administrative agencies with informal rulemaking powers, the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, 701-706, requires that an agency provide notice and opportunity for public comment before issuing a legislative or substantive rule. 5 U.S.C. § 553. Section 553(b)(A) of the APA expressly exempts from the notice and comment requirements of informal rulemaking "interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice." The distinction between legislative and non-substantive rules is critical because any action taken by an agency pursuant to a rule found to be legislative will be void if the agency did not follow the APA's notice and comment procedures. 5 U.S.C. § 706(2)(d). Where, however, a court determines that a challenged rule is either procedural, interpretive, or a general statement of policy, then the agency may issue the rule without undertaking notice and comment procedures. Note, *An Analysis of the General Statement of Policy Exception to Notice and Comment Procedures*, 73 Geo. L.J. 1007, 1008 (1985).

As noted above, "rules of agency organization, procedure or practice" are exempted from the notice and comment requirements of section 553. 5 U.S.C. § 553(b)(A).[1] It has been noted that this exception "may be the hardest to define . . . [although necessary] to ensure that agencies retain latitude in organizing their internal operations." Batterton v. Marshall, 648 F.2d 694, 707 (D.C. Cir. 1980). Procedural rules are those "cover[ing] agency actions that do not themselves alter the rights or interests of parties, although [they] may alter the manner in which parties present themselves or their viewpoints to the agency." American Hosp. Ass'n v. Batterton, 834 F.2d 1037, 1047 (D.C. 1987)(quoting Batterton, 648 F.2d at 707). Unlike legislative rules, procedural rules do not conclusively affect the rights of regulated parties, but instead provide for alternative courses of action. Batterton, 648 F.2d at 701-02. Thus, in determining whether a rule is procedural, the parties' affected rights and interests usually play a major role in determining whether the rule must be subject to public comment prior to taking effect. Id. at 708.

"Interpretive rules" and "general statements of policy" are also made exempt from notice-and-comment requirements by section 553(b)(A). Interpretive rules are defined as "rules or

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[1] The discussion on procedural rules is adapted from Note, *The Administrative Procedure Act, Procedural Rule Exception to the Notice and Comment Requirement -- A Survey of Cases*, 5 Admin. L.J. 485 (1991).

statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act, at 30 n.3 (1947). Likewise, general statements of policy are defined as those "statements issued by the agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." Id. Thus, the interpretive rule exemption allows "agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings," American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987), while the general policy statement exemption is designed "to allow agencies to announce their 'tentative intentions for the future' . . . without binding themselves." Id. at 1046 (quoting Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974)).

Just as courts have distinguished procedural from legislative rules, they have developed similar guidelines for distinguishing legislative rules requiring notice and comment from interpretive rules and policy statements which do not.[2] For example, the D.C. Circuit has defined legislative rules as those that "grant rights, impose obligations, or produce other significant effects on private interests," American Hosp. Ass'n v. Bowen, 834 F.2d at 1045 (quoting Batterton, 648 F.2d at 701-02), and interpretive rules as those that "merely clarify or explain existing law or regulations," Id. (quoting Powderly v. Schweiker, 704 F.2d 1092, 1098 (9th Cir. 1983)). If a rule explaining a statute makes "new law," as opposed to merely interpreting existing law or reminding parties of duties under existing law, then the rule is legislative and would not be considered an interpretive rule. See Cabais v. Egger, 690 F.2d 234, 239 (D.C. Cir. 1982). Rules have been found to make "new law" where they fill a statutory gap by imposing a new standard of conduct, create an exemption from a general standard of conduct, or establish a new regulatory structure. See Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 394.

Agencies may issue interpretive rules without a delegation of rulemaking authority and without following notice and comment procedure. Because such interpretive rules do not have the force of law, they are subject to challenge in agency enforcement actions and do not enjoy the same degree of judicial deference as legislative rules. See Skidmore v. Swift & Co., 323 U.S. 134,

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[2] The discussion of interpretive rules and policy statements is adapted from: Administrative Conference of the United States, A Guide to Federal Agency Rulemaking, pp. 52-68 (1991), and Note, *Delineation in the Exceptions to the Notice and Comment Provisions of the Administrative Procedure Act*, 56 Geo. Wash. L. Rev. 1069 (1989).

140 (1944); *National Latino Media Coalition v. FCC*, 816 F.2d 785, 788 (D.C. Cir. 1987).

Policy statements are issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power in subsequent adjudications or through rulemaking. Administrative Conference of the United States, A Guide to Federal Agency Rulemaking, p. 58 (1991). A general statement of policy:

> . . . does not establish a "binding norm." It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy.

Pacific Gas and Electric Co. v. Federal Power Commission, 506 F.2d 33, 38 (D.C. Cir. 1974). *See also American Bus Ass'n v. U.S.*, 627 F.2d 525, 529 (D.C. Cir. 1980)). Thus, if an agency promulgation "denies the decisionmaker discretion in the area of its coverage, so that [the decisionmaker] will automatically decline to entertain challenges to the statement's position, then the statement is binding, and creates rights or obligations" and would not be considered a general policy statement. *See McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988). It is therefore probative to determine whether the statement constrains the agency's discretion and establishes a binding rule requiring notice and comment. *Id.* An agency's characterization of its own action, while not dispositive, is also a factor for the court to consider. *Bowen*, 834 F.2d at 1047.

Interpretive rules and policy statements are exempt from notice and comment procedures because the public interest is often served by their prompt dissemination. Such statements are often indispensable to agency administration, as they instruct staff in its daily tasks and structure the exercise of agency discretion. The exemptions for these agency pronouncements reflect concern that public participation procedures would delay the issuance of interpretive rules or policy statements and could even discourage agencies from issuing them altogether. Administrative Conference of the United States, A Guide to Federal Agency Rulemaking, p. 53 (1991).

In *Bowen*, the court balanced close judicial scrutiny of the potential effect of agency action and judicial deference to the agency's characterization of its rule. It is important to achieve this balance as "the mere fact that a rule may have a substantial impact 'does not transform it into a legislative rule.'" 834 F.2d at 1046 (quoting *American Postal Workers Union v. U.S. Postal Serv.*, 707 F.2d 548, 560 (D.C. Cir. 1983), *cert.*

denied, 465 U.S. 1100 (1984)). The tests discussed above indicate the desirability of public participation if agency action is likely to have an adverse, concrete effect on a regulated party. The tests leave room, however, for agencies properly to cast their promulgations as procedural or interpretive rules, or general statements of policy in appropriate circumstances. Note, *Delineation in the Exceptions to the Notice and Comment Provisions of the Administrative Procedure Act*, 56 Geo. Wash. L. Rev. 1069, 1091 (1989).

3. EEOC's Authority for Issuing Procedural and Legislative Rules

Agencies need statutorily-delegated authority to adopt legislative rules. This authority may either be specifically delegated or derive from a general grant of rulemaking authority. Legislative rules issued under a statutory delegation and following section 553 procedures are given controlling weight by reviewing courts as long as they are not "arbitrary" or "capricious." Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984).

Commission guidelines issued under Title VII fall into the category of interpretive rules or general statements of policy since the Commission does not have the authority to promulgate legislative regulations under Title VII. General Electric Co. v. Gilbert, 429 U.S. 125 (1976); EEOC v. Raymond Metals, 530 F.2d 590 (4th Cir. 1976). Simply stated, legislative rules are those promulgated by an agency pursuant to specific statutory authority, while interpretive rules are those promulgated without such a specific Congressional delegation. Joseph v. Civil Service Commission, 554 F.2d 1140 (D.C. Cir. 1977). Interpretive rules do not have the force of law and even though courts often defer to an agency's interpretive rule they are always free to choose otherwise. Id. at 1154 n.26.

A. ADA

Under the Americans with Disabilities Act of 1990 (ADA), the EEOC issued legislative regulations in accordance with the Adminstrative Procedure Act on July 26, 1991 to carry out the ADA's prohibition against employment discrimination. 42 U.S.C. § 12116. Furthermore, to ensure that administrative complaints filed under the ADA and the Rehabilitation Act are treated consistently with no duplication of effort, the EEOC, the Attorney General, and the Office of Federal Contract Compliance Programs (OFCCP) have established coordinating mechanisms in regulations implementing the ADA and the Rehabilitation Act. 42 U.S.C. § 12117(b).

B. ADEA

The EEOC has acquired rulemaking power under the Age Discrimination in Employment Act (ADEA) by virtue of Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807, as responsibility for enforcing the ADEA was transferred from the Department of Labor to the EEOC.

Section 7 of the ADEA, 29 U.S.C. § 626, provides for recordkeeping, investigation and enforcement. This section grants the Commission the power to conduct investigations and to require the keeping of records necessary or appropriate for the administration of the Act.

The main grant of rulemaking and regulatory authority granted to EEOC in the ADEA is contained within section 9, 29 U.S.C. § 628. This section provides that EEOC may issue those rules or regulations necessary or appropriate for carrying out the Act in accordance with the requirements of the Administrative Procedure Act. Section 9 gives the Commission legislative rulemaking authority.

Section 15(b) of the ADEA, 29 U.S.C. § 633(a) specifically confers to the EEOC the authority to issue rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities concerning non-discrimination on account of age in federal government employment.

C. EPA

The EEOC has acquired rulemaking authority for recordkeeping purposes under the Equal Pay Act (EPA) by virtue of Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807, as responsibility for enforcing the EPA was transferred from the Department of Labor to the EEOC. 29 U.S.C. § 211.

D. Title VII

Title VII gives the EEOC the power to issue, amend, or rescind suitable procedural regulations to carry out its provisions, including those relating to federal sector employment. 42 U.S.C. §§ 2000e-12(a), 2000e-16. Under the Commission's regulations, an interested person may petition it in writing to issue an additional regulation or amend or repeal a current rule or regulation. 29 C.F.R. § 1601.32.

Title VII also gives the EEOC the implied authority to issue written interpretations or opinions concerning Title VII questions. 42 U.S.C. § 2000e-12(b). The Commission is also required to issue recordkeeping regulations under Title VII (29 C.F.R. Part 1602) which must be published for notice and comment. 42 U.S.C. § 2000e-8.

4. Judicial Deference to Agency Policy Statements

The federal courts generally show deference to the Commission's policies. By way of initial clarification, it is important to note that the federal judiciary views the Commission's policy guidance and Volume II of the Compliance Manual as well as its interpretative guidelines that are published in the Code of Federal Regulations as the Commission's administrative "interpretations" of the statutes it enforces. Therefore, a federal court's decision as to whether to accord deference to Commission guidance does not hinge, for example, on whether the guidance is a guideline published in the Code of Federal Regulations or is a policy statement. The court may apply the same standard to either type of interpretation in determining whether to give it deference.

The United States Supreme Court enunciated the most stringent standard it has applied to EEOC interpretations in Gilbert v. General Electric Co., 429 U.S. 125 (1975). The Court referred to an earlier decision, Skidmore v. Swift and Co., 323 U.S. 134, 140 (1944), in which it had held that the level of deference to an administrative interpretation depends on: the thoroughness evident in its consideration; the validity of its reasoning; its consistency with earlier and later pronouncements; and all factors that give it power to persuade (where it lacks power to control). The Court then declined to follow the Commission's interpretive guidelines on pregnancy disability, because they were not contemporaneous (published eight years after the enactment of Title VII), they contradicted the Commission's earlier position (closer to Title VII's enactment), and they contradicted the Wage and Hour Administration's regulation.

Fifteen years later, the Court applied the same standard to the Commission's policy statement on the extraterritorial application of Title VII. EEOC v. Arabian American Oil Co., 111 S.Ct. 1227 (1991). Again, the Court declined to follow the Commission's interpretation, because the policy was not contemporaneous (adopted 24 years after Title VII's enactment), and it contradicted an earlier, more contemporaneous policy. The Court also noted that the policy lacked support in the "plain language of the statute," and that, in combination with the Commission's other arguments, it lacked power to persuade. Id. at 1235.

Under the Skidmore-Gilbert standard, contradiction of a earlier position is more likely to prove fatal to a Commission interpretation than the fact that the interpretation is not contemporaneous with the enactment of the statute. This is illustrated by a third decision in which the Court let stand the portion of a Seventh Circuit decision that applied the Skidmore-Gilbert standard and nevertheless gave deference to a non-contemporaneous Commission policy statement on reproductive and fetal hazards, a subject on which no Commission policy previously had existed (i.e., there existed no previous Commission position to contradict). United Auto Workers v. Johnson Controls, 886 F.2d 871 (7th Cir. 1989).

Even though most Commission policies are either new (non-contradictory) or consistent with previous interpretations, and therefore would be shown deference under the Skidmore-Gilbert standard, the federal courts frequently apply a more lenient standard in determining the degree of deference to show to a Commission interpretation. For example, in a series of recent decisions as to whether the Civil Rights Act of 1991 should be given retroactive effect, some of the courts have considered the weight to be accorded the Commission's policy that the act should be applied only prospectively, and have applied a standard set forth by the Supreme Court in Chevron U.S.A. Inc. v. Natural Resources Defense Council, et al., 467 U.S. 837 (1984), that yields more deference to Commission interpretations. According to Chevron, where legislative delegation to the administering agency of authority to fill a gap in a statute by formulating policy and rulemaking is implicit (not on the face of the statute), a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the agency. Rather, considerable weight should be given to an agency's construction of a statutory scheme it is entrusted to administer, and the courts should defer to its administrative interpretations. Id. at 843-44. Of the 54 courts that had decided by April 27, 1992 that the Civil Rights Act should be applied only prospectively,[3] 11 of them considered the Commission's policy, and a number of them gave deference to it under the Chevron standard, although a number of them gave it deference pursuant to similar standards set forth in other Supreme Court cases such as EEOC v. Commercial Office Products Co., 486 U.S. 107, 115 (1988); Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); and Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

A sampling of federal court decisions on a variety of employment discrimination issues from 1990 to the present indicates that the majority of the courts that consider Commission interpretations of the employment discrimination statutes give them deference. See, e.g., Reynolds v. Frank, No. 2:89CV817 (PCD) (D. Conn. Mar. 18, 1992); Chacon v. Ochs, SACV 90-679 GLT (C.D. Cal. Dec. 23, 1991); Dreith v. The National Football League, C.A. No. 91-C-1289 (D. Colo. Nov. 4, 1991); Silver v. The City University of New York, et al., No. 90 Civ. 0061 (KTD) (S.D.N.Y. Mar. 23, 1991). And, even in the rare instance that a court applies the Gilbert

[3] Also as of April 27, 1992, 35 of the federal courts that have considered the issue have decided that the Civil Rights Act has retroactive applicability, and 35 of them have declined to decide the issue.

standard, the Commission's interpretation is given deference so long as it does not contradict a previous Commission policy. See, EEOC and Castrejon v. Tortilleria "La Mejor", 758 F. Supp. 585 (E.D. Cal. 1991) (EEOC Compliance Manual provision regarding applicability of Title VII to undocumented aliens had been consistent since 1981, and reaffirmed subsequent to passage of the Immigration Reform and Control Act).

If you have any questions about this memorandum, please contact me or Nicholas M. Inzeo at 663-4640.

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003. report	Recommendations (partial) (1 page)	nd	P5

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8808

OFFICE OF LEGAL COUNSEL

REPORT TO

CHAIRMAN TONY E. GALLEGOS

APRIL 1993

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Excerpt

Executive Summary

I. There is no commitment to maintaining a policy development program that resolves issues within the established policy structure. The Commission's policy development program has become balkanized and is unresponsive to the concerns of the Commission and to headquarters and field enforcement needs. The program also suffers from a lack of full debate on the issues.

Proposed Solutions:

- Policy development should again be centralized in one location.
- The procedures for determining policy issues in need of development should be revised to insure maximum input from headquarters and field enforcement offices and the Commission.
- Policy being developed on complex issues may require inter-office matrix meetings and the development of options papers to insure that Commission policy calls are fully informed.

II. There is a staffing-to-responsibility mismatch that undermines OLC's ability to effectively formulate and coordinate policy for the Commission.

Proposed Solutions:

- Accurate projection of the impact of new law (legislative or judicial) or the agency's policy needs.
- Priorities that take into account the overall policy needs of the agency should be set be the Chairman in consultation with the Commissioners.
- Maintain staffing in OLC at a fairly low level, but as episodic (as opposed to systemic) problems arise, authorize temporary transfers of personnel from other legal units.
- Use of total quality management techniques to catalog and address problems regarding how legal services should be provided.

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- Make greater use of policy options papers.

- Make greater use of work management tools such as matrix meetings and inter- and intra-office transfers to accomplish more with less as well as to enhance professional development of junior and/or highly specialized attorneys.

III. The leadership role that the Commission should exercise within the federal community has been diminished. The failure in leadership is demonstrated by diminished contacts with civil rights groups and a lack of support to assume leadership in the Executive and Legislative branches.

Proposed Solutions:

- Using the development of the substantive regulations under the Americans with Disabilities Act as a model, major policy initiatives require leadership with interest groups and within the federal community.

- The Commission must enhance its outreach and targeting programs through public dissemination of Commission policy.

- The Commission needs to reclaim its primary role in the development of federal equal employment opportunity policy.

- The Commission must enhance the perception that it is responsive to policy needs.

- Hold public hearings at various locations around the country on critical issues such as "Harassment in the Workplace."

I. Policy Development

Statement of the Problem:

There is no commitment to maintaining a policy development program that resolves issues within the established policy structure. The Commission's policy development program has become balkanized and is unresponsive to the concerns of the Commission and to headquarters and field enforcement needs. The program also suffers from a lack of full debate on the issues.

- Policy is no longer developed in an organized, centralized manner. As a consequence, appropriate and necessary input, intra and inter-agency coordination and in some instance Commission approval may be missing. For example, Policy developed for a specific purpose, such as the litigation of a case, is created in a vacuum without consideration of its impact on other Commission operations, without a full discussion of all available options, and without consideration of its future ramifications both in and outside the Commission.

- The issues determined to merit policy development and the resulting draft documents often do not reflect a Commission consensus on the tone and direction policy should take.

- Policy developed in response to the concerns of individual Commissioners underminds the collegial nature of that body.

- Charge processing and litigation policy needs are not met sometimes because policy is not developed on certain issues or is held because of political calls. In response, either charges are placed on hold or policy decisions which affect charge processing are made without Commission involvement.

- The selection and prioritization of issues in need of policy development do not sufficiently reflect the needs of the field and headquarters enforcement efforts.

- Policy development is often concentrated on one statute to the detriment of the other statutes we enforce. (For example, compare efforts directed toward the development of ADA policy with those directed toward policy development under the CRA and the OWBPA.)

- Policy decisions are often made without the benefit of an open and frank discussion of all available options.

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Proposed Solutions:

- **Policy development should again be centralized in one location.**

Policy development should be centralized in the Office of Legal Counsel, which has in place mechanisms to insure appropriate coordination and Commission involvement and approval. Further, OLC approaches issues not only from a sound substantive base but also from a policy perspective, which means that consideration is given to the global impact of policy calls.

Policy development should be permitted in other offices only in limited forms, such as amicus briefs and OFO decisions. Where it is necessary that policy be developed in these formats, appropriate inter office coordination should occur.

- **The procedures for determining policy issues in need of development should be revised to insure maximum input from headquarters and field enforcement offices and the Commission.**

OLC should conduct periodic conference calls with District Directors and Regional Attorneys to determine issues on which the field feels guidance is needed, why such guidance is needed and how this guidance will affect their output.

OLC will then meet with the headquarters program offices, OPO, OGC, and OFO, to gain their input and to discuss the field and OLC suggested policy issues. From this meeting, a preliminary list of policy issues, under all of the statutes we enforce, and justifications will be developed and scheduled for a Special Assistants meeting. At that meeting, input from Commissioners will be received, and a consensus will be reached on the issues to be included on a proposed list which will be sent to the Commission for a vote.

This process, or a similar one, will insure that field and program office concerns are addressed and that policy issues being developed reflect a Commission consensus of their importance. It will set policy priorities for OLC and improve staff morale because attorneys will know that the full Commission is committed to developing policy on the issues on which they are working. Finally, it allows Commissioners to assume ownership of a process on which their major responsibility as Commissioners rests.

- **Policy being developed on complex issues may require inter-office matrix meetings and the development of options papers to insure that Commission policy calls are fully informed.**

The majority of documents which OLC drafts will be coordinated with headquarters offices, the field and affected federal agencies for comment and then sent to the Commissioners in final form for their input and approval.

However, for complex or controversial issues which require difficult policy calls, we would suggest more involvement by other offices and the Commission earlier in the development process. This involvement could include inter-office matrix meetings to flesh out issues and theories and the development of options papers for Commission consideration before OLC drafts the actual policy document. These activities will insure that all issues are considered and that OLC drafts a document which reflects the policy positions of the full Commission.

II. Staffing

Statement of the Problem:

Since its creation in 1982, the Office of Legal Counsel (OLC) has experienced a dramatic expansion in responsibility, while at the same time staffing levels and resources, such as access to developmental opportunities, have decreased overall. The overall staffing levels have dropped at least 15% -- from a FTE in excess of 80 in 1982 to 68 at the end of 1992. (Last month, two (2) positions were added, but have not yet been filled, to develop ADR policy for the Commission). During that 10-year period from 1982 to 1992, there have been many statutes expanding OLC's legal responsibilities, such as the Americans with Disabilities Act, the Civil Rights Act, the Older Workers Benefit Protection Act, the Immigration and Reform Act, the Sunshine Act and the Ethics Reform Act. There has been no concomitant reductions in responsibilities. Furthermore, as the agency has grown, so too have the legal advice and support services, such as those related to personnel matters.

- This mismatch in the staff-to-responsibility ratio, in part, has resulted in delays in much needed poliy formulation (see I. above) and forfeiture of the EEOC's leadership role in the various communities affected by the laws the EEOC enforces (see III. below).

- Although there have been periodic increases in staff, the increases have not coincided with workload surges. For example, staff ceiling was increased to create an ADA Services <u>after</u> the ADA Title I regultions had been drafted by existing OLC staff with the assistance of a few detailees from other offices.

- Work under other new statutes, such as the Civil Rights Act of 1991, has not had the benefit of additional temporary staff (detailees) or permanent staff. Moreover, because of work priorities under the ADA and the Section 1614 regulations, the use of intra-office reassignments has been limited.

- Although OLC no longer has a Technical Assistance

Division after the dissolution of the ADA Services in 1992, the ADA Policy Division frequently is called upon to provide technical assistance on the more complex ADA issues. This means attention is diverted from policy.

- Projects not directly related to case processing or for which there is no statutory deadline, such as the development of a comprehensive EEOC alternate dispute resolution program, get a lower priority in OLC.

Proposed Solutions:

- **Accurate projection of the impact of new law (legislative or judicial) or the agency's policy needs.**

When new laws enlarging EEOC's enforcement responsibilities are enacted, we recommend that an accurate assessment of the agency's policy needs and workload projections be considered in conjunction with staffing decisions. For example, shortly after the Civil Rights Act of 1991, OLC developed a very comprehensive work plan identifying issues in need of policy guidance for enforcement purposes and projected staff needs at approximately five (5) FTE to accomplish those policy goals. The goals were categorized as short term and long term.

- **Priorities that take into account the overall policy needs of the agency should be endorsed by the Chairman in consultation with the Commissioners.**

Because of our role as a service organization, we have relatively little control over our day-to-day projects. New issues are presented on a daily basis. In this context, a directed, focussed policy program growing out of regular meetings with the Chairman or his representative would allow us to concentrate on agreed upon priorities, thereby getting the biggest bang for the buck.

- **Maintain staffing in OLC at a fairly low level, but as episodic (as opposed to systemic) problems arise, authorize temporary transfers of personnel from other legal units.**

The current level of staffing in OLC, although substantially less than when the office was set up in 1982, is adequate to meet the routine policy and legal services needs of the Commission. However, we recommend temporary adjustments for episodic demands to respond to a particular statute or set of court decisions.

- **Use of total quality management techniques to catalog and address problems regarding how legal services should be provided.**

In an effort to maximize efficiency, improve overall quality and

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provide enhanced developmental opportunities for OLC staff, all with existing staff, we recommend undertaking the application of TQM to OLC in much the same way that it has been applied and used in corporate law departments across the country. The expected outcomes include "doing it right the first time," creation of an environment in which individuals substitute for each other, thereby enhancing cross-training opportunities and the reduction of cycle time, that is, the ability to provide a product in increasingly less time. Matrix meetings, which have been used in OLC to garner broad intra-office input (cross-fertilization) on complex policy and legal matters, could be used to facilitate coordination on policy issues throughout the Commission.

III. Leadership

Statement of the Problem:

The leadership role that the Commission should exercise within the federal community has been diminished. The failure in leadership is demonstrated by diminished contacts with civil rights groups and a lack of support to assume leadership in the Executive and Legislative branches.

- Interest groups, other than EEAC and the ABA, are not looking to the Commission for leadership.
- The Commission is more subject to attack when it is reactive and not seen as a valuable resource or when interest groups are not vested in the Commission's actions.
- The Department of Justice was allowed to usurp the Commission's lead responsibility on employment issues granted by Executive Order 12067.
- The Commission's administrative leaders have not exercised political leadership within the Administration or the federal community.

Proposed Solutions:

- **Using the development of the substantive regulations under the Americans with Disabilities Act as a model, major policy initiatives require leadership with interest groups and within the federal community.**

The Commission's efforts in developing substantive regulations under the Americans with Disabilities Act has been the Commission's most successful effort in exercising a leadership role. The methods used to reach such success should be used as a model for other major policy initiatives. While the Commission's administrative leaders asserted a primary role within the

Administration for ADA issues and worked with the leadership of major disability rights groups, Commission staff worked closely with the staff of interest groups in developing the regulations. The input afforded interest groups gave them a feeling of ownership in the process, leading to a regulation that was commended and not criticized.

The Commission was able to insure that its policy positions would be followed by other agencies because the Commission's administrative leaders worked within the highest levels of the Administration while Commission staff worked with other agencies' staff with the confidence that the Commission's administrative leaders would support the positions they were espousing.

- **The Commission must enhance its outreach and targeting programs through public dissemination of Commission policy.**

The leadership role that the Commission seeks to assert must include a coordinated plan on how Commission policy will be communicated to affected interest groups. If the Commission is to be successful in increasing its service to previously underserved communities, the Commission must include in its outreach and targeting plans a comprehensive plan for the communication of its policy to these groups. A comprehensive and coordinated plan of public speaking appearances by Commission officials and staff would help re-start and strengthen the outreach and targeting programs of the Commission.

- **The Commission needs to reclaim its primary role in the development of federal equal employment opportunity policy.**

Under Executive Order 12067 the Commission was given the lead among all federal agencies in the development of equal employment opportunity (EEO) policy. In order to regain and, to some extent assume for the first time, that leadership position, the Commission must be prepared to perform the leadership role in EEO policy, training and related matters. The Commission must understand that its administrative leaders allowed the Department of Justice to assume the leadership position on EEO policy on most issues in the past years. The Executive Order must be used to assert EEOC primacy in policy areas.

- **The Commission must enhance the perception that it is responsive to policy needs.**

In order to regain the public's confidence that the Commission is performing its policy function, the Commission must be more responsive to those outside the Commission in formulating policy. Especially in the past two years, but for a number of years, the Commission has not issued enough policy on major issues and

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legislation. More Commission policy needs to be developed. In developing that policy, input from interest groups and from the Executive and, especially, the Legislative Branches needs to be sought. Allowing more public and legislative input will provide those groups with more of a sense of ownership in the policy process and, as a result, more of a sense of ownership in the outcome of the policy process. Finally, an enhanced public perception of responsiveness requires more public speaking on the part of Commission officials and staff so that there is a greater understanding of what Commission policy is.

- **Hold public hearings at various locations around the country on critical issues such as "Harassment in the Workplace."**

In order to better develop policy and technical assistance on issues that are of importance to the Commission, such as harassment in the workplace, including racial and ethnic harassment as well as sexual harassment, the Commission should schedule hearings around the country on these issues. We would propose that the first set of major hearings concentrate on the topic of "Harassment in the Workplace," and include all bases of harassment in the workplace. The hearings will rehabilitate the Commission's primary role in the development of federal policy on EEO matters, help rebuild communication with interest groups and can be used as part of the Commission's outreach program. The suggested topic is current, yet will not interfere with work being done by the Administration (e.g., health care reform) or another agency.

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3) THE EEOC SHOULD INCREASE ITS ENFORCEMENT EFFORTS THROUGH GRANTS FOR TRAINING, INFORMATION, AND TECHNICAL ASSISTANCE TO PEOPLE WITH MENTAL DISABILITIES, EMPLOYERS, AND THE LEGAL COMMUNITY.

4) ISSUES OF PARTICULAR IMPORTANCE TO PEOPLE WITH MENTAL DISABILITIES:

Political decision

a) Insurance: The EEOC's Health Insurance Guidance misapplies the ADA and undermines its protections for people with mental disabilities. See Comments of the Bazelon Center regarding the EEOC's Guidance on the Application of the ADA to Employer Provided Health Insurance (1/28/94). This Guidance should not be enacted as regulations and should not apply to other forms of insurance such as long term disability and ~~health~~ life insurance. The agency should issue additional guidance prohibiting mental disability based distinctions unless supported by actuarial data.

b) There is need for further guidance on the relationship between collective bargaining agreements and reasonable accommodations mandated by the ADA.

c) Recent cases have questioned the EEOC's guidance on the issue of determining whether an individual is substantially impaired when that individual is taking medication which ameliorates the disability's symptoms. The Agency should reinforce its position that this determination should be made without regard to the medication and should look to the underlying impairment.

d) There is need for additions to the technical assistance manual on the application of the ADA to episodic disorders.

June 24, 1994

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Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Elizabeth M. Thornton to Claire Gonzales re: The Older Workers Benefit Protection Act of 1990 (2 pages)	5/19/1994	P5 8809

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9592

FOLDER TITLE:

[Equal Employment Opportunity Commission Confirmation Briefing Materials] [6]

Dana Simmons

ds68

RESTRICTION CODES

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]
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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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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

DETERMINED TO BE AN ADMINISTRATIVE MARKING Per E.O. 12958 as amended, Sec. 3.2 (c)
Initials: AMS Date: 8/25/05

CONFIDENTIAL

MAY 19 1994

MEMORANDUM

TO: Claire Gonzales, Director
Office of Communications and Legislative Affairs

FROM: Elizabeth M. Thornton
Acting Legal Counsel

SUBJECT: The Older Workers Benefit Protection Act of 1990

We have attached for your information a paper providing a brief discussion of the effect upon the ADEA of the Betts decision and the Older Workers Benefit Protection Act of 1990 (OWBPA). For the reasons set out below, we recommend that the Commission engage in formal rulemaking under OWBPA. The rulemaking could be either the traditional notice and comment rulemaking or negotiated rulemaking.[1]

(1) OWBPA is probably the most complex civil rights statute ever enacted. OWBPA added extremely complicated technical provisions to the ADEA, provisions requiring expertise both in civil rights laws and ERISA. The comments we received in response to the 1992 Federal Register notice (see below) demonstrate that there is intense disagreement and confusion in the employer and employee communities regarding the precise meaning of some OWBPA terms. The stakes are high on some issues (for large employers, the price of guessing wrong could be in the tens of millions of dollars) and many employers have threatened to terminate valuable employee benefits rather than be subjected to expensive lawsuits.

(2) We have received numerous requests from the public for guidance under OWBPA. Over the past three and one-half years, we have received several thousand telephone calls since OWBPA was enacted, requesting advice on how to interpret the provisions of Titles I and II of OWBPA. Most of the calls have been from employers who appear to be doing their best to comply with OWBPA but who are truly confused about their obligations.

[1] In response to an Administration request that agencies consider the use of negotiated rulemaking wherever feasible, EEOC informed OMB earlier this year that negotiated rulemaking could be used in developing OWBPA regulations. Negotiated rulemaking would allow for increased public input into the regulatory process and could make it easier for the Commission to develop a consensus on difficult issues.

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(3) During Congressional testimony in September 1991, Chairman Roybal urged the Commission to issue regulatory guidance on OWBPA. Former EEOC Chairman Kemp indicated that the Commission was preparing a request for public comment on OWBPA, to enable the Commission to decide whether regulatory guidance was necessary. On March 27, 1992, the Commission published a Request for Comments in the Federal Register, 57 FR 10628 (March 27, 1992). The Commission received approximately 40 comments from members of Congress and from the public. The comments on several complex issues indicated a difference of opinion among interested parties with regard to the changes made by OWBPA.

Among the commentors were Senators Pryor, Metzenbaum, and Hatch; Representatives Goodling, Martinez, Roybal, Clay, and Ford; the American Association of Retired Persons; the Equal Employment Advisory Council; and the Coalition on State and Local Employee Pension and Benefit Issues (Coalition). While most of the commentors expressed the hope that the Commission would issue regulatory or other guidance to permit employers and employees to understand their rights and obligations under OWBPA, a few commentors suggested that existing guidance was sufficient.

(4) Our field offices are beginning to present cases for Commission litigation consideration involving OWBPA rights. We are aware of two allegations of discrimination involving disability retirement plans of a large state government, that could result in significant disruption to that state's retirement fund. The issues involved are precisely the issues that the Coalition has been urging the Commission to resolve since 1991. Cases involving the waiver of ADEA rights are being decided across the country, often without formal Commission input. The only way to be certain that the Commission will have control over the development of post-OWBPA law is to provide guidance to the public (and to the courts) regarding our interpretation of the law.

Therefore, we would recommend that the Commission go forward with its regulatory project under OWBPA to enable both employers and employees to deal with OWBPA based upon certainty, not guesswork.

We would be pleased to discuss this matter with you in greater detail at your convenience.

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Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Reginald Welch to Claire Gonzales re: Background on EEOC's ADEA Directed Investigation (8 pages)	6/15/1994	P5 8010
002. memo	John C. Hendricksen to James R. Neely, Jr. & Reginald Welch re: Chicago Tribune/Mike Royko/Medici/etc (1 page)	6/9/1994	P5 8011
003. memo	Jean Kamp to John Rowe & Cynthia Pierre re: ADEA Directed Investigation (3 pages)	6/6/1994	P5 8012
004. letter	Rich Proulx to Hans Morsboch (2 pages)	4/13/1994	P6/b(6)
005. letter	Hans Morsbach to Rich Proulx (2 pages)	4/13/1994	P6/b(6)
006. letter	Eileen Anstadt to Hans Morsbach (2 pages)	4/19/1994	P6/b(6)
007. letter	Hans Morsbach to Eileen Anstadt (1 page)	5/4/1994	P6/b(6)
008. letter	Kent D. Harder to Hans Morsbach (1 page)	4/27/1994	P6/b(6)

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9592

FOLDER TITLE:

[Equal Employment Opportunity Commission Confirmation Briefing Materials] [3]

Dana Simmons

ds74

RESTRICTION CODES

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8010

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

June 15, 1994

MEMORANDUM

To: Claire Gonzales
Director of Communications
and Legislative Affairs, EEOC

From: Reginald Welch
Communications Director

Subject: Background on EEOC's ADEA Directed Investigation of Chicago Restaurant: Medici on Surf, Inc.

The above subject matter has been the focus of three columns by Chicago Tribune columnist Mike Royko (see attached). The case against Medici was brought by EEOC's Chicago District Office and stems from information received during an ongoing directed investigation of an employment agency, Job Exchange. Chicago District Office officials emphasized to us that this is an employment agency referral case and not an advertising case as suggested by Royko. The case failed conciliation and is pending with our Office of General Counsel, which will decide whether to concur with the Chicago office and recommend to the Commission that we bring litigation against Medici.

The following is an account of various communications in this matter. The principals are: Medici co-owner, Hans Morsbach; Chicago District Office Director John Rowe; Chicago District Office Regional Attorney John Hendrickson; Royko writer Pam Cytrynbaum; you; and myself.

Thursday, June 2

I received a call from EEOC's Chicago District Office Director John Rowe alerting me to a call Rowe received from a writer for the Royko column, Pam Cytrynbaum. [Notification of this sort is standard procedure throughout the agency. It enables the Office of Communications and Legislative Affairs (OCLA) to stay abreast of all matters of media interest that OCLA might have to respond to as the agency's designated liaison with the media.] Rowe said Cytrynbaum contacted the EEOC investigator supervising the Medici case, stating that she had a series of questions she wanted answered. Cytrynbaum was adamant about getting the answers immediately, the investigator informed Rowe. The writer said she received information about the Medici case from Hans Morsbach, an owner of the restaurant. (Chicago Regional Attorney Hendrickson reports that Morsbach is a personal friend of Royko.) Rowe provided me with the case background and I consulted you on the matter.

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You and I gleaned from our reading of Title VII of the 1964 Civil Rights Act, and based on our consultation with agency legal officials, that EEOC's practice historically has been to apply the same confidentiality provisions that are required by Title VII to cases brought under the Age Discrimination in Employment Act, as well as to those brought under all other EEOC-enforced laws. The practice of strict confidentiality is meant to protect the interests of both the charging party and respondent during the investigation and conciliation stages of EEOC's administrative process, and to facilitate positive outcomes at these stages consistent with the legislative intent of Title VII.

The language regarding confidentiality in ADEA and other agency-enforced statutes is not explicitly stated as it is in Title VII; however, since we use the same administrative enforcement procedures for all charges regardless of the law under which they are brought, uniform application of the confidentiality policy is appropriate. It is our practice not to turn over our investigative file to the parties prior to litigation, which is, as you know, the last resort in seeking resolution of discrimination charges.

Your attempts to contact Cytrynbaum by telephone to inform her of EEOC's confidentiality obligation were unsuccessful.

Rowe also informed you that a person who identified himself as Robert Marks of CBS's "60 Minutes" called requesting information about the case. Rowe provided you with the telephone number Marks provided, which turned out to be a nonexistent number. (Marks called the Chicago office subsequent to this date, leaving the same number, but with a different area code. This number was also not good -- "temporarily disconnected."

Friday, June 3

Royko's column appeared in the Tribune this morning. Among other things, the column criticized EEOC's policy of not sharing its investigative file with respondents -- in this case, Morsbach. Cytrynbaum returned your call in the afternoon and you tried to explain to her the reasons for the confidentiality policy.

Regional Attorney Hendrickson reported that there had been no calls to the Chicago office about the Royko column.

Monday, June 6

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A staffer from the EEOC headquarters Field Management-West office, which oversees activities in the Chicago office, reported that a former employee of Medici (the staffer did not give the individual's name) called the Chicago office. He wanted to speak on behalf of Medici.

Regional Attorney Hendrickson reported that Chicago office officials scheduled to meet with an aide to Senator Carol Mosely-Braun on Tuesday, June 7. The aide said he too got a call from Marks of "60 Minutes," but was also given the disconnected number.

Thursday, June 9

A second Royko story on the Medici case appeared in the Tribune, again criticizing EEOC's practice of not revealing its investigative file to respondents. The column also mentioned that U.S. Representative Luis Gutierrez asked to see the evidence in the case. A Gutierrez aide alluded in the article to his experience with EEOC's alleged recalcitrance in such matters where the Congress is concerned.

Friday, June 10

A third Royko column appeared in the Tribune, accusing EEOC of "harassing" Medici co-owner Morsbach and being a bully to small businesses. The article again alluded to Rep. Gutierrez looking into EEOC "methods."

* EEOC informed Rep. Gutierrez' office that it will prepare a response to their inquiry detailing EEOC's administrative procedures and its longstanding policy regarding confidentiality of investigative files, as well as its history of cooperating with Congress in responding to requests for information about EEOC's enforcement activities.

In a memorandum to Jim Neely and me, Regional Attorney Hendrickson reported that:

* Chicago office Deputy Director Cynthia Pierre and Supervisory Trial Attorney Jean Kamp met with a member of Senator Mosely-Braun's Chicago staff today. The staffer said he was going to be "proactive" and call Morsbach.

* Hendrickson knew nothing about any inquiry from Rep. Gutierrez' office.

* Morsbach just completed or is in the process of completing a sale of the restaurant in question.

I participated in a meeting on the Medici/Royko matter along with OPO Director Jim Troy, Deputy General Counsel Jim Neely, Associate General Counsel Phil Sklover, and FM-West Director Paula Choate. Troy made the following observations:

* We cannot respond substantively to Royko's assertions since conciliation is ongoing (I thought conciliation had failed and we were now in post-conciliation mode).

* The questions Morsbach posed or implied in his April 13 letter are valid, i.e., Who placed the ad in question? and, Who are the four applicants affected?

* The courts have agreed with our deliberative process and, by extension, we need not feel compelled to defend the process.

* When we do respond to the media, we should do so with facts, after suit is filed. We should, therefore, get the case to commissioners for a speedy decision.

<u>Monday, June 13</u>

You received call from Bruce Dold of the <u>Chicago Tribune</u>'s Editorial Board requesting that EEOC explain its reasons for -- as Royko has asserted -- not allowing Medici co-owner, Hans Morsbach, to see our investigative file. You responded that our confidentiality provisions precluded you from acknowledging the receipt of, let alone discussing, any charge in the administrative process. Upon notifying me of this conversation, you indicated that I might explain to Dold our policy of not revealing investigative files or information on charges prior to litigation.

I contacted Bruce Dold and reiterated the major point you made to him on June 10: Agency-enforced laws and policy preclude EEOC from discussing any agency charge that has not been filed in court. I verified that it is our practice not to open our investigative files to parties prior to litigation. I declined to discuss the merits of this policy, except to indicate that it is to protect the interests of both charging parties and respondents during the administrative process. I advised Dold that EEOC may prepare, in writing, a description of its administrative procedures, and point out the prudence of not revealing our investigative files to parties in the pre-litigation stage. Dold said he wanted us to fax him this document by June 14.

I contacted Jim Troy and asked him if his staff was preparing an explanation of our policy of not disclosing investigative files prior to litigation. He had originally talked to Mike Fetzer about it, but Mike is on a two-week vacation so he assigned the matter to Donna Swanson. I discussed with Swanson the areas of contention brought out by the Tribune regarding the Medici case.

OLC's Nick Inzeo made the following comments about our confidentiality policy:

* Under the ADEA and EPA we can share as much or as little of the investigative file with parties as we choose -- as long as we do not hamper our enforcement efforts. We have that flexibility. He mused as to whether the investigator in Medici knew this and what his rationale was for not revealing any of the file to Morsbach.

Wednesday, June 15

Donna Swanson, who was on sick leave June 14, called to report that OPO Director Jim Troy said the written communication to the Tribune (alluded to above) will not be prepared. Instead, OPO will confine its response on this matter to the Rep. Gutierrez inquiry. Troy also called me to discuss what was apparently a miscommunication between him and me regarding what and to whom his office would prepare written material about the confidentiality of our administrative process. His understanding was that the only OPO response would be to Rep. Gutierrez after we received Gutierrez' inquiry. I did not contest this since, upon further reflection, I feel any response to the Tribune would prove counterproductive, unless we can provide substantive information. This cannot be done until we file suit.

Hendrickson and Rowe in the Chicago office are concerned that publicity in this matter will only get worse and feel that reopening conciliation negotiations may be the way to go. I advised that it was up to them to persuade OPO of the merit in this strategy. If conciliation is reopened, I think we should see if we can waive confidentiality so we can discuss the reasons for this step in public.

Troy is strongly opposed to altering our stance in this matter because of the appearance that we caved in to media pressure.

I attempted to schedule meeting for June 17 to discuss our confidentiality policy with principals from OPO, OLC, and OGC. Just about everybody has a schedule conflict.

Mark Wong of FM-West delivered the attached report from the Chicago office on the Medici case. It should help shed some light on the circumstances in this matter.

# # #

Attachments

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6/15/94

Additional information provided by the Chicago District Office in the matter of EEOC v. Medici on Surf Restaurant in conjunction with Mike Royko's column which appeared in the Chicago Tribune on 6/09/94. (Two other columns by Royko on this same subject have since been published.)

1. Was a PDI held?

   The District reports that PDI with CP was not applicable, since this was an EEOC initiated ADEA charge. The District also reported that a pre-determination discussion with R regarding the evidence was not held. However, the District indicates that the evidence in the case was discussed in great detail with R over the telephone and in letters during its conciliation efforts.

2. How was job order taken? Over the telephone? By written request?

   According to Ken Harder, the manager of the Medici during 1992 and 1993, he would normally call in his waitstaff and other staffing needs to the Job Exchange. He also indicated in his interview that he did not use any other referral service. Otherwise, applicants were walk-ins or individuals who learned about openings at the restaurant through word-of-mouth recruiting. Harder also indicated that he frequently spoke to Ken Cole, the owner of the Job Exchange.

3. What was specifically requested by Medici?

   Harder claimed in his affidavit that he could not remember the job order in question, but stated that he might have used the words "enthusiastic" or "energetic' in his conversations with Cole for waitstaff and other restaurant staff. He denied that he would have used the term "young." He also said that he has been in the restaurant business for twenty-five years and he knew what words should be used.

4. Was "young bub" an interpretation noted by receiver?

   The District reported that R indicated that "bub" was a reference to bubbly and to a person who was under the age of 40. On the entry of "young bub" in the Job Exchange notebook, Harder denies saying it and Cole does not recall whether he had written it; however, it was established that Cole does routinely make entries into the Job Exchange notebook, and that based on the investigator's examination of prior entries made by Cole and the "young bub" entry, it appears that entries in the book are made by Cole. Moreover, investigators indicated that other entries in the book included descriptive notes along with individual job requests, e.g. civic opera season starts, which leads the District to believe that the

Job Exchange was noting special requests, as opposed to making an interpretation of particular job orders. The District indicates that the Job Exchange notebook contains a number of other relevant examples.

5. Who received the message at the Job Exchange? What did he/she note down in the book? What was the documentation?

   Cole does not remember receiving the message from Harder. Harder admits that he has repeatedly called the Job Exchange for waitstaff and other staff. Harder does not have any documentation of the call he made.

6. Who was the requestor? Medici manager (Ken Harder)? What documentation did he/she have?

   Harder called the Job Exchange, but does not have any documentation of the call.

7. How was relief for the four PAG members calculated? Amount? What were their names?

   There are no identified individuals who have been harmed. The proposed relief (backpay) was based on the four waitstaff hires who joined Medici from the time of the notice of the charge until December 1993. The relief was premised on, absent the age discrimination, who of the PAG who met R's qualifications would have been hired. The amount of backpay would be a net amount, i.e., the amount one would have earned minus the amount that person may have earned elsewhere during the relevant time period.

8. What evidence was discussed with Medici owner? What was denied? and Why?

   The evidence in the case was discussed in great detail with the owner of the restaurant, Hans Morsbach. Mr. Morsbach, however, indicated that he would not settle because he was being accused of being a bigot and that he didn't feel he should be blamed for something that his manager did. He also asked for copies of documents in the case file. The District described to him the evidence that we had collected, but denied him copies of case file materials which he wanted, since the case was still in active investigation.

9. Testimony from Job Exchange? (Cole and Childers)?

   Ken Cole is the owner of the Job Exchange and Robert Childers is a clerk on the staff. (Please see attached).

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06/09/1994 09:43

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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Chicago District Office

500 W. Madison Street, Suite 2800
Chicago, IL 60661-2511
PH: (312) 353-2713
TDD: (312) 353-2421
FAX: (312) 353-7355

TO: James R. Neely, Jr.
Deputy General Counsel
Office of General Counsel

Reginald Welch
Director, Communications
Office of Communications and Legislative Affairs

FROM: John C. Hendrickson
Regional Attorney
Chicago District Office

SUBJ: Chicago Tribune/Mike Royko/Medici/etc.

DATE: June 9, 1994

BY FAX TRANSMISSION

Transmitted herewith are (i) Mike Royko's column from this morning's Chicago Tribune, (ii) a Chicago Tribune story regarding the proposed harassment guidelines (you will note the between-the-lines anti-EEOC bias in this "news" story), and (iii) STA Jean Kamp's memorandum of June 6, 1994 regarding the first Royko column.

Additional items of information:

1. We believe that Morsbach may have just completed or be in the process of completing a sale of the restaurant as to which cause was found. (Cause was found as to only one.) EEOC's cause finding may have had an impact on that transaction in some way, leading to Morsbach's/Royko's vehement response. (Morsbach claims that he did not receive the April 19 letter from EEOC prior to the Notice of Failure of Conciliation.)

2. We should probably assume that Royko will keep after this "story"--*i.e.*, run further columns--because of his personal friendship with Morsbach.

3. I do not know anything about any inquiry from Congressman Gutierrez' office. Deputy Director Cynthia Pierre and STA Jean Kamp met with a member of Senator Carol Mosely-Braun's Chicago staff yesterday, and he said that he was going to be "proactive" and call Morsbach.

4. As indicated elsewhere, this is an employment agency referral case and not an advertising case as suggested by Royko.

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Chicago District Office
500 W. Madison Street, Suite 2800
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TO: John P. Rowe
District Director

Cynthia Pierre
Deputy Director

THRU: John C. Hendrickson
Regional Attorney

FROM: Jean P. Kamp
Supervisory Trial Attorney

RE: ADEA Directed Investigation
Medici on Surf, Inc.
Charge No. 210 94 0149

DATE: June 6, 1994

As requested, I have prepared this memorandum in response to the Chicago Tribune column by Mike Royko concerning the above case, to detail the history of the investigation and conciliation.

As set forth in the Investigative Memorandum and the Presentation Memorandum, this was a directed investigation based on information received during an ongoing directed investigation of an employment agency, The Job Exchange. That agency lists requests, primarily by restaurants, for help wanted, and in many cases includes illegal preferences based on age and/or gender. The Job Exchange records included an order for "Medici" at "2850 N Sheridan,"[1] dated September 16, 1993, requesting "wts" described as "young, bub."[2]

In addition to the job order document obtained from The Job Exchange, the reasonable cause finding was based primarily on an interview with Kent Harder, Respondent's manager in charge of

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[1] In his column, Mr. Royko describes Hans Morsbach as owning restaurants in the Hyde Park area of Chicago. While this is true, the reasonable cause determination concerns only his restaurant located at 2850 North Sheridan, on the North Side of Chicago.

[2] A copy of the notice is included at p. 20 of the PM.

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hiring until his resignation effective December 31, 1993,[3] and on actual hiring and applicant data. During the interview Harder stated that he did use The Job Exchange, and that he sought waitstaff who were "outgoing" and who had "a positive, upbeat attitude and smiled a lot." See attachment to PM, p. 11. He denied requesting "young" applicants. In light of the existence of the notice in the records of The Job Exchange and Mr. Harder's overall testimony, the investigator did not find the denial to be credible.

Hiring data, while not conclusive, supported the direct evidence of age discrimination. At the time of the on-site, only one of thirteen waitstaff employees was over 40; that individual, who was 43 or 44, had been hired in 1986. Approximately 32 persons were hired as waitstaff in 1992 and 1993, only one of whom (who worked for only two shifts) was in the protected age group. To the extent the investigator was able to determine the ages of job applicants, it appeared that virtually all were young. Job Exchange records showed 26 individuals referred to Respondent during 1992 and 1993; Medici records show 11 referrals (not all of whom are included in the 26). None of the referrals whose ages could be determined were in the protected age group.

Based on this evidence, it was determined that there was not sufficient evidence of age discrimination prior to the request for "young" waitstaff on September 16, 1993, to justify a cause finding as to Respondent's activities prior to that date. However, after the request, Medici hired four individuals as waitstaff, none of whom were in the protected age group. At least one was a referral from The Job Exchange. Based on this and the direct evidence, cause was found for the period after September 16, until the resignation of Harder on December 31, 1993. Full relief calculations, therefore, were based on relief for no more than four individuals in the protected age group who had not been referred to Medici because of the discriminatory request.

Following the cause finding and invitation to conciliate on March 28, 1994, and telephone discussions concerning conciliation, Investigator Rich Proulx on April 13, 1994, faxed the letter, attached as Exhibit 1 to this memo, setting forth a detailed conciliation proposal. In response, Hans Morsbach, Medici's owner, wrote the letter to EEOC which is attached as Exhibit 2 to this memo, also dated April 13, 1994. The letter, which is quoted in

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3 The Royko column describes Morsbach as "not having the faintest idea" how an "ad" was placed without his knowledge. In fact, in his letter to EEOC, attached to this memo as exhibit 2, Morsbach stated "at this time I do not know whether, indeed, the transgression occurred as I could not get in touch with the manager at the time." On May 4, 1994, Morsbach sent EEOC a statement from Harder again denying that he had asked for young applicants.

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the Royko column, asks for additional information concerning the basis for the finding. In response to the Morsbach April 13 letter, EEOC explained that the finding was based on the request to The Job Exchange, and included the date and the substance of the notice. The letter also explained that hiring and monetary relief would go only to qualified individuals over the age of 40 who were on file with The Job Exchange from September 16, 1993 through December 31, 1993, as actively seeking waitstaff positions during that period, and that timing of hires was negotiable. Mr. Morsbach did not respond to the letter; a Notice of Failure of Conciliation was mailed on April 28, 1994. By letter dated May 4, 1994, attached as Exhibit 4, Mr. Morsbach again declined "your offer of reconcliating this matter."

The investigative file has not been produced, in compliance with FOIA Regulations, since the Presentation Memorandum was, and is, pending in the Office of General Counsel. The criticisms voiced by Mr. Royko are without justification. There is direct evidence supporting the reasonable cause determination in this case, and as set forth in the Presentation Memorandum, litigation is appropriate. EEOC's position during conciliation was reasonable.

Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Juanita C. Hernandez to Adrien Silas re: Comments to H.R. 739 and S.356, English Only bills; Control # L95101002481 (11 pages)	10/12/1995	P5 8013

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9588

FOLDER TITLE:

[English Only - Legislation] [1]

ds73

RESTRICTION CODES

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 advice 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]

U.S. Department of Justice

Civil Rights Division

8013

Office of the Assistant Attorney General *Washington, D.C. 20530*

TELEFACSIMILE COVER SHEET

DATE: 10-19-95 **TIME:** 6:45 p.m

TO: Steve Warnath

PHONE: 456-5576

FAX: 456-7028

FROM: Juanita C. Hernandez
OFFICE OF THE ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
FAX NUMBER: 202-307-2839
PHONE: 202-514-3653

COMMENTS: Per your request

NUMBER OF PAGES TRANSMITTED (INCLUDING THIS SHEET) 15
(max. 30 pages)

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

To: Adrien Silas
Office of Legislative Affairs

From: Juanita C. Hernandez
Counsel to the AAG

Date: October 12, 1995

Subject: Comments to H.R. 739 and S. 356, English Only bills; Control # L95101002481

The Civil Rights Division has reviewed H.R. 739, the Declaration of Official Language Act of 1995 and S. 356, the Language of Government Act of 1995. At the last minute, we were also asked to look at other English Only bills, including H.R. 1005 which will only be lightly referenced because of time constraints. All of these bills are most problematic, and we have several comments to oppose them. Given their largely negative impact, the Department of Justice should come out forcefully against these bills and a policy of English only.

There are several English only type bills, and they generally fall into three categories:

1) Bills that express the sentiment that English should be the official language of the United States. These bills do not restrict activities and therefore, pose the least amount of threat to current practices of using other languages for purposes of educational equity, health and safety issues, and/or to guarantee voting rights.

2) Bills aimed at halting Federal government activities conducted in languages other than English. H.R. 1005, the National Language Act of 1995 (King-NY), is one of such bills. It would declare English as the official language of the United States and impose various restrictions on the use of other languages for official government activities. This category of bills has a direct adverse impact on Federal efforts to ensure access to equal education, to federally funded health services and participation in the electoral process. S. 356 also would fall into this category.

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3) Bills with a far-reaching objective of prohibiting all official government activities (Federal, State, and Local) to be conducted in languages other than English. This category of bills would have the greatest impact and would likely run counter to state and local laws related to the use of languages other than English. H.R. 739 would fall in this third category.

1. English as the Official Language of the U.S.--

Both H.R. 739 and S. 356 propose to declare English the official language of the United States. This declaration is totally unnecessary since presently all official business of the U.S. government is conducted in English. Only a small percentage of government documents or forms are in a language other than English, and these are mere translations of English documents. Also, these non-English documents were formulated to assist individuals in this country who are limited English proficient and are subject to the laws of this country, such as income tax forms, ballots, access to medical care, etc.

There has never been a dispute in this country that English is the common and primary language of the United States. In fact, 95% of the residents of this country speak English according to the 1990 Census. Also, the 1990 Census figures show that even though 13.8% of U.S. residents speak languages other than English at home, 97% of those above the age of four speak English "well" to "very well". These figures clearly demonstrate that there is no resistance to English among language minorities. This is demonstrated by the overwhelming demand for English as a Second Language (ESL) classes in communities with large language minority populations.

2. Private Right of Action--

It is unclear in H.R. 739 and S. 356 what type of injury is supposed to be prevented or right protected by the cause of action created for violation of the proposed laws. Where is the injury or damages? Presently, all official business of the federal government is carried on with English as the primary language. Why is this provision necessary?

The sections are vaguely worded and would encourage lawsuits against the government by "any person alleging injury arising from a violation" or "whoever is injured by a violation" of these proposed laws. Dropping the sovereign immunity of the Federal government here and adding attorneys fees for winning plaintiffs would only invite major litigation against the government by English only advocates. It would also create a chilling effect and discourage federal agencies from performing tasks in languages other than English. While the bill would allow attorney fees for the plaintiffs who win, the government could

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not get fees if the plaintiff loses. Certainly, the government would be negatively impacted.

3. Bilingual Education--

These language restrictive bills (H.R. 739, S. 356 and H.R. 1005) are based on an underlying assumption that persons of limited English skills in the U.S. do not want to learn English, which is incorrect. Most communities with large immigrant communities have long waiting lists for English as a Second Language (ESL) programs. For instance, in Los Angeles over 300,000 persons are wait listed for ESL classes, and in New York, people are no longer wait listed for ESL classes. Due to the high demand in New York, class assignments are now determined by lottery.

H.R. 739 by Representative Roth would repeal most of Title VII of the Elementary and Secondary Education Act which funds bilingual education programs. Further, and most devastating is H.R. 1005 at § 3 which would specifically terminate the Office of Bilingual Education and Minority Language Affairs and repeal the entire Bilingual Education Act (20 U.S.C. §3281 et. seq.).

Title VII of the Bilingual Education Act, assists school districts in meeting their obligations under the Civil Rights Act of 1964 and the Supreme Court ruling in Lau v. Nichols of 1974. Both established that school districts have a responsibility to provide equal educational opportunity to limited English proficient (LEP) students. Hence, Title VII provides direct funds to implement programs targeted to assist linguistically diverse students. These programs assist limited English proficient (LEP) students master English proficiency and achieve high standards in all academic areas.

The Bilingual Education Act already stresses the need to promote a child's rapid learning of English. As President Clinton recently commented on bilingual education: "The issue is whether children who come here, while they are learning English, should also be able to learn other things....The issue is whether or not we're going to value the culture, the traditions of everybody and also recognize that we have a solemn obligation every day in every way to let these children live up to the fullest of their God-given capacities." Bilingual education helps ensure that limited English proficient children learn English and keep up with the content of what they are learning in other subjects. Otherwise, language minority children who are unable to keep up with their English-speaking classmates in their subject matter, are more likely than other children to drop out of school.

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The repeal of Title VII of the Bilingual Education Act would cut funding to states and their school districts for bilingual

Is there anything in each area (Ed employ) that requires fixing?

- SUMMARY OF LEG.
- Q+As Proposed
- Proposed Statement of Policy
- Anticipated Counter arguments
- Time frame for actions reqd.

- E.g. what we are doing to help assimilation
- 2nd language statistics

Short report for each area

Counterargument: This is done for citizens. Immigrants were suppose to have been required to have English Language proficiency.

- Position on states declaring official state language key ed?

Each draft in each area - Ed. Employment

COPY

education programs. However, nothing in H.R. 739 or H.R. 1005 would limit the power of courts to effect the appropriate remedy for LEP children under the Equal Educational Opportunities Act or Title IV of the Civil Rights Act of 1964. In other words, if the Department of Education finds that a school district is out of compliance with its regulations which are constitutionally based, then the school could be held to be out of compliance. In effect, the repeal of Title VII would amount to an unfunded constitutional mandate by shifting the financial burden from the Federal government to the states and the local school districts.

4. Section 203 of the Voting Rights Act--

Background

In H.R. 739, Section 2(b) would repeal Section 203 of the Voting Rights Act (VRA) of 1965 which includes minority language protections. H.R. 1005 at Section 4 by Representative King would be even more devastating by not only repealing Section 203 of the VRA but also striking other key provisions in the VRA including Section 4 and any references to minority language protections and requirements for bilingual ballots or information. The repeal of these provisions of one of the most important civil rights statutes would be a travesty and prohibit minority language citizens from casting an informed ballot.

Section 203 was first added to the Voting Rights Act in 1975 in recognition that large numbers of American citizens who spoke languages other than English had been effectively excluded from participation in our electoral process. Under Section 203, the language minorities: are defined as "persons who are American Indian, Asian-American, Alaskan Natives or of Spanish heritage." The rationale for Section 203 was identical to, and "enhance(d) the policy of Section 201 of removing obstructions at the polls for illiterate citizens." Senate Report No. 295, 94th Cong., 1st Sess. 1975, p.37. Congress recognized, as had the federal courts, that "meaningful assistance to allow the voter to cast an effective ballot is implicit in the granting of the franchise." Senate Report No. 295, 94th Cong., 1st Sess. 1975, p.32. Congress found that the denial of the right to vote among such citizens was "directly related to the unequal educational opportunities afforded them, resulting in high illiteracy and low voting participation." 42 U.S.C. §1973aa-1a(a). Congress, therefore, required that political subdivisions (usually counties) provide language assistance if: 1) more than 5% of the citizens of voting age in the county were members of a language minority, and 2) the illiteracy rate of these individuals was higher than the national illiteracy rate. Generally, counties that fall within the first requirement meet the second also. The judgment of Congress in 1975 on this structure showed that they understood that historically minority language individuals have

COPY

- Summary of LEG.
- Q+As Proposed
- Proposed Statement of Policy
- Anticipated Counter arguments
- Time frame for Action req.

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4. Section 20... ng Rights Act--

- E.g. what we are doing to keep [illegible] - 2nd language statistics

Background

Is there anything in each area (Ed, Employ) that requires fixing?

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Short report in each area

- Position on states declaring official state language key [illegible]

Each area in each area - Ed. Employment

not had the same educational opportunities as the majority of citizens.

In fact, this recognition and understanding is shown in that Congress has extended Section 203 twice, and it is now in effect until 2007. At present, some 254 jurisdictions in 28 states are covered by Section 203 and/or Section 4 of the VRA. Of these jurisdictions, 61 jurisdictions cover Native Americans and/or Alaskan Natives, and of these one is statewide Native Alaskans. Also, 167 jurisdictions, of which 2 are statewide, cover Spanish language populations. In addition, 4 jurisdictions cover Asian-Americans, and 22 jurisdictions are mixed languages populations.

In 1992, the minority language provisions were extended fifteen years and further amended to target more closely those American citizens who need assistance. In addition to counting language minority citizens as a percentage of their counties, Congress added a numerical basis, i.e. 10,000 or more limited English-speaking voting age citizens, in order to include those American citizens who live in heavily populated urban areas but who did not comprise 5% of that area. Also, limited English-speaking citizens residing on Indian reservations were counted as a percentage of the Indian reservation rather than the county because Congress determined that reservations are often divided among several counties. Each enactment and amendment of Section 203 enjoyed strong bipartisan support and the support of the Ford, Reagan and Bush administrations.

The need for bilingual election procedures has been long recognized by Congress. As Senator Hatch noted in connection with the 1992 amendments

> The right to vote is one of the most fundamental of human rights. Unless government assures access to the ballot box, citizenship is just an empty promise. Section 203 of the Voting Rights Act, containing bilingual election requirements, is an integral part of our government's assurance that Americans do have such access.... I believe, of course that our citizens should learn the English language. I also believe, however, that providing foreign language assistance for the purpose of exercising the right to vote is appropriate. The assistance is not a real disincentive to learn the English language....The growth in the minority communities covered by Section 203 indicates that continuing to remove language barriers will further enhance voter participation by language minorities....I am pleased to cosponsor this measure.

S.Rep. No. 315, 102nd Cong, 2nd Sess., 1992 p.134.

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The importance of bilingual election procedures also has been recognized by the courts at both state and federal levels. The Supreme Court in Katzenbach v. Morgan, in approving the section of the Act which allowed Puerto Ricans to vote even though they were illiterate in English, rejected the notion that the "denial of a right deemed so precious and fundamental in our society [is] a necessary or appropriate means of encouraging persons to learn English." 384 U.S. 641, at 655 (1966). Similarly, the California Supreme court struck down English-only elections as a violation of the equal protection clause of the 14th Amendment. Castro v. California 466 P2d 244, 258 (1970). The state subsequently enacted legislation which was more inclusive than the federal legislation requiring the recruitment of bilingual deputy registrars and poll workers in precincts with 3% or more non-English-speaking voting age population.

The bilingual provisions of the Voting Rights Act provide a bridge for America citizens who have been segregated from the mainstream to become informed and to participate equally and fully as American citizens.

Enforcement

Section 203 provides that whenever a covered county "provides any registration or voting notices, forms, instructions, assistance, or other material or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language." The Department of Justice has interpreted this broad language to encompass the full range of voting related activities, beginning with the provision of any material regarding how to register to become a voter, right through to assistance at the actual moment of casting a ballot. Section 203 explicitly provides that when the minority language is unwritten, as in the case of many Native Americans and Alaska natives, the county must provide oral assistance in the minority language.

Much of the Department's enforcement effort has been focused on voluntary compliance. Immediately following the 1992 amendments, Department attorneys travelled to newly-covered jurisdictions to explain in practical terms the Act's requirements including the principles of targeting only those who need information and materials, and the primary importance of trained bilingual personnel at the polls. Letters were dispatched to each newly-covered jurisdiction. In February, 1995, the Department established a Minority Language Task Force within the Civil Rights Divisions's Voting Section to identify problem areas, encourage compliance and coordinate enforcement.

Although many jurisdictions have responded well to section 203, others have needed a push. The Department has sent out

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large numbers of federal observers and has had to file nine lawsuits to force compliance with Section 203, including 4 since the 1992 amendments. All have been resolved successfully through consent decrees.[1]

Seven of our enforcement suits have addressed the problems of Native Americans in 9 counties in three southwestern states (New Mexico, Arizona and Utah). Each of these counties has Navajo or Pueblo citizens with limited abilities in the English language and limited familiarity with many of the concepts required to be an effective voter. These counties had not taken the initiative to identify the barriers that were preventing participation by Navajo or Pueblo citizens or to devise programs that would provide a realistic opportunity for equal access to the franchise. The consent decrees we negotiated under Section 203, and which we continue to monitor and update as necessary, for the first time provide an effective mechanism to enable the Native American population in these counties to enter the electoral mainstream. The jurisdictions included in these lawsuits would no longer be required to provide language assistance to these citizens if Section 203 were repealed.

The consent decrees are based on the extensive experience of the Department and the particularized needs and resources of the local communities. What works best for citizens of Chinese-

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U.S. v. City and County of San Francisco C.A. No. C-78 2521 CFP (N.D. Cal., consent decree May 19, 1980); U.S. v. San Juan County, New Mexico, C.A. No. 79-508-JB (D. N.M., consent decree Apr. 8, 1980); U.S. v. San Juan County, Utah, C.A. No. C-83-1287 (D. Utah, consent decree Oct. 11, 1990); U.S. v. McKinley County, New Mexico, C.A. No. 86-0029-M (D.N.M., consent decree Oct. 9, 1990); U.S. v. Arizona, C.A. No. 99-1989 PHX EHC (D. Ariz., consent agreement originally filed Dec. 5, 1988, amended Sept 27, 1993) (Section 203 and Section 2); U.S. v. Sandoval County, New Mexico, C.A. No. 88-1457-SC (D. N.M., consent decree Sept. 30, 1994) (Section 203 and Section 2) (Navajo and Pueblo) filed prior to the 1992 amendments.

Cases subsequent to the 1992 amendments include: U.S. v. Metropolitan Dade County, Florida, C.A. No 93-0485 (S.D. Fla., consent decree March 11, 1993) (Section 203 and Section 2) (Spanish); U.S. v. Socorro County, New Mexico, C.A. No. 93-1244-JP (D. N.M., consent decree Oct. 22, 1993) (Section 203 and Section 2) (Navajo); U.S. v. Cibola County, New Mexico, C.A. No. 93-1134 (D. N.M., consent decree Apr. 21, 1994) (Section 203 and Section 2) (Navajo and Keres); U.S. v. Alameda County, CA C.A. No. C-95-1266 SAW (N.D. Cal., filed April 13, 1995; consent decree pending approval of three judge court).

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American heritage in highly urban Alameda County may not work best in the remote reaches of New Mexico. The decrees specifically avoid wasteful or expensive procedures in favor of practical steps and the utilization of the minority communities' own communication systems. The decrees call for constant communication between the affected citizens and their local government, and provide for flexibility to meet changing circumstances.

Enforcement actions by the Department of Justice have been based on detailed incontrovertible evidence of the denial of the right to vote of United States citizens. Since 1975, federal observers, where other provisions of the Voting Rights Act allow, have monitored elections to determine the extent to which language minority citizens were able to receive materials, instructions and assistance in minority languages. A total of 2,199 federal observers have served in this effort so far. They have been sent to 12 different counties in six states -- Arizona, California, New Mexico, New York, Texas, and Utah -- and have monitored the treatment of Native American voters, Hispanic voters and Chinese American voters.

These federal observers have directly witnessed the extraordinary extent to which the limited ability in the English language of many citizens seriously compromises their ability to participate in the electoral process on an equal basis with other voters. Based on our enforcement efforts in the Division, we can safely conclude that there are many citizens whose limited proficiency in the English language seriously compromises their ability to participate in the electoral process on an equal basis with other voters. Also, we can conclude that Section 203 which provides bilingual materials, instruction, and assistance makes a real difference for minority language voters with limited English language abilities.

Section 203 has made a difference. Both rates of voter registration and actual participation in elections by minority language individuals have increased since Section 203 was enacted. We also have learned that providing bilingual materials, instruction and assistance makes a real difference for minority language voters with limited English language abilities.

It is more difficult to produce statistical evidence showing that Section 203 has had a significant effect among Native Americans, but based on our enforcement efforts and our experience, we are convinced that it has and that it remains essential. In 1990, some 39 percent of non-Native American voters cast votes on the referenda items on the ballot while only 13 percent of Native Americans did so. In Socorro County, New Mexico, prior to the filing of our lawsuit, 375 Native Americans were registered to vote. Following our lawsuit, 742 Native Americans became registered to vote. In Cibola County, prior to the filing of our lawsuit, 1,561 Native Americans were registered to vote. Following our lawsuit, 2,359 Native Americans became registered to vote. Some of the problems that we have seen and that we continue to see regarding the provision of language assistance to Native Americans help to illustrate the continuing need for that assistance. For instance, oral assistance to Native Americans is frequently required because many Native American languages are not written. Also, it is frequently difficult to translate concepts into Native American languages because of cultural differences.

Furthermore, Native Americans present a unique situation because of their history, and offer compelling reasons for the protection of Section 203. Native Americans did not immigrate to this country, but rather this country came to them and they are our Nation's first citizens. In fact, it is the declared policy of the U.S. government, as enacted by Congress, under the Native American Languages Act to encourage the use and preservation of Native American languages, and the Act recognizes that the use of Native American languages should not be restricted in any public proceeding. 25 U.S.C. §§ 2901, 2904.

Many Native Americans, especially older individuals, continue to speak their traditional languages and live in isolation from English-speaking society. For example, in both Apache and Navajo Counties, Arizona, more than one-half of the voting age Navajos lacked sufficient English fluency to participate in English-only elections as of the 1980 census. As of the 1990 census, 49 percent of the voting age Native American citizens in Apache county, and over 50 percent of the voting age Native American citizens of Navajo County continue to be limited English proficient. According to the 1990 census, in Pima county, Arizona, 2,173 Navajo citizens of voting age were limited English proficient and became covered by the Act's requirements for the first time in 1992. For these citizens, the requirement that counties provide them with language assistance is not only necessary if they are to participate in elections, but it is a matter of fundamental fairness.

We have little reason to believe that the need for Section 203 has diminished since 1992. The Latino, Native American, Asian and Alaska Native populations in our country have all grown in the past decade. Although applicants for citizenship must satisfy an English proficiency test, it is likely that many new citizens still need language assistance to participate meaningfully in the political process, and surely, many who may barely function in the electoral process benefit from the availability of language assistance. Also, many elderly and disabled American citizens who are minority language persons were able to naturalize and become citizens by taking a citizenship test in their native language and did not need to show English proficiency based on their advanced aged and lengthy permanent

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Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Pamela J. Marple to Marvin Krislov re: Arkansas English Language Statute (1 page)	3/25/1996	P5 8014

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9588

FOLDER TITLE:
English Only [Folder 1] [1]

ds55

RESTRICTION CODES

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 advice 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]
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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

8014

DETERMINED TO BE AN ADMINISTRATIVE MARKING
INITIALS: DMS DATE: 8/25/05

Privileged and ~~Confidential~~

March 25, 1996

MEMORANDUM FOR MARVIN KRISLOV
ASSOCIATE COUNSEL TO THE PRESIDENT

FROM: PAMELA J. MARPLE

SUBJECT: ARKANSAS ENGLISH LANGUAGE STATUTE

The Arkansas "English language" statute was enacted and signed by Governor Clinton in 1987. Ark. Code Ann. Sec. 1-4-117. The statute provides:

(a) The English language shall be the official language of the State of Arkansas.

(b) This section shall not prohibit the public schools from performing their duty to provide equal educational opportunities to all children.

General Information:

o The statute is part of the Arkansas Code entitled "State Symbols, Motto, Etc.," which declares that the state motto is "Regnat Populus," the state flower is the apple blossom, the state insect is the honeybee, the state beverage is milk, etc., (attached).

o The statute does not appear to have any operative effect.

o Section (a) and (b) were passed separately. Section (a) was passed first, and unanimously (or close to it), apparently because it was considered to be ceremonial.

o After passage of Section (a), Governor Clinton submitted a bill to the legislature which contained the language of Section (b). This language was also passed in 1987. He apparently did this to be safe -- Arkansas provides bilingual education to its citizens.

o The statute is much different than the Arizona "English only" Constitutional Amendment to be reviewed by the Supreme Court. That Amendment requires that "the state and its political subdivisions -- including all government officials and employees performing government business -- must 'act' only in English." The Ninth Circuit found that state employees could violate the Amendment by speaking Spanish or any other language to conduct state business. Yniguez v. State of Arizona, 69 F.3d 920 (9th Cir. 1995) (striking down the Arizona Amendment as violative of the First Amendment) (attached).

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Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. fax	Claire Gonzales to Steve Warnath re: Backgrounder on '92 Bilingual Voting Rights Legislation (4 pages)	10/30/1995	P5 8015

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9588

FOLDER TITLE:
[English Only] [1]

ds64

RESTRICTION CODES

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SENT BY: 10-30-95 ; 1:32PM ; EEOC→ CCITT ECM;# 1

8015

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U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF COMMUNICATIONS AND LEGISLATIVE AFFAIRS
1801 L STREET, N.W.
WASHINGTON, D. C. 20507
FAX: (202) 663-4912

DATE: 10/30/95 TIME:

TO: Steve Warnath

FAX NUMBER: 456-7028

SENDER: CLAIRE E. GONZALES, DIRECTOR

SENDER'S TELEPHONE NUMBER: (202) 663-4915

DOCUMENT: Backgrounder on '92 Bilingual Voting Rts Legislation

NUMBER OF PAGES TRANSMITTED (INCLUDING COVER): 13

SPECIAL INSTRUCTIONS:

Steve - Please keep this confidential, OK? It wasn't prepared for public consumption, but rather for an NCLR Bd Mtg. I hope it is helpful.

With the Best of Intentions -
CEG

PLEASE TELEPHONE SENDER IF YOU DO NOT RECEIVE ALL DOCUMENTS.

DETERMINED TO BE AN ADMINISTRATIVE MARKING Per E.O. 12958 as amended, Sec. 3.2(c)
Initials: DMS Date: 8/25/05

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ISSUE UPDATE: THE VOTING RIGHTS LANGUAGE ASSISTANCE ACT OF 1992

I. INTRODUCTION

On August 26, 1992, President Bush signed into law the Voting Rights Language Assistance Act of 1992 (the Act), which reauthorized and improved Section 203 of the Voting Rights Act of 1965. Section 203 is one of two major bilingual voting assistance provisions of the Voting Rights Act and it was scheduled to expire by its own terms on August 6, 1992. The re-enactment of this critical legislation preserves existing mandatory bilingual voting assistance in more than 60 counties nationwide with significant concentrations of limited-English-proficient Hispanic, Asian, and Native American voters, as well as expanding Section 203's coverage formula requiring bilingual voting assistance in many large metropolitan areas that were previously not subject to the law, such as Los Angeles, Chicago, and large portions of New York City.

The Act, with its new coverage provisions, became effective immediately upon its enactment. The Department of Justice, the federal agency responsible for enforcing the Voting Rights Act, has announced that it will require full compliance with the law in the November 3 election. As a result of the newly expanded coverage of Section 203, thousands of limited-English-proficient Hispanic voters will have their first opportunity to participate freely and effectively in the electoral process.

The National Council of La Raza (NCLR) played a leading role in every aspect of the advocacy effort that culminated in this civil rights victory, including the creation of the language-minority rights coalition that led the effort, the drafting of the legislation, and the development and implementation of the political strategy that assured timely passage of the bill. This memorandum discusses the substance of Section 203 and the Act; the coalition's advocacy activities, including the strategy that was used to achieve passage of the Act; and the legislation's history as it went through Congress.

II. SECTION 203 AND THE ACT

A. *Section 203*

Section 203, together with two other language assistance provisions,[1] was added to the Voting Rights Act in 1975 to address the exclusion of certain limited-English-proficient

[1] The other two language assistance provisions of the Voting Rights Act, both of which are permanent, are Section 4(f)(4), which covers jurisdictions that met certain criteria in the November 1972 Presidential election, and Section 4(e), which protects the right to vote of U.S. citizens educated in American-flag schools in a language other than English (Puerto Rico). Some jurisdictions are covered by both Section 203 and Section 4(f)(4).

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(LEP) voting-age citizens from effective participation in the electoral process.[2] Section 203 is based upon Congressional findings that certain language-minority citizens have been systematically denied their right to vote due to pervasive discrimination, manifested in exclusionary voting procedures (e.g., English-only elections and literacy tests) and unequal educational opportunities. Congress recognized that the unequal educational opportunities commonly suffered by certain language minorities often result in high illiteracy rates and low voting participation, with the overall effect of preventing these citizens from exercising their right to vote. Section 203 is intended to prohibit discriminatory voting practices based on language, which violate the Equal Protection clause of the 14th Amendment and the 15th Amendment's guarantee to all eligible citizens of the right to vote.

In sum, Section 203:

- Prohibits any state or "political subdivision" (a county or parish) with significant populations of LEP **Hispanic, Asian American, American Indian, or Alaskan Native** voters, which also have illiteracy rates above the national average, from conducting English-only voting assistance and elections.

- Requires covered jurisdictions to provide "any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots," in the language of the applicable language minority. Where a language is traditionally unwritten, as is the case with Native American languages, only oral assistance is required.

- Is the only language assistance provision of the Voting Rights Act with a flexible coverage formula that includes or excludes jurisdictions solely on the basis of changing demographic characteristics, such as shifts in major LEP voting-age populations and high illiteracy rates common to language-minority populations due to persistent educational disparities.

- Permits covered jurisdictions to implement the required assistance in a cost-efficient manner, pursuant to U.S. Department of Justice regulations.

- Has been instrumental in opening up the electoral process to language-minority citizens over the past 16 years, which is evidenced by significant growth in language-minority voter registration and participation rates and the increase in the number of elected officials with language-minority backgrounds.

---

[2] For purposes of this memorandum, "LEP" is used to describe limited-English-proficient, voting-age citizens who also meet the statute's illiteracy standard.

- Continues to be needed by an even greater number of LEP voters today than when it was originally passed because of the huge demographic changes in language-minority communities during the last decade.

B. Substance of the Act

1. Preservation of Existing Bilingual Election Requirements

The primary purpose of the Act was to maintain the existing bilingual voting assistance required by Section 203 by reauthorizing the provision for 15 years until 2007, the expiration date for the rest of the Voting Rights Act. If not reauthorized, Section 203 was set to expire on August 6, 1992, at which time at least 61 counties that would be covered solely by Section 203 (using only the original 5% coverage formula and according to preliminary 1990 Decennial Census data) would otherwise not be required to provide bilingual voting assistance.

2. Improvements to Coverage Formula

During the 17 years since enactment of Section 203, it had become evident that the statute's limited coverage formula did not adequately serve the LEP voting communities in the manner Congress originally intended. One of the purposes of the new Act, therefore, was to amend the Section's coverage formula to better serve large language-minority communities in need of assistance.

Section 203's original coverage formula required that a state or "political subdivision" (usually a county or parish) was subject to its requirements if the Director of the Census determined that:

> (i) more than 5% of its voting age citizens [a] are members of a single language-minority and [b] do not speak or understand English adequately enough to participate in the electoral process; *and*
>
> (ii) the illiteracy rate of this group is higher than the national illiteracy rate (illiteracy is defined as failure to complete the fifth grade).

Because of certain unintentionally restrictive elements of its original coverage formula, Section 203 failed to reach some of the nation's largest concentrations of LEP voters. To address this problem, the Act amends Section 203's coverage formula to better target significant populations of language-minority voters in need of assistance by providing two alternative standards.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Transition Record - Civil Rights (7 pages)	12/10/1992	Personal Misfile
002. report	Background on Title VI (4 pages)	n.d.	P5 8016

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9884

FOLDER TITLE:
[Civil Rights Working Group] [2]

ds51

RESTRICTION CODES

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

P1 National Security Classified Information [(a)(1) of the PRA]
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Background on Title VI

8016

Prepared by the
U.S. DEPARTMENT OF JUSTICE
Civil Rights Division
Coordination and Review Section

ATTORNEY-CLIENT PRIVILEGED INFORMATION

The Civil Rights Act of 1964 was a product of the growing demand during the early sixties that a nation-wide offensive be launched by the Federal Government against racial discrimination.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d to 2000d-6, prohibits discrimination on the basis of race, color, or national origin in all Federally assisted programs. In calling for its enactment, President Kennedy identified "simple justice" as the justification for Title VI.

Title VI itself is embodied in its first four parts. Section 601 sets forth the basic national policy that controls the other provisions of Title VI:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

This enunciates the basic principle that Federal funds should not be used to subsidize discrimination. By its terms, discrimination on the basis of race, color, or national origin is prohibited in any program or activity receiving Federal financial assistance.

If Section 601 is the heart of Title VI, Section 602 is the body. It provides the administrative framework upon which the implementation of Title VI is built. Section 602 directs every Federal department or agency granting financial assistance "by way of grant, loan, or contract other than a contract of insurance or guaranty" to effectuate Section 601 by issuing rules, regulations, or orders of general applicability consistent with the objectives of the funding statute.

Section 603 of Title VI provides that any action taken pursuant to Section 602 is subject to such judicial review as may otherwise be provided for by law for similar agency actions taken by such department or agency on other grounds.

Section 604 of Title VI provides, in essence, that the prohibitions of Title VI do not apply to the employment practices of recipients unless a primary objective of the Federal assistance to the recipient is to promote employment.

As provided by Section 602, above, each of the 28 agencies providing Federal financial assistance has issued Title VI regulations. Thus it is the granting agency that is responsible for enforcing title VI for its own programs and activities. Each agency's programs and activities covered by Title VI should be listed in Appendix A to the Agency's Title VI regulations.

One of the issues in carrying out environmental justice responsibilities will be identifying State and local entities that are recipients of Federal financial assistance and are thus subject to Title VI. (Note that the Civil Rights Restoration Act of 1967 broadened the definition of "program or activity" to include all the operations of "a department, agency, special purpose district, or other instrumentality of a State or local government..."). 42 U.S.C. 2000d-4a. The easiest method for identifying a recipient is to determine whether an entity directly receives a Federal grant, loan, or contract other than a contract for insurance or guaranty. However, to determine the reach of Title VI solely on the basis of a cash flow analysis is to improperly restrict its intended scope. Title VI aid can flow from aid that enhances a recipient's ability to improve or expand the allocation of its resources in addition to aid that increases those resources. Therefore "Federal financial assistance" may be in the form of not only cash but also goods, services, or equipment.

A second issue concerns the "effects" language in the regulatory list of prohibited discrimination. Prohibiting conduct that has the effect of discriminating appears in two places in many Title VI regulations:

A recipient, in determining the type of disposition, services, financial aid, benefits, or facilities which will be provided...may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the <u>effect</u> of subjecting individuals to discrimination.... 28 C.F.R. Section 42.104(b)(2). (Department of Justice regulations)(emphasis added).

In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination....C.F.R. Section 42.104(b)(3). (Department of Justice regulations)(emphasis added).

The Supreme Court has recognized that agencies may issue Title VI regulations which reach the effects or actions or decisions by recipients. This is often referred to as reaching actions that have a disparate impact. Guardians Assn. v. Civil Serv. Common, 436 U.S. 582,(1983). This is particularly important in the environmental justice area because there will seldom be evidence of intentional discrimination in decisions reached by a variety of State and local governmental entities.

A third issue likely to arise in the environmental justice area is the duration of coverage when assistance is provided to acquire or improve land or structures on land. Several agencies' regulations make a distinction in the duration of Title VI coverage between assistance provided to acquire or improve land or structures on land and assistance to acquire personal property. Under the regulations of agencies that make this distinction, a recipient of assistance providing land or structures and any subsequent transference is subject to Title VI for as long as the land or structure is used for a purpose for which the assistance was intended or for the provision of services or benefits similar to those originally contemplated. In the case of personal property, Title VI applies only for as long as the recipient retains either ownership or possession of the property. Under the regulations of agencies grouping land, structures, and personal property together, the obligations of Title VI last as long as the land, structures, or personal property is used for a purpose for which the assistance was intended, services or benefits are provided that are similar to those originally contemplated, or the recipient retains ownership or possession of the property, whichever is longer. In these situations, the property for which the assistance was advanced has a relatively permanent character. Each time Federally assisted real or personal property is used, the recipient receives a continuing benefit.

At present, authority for coordination of Title VI resides in the Coordination and Review Section of the Civil Rights Division. The Section has primary staff responsibility for carrying out the duties set forth in Executive Order 12250, Leadership and Coordination of Nondiscrimination Laws. Both the Section and the Agencies extending financial assistance are guided by the Department's regulations concerning coordination of enforcement of non-discrimination in Federally assisted programs, found at 42 C.F.R. Sections 42.401-.415.

Primary enforcement responsibility for Title VI remains with the 28 agencies providing Federal financial assistance. If a Title VI complaint is filed directly with the Department of Justice, the complaint will be referred to the appropriate funding agency for investigation. Each agency's regulation provides for the enforcement mechanisms, such as submission of assurances of compliance and compliance reports. Periodic compliance reviews are specifically required in agency regulations. In addition, any individual may file a complaint, and agency regulations require a prompt investigation. Whether determined through a compliance review or a complaint investigation, if there has been a failure to comply with the regulation, the recipient is informed and an informal resolution is attempted. If this cannot be accomplished, the Federal assistance may be suspended or terminated, following an express finding after opportunity for a hearing, of a failure to comply. Alternatively, the case may be referred to the Department of Justice for litigation. Once the Department has filed suit, both injunctive relief and compensatory damages may be available. (In Franklin v. Gwinnett City Public Schools, ___U.S.___, 112 S. Ct. 1028 (1992), the Supreme Court held that damages were available for an action brought to enforce Title IX of the Education Amendments of 1972, as amended; remedies available under Title VI are identical to those under Title IX.) Examples of appropriate injunctive relief might be ordering a new site selection or a prohibition on placing a facility with adverse environmental consequences in a minority community.

For further information, please contact Catherine M. Sheafor, Environmental Justice Coordinator (202-514-2704) (FAX 202-514-4231); Merrily Friedlander, Acting Chief, Coordination and Review Section, Civil Rights Division (202-307-2222); or Daniel A. Searing, attorney, Coordination and Review Section (202-307-2215) (TDD number 202-307-2678) (FAX 202-307-0595).

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	Deval Patrick to Peter Edelman re: Response to the Civil Rights Division (9 pages)	6/13/1994	P5 8017
002. report	EEOC to ETR Working Group (3 pages)	n.d.	b(2)
003. memo	William Spriggs to Sheryll Cashin re: Justification for Anti-Discrimination Policy (2 pages)	6/16/1994	P5
004. memo	Carol H. Rasco to Patricia E. Romani, Jeremy D. Benami re: appt. to set up (partial) (1 page)	10/12/1994	P6/b(6)

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9884

FOLDER TITLE:
[Civil Rights Working Group] [1]

Dana Simmons

ds62

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U.S. Department of Justice

Civil Rights Division

8017

Office of the Assistant Attorney General

Washington, D.C. 20035

June 13, 1994

Peter B. Edelman
Counselor to the Secretary
U.S. Department of Health & Human Services
Room 615F
200 Independence Ave., S.W.
Washington, D.C. 20201

Re: Response of the Civil Rights Division to the Proposal for an Administration Strategy Attacking Employment Barriers Facing First-Time Job Seekers

Dear Peter:

By memorandum dated May 16, 1994, you requested our views on a strategic plan to attack employment barriers (including discrimination) facing first-time job seekers. The response ~~has~~ been requested by June 13 for distribution before a June 16 meeting. The Civil Rights Division fully supports the idea of a cooperative strategy in this area, including the use of employment testing, and we look forward to working closely with other agencies on this initiative. The following is a first cut response to the items you asked us to address.

1. Data trends on job discrimination and inequality for young people entering the labor market. Bill Spriggs from NCEP will take primary responsibility for this section, but everyone should offer whatever relevant statistical information and data they have.

RESPONSE

Employment discrimination based on race, color, religion, sex, national origin and disability remains a significant problem in our nation's workforces, ranging from entry level positions, through promotional ranks and into the highest levels of management. Testimony to this condition lies with the ever increasing number of employment discrimination charges that have been filed with the Equal Employment Opportunity Commission as well as the continuing work of the Glass Ceiling Commission. The Office of Federal Contract Compliance Programs with the Department of Labor and the Office of Civil Rights within the Department of Education can also make the case for the need for a

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continuing, vigorous enforcement effort in the federal arena to combat unlawful workplace conduct.

2. Currently applicable law, statutory and decisional. What enforcement powers does each relevant agency have? What are their current enforcement policies and strategies?

RESPONSE

A. Federal Statutes and Executive Order

There are a number of federal laws which prohibit employment discrimination. Title VII of the Civil Rights Act of 1964 states that it is an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex and national origin; or 2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise affect his status as an employee, because of such individual's race, color, religion, sex or national origin. The reach of Title VII is broad and includes all private and state and local government employers which have fifteen or more employees, as well as employment agencies and labor organizations. The Americans with Disabilities Act of 1990 adds the category of disability to the classes protected by federal employment discrimination law.

Title VI of the Civil Rights Act of 1964 states that "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to, discrimination under any program or activity receiving Federal financial assistance." Each Federal department and agency empowered to extend such financial assistance is authorized to enforce this provision with respect to any program or activity.

Executive Order 11246 prohibits discrimination by federal contractors against employees or applicants for employment because of race, color, religion, sex or national origin. In addition, 11246 carries a command that is not in Title VII: that the contractor take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to race, color, religion, sex or national origin.

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B. Civil Rights Division Enforcement Program

The Civil Rights Division, through its Employment Litigation Section, enforces with respect to state and local government employers: Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972; Title I and parts of Title II of the Americans with Disabilities Act of 1990; the Pregnancy Discrimination Act of 1978; and other federal laws prohibiting employment practices that discriminate on the grounds of race, color, sex, religion, national origin and disability.

The Employment Litigation Section also has authority to prosecute enforcement actions upon referral by the Department of Labor under Executive Order 11246, which prohibits discrimination in employment by federal contractors. Finally, the Employment Litigation Section represents federal agencies when their affirmative action programs are challenged in federal court. These matters have included the Departments of Labor and Transportation, the Army Corps of Engineers and the Small Business Administration.

The Employment Litigation Section has two major enforcement vehicles: (1) pattern or practice suits brought pursuant to Section 707 of Title VII or Section 107 of the ADA; and (2) suits brought pursuant to Section 706 of Title VII or Section 107 of the ADA involving individual charges of employment discrimination that have been referred to the Department by the Equal Employment Opportunity Commission following a reasonable cause determination and a failure to conciliate.

Pattern or practice suits have been and remain the Division's most effective enforcement tool. These suits typically are brought against large state or municipal government employers, challenging broad-based unlawful employment practices (often involving the use of hiring or promotion examinations) that discriminate against a class or classes of persons. These suits typically require the use of a variety of expert witnesses, including statisticians, industrial psychologists, labor economists and exercise physiologists. Discovery and litigation in these cases is time consuming, labor intensive, complex and costly. One of the first priorities with a new testing program would be to examine ways in which testing could be utilized to complement our investigation and litigation programs, in order to minimize the demands of time, labor and costs associated with these suits.

The objective in a pattern or practice suit is to eliminate the unlawful employment practice(s), have the employer implement lawful selection procedures and, where appropriate, identify and recompense individuals who have been victims of the unlawful practices, and provide for a period of court review. Pattern or practice litigation is fundamental to a vigorous and effective law enforcement program, because it is through such litigation that important legal precedent is established and broad-based injunctive and make-whole relief for victims is obtained. As such, pattern or practice litigation has been the bread and butter of this Division's efforts to enforce the Federal equal employment opportunity laws for which we have responsibility.

Matters which merit pattern or practice investigation are identified through several different ways, among them: 1) internal targeting of types of employers (e.g., police departments, corrections departments, etc.) that historically have excluded minorities and/or women; 2) internal targeting of employers, through the use of EEO-4 reports and labor market statistics from the Bureau of the Census, who underutilize minorities and/or women overall or in one or more job category; 3) the investigation of individual complaints of discrimination referred to us by the EEOC that reveal broad-based discrimination; 4) information obtained through media reporting (e.g., newspapers, television, etc.); and 5) complaints received through citizen and congressional mail. Testing would provide another means of identifying violations.

The Division also investigates and litigates individual charges of discrimination that have been referred to us by the EEOC under Title VII and the ADA. These suits are substantially more limited in scope than pattern or practice suits and generally involve a charge of discrimination against one person or a small number of persons. We encourage all attorneys to conduct each investigation with a view to developing a pattern or practice suit if the evidence warrants such action.

The 1991 amendments to Title VII in large measure restored the Act to its pre-1989 status by overruling six decisions of the Supreme Court handed down from 1989 to 1991 that were adverse to plaintiffs. The 1991 amendments also expanded Title VII to allow for jury trials and the recovery of compensatory damages, as well as punitive damages in some instances, in cases of intentional discrimination. The Supreme Court in its 1993 decision in St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993), allowed an employer to avoid a finding of employment discrimination where the reason offered by the employer for the challenged practice was proven to be false. In cases where there is no direct evidence of discrimination, the Hicks decision will prove yet another hurdle to plaintiffs. Testing may be a useful tool in Hicks type cases where direct evidence of discrimination is otherwise lacking.

While the issue of standing of private testers to sue for damages and other relief is unresolved, the resolution of that issue should not directly affect or limit the evidentiary purposes for which the Department, or other agencies such as the

EEOC, use testing. In November 1990, EEOC issued a "policy guidance" wherein the Commission concluded that testers are aggrieved parties under Title VII, where they have been treated differently when applying for employment. Accordingly, EEOC has instructed field offices to accept charges from testers or from civil rights/community organizations filing charges on behalf of testers.

3. Proposed enforcement strategies, including both coercive and persuasive activities: public education of employers concerning their legal obligations, conciliation, litigation, etc. How can litigation be used to have the maximum leverage across any one industry and across industry lines?

> **- What do we already know as to what industries and employers should be priority foci for enforcement activity? Do we have sufficiently sophisticated labor market information to identify the types or categories of employers that should be hiring the people we are concerned with?**
>
> **- What research needs to be done to perfect a workable enforcement strategy? What role should testing play in that research? How should a testing strategy for research purposes be designed? Should it concentrate on a number of pilot sites? A number of pilot industries? What are the costs of such a research agenda? What agency or agencies should be charged with carrying it out? (See coordination issues below)**
>
> **- What other uses should be made of testing? How should testing be used as the basis of a strategy of public education of employers? How should testing be used as a basis for litigation? What are the budgetary implications of the answers to these questions?**
>
> **- What other new enforcement strategies are possible and should be utilized? Are strike forces a useful tool? What is the role of pattern and practice litigation? What other approaches have a promise of systemic effect?**

RESPONSE

The use of testers to explore the existence of housing discrimination has been an effective enforcement tool for our Housing and Civil Enforcement Section and we believe it could be equally effective in the employment context. The use of "paired testers" in the open job market would allow us to attack even the most sophisticated means by which employers discriminate in entry level hiring. In addition, notice to employers that testing was being conducted in a geographic region could enhance the employment opportunities available to minorities and women in both public and private sector jobs.

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"Paired testing" can bring a dimension to our enforcement program that could improve our effectiveness in terms of identifying, investigating, litigating, settling and monitoring pattern or practice suits in communities throughout the United States. Typically, our pattern or practice investigations take over a year to complete, for a variety of reasons that often are not within our control. With testing available to us, we may be able to learn a great deal about the hiring practices of the employer and, in some cases, establish disparate treatment early in our investigation. Testing may also supplement our ability to evaluate EEO-4 employer information and provide insight into the reasons for the composition of the employer's workforce. The more we know about the employer's practices and the earlier we know it all factor into our ability to undertake and conclude litigation.

There are several other contexts in which testing would serve to enhance the enforcement of Title VII. In those instances where we examine the need for prompt judicial action in a hiring context during a pre-suit investigation, testing may be able to assist us in framing a judicial remedy. Testing also may prove to be a useful compliance tool to ensure court decrees are being carried out in good faith. And the existence of a testing program has the salutary effect of educating the public about the continuation of unlawful discrimination. Video and audio recordings of actual employers caught in the act of discriminating have provided dramatic and graphic examples of the reasons why vigorous and creative civil rights enforcement remains critically important.

The Division's employment testing program could be made available to the EEOC and other federal agencies with civil rights enforcement responsibility. One possible role for the Division in this regard would be to provide testing services to the EEOC for its pattern or practice investigations or for Commissioners' charges, and to the OFCCP for its role of monitoring the employment practices of federal contractors.

Priority targets for the Department's employment testing might include the following:

Suburban governments that traditionally use unstructured hiring devices that are not susceptible to disparate impact analysis.

College and university hiring practices with emphasis on athletic and sports information departments.

Private employers that engage in seasonal hiring which serves as an entry level for permanent full time positions.

Private employers in industries which earlier studies have shown were engaged in discrimination in entry level jobs.[1]

Employment agencies that engage in discriminatory screening for private employers.

We are concerned about another employment issue that does not implicate testing but that will require multi-agency cooperation. The overwhelming majority of the state or local government employers we investigate or against whom we bring suit utilize selection processes for hire and promotion that involve the administration of written examinations for most jobs, and physical strength and agility tests for public safety jobs (e.g., fire, police, etc.) and other jobs that have a significant physical component. It has been our experience over the past few years that one of the greatest barriers to minorities has been the use of such written examinations. Many of them have a substantial adverse impact upon minorities, and most of those we have seen are accompanied by little or no evidence of job-relatedness. The same holds true with regard to the use of physical strength and agility tests with respect to women. As such, we will be focusing more attention upon this area.

In this regard, until recently the Federal government for years made available a written examination called the General Aptitude Test Battery ("GATB") for use by state and local governments and referral agencies. The GATB, which was developed by the U.S. Employment Service, had a severe impact upon minorities when used on a rank order basis and in our view was of dubious validity. It is our understanding that the United States Employment Service is conducting research to modify the GATB. We will be contacting the Department of Labor in the near future to work with them in their modification of this examination. Our goal will be to ensure to the extent practicable that the result of such modification is a test that eliminates adverse impact and is job-related.

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[1] The Urban Institute recently conducted several studies which suggest that entry level employment discrimination continues to be a reality in the work place. In a 1989 study conducted in Chicago and San Diego, Hispanic job seekers were treated less favorably in 31% of the 360 audits than their white counterparts. In a 1990 study conducted in Chicago and Washington, D.C., black job seekers were treated less favorably in 20% of the 476 hiring audits than their white counterparts. Moreover, the 1990 study suggested that the discrimination appears to be most severe in the jobs offering the highest wages and income potential, particularly white-collar clerical, sales and service jobs.

4. How will we coordinate the enforcement strategy among the relevant federal players? How will we set priorities? How will we coordinate with the private civil rights enforcement community? It is important that everyone offer their views about the coordination issue even though it, by definition, transcends each individual agency's responsibility.

RESPONSE

It is important that coordination exist among the federal agencies in executing a consolidated enforcement strategy, including the use of employment testing. In this regard, EEOC, Labor, Justice, Education and any other federal agencies that enforce EEO statutes and regulations should establish a coordinating committee to meet periodically to discuss joint program issues including implementation.

We propose that the Civil Rights Division convene such a committee and chair its operations. The Housing and Civil Enforcement Section in this Division has already successfully developed and implemented a comprehensive enforcement program utilizing testing in the fair housing area. We already have trained testing coordinators and are using innovative cost-saving methods such as the recruitment of volunteer testers from the Justice Department. This role would also fit within our efforts to work with other agencies and departments on a strategic enforcement plan in the area of civil rights.

5. How does our enforcement/testing strategy fit into our broader barriers-to-entry employment strategy?

RESPONSE

It fits in well and should become a priority for the federal EEO enforcement effort. We propose to undertake a pilot project to target the types of employers and jobs for which testing may be appropriate, with substantial input and assistance from the labor experts as we discussed. Jobs should be selected for testing that provide real opportunities for advancement. Testing should then be undertaken and a public announcement of the program should await results from the initial round of tests, in order to educate the public about entry level job discrimination and to solidify support for the program.

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We look forward to our meeting on June 16 to discuss these matters.

Sincerely,

Deval L. Patrick KS

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

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NATIONAL COMMISSION FOR EMPLOYMENT POLICY
1522 K Street, NW, Suite 300
Washington, D.C. 20005

(202) 724-1545

June 16, 1994

MEMORANDUM FOR: Sheryll Cashin, Director
National Economic Council

FROM: William Spriggs Bill

SUBJECT: Justification for Anti-Discrimination Policy

Following the meeting of your ETR group last Thursday, Paul Dimond suggested that I draft a one page memo to you on how to position an anti-discrimination policy. This is my stab at that.

Anti-discrimination should not be confused with "underclass." So, policies aimed at young African American males, should not confuse anti-discrimination policies — aimed at the vast majority of African Americans — with "underclass" programs aimed at a minority. I think the policy should be focused, and so I offer three key points.

1. Using data from this past April, among out-of-school youth (ages 16 to 24), there are more African Americans with some college, or who are college graduates than there are high school dropouts. Because the labor force participation of high school dropouts is so low, there are more African Americans in the labor force with some college course work than there are dropouts. The unemployment rate among this group was 16.1 percent. For similarly educated whites, the unemployment rate was 6.7. For white high school graduates, with no college course work, the unemployment rate was 10.3, still significantly lower than for African Americans with some college!

2. The Administration's general labor policy is to increase the share of young workers with some college. Among African Americans this is already a larger group than high school dropouts. So, the Administration's general policy will appear hollow in the African American community if skill attainment does not result in economic progress.

3. An Affirmative Action policy must be rooted in the Administration's general labor policy, not as an agenda piece that ignores that broader mission. This is because if the improvement in skills in the African American community do not

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translate to economic gain, then it raises serious questions about the efficacy of the Administration's program for all workers. In 1970, 22.2 percent of African Americans between the ages of 14 and 24 were high school dropouts. By 1991 that number had declined to 11.3 percent, a 49 percent reduction. Among white youth in that age group, the dropout rate dropped from 10.8 to 10.5 percent. The increase in the years of schooling were also marked by rapid increase in the measured quality of schooling based on the National Assessment for Educational Progress. In 1978, while 96 percent of white 17 year olds reached a math proficiency level of "numerical operations and beginning problem solving," 71 percent of African Americans were at that level. By 1990, the gap was 98 percent for white youngsters and 92 percent for African Americans. In reading proficiency, in 1978, 86 percent of white 17 year olds achieved a level so they could "interrelate ideas and make generalizations," while 43 percent of African Americans reached that level. By 1990 the gap was 88 percent of whites to 69 percent for African Americans. Yet despite rapid increases in school quality, and a rapid drop in the share of dropouts, the ratio of the black to white unemployment rate for out-of-school youth *increased* from 1.9 in 1970 to 2.4 last year. The trend in earnings is also in the wrong direction. John Bound and Richard Freeman report the gap in wages for young men grew at the rate of 0.56 percentage points per year from 1973 to 1989. These figures run contour to the predictions on which the Administration's labor market policies are based. So, advocates of skill enhancement must have an Affirmative Action plan to insure that the rewards they predict come true.

The third point I think is the key point. An Affirmative Action policy is in direct line with the President's joint responsibility of individuals with the government. People who play by the rules must be treated fairly. African Americans who buy into the Administration's skill enhancement strategy must be assured that skill enhancement will be equally rewarded.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Joseph N. Cleary to Ellen J. Vargyas re: Age Limitations for Law Enforcement Officers and Firefighters (6 pages)	2/2/1995	P5 8018

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9589

FOLDER TITLE:
[Age Discrimination in Employment Act]

Dana Simmons

ds47

RESTRICTION CODES

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]

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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]
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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]
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Initials: DMS Date: 8-29-05

Memorandum

TO: Ellen J. Vargyas
Legal Counsel

Thru: Elizabeth M. Thornton
Deputy Legal Counsel

From: Joseph N. Cleary JNC
Director
ADEA Division

Subj: Age Limitations for Law Enforcement Officers and Firefighters

The ADEA contains an affirmative defense in section 4 (f) (1) of the Act which provides that it is not unlawful to take any action otherwise prohibited where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. From the transfer of ADEA enforcement from the Department of Labor to the Commission in 1979 until January of 1987, this so called "BFOQ" exemption was the focus of considerable litigation brought by the Commission against State and local governments who were using age limitations for hiring and retiring police officers and firefighters. In a majority of cases brought by the Commission, our position prevailed and the defendant was required by the court to abandon the use of age limitations. There were, however, other cases in which the courts accepted the defendant's position that age was in fact a BFOQ for making hiring and retirement decisions in the public safety sector.

In 1986 Congress called a halt to EEOC enforcement efforts against State and local police and fire departments by passage of the Age Discrimination in Employment Amendments of that year, Public Law No. 99-592. The amendments provided, in pertinent part, that it would not be unlawful for a State or local government to fail to hire or to discharge an individual for a law enforcement (this category includes correctional officers) or firefighter position because of such individual's age, provided that the age limitation being used was in place under State or local law on March 3, 1983. This exemption was to remain in effect for a seven year period beginning on January 1, 1987 through December 31, 1993. During this period the Commission and the Department of Labor jointly were to conduct a study---

(A) to determine whether physical and mental fitness tests are valid measurements of the ability and competency of police officers and firefighters to perform the requirements of their jobs;

(B) if such tests were found, to determine which particular types of tests most effectively measure ability;

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(C) to develop recommendations with respect to specific standards that such tests, and the administration of such tests should satisfy;

(D) to submit a report on the study to the Speaker of the House of Representatives and the President pro tempore of the Senate that included a description of the results of the study, and a statement of the recommendations developed under (C) above; and

(E) to propose, not later than five years after the date of enactment of the amendments, guidelines for the administration and use of physical and mental fitness tests to measure the ability and competency of police officers and firefighters to perform the requirements of their jobs.

The Commission and the Department of Labor selected the Center for Applied Behavioral Sciences at Pennsylvania State University to conduct the study. Due to the complexity of planning and organizing the study and delays brought about by congressional funding deficiences, the study was not completed and transmitted to Congress until October 1992. The conclusions reached in the study were fully consistent with the position that the Commission had taken over the many years when it had been challenging the use of age limitations in public safety occupations. Specifically, the study concluded that the risk of experiencing a catastrophic medical event (e.g., heart attack) while actually performing a task affecting public safety is so small as to eliminate this factor in the debate regarding age-based retirement. Further, accumulated deficits in abilities are only marginally associated with chronological age and can be documented with available tests that are better predictors than age. Consequently, the study recommended that the exemption be permitted to expire and that police and fire occupations be treated like all others covered by the ADEA.

The Commission and the Department of Labor transmitted the study to Congress but neither agency offered specific recommendations. The conclusions reached and recommendations set out in the study, conducted by an array of experts on the subjects under review and further evaluated by an independent panel of experts on aging, physiology, and medicine, were believed to constitute recommendations that stood on their own. It was also believed better to let the study speak for itself because of its potential for use in future litigation under the ADEA involving BFOQ issues. In sum, there was little or nothing that the Commission could add to the exhaustive study, and good reason to avoid creating any impression that EEOC had played a role in shaping the conclusions reached -- something that it clearly had not done.

Nor did the Commission propose guidelines for the administration and use of physical and mental fitness tests. In a sense, the guidelines requirement had already been met. The general testing and selection procedure guidelines long utilized by the Commission -- the Uniform Guidelines on Employee Selection Procedures (29 C.F.R. sec. 1607) -- had been referenced as the applicable standards for the use of tests under the ADEA since 1981 (29 C.F.R.

sec. 1625.7 (d)). Although these guidelines were in full force and effect, they had been under review by prior administrations for most of the 80s and the early 90s. Because of this ongoing review there was a reluctance to reaffirm the statement contained in sec. 1625.7 (d). Shortly after the study was transmitted to Congress, the Commission voted to discontinue its review of the guidelines. This action assured that the guidelines would continue to be used and would likely be appropriate for validating public safety fitness testing. Staff had begun assessments of the uniform guidelines for use in the public safety area, but before anything was finalized the temporary exemption had expired and bills to restore the temporary exemption soon followed in the House of Representatives. Given these developments, and the presence of the Commission statement already applying the guidelines to ADEA enforcement, no further resources were spent on the matter.

It appears that soon after the study was transmitted to Congress and its recommendations and conclusions were made public, an intense lobbying effort to retain the exemption began. Several powerful organizations representing management and labor were soon expressing strong opposition to the elimination of age as a criterion for police and fire hiring and retirement decisions. As early as July of 1993, the Commission was asked to review H.R. 2722, a bill which would have restored and in fact broadened the ability of police and fire departments to use age limitations. Although former Chairman Gallegos expressed the view that restoring the exemption would be inconsistent with (i) the results of the study, (ii) EEOC's past enforcement efforts in litigation, and (iii) the objective of the ADEA to eliminate arbitrary age discrimination, a bill restoring the exemption passed the House with overwhelming support in November of 1993. The effort to restore the exemption was blocked, virtually singlehandedly, by Senator Metzenbaum who was said to have vowed to filibuster against any efforts on the Senate side to follow the same path as that taken by the House. After Senator Metzenbaum succeeded in derailing the efforts to restore the exemption, the International Association of Firefighters promised to withhold all future campaign contributions to Democratic senators until such time as the exemption was restored.

During the debate over whether to restore the exemption, proponents of restoration were harshly critical of the study and EEOC's failure to promulgate guidelines. They also questioned EEOC's alleged failure to challenge the use of age limitations for public safety officers who are employed by the federal government. Most of these attacks appeared to be nothing more than a convenient cover for a deep seated opposition to the use of testing in place of age limitations. To illustrate, efforts were made to convince Congress that EEOC's charge was to develop a uniform national test accompanied with the appropriate scoring mechanisms -- in other words a safe harbor test that could be used everywhere and at all times without fear of challenge. The Commission never considered this to be its charge and indeed there is no support for that view in the legislation itself. The law required EEOC to "determine whether physical and mental fitness tests are valid measurements of the ability and competency of police officers and fire fighters to perform the requirements of their jobs," to "determine which particular types of tests most effectively measure such ability and competency ," and to "develop recommendations with respect to specific standards that such tests and the administration of such tests should satisfy." These requirements do not call for a single safe harbor test. On the other hand, the study referred to various types of tests that could be used and contained numerous references to appropriate validation standards. Other charges against the Commission or the study were similarly lacking in substance. For example, there is nothing that the Commission could do about challenging age limitations that exist in federal sector employment for the simple reason that those limitations have been specifically authorized by Congress. See 5 U.S.C. secs. 3307 and 8335. When Congress amended the ADEA in 1978 to remove the upper age cap for most federal employees, it noted these separate statutory provisions for federal public safety personnel and made clear that they were not to be invalidated by the ADEA.

Proponents of using age limitations for police and fire occupations continue to insist with considerable vehemence that such limitations are called for to protect the public safety. There is considerable evidence available to rebut this contention, the foremost example being the Penn State Study. It is also clear, however, that the departments have other significant concerns that surface from time to time. Among those concerns are the following: (i) testing is an uncertain science and its use will lead to at least as much expensive litigation as did the prior use of age limitations under the BFOQ standard; (ii) testing will hurt many officers who are unable to pass the tests and who do not have the requisite years of service for retirement; (iii) taking action against people who cannot pass physical tests may present problems under the ADA; (iv) minorities and women will suffer at the entry level if departments are unable to retire older personnel at a designated age; (v) if departments are required to keep personnel as long as they are able to pass a test, the generous 20 year and out pension systems for public safety employees will no longer be available -- the public will demand that they be replaced with the more routine less expensive civilian sector pension systems; (vi) departments will face constant litigation brought by 50 year old applicants claiming that they were not hired on account of age; (vii) on the other hand, if departments hire a 50 year old applicant, it is unrealistic to expect that person to serve 20 years on the street as a law enforcement officer; (viii) departments are irritated by the fact that Congress has contemplated removing age limitations in public safety occupations for State and local governments, while at the same time permitting federal sector employers to use age limitations; (ix) fitness testing and fitness programs are viewed by many as expensive to implement and maintain -- Congress has opened the door to requiring such programs at a time when many State and local governments are experiencing budget deficits; (x) on a related cost concern, some contend that hiring and retaining older individuals will lead to

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increased workers compensation and disability claims, and will place service retirement plans in danger of insolvency.

Regardless of whether public safety or other less dramatic factors underlie the opposition to removing age limitations from public safety employment decisions, the reality is that strong opposition continues to exist. On January 24, 1995, a hearing chaired by Congressman Fawell heard testimony on whether the exemption should be restored. Those in favor of restoring the exemption included spokespersons on behalf of police and fire organizations and the National League of Cities. These witnesses contended that labor and management are united on the need to restore the exemption. The police and fire spokespersons made the claim that the overwhelming majority of rank and file public safety officers strongly support the use of age limitations. Judging from the comments made by committee members from both parties, there appears to be a consensus, at least on the House side, in support of restoring the exemption. It is expected that Chairman Fawell will soon introduce a bill that, if passed, would implement the views expressed by those favoring the use of age limitations. There have been some indications that the Senate is far more ambivalent about the need to use age limitations. Thus, the outcome on this policy debate remains uncertain.

If the Commission is invited to comment on Chairman Fawell's proposal, as we expect it will, the Office of Legal Counsel would recommend that the Commission continue to oppose restoration of the exemption. The reasons for our recommendation can be stated concisely. The purpose of the ADEA is the elimination of arbitrary age discrimination in employment and the elimination of employment actions based upon stereotypical assumptions regarding the capabilities of older individuals. Prior to enactment of the temporary exemption in 1986, the Commission was successful in convincing most courts that age did not represent a BFOQ in the area of public safety occupations. Nothing whatever appears in the Penn State Study to suggest that the Commission's or the courts that agreed with the Commission's view were wrong. Should the Commission agree with this point of view, we have attached for your consideration a letter signed by former Chairman Gallegos expressing Commission opposition to H.R. 2722. In our view, this letter sets out the principal reasons for Commission opposition.

A final point warrants discussion. If for "bigger picture" reasons, the administration prefers that the Commission not take a position on the merits of this issue, we would still urge the Commission to oppose any efforts by the Congress to require a second Commission sponsored study. We take this position because we believe the first study provides answers to the critical questions asked in 1986, that is, age is not a good predictor of ability to perform public safety jobs -- tests are available that are practical and effective and better predictors of performance -- such tests can be validated under standards such as those contained in the Uniform Guidelines. To conduct a second study would be a needless expenditure of public funds, and to the extent that the

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objective of a second study is a safe harbor test, that concept would go against the grain of fundamental principles of test validation. Users of tests must find testing mechanisms that are tailored to the specific performance criteria needed to perform the specific jobs in question.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. draft	Affirmative Action Review (3 pages)	7/11/1995	P5 8019

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9590

FOLDER TITLE:

[Affirmative Action]

Dana Simmons

ds45

RESTRICTION CODES

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]
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RR. Document will be reviewed upon request.

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

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Draft July 11, 1995 **Master15.mwn**

8019

AFFIRMATIVE ACTION REVIEW
OUTLINE OF THE REPORT

[approximate]

1. **INTRODUCTION**
   - 1.1 Purposes of the Review
   - 1.2. Analytical framework
   - 1.3 The *Adarand* Review

2. **AFFIRMATIVE ACTION: HISTORY AND RATIONALE**
   - 2.1 Background
   - 2.2 Fair Employment -- The Executive Order
   - 2.3 Fair Employment -- The Enforcement of Title VII
   - 2.4 Education
   - 2.5 A Note on Affirmative Action for Other Minorities

3. **HAS AFFIRMATIVE ACTION WORKED?**
   - 3.1 Review of the empirical literature, in summary
   - 3.2 Effect on earnings
   - 3.2 Effect on employment

4. **THE FIRST RATIONALE FOR AFFIRMATIVE ACTION: THE CONTINUING PROBLEM OF DISCRIMINATION**
   - 3.1. Evidence of continuing discrimination
   - 3.2. Results from random testing
   - 3.3 Continuing disparities in economic status

5. **REVIEW OF THE PROGRAMS -- An Initial Taxonomy**

6. **OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS** *[Section 7 in this printout]*
   - 6.1 Concepts & Principles
   - 6.2 Policies & Practices
   - 6.3 Performance & Effects
   - 6.4 A Note on OFCCP Anti-Discrimination Enforcement Functions
   - 6.5 Conclusions and recommendations

COPY

Michael — I didn't do these — CAE.

antidiscrimination enforcement, decreasi ... s. On the other hand, the fact that we observe so much continuing ... inequality of opportunity does not imply that affirmative action is ... y one tool among many that must play a part in creating opportu...

1.2.3. The second test: is the program fair?

For each such federal program, at the President's direction, the Review team asked each agency head to apply the following test of essential fairness:

(1) **Not quotas.** Quotas are intrinsically rigid, and intrinsically relegate qualifications and other factors to secondary status. Does the program effectively avoid quotas for inclusion of minorities or women?

(2) **Race-Neutral Options.** In a program's design or reconsideration, have options for using various *race-neutral decision factors* been analyzed and reasonably rejected, given the available information and experience, because those alternatives are unlikely to be acceptably effective in advancing the program objectives?

(3) **Flexible.** If race-neutral measures will not work, is the measure applied in a flexible manner, and were *less extensive or intrusive uses of race* analyzed and rejected based on a determination that they would not have been acceptably effective?

(4) **Transitional.** Is the measure *limited in duration*, and does the administering agency periodically review the continuing need for the measure?

(5) **Balanced.** Is the *effect on nonbeneficiaries* sufficiently small and diffuse so as not to unduly burden their opportunities? In other words, are other jobs or other similar benefits available, or is the result of the program to close off an irreplaceable benefit?

1.2.4. Affirmative Action: The Right Way and The Wrong Way

In short, there is a right way to do affirmative action, and a wrong way. This review seeks to scrutinize many of the existing programs to ensure that they are being done the "right way." This means two things: they must actually work to effectuate the goals of fighting discrimination and encouraging inclusion; and they must be fair -- i.e., no unqualified person can be preferred over another qualified person in the name of affirmative action, decisions will not be made basis of race or gender except when there is a special justification for doing so, and these measures will be transitional. Only by applying these principles can we *aggressively and simultaneously* pursue remedies to discrimination, the inclusion we need in order to strengthen our institutions and our economy, *and* essential fairness to all.

1.3 The Adarand case

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While some of these factors bear a resemblance to factors relevant to the Adarand inquiry, the policy inquiry undertaken by this review is distinct from the

Move to p. 2

On June 12, 1995, in the case of *Adarand Constuctors, Inc. v. Pena* ([cite]), the United States Supreme Court issued a major ruling affecting federal affirmative action programs. Most significantly, the Court held that federal affirmative action programs, under the equal protection component of the Fifth Amendment's Due Process Clause, must be reviewed by the courts using "strict scrutiny." To surmount this hurdle, the program must be shown to meet a "compelling governmental interest," and must be "narrowly tailored to meet that interest." This is a more demanding legal test than had previously been applied to federal affirmative action programs, and as a practical matter it will require the administration, Congress and the courts to engage in an analysis of federal programs across the board.

The Court's decision, naturally, concerned what is permissible under the Constitution, and the way in which courts can examine that question. The review directed by the President, however, was concerned with policy. In other words, the President asked the review to analyze whether a particular program was wise social policy, rather than whether it was constitutional. However, the questions asked by the President are not dissimilar to the questions that will have to be asked by any post-*Adarand* analysis of programs. In particular, this review's analysis of the "fairness" of particular programs tracks the analysis done by courts for whether a program is "narrowly tailored."

some of

~~However~~ While the questions asked by the President may be similar, the nature of the answers required are different. To survive the "strict scrutiny" mandated by the Court, the justifications both for a compelling government interest and narrow tailoring require a ~~greater~~ high degree of empirical rigor ~~than was practical or necessary to make the general policy decisions envisioned by this report~~.

Therefore, [...] The analysis of programs in this report is not intended to bear in any way on the legal determination whether a program meets the constitutional test announced in Adarand.

2. CONTEXT FOR THE REVIEW

Neither this review nor the current debate over affirmative action occurs in a historical vacuum. This section sets forth the context for this review, and, indeed, for the current set of affirmative action programs. First, it examines the history of the creation of modern affirmative action programs, which was a result of the efforts to overturn two centuries of discrimination. Then, it examines whether such discrimination persists today, requiring a continuation of affirmative action. Finally, it briefly discusses the Clinton Administration's actions leading up to this review on the area of affirmative action.

2.1.1 *Background*

Current affirmative action programs are best understood as part of our national effort to redress racial inequality. Some affirmative action efforts began before the great burst of civil rights statutes in the 1950s and 1960s. But these programs did not truly take hold until it

Assistant Attorney Generals

The standards for that inquiry are laid out more fully in the memorandum of June 28, 1995, ...

Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. briefing paper	Briefing Materials regarding the Voting Rights Act (1 page)	n.d.	P2, P5

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9593

FOLDER TITLE:

[Justice, Department of - Confirmation Briefing Materials]

Dana Simmons

ds77

RESTRICTION CODES

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

P1 National Security Classified Information [(a)(1) of the PRA]
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RR. Document will be reviewed upon request.

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

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political exclusion that continued into the 1980's. Those who think that egregious voting rights violations are a thing of the past ought to read the Committee Reports issued by Congress in connection with the 1982 amendments. In particular, the Report of this Committee -- the Senate Judiciary Committee (No. 97-417, May 25, 1982) -- documents widespread, continued, serious exclusion of minorities from political participation. After its in-depth re-examination, Congress came to the same conclusion as the Zimmer courts and enacted the 1982 amendments.

When I first started thinking about voting rights and remedies, it was not on a clean slate, or as a theoretical matter. I base my support of the "totality of the circumstances" standard on the wisdom of many federal courts and Congress.

My own experience has shown me that the "totality of the circumstances" standard is a useful tool. In the case I litigated against the State of Arkansas, we faced a situation where voter registration opportunities were severely limited. All voters suffered from the fact that voter registration locations often were difficult to get to, that these locations had limited hours of operation, etc. However, African American voters felt these restrictions most harshly, because of a long prior history of exclusion from the political process and other circumstances. Regardless of the intent, the Arkansas' restrictions, combined other local facts and circumstances, had the effect of disadvantaging African Americans more than whites. I think situations like this are probably what led this Committee, the Senate Judiciary Committee to write in its 1981 Report on Voting Rights Act amendments: "The intent test focuses on the wrong question and places an unacceptably difficult burden upon plaintiffs in voting rights cases."[1]

Key Points: Use "totality of the circumstances," not "results" to describe this standard.

This standard was developed by numerous federal courts faced with real situations of political exclusion. It ultimately was adopted by Congress, with broad bi-partisan support and signed into law by President Reagan. It is a practical response to real problems.

[1] S. Rep. No. 97-417, at 16.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Donsia Strong & Stephen Warnath to Phil Lader re: EEOC Hearing (2 pages)		P5

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9589

FOLDER TITLE:

[Harassment - Religious and Consolidated Guidelines]

Dana Simmons

ds76

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THE WHITE HOUSE

WASHINGTON

JUNE 3, 1994

MEMORANDUM FOR PHIL LADER

FROM DONSIA STRONG, DPC
STEVE WARNATH, DPC

SUBJECT EEOC HEARING

CC: CAROL H. RASCO
TRACEY THORNTON, OLA

Senator Heflin has scheduled a hearing on June 9, to examine the Proposed Consolidated Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability. He has requested that the EEOC testify. As you are aware, the Chairman is not a Clinton Administration appointee and, in fact, will be on travel on the hearing date. It is our understanding that the Chairman is reticent about testifying. There is no other appropriate staff to testify.

This memo has been prepared to apprise you of the situation and seek guidance on how we should proceed.

BACKGROUND

The proposed guidelines would inform employers and employees of their respective rights and responsibilities as they relate to the categories protected by Title VII (race, religion, national origin, gender, age, color or disability).

The impetus for the guidelines was a proposal by a former Commissioner to issue guidelines on racial harassment because, at that time, the EEOC had promulgated guidelines for only sexual and national origin harassment. The past Commission was persuaded to issue consolidated guidelines which would provide guidance for all the protected categories.

The EEOC Office of Legal Counsel sought to consolidate twenty years of judicial and Commission precedent, the existing guidelines and the Commission's Policy Guidance on Sexual Harassment that was issued in the 1990. The guidelines were intended to explain and interpret existing law, not to create new law.

On October 1, 1993, the Commission published the guidelines for comments. The comment period ran for 60 days and EEOC received 86 comments. Shortly, after the comment period, several op-ed pieces ran which misconstrued the guidelines as banning religion from the workplace entirely. On February 24, EEOC staff then met with a coalition of religious groups from the right which resulted in the coalition calling for the removal of religion from guidelines.

In early March the Commission began to receive a large volume of mail and telephone calls expressing dissatisfaction with the inclusion of religion in the guidelines. The Commission extended the comment period until June 13, 1994. To date they have received about 5,000 comments.

Indeed, some of the issues taken with the guidelines have merit. However, to the extent that the guidelines do clarify current law and provide necessary guidance we should support them.

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We probably do not want to back away from the guidelines because those interested in the other protected categories and other religions are fully vested in this matter and alerted their Hill supporters. On March 16, EEOC staff met with religious and civil rights groups that support keeping religion in the guidelines.

We have asked Leg Affairs to contact Senator Heflin to determine whether the hearing can be postponed.

We agreed with EEOC that they prepare testimony which explains the intent of the guidelines and concedes where it is wrong. Steve and I suggest that the testimony state that the guidelines will be reviewed anew when the new commission is seated. Therefore, the EEOC witness can take all suggestions and suggest that the guidelines will be reviewed further and released for comment upon revision.

On the House side Rep. Wolf is threatening to hold up the Appropriations bill (which creates all other problems). The subcommittee markup is next week with full committee markup the following week. The chief committee staffer has suggested a compromise which we think is fine-- that a rider be included prohibiting the adoption of the guidelines until a commission is seated.

We need guidance on who should be testifying, who would be willing to talk to the incumbent to encourage him to testify (OMB? EEOC is an independent agency --Cheryl Mills is looking at how much the WH can discuss this hearing with them), when we may possibly have a chair (we understand we're in the last rounds), and if our strategy for Appropriations is ok. You may recall you resolved the last EEOC issue.

Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. briefing paper	Confirmation Issues Outline (partial) (1 page)	7/11/1994	P5

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9592

FOLDER TITLE:

[Equal Employment Opportunity Commission Confirmation Briefing Materials] [9]

Dana Simmons

ds75

RESTRICTION CODES

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

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Issues involving Commission Operations - cont.

- Performance Reviews/Awards - Chairman Major Owens' staff has complained about the reportedly large performance awards given to favored Commission staff, despite record poor performance by the agency.

- Improving Commission Service to Traditionally Underserved Communities - Refer to Serrano Amendment of the Civil Rights Act of 1991, which mandates that the EEOC conduct an education and outreach program for historically underserved communities.

- Commission's Technical Assistance Role - The Technical Assistance Revolving Fund was authorized in 1992 to establish a revolving fund to finance the cost of providing education, technical assistance, and training. The Fund's corpus was authorized through a transfer of $1,000,000 from the Commission's Salaries and Expenses appropriation. The activities sponsored by the Fund for a fee are meant to supplement basic informational materials and services provided free by the EEOC. The Fund became operational in FY 1993 and supported over 40 Technical Assistance Program Seminars (TAPS). These seminars were targeted almost exclusively to the employer community.

  AUTHOR'S NOTE: The Office of Management is administering this program and has made plans for a new division within that office, with additional staff positions. It is seen primarily as a fee generating opportunity. There is essentially no coordination with the Office of Communications and Legislative Affairs either in the development of the programs offered or the outreach/marketing plan. It is a good example of turf wars and self-interest undermining the overall mission of the agency. (Please excuse the editorializing -- ceg)

outline
cg:7/11/94-8:50pm

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. briefing paper	EEOC Confirmation Briefing Material (1 page)	n.d.	P5
002. briefing paper	EEOC Confirmation Briefing Material (1 page)	n.d.	P5

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9592

FOLDER TITLE:

[Equal Employment Opportunity Commission Confirmation Briefing Materials] [5]

Dana Simmons

ds67

RESTRICTION CODES

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Doe v. Mercy Hospital

Q. Doe v. Mercy Hospital is a lawsuit brought by a doctor who was denied operating privileges when Mercy Hospital learned that he was HIV positive. What is the Commission's involvement in this case, and what are your views on whether Dr. Doe would pose a direct threat to others if he performed surgery?

A. Dr. Doe has brought a suit in the Eastern District of Pennsylvania, alleging violations of the Rehabilitation Act and Title III of the Americans with Disabilities Act. At this point, I have no knowledge of what, if any, involvement EEOC has with his case. [**Confidential: Doe filed a charge with EEOC. A recommendation from the Office of General Counsel against litigation is currently before the Commission.**]

The direct threat defense is always case specific. Since I am not familiar with the facts of this case, I do not feel it is appropriate to comment.

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Charges Against the President, Governors, etc.

Q. I have received inquiries from constituents about charges they have pending against high-ranking city or state officials. [Alternatively: I have seen reports that some White House employees have brought discrimination charges against the White House] What will EEOC do with these charges?

Information: section 320 of the 1991 Civil Rights Act gives certain "presidential appointees" the right to file discrimination charges and section 321 gives certain policymaking appointees of state and local governments the right to file discrimination charges. Proposed EEOC regulations were sent to OMB, reviewed by White House counsel's office and then withdrawn from OMB at the White House's suggestion. They had a number of questions about the coverage and operation of section 320.

A. I have been advised that EEOC is working on operational instructions for the processing of these types of charges. I will ensure that these charges are treated carefully and expeditiously by EEOC. We will work with OMB on whatever regulatory guidance needs to be developed for these types of charges.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. draft	Remarks by Vice President Al Gore - July 12, 1994 - Chicago, Illinois (6 pages)	7/12/1994	P5

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9592

FOLDER TITLE:

[Equal Employment Opportunity Commission Confirmation Briefing Materials] [4]

Dana Simmons

ds66

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Steve:
For internal use only,
according to Gore's Office.
- Willie

Steve:
Gore followed
this text for the
most part. Note
that he deleted the
section about Haiti. WJE

COPY

DRAFT

Remarks
by
Vice President Al Gore
to
National Association for the Advancement
of
Colored People
Chicago, Illinois
July 12, 1994

(ACKNOWLEDGEMENTS FROM ADVANCE)

After President Kennedy's assassination, President Johnson addressed a joint session of Congress, and reminded everyone that no eulogy or memorial could honor Kennedy more than passage of the Civil Rights bill.

"We have talked for one hundred years or more," Johnson said. "Yes, it is now time to write the next chapter."

Thirty years ago this month, that next chapter -- the Civil Rights Act -- became law.

The time had come, but not just for celebration.

For who could think the work was done when -- less than a year after Medgar Evers' murder -- racial violence was still so prevalent; when churches were burned simply because African-Americans wanted to practice a basic right -- the right to vote? And who could think the work was done when during the same month Johnson signed that landmark legislation, the search continued for three missing volunteers from Freedom Summer -- two white, one black -- along the red clay roads in towns like Meridian and Philadelphia, Mississippi?

We all know the tragic story of Jim Chaney, Andrew Goodman, and Mickey Schwerner. But what is too often forgotten -- not by the people in this room -- is what happened after these three brave young men disappeared.

Skepticism, doubt and fear didn't stop the activists of Freedom Summer. Few volunteers packed their bags and went home. African-Americans did not give up the fight. Intimidation served only to motivate.

"Whenever an incident like this happens," one volunteer said, "everyone reacts the same way. They become more and more dedicated."

Words that reflect your philosophy.

It is a philosophy you've been putting into practice for 85 years since the NAACP was organized in New York.

Whether in the halls of Congress, courthouses like Topeka or Little Rock, on the streets of small towns in Mississippi or the inner cities of America ... you've dedicated yourselves to change. Often alone, you've refused to be intimidated. You fought for principle. You fought to win.

In a sense, that is the philosophy of this Administration. That's why, when President Clinton searches for appointees, he looks for those who hold this philosophy close to their heart.

COPY

Cabinet members like Mike Espy and Hazel O'Leary and Ron Brown and Lee Brown and Jesse Brown ... Surgeon General Jocelyn Elders.

They've spent their lives refusing to be intimidated... fighting for principle.

And remember last year when I spoke in Indianapolis and told you we would have a great Assistant Attorney General for Civil Rights? Deval Patrick has been just that: great.

He'll talk about these issues later today.

But let me tell you how much he's done to galvanize civil rights during the short time he's been in Washington.

He's been there when it comes to voting rights. He's organized a voting rights task force and his division is devoting more resources to this issue than any in history.

He's been there when restaurants like Denny's tried to discriminate against African-American customers.

He's been there for those who want a fair shake when it comes to housing -- the Justice Department increased the number of fair housing cases this year by 35%.

We can't allow the clock to be turned back. We can't allow people to be denied equal opportunity because of the color of their skin.

I've mentioned Deval Patrick and Mike Espy and Jesse Brown to make the point that the President was serious when he said he wanted an Administration that "looked like America.

But let's make no mistake about it. What counts most is not their diversity but their diligence, dedication and desire to make this country even greater. Without their character -- without the excellence they bring everyday to their jobs, we couldn't possibly have had such a great year and a half.

And yes, we have had a great year and a half.

You made an investment in Clinton/Gore, and like all good investments... this one is paying off!

Remember what things were like in 1992?

During the campaign I used to say everything that should be down was up -- and everything that should be up was down. Housing starts, down. Job creation, down. Growth, down. Consumer confidence, down. Inflation, up. Deficit, up. Unemployment, up.

And I would say we were going to make things right side up again.

We have.

Unemployment's down. The deficit is down. Housing starts are up. Growth is up. Jobs are up.

Despair is down. And hope is up. Your investment is paying off! We're bringing change to America!

Change hasn't always come easy. For every vote like Head Start -- which passed 98 - 1 in the Senate and 393 - 20 in the House -- there have been some votes we've had to fight tooth and nail for. And since I spoke to you last year, even I've had the opportunity to vote. [EVERY TIME I VOTE, WE WIN ROUTINE]

But, I can't take all the credit. Politics is a team sport. And this Administration's accomplishments show what we can do when we pull together as a team.

Let's talk about one issue. Jobs.

COPY

When George Bush was President, we were losing 10,000 manufacturing jobs a week. Unemployment was at 7.4% -- and that didn't count those working part-time or those too discouraged to work.

Well, since Inauguration Day we've created close to 3.8 million jobs.

More new businesses started in 1993 than any year since we started counting.

And we did a lot more.

We passed the single largest deficit-cutting plan in history. It will reduce the deficit by close to 5 billion over five years.

Remember how you used to fight for good legislation only to see it vetoed? Now the President signs those bills.

Motor voter? George Bush vetoed it. NAACP supported it. Bill Clinton signed it into law!

Family and Medical Leave? George Bush vetoed that too. NAACP pushed for it. And Bill Clinton signed it!!

Bill Clinton's also a man who believes that no one who works full time should live in poverty. So we expanded the Earned Income Tax Credit (EITC), a credit which will increase living standards for 20 million American families.

And what about education?

We've increased funding for Head Start. We've created the Historically Black College and University Capital Financing Program. We've passed National Service. We passed the Student Loan Reform Act of 1993. And we set forth "Goals 2000."

You invested in us, and we're paying back by investing in all of our children!

But as far as we've come, there's still so much to do.

CRIME

We have to do more when it comes to crime. Just look at the newspaper. Children who are afraid to walk to school. Children who sleep in bathtubs to protect themselves against drive-by shootings. A few months ago, children, just blocks from the White House, had their chemistry class interrupted with a barrage of gunfire.

We're working hard to turn this around. The Brady Law and the Assault Weapons Ban. 100 thousand more cops on the beat.

But we also know that gun control and more policemen isn't a cureall. We will not solve the problem of crime by focussing just on locking people up.

We have to prevent crime.

Yesterday, I was at a Conference that looked at the ways we can strengthen families in America. I go to this Conference every year.

It's a chance to listen not just to experts but to people from every walk of life.

Yesterday we talked about fathers and fatherhood. 40% of children in America don't live with their biological father. A lot more live with fathers who are unable to give them the emotional support they need.

I believe that the key to preventing crime is a strong, solid family. But we can't look at family issues in isolation. We need to look at ways to create safe streets for families to walk on ... ways to attract business so there are jobs for people willing to work ... schools for children eager to learn.

That's why we're so proud of our Community Empowerment program.

We asked communities all over America to design their own plans for revitalization. We asked for plans that would look at all these issues. The plans are in. Help is underway. We're going to help communities help themselves. That's how we bring families together. That's how we give them the power to <u>stay</u> together.

<u>HEALTH CARE</u>

We also have a lot of work to do when it comes to health care.

You know all about the 37 million Americans without coverage and the million more who are underinsured. We have a health care system that will cost each American family $14,000 a year by the year 2000.

We can't afford it.

And you know that every crisis hits minorities and low income households the hardest. Heath care is no exception. African-Americans have twice as many low birth weight babies than whites. African-Americans have considerably less access to prenatal care. And the life expectancy of African-Americans is close to ten years less than that of whites.

You hear a lot of talk about people losing insurance because of "preexistent conditions.

High blood pressure is one. Diabetes is another. There's no question we need a system that guarantees coverage to the uninsured and the unemployed... and the working poor. Those who have been left out of the system.

That's why you endorsed the Clinton health care plan.

Your endorsement was a great shot in the arm for all of us who want a health care plan for America. Because the NAACP fights for people. You are not just another interest group. You're an army on the side of right.

So, thank you for that endorsement.

Now, there are still those who will ask, "What good is universal coverage when there are no providers? What good is coverage when hospitals are overrun and clinics overcrowded?"

Let me tell you what good it is.

Universal coverage will attract providers. With universal coverage, providers will look at poor urban and rural areas and they will see people holding cards -- cards that ensure health care coverage that can't be taken away. They'll see places where they can make money. New clinics and new hospitals -- with more providers -- will not only ensure a healthier people, but it will go a long way in revitalizing the communities I just spoke about.

That's why it's so important that your support of the Clinton health care plan doesn't stop with your endorsement. Now it's time to write letters... get on the phone... tell your congressmen not to come how without a health care plan! Tell them to give America what it deserves... the same guaranteed health care that each and every one of them has, a plan paid for in large part by their employers. And that means you.

There is one other area I want to bring up with you, today.

It's been almost three years since the military overthrew Jean-Bertrand Aristide, the democratically elected President of our neighbor to the South.

Progress has been too slow. But we have made progress --- especially since the President appointed Bill Gray to head up the Haiti Task Force, a man whose dedication to justice characterizes his life, whether on the House Floor or the pulpit of a Baptist Church.

And we have served notice ont he Haitian military: they must step aside and permit restoration of democracy to their country. We cannot tolerate a regime that denies democracy and civil rights to its own people.

Health care... crime... community empowerment... prosperity at home... democracy abroad.

It's an ambitious agenda. There are those who think its too ambitious. They think we've bitten off more than we can chew.

To those who doubt, I ask you to think back thirty years.

Think back to those days in 1964 when African-Americans couldn't even do something as basic as casting a ballot. Now, when the Freedom Summer veterans go back to Meridian, Mississippi, there are welcomed by African-American state troopers and they see signs that say Martin Luther King Drive.

And think back to something else going on in 1964: thousands of miles away from America. It was in a South African courtroom, where a young man named Nelson Mandela was being sentenced to prison.

Who would have thought in 1964 -- or 1984 -- that Nelson Mandela would raise his right hand and take the oath of office as President of a new South Africa?

I wish you could have been with me to witness it last month: the thousands of cheering Africans, black and white; the jets flying over, contrails in all the colors of the new South African flag; the tears of joy streaming down faces of those fought so long to end injustice.

The victory in South Africa was the victory of South Africans. But it was also a victory for you. You marched. You demonstrated. You helped the United States become a force for freedom when it seemed to side with those who would deny freedom.

Who can look at what happened in Pretoria last month and believe change is impossible in Haiti? Or in the United States?

In the time that lies ahead, join us. Help Bill Clinton finish the job <u>he</u> started. Let us bring jobs to those who are without work, health care to those who have none, safe streets to those who are afraid even to walk in their own neighborhood, power to communities who want to control their own destiny.

The call to found the NAACP was issued in 1909, on Lincoln's 100th birthday. It talked about what Lincoln would find if he had come back on that day: He would see a Supreme Court that "refused to pass on the disenfranchisment of millions ... He would see black men and women for whose freedom a hundred thousand soldiers gave their lives, segregated in railway stations and places of entertainment; he would observe that State after State declines to do its elementary duty in preparing the Negro through education."

Whether we look back to those meeting in 1909 in New York City ... or those travelling on busses through the South in 1964 we see stories of heroism, of fighting against the odds, and of sacrifice for generations ahead.

Let us look back to salute those who fought for justice in their time, and rededicate ourselves to the fight for justice in our own.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	Claire Gonzales to The Honorable Elton Gallegly (partial) (2 pages)	n.d.	P6/b(6)
002. report	Confirmation Issues Outline (partial) (2 pages)	7/12/1994	P5
003. memo	Peter Yu to Robert Rubin re: Affirmative Action & Procurement Reform (2 pages)	9/28/1993	P5

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9592

FOLDER TITLE:

[Equal Employment Opportunity Commission Confirmation Briefing Materials] [2]

ds56

RESTRICTION CODES

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]
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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)]

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Issues involving Commission Operations - cont.

- Controversial Enforcement Policies -

    - **Full Investigation**

    - **Full Relief** (v. lesser voluntary settlements)

    - **Emphasis of Individual Charges over Systemic/Class**

- Mission of the Agency - current view is solely law enforcement focus, no education /outreach focus and no assertion of federal eeo leadership role

- Jurisdiction/Autonomy of Field Offices - all litigation decisions have to be made by HQ, field offices cannot proceed on their own

- State & Local FEPA Worksharing Contracts - Under Title VII, the EEOC must contract with qualifying State and Local Fair Employment Practices Agencies (FEPAs) to process charges within the FEPAs jurisdictions. The quality of FEPA performance is a constant issue in Congressional oversight. As noted in the Transition Report, new FEPAs charge that contracts are not awarded competitively and, therefore, there is little incentive for the FEPAs with contracts to perform well. Those FEPAs in turn charge that they are provided with inadequate resources to perform their responsibilities.

    *** [MEMO ON FEPAs TO COME]**

- Tribal Employment Rights Organizations (TEROs) - EEOC contracts with TEROs, which are akin to FEPAs, to process charges on Indian Reservations. The program is relatively new and small, with little attention having been given to it until Acting Chairman Gallegos.

    [See attached memorandum on TEROs]

- Computer Capacity - Charge/Litigation Tracking Systems -

    [See attached memorandum on EEOC's Computer Systems]

COPY

Issues involving Commission Operations - cont.

- Performance Reviews/Awards - Chairman Major Owens' staff has complained about the reportedly large performance awards given to favored Commission staff, despite record poor performance by the agency.

- Improving Commission Service to Traditionally Underserved Communities - Refer to Serrano Amendment of the Civil Rights Act of 1991, which mandates that the EEOC conduct an education and outreach program for historically underserved communities.

- Commission's Technical Assistance Role - The Technical Assistance Revolving Fund was authorized in 1992 to establish a revolving fund to finance the cost of providing education, technical assistance, and training. The Fund's corpus was authorized through a transfer of $1,000,000 from the Commission's Salaries and Expenses appropriation. The activities sponsored by the Fund for a fee are meant to supplement basic informational materials and services provided free by the EEOC. The Fund became operational in FY 1993 and supported over 40 Technical Assistance Program Seminars (TAPS). These seminars were targeted almost exclusively to the employer community.

  AUTHOR'S NOTE: The Office of Management is administering this program and has made plans for a new division within that office, with additional staff positions. It is seen primarily as a fee generating opportunity. There is essentially no coordination with the Office of Communications and Legislative Affairs either in the development of the programs offered or the outreach/marketing plan. It is a good example of turf wars and self-interest undermining the overall mission of the agency. (Please excuse the editorializing -- ceg)

outline
cg:7/12/94-11:50pm

COPY

THE WHITE HOUSE

WASHINGTON

September 28, 1993

MEMORANDUM FOR ROBERT RUBIN

FROM: Peter Yu

SUBJECT: Affirmative Action & Procurement Reform

Two of the central issues at Wednesday's meeting with the Vice President will be whether to waive affirmative action requirements (Executive Order 11246) for procurement of commercial items and for purchases of less than $100,000 (purchases of less than $25,000 are currently exempt). I strongly recommend *against* such a waiver, for both substantive and political reasons.

I. <u>SUBSTANTIVE CONSIDERATIONS</u>

1. **The Executive Order is a cornerstone of modern employment law and has greatly improved the economic status of minorities.** EO 11246 has a wide reach: covering $184 billion in government contracts for 95,000 businesses with 27 million employees. Thus it is not surprising that the EO has improved employment opportunities for minorities: about 20% of contractor employees are minorities, compared to 12% of noncontractor employees. This in turn has improved the economic status of minorities: data suggest that affirmative action in the public sector and among contractors has encouraged the development of the black middle class.

2. **The need for EO 11246 is as great as ever.** As reported ten days ago on the front page of the Wall Street Journal, essentially *all* of the job loss in the last recession was among African Americans--60,000 jobs in large companies alone. The data are shocking--and point to the need to keep government at the forefront of equal opportunity.

Moreover, government requirements have assumed added significance with the declining efficacy of private causes of action. In the 1980s, the Rehnquist Court's assault on various employment discrimination laws made such suits virtually unwinnable. While this situation has improved some under the Civil Rights Restoration Act of 1992, government leadership in this area will prove a far more efficient force for equal opportunity than private litigation.

3. **Little will be gained by waiving EO 11246.** No one knows the real costs of EO 11246. My instincts and experience tell me that those costs are not great. In most cases, the EO calls for the compilation of demographic data, and remedial action only if there is a likely violation. In the mid-1980s, I worked on the Ford Foundation's affirmative action plan for grantees: in general the costs were minimal--and sometimes those who protested the most were not really concerned about the costs.

More broadly, what is the cost of fairness? The bottom line is important, but not our only *raison d'etre.* CRA requirements, the collection of HMDA data by banks, environmental

COPY

regulations, FLSA, OSHA--all are far more costly than any affirmative action plan, but few challenge those costs.

4. **A waiver may have undesirable downstream consequences.** After procurement reform, it will be difficult to justify requirements on universities, hospitals, and day care centers receiving federal funds. Moreover, a waiver will increase pressure on state and local governments that piggyback on federal standards.

II. <u>POLITICAL CONSIDERATIONS</u>

To my mind, all political considerations militate *against* a waiver:

- The politics on this are daunting: when President Reagan was considering a revision of EO 11246 in 1985,[1] Senator Dole and Congressman Michel publicly criticized the plan. They were joined by 200 members of Congress, a coalition of civil rights groups, the National Association of Counties, and the National Association of Manufacturers. A 1985 Fortune Magazine poll found that a majority of business leaders supported the Order.

- The timing could not be worse: as noted above, the disparate impact of the recession on minorities makes this a particularly inopportune time to draw back from EO 11246.

- As was threatened in 1985, Congress may, in response to a contraction of the Order, attempt to codify EO 11246 in appropriations measures: I do not believe we want to put ourselves in a position where we must oppose such requirements.

- As a symbolic matter, EO 11246 is almost 30 years old--signed by President Johnson in 1965. It has been a cornerstone of equal opportunity policy--the source of the famous "Philadelphia Plan" for construction hiring and referenced in the recent "glass ceiling" studies of corporate America. Editorialists will be surprised by the contraction of the EO by a Democratic Administration--especially in the name of unspecified savings.

- Finally, editorialists and pundits are likely to observe that
  - the last two senior Executive branch official to call for a reform of EO 11246 were C. Boyden Grey and Ed Meese;
  - the third-to-the-last official was an EEOC Chairman named Clarence Thomas.

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[1]Although the current proposal would likely be spun as "procurement reform," I have absolute confidence that others will spin the proposal as "undermining affirmative action."

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Carol H. Rasco to Christopher F. Edley, Jr. Re: Civil Rights (2 pages)	6/15/1994	P5
002. memo	Carol H. Rasco to Christopher F. Edley, Jr. Re: Civil Rights Working Group (1 page)	1/11/1994	P5
003. memo	Christopher F. Edley, Jr. to Carol H. Rasco re: Civil Rights Working Group (1 page)	1/12/1994	P5
004. memo	Jeremy D. Benami to Stephen C. Warnath re: Korematsu Event (1 page)	11/1/1994	P5

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9590

FOLDER TITLE:

Civil Rights Working Group [1]

Dana Simmons

ds50

RESTRICTION CODES

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]
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E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

15-Jun-1994 09:27pm

TO: (See Below)

FROM: Carol H. Rasco
Economic and Domestic Policy

SUBJECT: Civil Rights

I have received your mail message of last evening with the attached message you had received from Lori Victor which was cc'd to Daryl Hennessy and Margaret Shaw.

I want to assure you that I fully understand the seriousness of this issue and that "several people have put a fair amount of time into this over many months." However, I feel it important to set the record straight.

The memo from Mac Reed was hand delivered by him to my office on June 13 and that is the date on his note, not two weeks ago as noted in Lori Victor's mail message to you. Therefore, there is no "shaking loose" of the memo from my office to be done. On the 13th it arrived in my office after I last was at my desk prior to attending the White House dinner. The next morning I unfortunately did not find myself free of meetings prior to leaving for Kansas City and upon my arrival back at 7:10 p.m. I attended a brief meeting and came home. Today I unexpectantly was not free to review your email nor Mac Reed's note and package until after 7:30 p.m. Certainly after seeing the two emails I knew I would get a message on to you tonight as again I do not wish to be seen as an impediment.

On April 22 I sent a memo to Mac after the most recent "clearance" distribution of the memorandum. I asked in that memo to Mac the same questions I had asked some time previously. I to date have had no responses to those questions except a phone call from Mac recently which I have tried several times to return and we haven't been in our offices at the same time. I felt my questions were legitimate as I knew I would be asked those questions and indeed have been asked those questions by others.

The questions were basically: How were the co-chairs decided upon? What does "under the auspices of the DPC" mean ...especially since the DPC head is not even named as a member?

COPY

I am fine with this group moving ahead. With no response to my inquiries I will assume that I should move immediately to request a meeting with the A.G. and the OMB Director to work with them to determine how we will set this up so that we can move immediately upon the issuance of the memorandum from the President. I will have my assistant call both the A.G.'s office and the OMB Director's office tomorrow to set that into motion.

I hope this clears the matter up for all.

Thank you.

Distribution:

TO: Christopher F. Edley, Jr

CC: John Podesta
CC: Donsia Strong
CC: Lori L. Victor
CC: Daryl P. Hennessy
CC: Margaret R. Shaw
CC: R. Paul Richard

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

11-Jan-1994 11:00pm

TO: Christopher F. Edley, Jr

FROM: Carol H. Rasco
Economic and Domestic Policy

CC: Donsia Strong
CC: Rosalyn A. Miller

SUBJECT: RE: Civil Rights Working Group

I have tried to call your office tonight as well as having the White House Operator call your office, your residence (she tells me she doesn't have a working number for a residence) and she has tried to beep you. I will discuss this with Leon tomorrow since clearly my memo (to one person with ATTN: directed to another person and now you as yet a third person answering it) is clearly being miscontrued while at the same time three or four people WERE copied in the White House on the original distribution and now you are telling me the AG as well as George have been consulted today but still no consultation or discussion with the person/COuncil with whom yes, the working group very logically belongs....it is all a mystery to me.

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

12-Jan-1994 08:06am

TO: Carol H. Rasco

FROM: Christopher F. Edley, Jr
Office of Mgmt and Budget, EG

CC: Donsia Strong
CC: Rosalyn A. Miller

SUBJECT: RE: Civil Rights Working Group

I'm awfully sorry. Must be budget pressures interfering with my judgment and collegiality.

I of course want to include DPC staff early and often in what OMB is working on, as I hope DPC will try to do with OMB.

Let's start this again.

COPY

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

01-Nov-1994 12:43pm

TO: Stephen C. Warnath

FROM: Jeremy D. Benami
Domestic Policy Council

SUBJECT: Korematsu event

Mikva indicated to Carol that he doesn't think an event with Korematsu is appropriate.

Carol asked if one of us (I think it should be you because of your relationship with him) could call Deval and thank him for getting the material to Carol and tell him that with the crazy schedule between now and the end of the year (APEC, Summit of the Americas, budget brieifings) there was just no time to do this.

Let me know if you would prefer me to call!

Thanks.

P.S. Is the Immigration Interagency meeting rescheduled?

COPY

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	Mac Reed to Carol Rasco re: Civil Rights Working Group (1 page)	6/13/1994	P5
002. memo	Carol Rasco to Mac Reed re: "Civil Rights Working Group" memorandum (1 page)	4/22/1994	P5
003. memo	Heads of Executive Departments and Agencies re: Civil Rights Working (7 pages)	n.d.	P5
004. memo	Claire Gonzales to Eric Senunas re: summary of meeting with Maria Cuprill (4 pages)	5/4/1994	P2, P5

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9589

FOLDER TITLE:

[Civil Rights Working Group] [2]

Dana Simmons

ds53

RESTRICTION CODES

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]
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

13 June 96

Carol,

Attached are the: (1) draft Executive memorandum establishing the "Civil Rights Working Group," (2) draft Press Release, and (3) your comments concerning the memorandum.

Chris Edley's staff have asked me to go forward with the memorandum and have stated that he would address your concerns about the memorandum with you.

Do you now want me to go forward with the memorandum?

Please advise.

Thank you.

Mac (X53565)

What does Carol want?

(1) chair

(2) member

(3) recipient of recommendations

COPY

TO: Mac Reed
OMB

FROM: Carol H. Rasco
Assistant to the President for Domestic Policy

SUBJ: "Civil Rights Working Group" memorandum

DATE: April 22, 1994

I have received the above named memorandum and have the same questions I raised earlier when it was distributed.

1. I find it puzzling why the Director of OMB is one of two chairs of this group. When I asked that question following the previous distribution I was told by OMB it was strictly because his presence would make agencies cooperate out of fear. I still question if this is the appropriate rationale for determining the leadership for this important group.

2. The memorandum states the group will be under the auspices of the Domestic Policy Council. When I asked previously what that meant in actuality since I had not been a part of the drafting process, I was told it could be taken out...I explained I was not asking that it be taken out, I simply wanted to know what it meant. I was then told it was done to keep Domestic Policy staff happy....we are delighted the group is being formed, simply puzzled with the answer given us and are still interested in understanding what "under the auspices" means.

Thank you.

cc: Bob Rubin
Anthony Lake
Lloyd Cutler
John Podesta
Jack Quinn

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: CIVIL RIGHTS WORKING GROUP

I am writing to you about our responsibility to promote equal opportunity for all Americans. We have accomplished much in our pursuit of a society in which all our people can achieve their God-given potential. But we still have a long way to go.

Americans believe that, in spite of our differences of race and religion and national origin, there is in all of us a common core of humanity that obliges us to respect one another and to live in harmony and peace. We must build on this belief and give real meaning to civil rights by tearing down all remaining barriers to equal opportunity -- in education, employment, housing, and every area of American life.

Throughout the nation, each of us must bring new energy to our efforts to promote an open and inclusive society. Those of us who are public servants have a special obligation. At the federal level, we will do this by re-evaluating the civil rights missions, policies, and resources of every agency, so that they carry out their missions in a manner consistent with the Administration's commitment to equal opportunity. In reviewing our activities, we must seek not only to eliminate barriers to equal access and opportunity, but also to identify opportunities for innovation. No federal office should be exempt from the obligation to further the struggle for civil rights. And every state and local government should be encouraged to do the same.

On January 17, 1994, I issued an Executive order establishing a President's Fair Housing Council to be chaired by

COPY

the Secretary of Housing and Urban Development. Working across agencies and programs, this Council will bring new focus and leadership to the administration of the Federal Government's fair housing programs. On February 11, 1994, I issued an Executive order directing agencies to develop strategies to identify, analyze and address environmental inequities that are the result of federal policies. That order will increase public participation in the environmental decision-making process.

In addition to these efforts, I believe more can be done to exercise leadership for civil rights enforcement. That is why I hereby establish a Civil Rights Working Group, under the auspices of the Domestic Policy Council, to evaluate and improve the effectiveness of federal civil rights enforcement missions and policies. The Civil Rights Working Group will identify barriers to equal access, impediments to effective enforcement of the law, and effective strategies to promote tolerance and understanding in our communities and work places. Most important, I expect the Working Group to develop new approaches to address these concerns.

The principal focus of the Working Group will be our civil rights enforcement efforts. We must recognize, however, that public and private enforcement resources will never be fully adequate to the task, and all of the remaining obstacles to opportunity cannot be removed through litigation alone. Therefore, I direct the Working Group to identify innovative strategies that can leverage our limited resources to provide new

h d3
Dwal
get involved?

— circumventing
DPC entirely?

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avenues for equal opportunity and equal rights. Among those potential strategies are new measures relying on civil education and voluntary efforts to engage citizens in effects of past discrimination. These new s designed to complement our improved and rein efforts.

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The Attorney General and the Director c Management and Budget will co-chair the Work following Administration officials will serv Secretary of the Treasury, the Secretary of Secretary of Agriculture, the Secretary of Secretary of Education, the Secretary of Health and Human Services, the Secretary of Housing and Urban Development, the Secretary of Labor, the Secretary of Transportation, the Secretary of the Veterans Affairs, the Administrator of the Environmental Protection Agency, the Chair of the Equal Employment Opportunity Commission, and the head of the National Economic Council. I also have invited the Chair of the Commission on Civil Rights to participate in this crucial endeavor on an informal basis, respecting the independent and critical voice we expect of that Commission. membership list is not exclusive. I invite an Cabinet officers and agency heads to participa Group.

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avenues for equal opportunity and equal rights. Among those potential strategies are new measures relying on civil education and voluntary efforts to engage citizens in overcoming the effects of past discrimination. These new strategies should be designed to complement our improved and reinvigorated enforcement efforts.

The Attorney General and the Director of the Office of Management and Budget will co-chair the Working Group. The following Administration officials will serve as members: the Secretary of the Treasury, the Secretary of Commerce, the Secretary of Agriculture, the Secretary of the Interior, the Secretary of Education, the Secretary of Health and Human Services, the Secretary of Housing and Urban Development, the Secretary of Labor, the Secretary of Transportation, the Secretary of the Veterans Affairs, the Administrator of the Environmental Protection Agency, the Chair of the Equal Employment Opportunity Commission, and the head of the National Economic Council. I also have invited the Chair of the Commission on Civil Rights to participate in this crucial endeavor on an informal basis, respecting the independent and critical voice we expect of that Commission. Finally, this membership list is not exclusive. I invite and encourage all Cabinet officers and agency heads to participate in the Working Group.

The Working group will advise appropriate Administration officials and me on how we might modify federal laws and policies to strengthen protection under the laws and on how to improve coordination of the vast array of federal programs that directly or indirectly affect civil rights. I direct the Working Group to provide the Cabinet and me with a brief progress report no less than every six months, and specifically to:

(a) examine each federal agency with a significant civil rights mission and provide me with an evaluation of how well that mission is being implemented. These analyses should examine whether each agency uses the experience gained from enforcement activities of other agencies and other levels of government. Counterproductive and inconsistent practices should be identified and proposals for change recommended;

(b) examine cross-cutting civil rights law enforcement challenges such as voting rights and equal access to government benefit programs and identify innovative means of coordinating and leveraging resources;

(c) develop better measures of performance for federal civil rights enforcement programs, taking into account the real impact of programs on the daily lives of all Americans; and

(d) support and advise all agencies as we reinvent our strategies for the promotion of an open and inclusive society.

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With this interagency effort, I underscore the commitment of this Administration to bring new energy and imagination to the opportunity agenda. In departments and agencies throughout the Federal Government, this work is already well underway. The Working Group will provide a mechanism to expand and accelerate that vital work. Its work will be among our greatest contributions to the people we serve.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

~~CONFIDENTIAL~~ MEMORANDUM - PLEASE DO NOT DISTRIBUTE

TO : Eric Senunas, WH Legislative Affairs

FROM : Claire Gonzales, OCLA, EEOC CG

DATE : May 4, 1994

SUBJECT : Summary of Meeting with Maria Cuprill, Staff Director, House Select Subcommittee on Education and Civil Rights

As I mentioned to you in our earlier telephone conversation, I met with Maria Cuprill this morning to discuss a wide range of issues related to the EEOC. The following is a summary of the major points made by Ms. Cuprill and the issues that she raised on behalf of Major Owens, Chairman of the House Select Subcommittee on Education and Civil Rights.

(Please forgive the rough format. In the interest of time, I did not spend a lot of time editing. I am somewhat uncomfortable sending this information in writing, so I hope you will use it carefully.)

Articulation of Clinton Administration Civil Rights Policy

Ms. Cuprill mentioned a number of times that they* are anxiously awaiting a statement by the President outlining both his larger vision for civil rights and his plans for the EEOC.

She stated that the Democratic leadership needs to know where the President is going with the EEOC. She suggested that those members who are concerned with civil rights have spent the last twelve years trying to preserve the civil rights agencies while under constant attack. She further suggested that the EEOC has a lot of enemies on the Hill and believes that there are enough GOP votes to do away with the agency should they have the opportunity.

Chairman Owens' and Subcommittee's Current Posture

According to Ms. Cuprill, the EEOC is Owens' next "project."

* Throughout this memorandum I use "they" to refer jointly to Chairman Owens, Ms. Cuprill, and senior subcommittee staff.

Since the beginning of the Clinton Administration and while they have awaited the new leadership, they have tried to protect the interim leadership at the agency. They have done this by not calling the interim leadership to testify in the many hearings they have held.

The Subcommittee has an EEOC hearing scheduled in New York on June 13. While she did not expressly state it, Ms. Cuprill made it clear that they view the June 13 hearing as some kind of deadline. In lieu of a policy statement from the Administration on the EEOC, Ms. Cuprill suggested that Owens can either announce how he believes the agency should be organized and operated (issue the directives for the agency that the President has not) <u>or</u> he can spotlight the Agency's problems and denounce it.

<u>Selection of EEOC Leadership</u>

Ms. Cuprill made it very clear that they expected to be consulted, at the very least directly informed, about the Administration's choices for EEOC leadership. She expressed particular concern that prospective nominees for EEOC Chair are not being passed by the Subcommittee for approval. (As she said, "It would have been nice if we could have said 'Amen'.")

Ms. Cuprill raised questions about the qualifications of the candidates who have already been announced, particularly Paul Steven Miller. (I am going to send their résumés to her. Remind me to give you the background on her concerns with PSM next time we talk.) She said that they have been very clear on what is needed from the new leadership -- someone who knows the agency well and can lead it. (A reminder that Ms. Cuprill is a strong supporter of Joe Sellers.)

<u>Views on Specific Agency Activities</u>

Like Simon's Employment and Productivity Subcommittee (the Senate subcommittee with oversight authority), Owens' subcommittee is very interested in and knowledgeable about the internal workings of the EEOC. They know all of the major "players" from an operational standpoint and they view many of them as being at the heart of many of the EEOC's problems.

Ms. Cuprill suggested that, immediately upon the arrival of the new leadership, a formal, objective evaluation of the agency's senior management staff be performed. She recommends that such an evaluation be used as the basis for the development of a reorganization plan for the agency (done in consultation with Owens).

Ms. Cuprill stated that she does not believe that the Agency can be "reinvented" at the margins, but rather fundamental structural change is needed. She feels very strongly that there are too many Reagan/Bush holdovers in the EEOC and that they will impede any real change. She urges that the new leadership deal swiftly and decisively with problematic staff by moving them out. (She suggests that the new leadership follow the Reagan model and clean house immediately.) When I raised labor concerns that should be factored in to any reorganization plan, she assured me that Owens has enough labor support to help in this area.

Other specific concerns about EEOC operations that Ms. Cuprill raised:

- There is no central coordination or supervision of field offices. They are very concerned about complaints they have received from charging parties involving the way in which their cases were mishandled by the EEOC.

- Believe there are widespread EEO problems within the agency itself; suggested that this was an explosive issue that could blow up any minute. She specifically mentioned discriminatory practices based on sex and glass ceiling issues.

- The continuation of the controversial charge processing policy instituted by Clarence Thomas that requires full investigation of all charges, whether merited or not. This adds to problems with severe backlog of charges/cases, but there is no agency-wide strategy with which to replace it.

- Lack of coordinated litigation system, particularly concerned with lack of emphasis of systemic litigation.

- Very concerned about the policy of merit pay or bonuses going to EEOC Regional Directors who close out high number of cases, without regard to quality of work. (She said very clearly that this practice is going to stop.) The Subcommittee is considering having the GAO investigate this practice, but have held off because they have not wanted to embarrass the Administration.

<u>Relationship with Administration and OCLA</u>

Ms. Cuprill feels that the White House has not been forthcoming with the Subcommittee and that there has been little or no communication. She reiterated that they want to work with the Administration, not continue to battle the Administration as in years past; and offered assurance that they did not want to "fight" in public. She urged the development of honest dialogue between the Administration, the Agency, and the Subcommittee.

Ms. Cuprill did offer their services and assured me that they would give us "heads up" on what they plan to do before they do it. I assured her that I would provide them with the same courtesy, and that I would convey her concerns to the White House.

Finally, on a substantive point, they feel very strongly about the Police and Firefighters exemption to the Age Discrimination in Employment Act. (Metzenbaum is very strongly opposed and held a hearing on the issue two weeks ago.) OMB and Domestic Policy are working on the ongoing development of the Administration's position.

I hope that this is helpful. Please call me if you have any questions.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Carol H. Rasco to Stephen C. Warnath re: Bilingual (1 page)	06/10/1996	P5

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9589

FOLDER TITLE:
Church Burnings [3]

Dana Simmons

ds48

RESTRICTION CODES

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]
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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]

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

10-Jun-1996 08:21am

TO: Stephen C. Warnath

FROM: Carol H. Rasco
Domestic Policy Council

CC: Jeremy D. Benami
CC: Elizabeth E. Drye

SUBJECT: RE: Bilingual

Simply FYI: The only BAD mistake the POTUS made in radio address was saying he remembered church burnings in his state.....there was big article in Ark. paper, front page yesterday in which the most esteemed black leaders in Ark. were quite puzzled as they don't have memory of church burnings, were very proud of fact Ark. didn't have church burnings back then...even the state government historian who is a non-partisan appointed official was puzzled. Mack and I agree with the Arkansans in the article, we don't remember that being a big deal. The regional South media were playing off this and the people all being quoted throughout South who are in large part good friends of POTUS were more hurt than anything it sounded like....they are proud of fact we didn't have the bad burnings or numbers of them and are puzzled why POTUS made it sound like we did.

I am doing note to POTUS on it.

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Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	Frederick S. Ansell to Dr. William Galston (2 pages)	11/24/1993	P5

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9591

FOLDER TITLE:

Child Pornography

Dana Simmons

ds72

RESTRICTION CODES

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

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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

November 24, 1993

Dr. William Galston
Deputy Assistant to the President
for Domestic Policy
Old Executive Building
Washington, DC 20500

Dear Dr. Galston:

Thank you for meeting with Senator Grassley last Friday to discuss the issues presented in the Knox case. Attached are the legislative reports and floor debates concerning the enactment and amendment of the federal child pornography statutes. Most of these materials address issues other than the relevant Knox issues, but I wanted to be sure that you had everything that might be useful.

These reports and statements evidence congressional concern regarding the exploitation that necessarily occurs to children during child pornography production, and the negative psychological consequences of that exposure that develop thereafter. (See for instance p. S33049 from 1977 regarding coercion and manipulation.) Since Congress was concerned that children being used in the production of child pornography did not fully appreciate what was being done to them, Congress could not have intended that the materials would be banned only if the child intentionally acted lasciviously.

Additionally, I spoke with Senator Grassley's chief counsel at the time. She indicated that senators were aware of both the nudity and lascivious exhibition issues at the time and resolved them contrary to the current position of the Justice Department. Outside groups lobbied in favor of changes to state what forms of exposure would be protected or prohibited, but to no avail. As I mentioned at the meeting, Congress expressly considered and deleted the original bill's nudity requirement. Moreover, a majority of the senators participating in the unanimous vote earlier this month that the Administration had misinterpreted congressional intent on these issues were members of the Senate in 1984 when the legislation was passed.

Some specific items of note in the legislative history include the committee report from 1977 (p. 43) that points out that Congress wanted to prohibit various "lewd poses." See also p. H34993 (Rep. Conyers) ("[W]e have now a piece of legislation that goes not only to sexual abuse but to those who would engage children in pornographic activity."); p. H34999 (Rep. Ashbrook)

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("If we do not allow children to buy an automobile, sign a note, or buy a home at age 15, then why should we permit them to engage in conduct which can be damaging to themselves? Is it not reasonable to assume that children engaged in these acts do so under some sort of coercion?"). These statements also show that the true meaning of the key word "engaging" in the statute does not require that the child himself or herself actually intend to act lasciviously, as the Justice Department now contends.

Similarly, in 1984, Congress continued to be concerned about situations in which the child is posed. It understood that the law already encompassed such poses, and did not contemplate that the child must intentionally act lasciviously for the statute to apply. See p. S7196 (Sen. Specter) ("Under current law, distribution of materials depicting children in sexually explicit poses in unlawful only if the materials are proven to be legally obscene. This bill removes the obscenity requirements.") See also S7196-97 (quoting from FBI congressional testimony regarding a "child posing for the picture.")

Finally, I also enclose a copy of the Bush Justice Department's brief defending the Third Circuit's decision in the Knox case. This brief, which the current Justice Department rejects, and the Third Circuit opinion cite the relevant case law on these issues. Please consider the effect of the lack of any case law supporting the Department's current position as one indication of its merit.

From these materials, I hope you will conclude that the statutory language and legislative history, read naturally, demonstrate that the correct interpretation of the two issues raised in the Knox case is that set forth in the Senate's November 4 vote rather than the Justice Department's current Knox brief. Whatever you might be able to do to discuss this conclusion with other members of the Administration would be greatly appreciated. Please do not hesitate to let me know if I can be of further assistance.

Sincerely,

Frederick S Ansell

Frederick S. Ansell
Minority Counsel
Subcommittee on Courts and
Administrative Practice

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Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. draft	Event Briefing (1 page)	n.d.	P5

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9884

FOLDER TITLE:
[Affirmative Action] [2]

Dana Simmons

ds46

RESTRICTION CODES

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

P1 National Security Classified Information [(a)(1) of the PRA]
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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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DRAFT

I am not prepared to jettison any reference to civil rights. For one thing, 4 that's the name of the working group. What is the basis for this recommendation? Are you convinced that saying these words is political suicide?

the working group. She would tell the group know that its work was important. She would not use the words "civil rights."

- Result: Reinforcing the President's message placing diversity issues on the public agenda, demonstrating a commitment to diversity management, and visibly reaching out to minority constituencies

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Event 3:

- Timing: Mid-December 1994

- Audience: The general public and minority constituencies

- Medium: Forty-five minute meeting between the Vice President and civil rights leaders for the Vice President to hear their concerns and ideas about diversity issues. The Vice President would issue a press release several hours after the meeting.

- Message: The Vice President would announce at the end of the meeting that the issue deserved more than forty-five minutes and ought to be discussed nationally. He then would tell the leaders that he would press for a town meeting on managing diversity and invite the Republicans to attend. The main purpose of the meeting would be to foster understanding rather than to propose specific initiatives. He would note that the time to cultivate a dialogue was when tensions were not at peak. He would not use the words "civil rights."

- Result: Demonstrating commitment to diversity management, bolstering the confidence of minority constituencies in mainstream civil rights leaders, and demonstrating a commitment to proceed in a bi-partisan way on diversity issues

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Event 4:

- Timing: Late January 1995, before publication of the first progress report of the working group

- Audience: The general public, minority constituencies and the Congress

- Medium: Town meeting on managing national diversity. Both the President and the Vice President, as well as two Republicans--such as Senators Robert Dole and Arlen Specter--would attend, in a show of bi-partisanship. The audience would include people knowledgeable about diversity issues.

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