

**NLWJC - Kagan**

**DPC - Box 041 - Folder 010**

**Race-Race Initiative Policy - Civil  
Rights - Federal Employees [5]**

Raise initial policy - civil rights enforcement

status of ops  
ideas / budget  
goals  
priorities

OP!

Meeting on civil rights enforcement

1. Resources at all time low (DOC)  
grass roots level.

1995 Study - US Civil Courts on resources  
in DC yrs - not gone up significantly -  
nowhere near what lost in R yrs.

att. acti-

coordination -  
long-term  
strategic approach

EEOC - lowest # of FTEs in 20 yrs.

Retooling / changing cultures of ops after R/Bush  
Need focus on more proactive / systemic /  
impact-oriented work.

Personnel intensive in terms of budget.

1987-470m  
actually appropriated

<sup>request</sup>  
1998-520m in  
budget auth.

With priorities  
ways to  
handle complaints

2. COORDINATION -

Some in various subject areas.  
Civ Rts at DOT overlaps w/ a # -  
subject-by-subject  
Civ Rts Wky Group at beginning of Admin -  
pulled back into att. acti - - got lost

3. Att. Acti

2. Creative in light of RCT  
1. Part can't deal w/ this alone - lots that  
don't include this.

4. Recruitment

stated at ASPR

Admin process - didn't go anywhere.

Also looked at premises of out - cannot v. stock  
Advocacy community very heavily opposed.

5. Internal REGO

diff way of compliance review - no larger one-  
size-fits-all.

Computerization -

6. Evaluation of employees

Perf eval. + review / assessment.

Gov'ts obligs etc should be part of this  
for everyone

many depts. This  
GPRAs - may have cut entirely -  
+ if no evaluation -  
becomes hot place to cut.  
Affects resource allocation.

Federal have in order - holding own GE's acceptable  
(new EEOC reqs -  
very controversial)

7. Targeting particular geographic areas.  
"Gov'ts zones"

MEMORANDUM

TO: ELENA KAGAN  
FROM: TOM FREEDMAN, MARY L. SMITH  
RE: AGENDA FOR CIVIL RIGHTS ENFORCEMENT MEETING  
DATE: AUGUST 21, 1997

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Attached is an agenda for the Civil Rights Enforcement meeting to be held on Friday, August 22, 1997 in Room 211.

In addition to the agenda, below are some issues relating to particular agencies that you might want them to address:

- **EEOC:** The EEOC has been criticized for having a backlog of cases or number of charges awaiting investigation. At one time the backlog was over 100,000 cases, but Chairman Gilbert F. Casellas has reported recently that the backlog has been reduced to 75,000. The EEOC has also been criticized for the delay involved in its investigations. In 1996, the EEOC adopted a national enforcement plan that sets priorities for the processing of charges and litigation on the national and local level.
- **U.S. Commission on Civil Rights:** A newly released GAO report from July found the agency in "disarray" and unable to accomplish its mission which is to monitor the enforcement of civil rights laws and to investigate cases of discrimination. The GAO report concluded that the agency lacked the most basic management oversight, was unable to account for its spending, and released obsolete reports. The U.S. Commission on Civil Rights has also been criticized because the formation of the President's advisory board on race casts doubt on the efficacy of the Commission whose mission is to essentially address the same issues.
- **DOJ:** DOJ can improve its image of civil rights enforcement by playing a more active role in hate crime cases and in high profile civil rights cases like the recent police brutality case against the Haitian man in Brooklyn.
- **SBA:** The SBA recently changed the criteria for eligibility for its 8(a) program which provides for government contract opportunities for small, disadvantaged businesses. These changes are expected to increase the awarding of government contracts under the 8(a) program to white women. Because funding for the 8(a) program has not increased, the percentage of other minorities' participation is expected to decrease accordingly.

- **USDA:** Following a demonstration by black farmers outside the White House in December, Secretary Glickman appointed a Civil Rights Action Team (CRAT) to develop a set of recommendations to address institutional and underlying problems with USDA programs. In July, Representative Eva Clayton (D-NC) wrote to Erskine Bowles to discuss the issue of race discrimination in lending practices by the USDA.
- **DOE:** As you are aware, the Education Department's Office of Civil Rights has been criticized for its handling of the Hopwood decision and its current investigation of the Board of Regents' resolution to exclude race as factor in admissions decisions.

## AGENDA

### CIVIL RIGHTS ENFORCEMENT MEETING AUGUST 22, 1997

#### I. AGENCIES PARTICIPATING

- EEOC
- DOJ
- EDUCATION
- SBA
- HUD
- LABOR
- INTERIOR
- USDA
- HHS
- DOT
- US COMMISSION ON CIVIL RIGHTS

#### II. PRESENT STATUS OF CIVIL RIGHTS ENFORCEMENT IN AGENCY PROGRAMS

- *What programs at your agency involve civil rights issues?*
- *What types of complaints do you receive at the agency? E.g. backlog, discrimination in selection, unfair treatment, denial of loans, etc. What is the most common type of complaint?*
- *What is the process for investigating civil rights complaints? How many complaints do you have pending currently?*
- *How many court cases are pending?*
- *What percent of program benefits do minorities receive?*
- *Which minority groups are affected by your programs?*
- *What recent high profile initiatives or problems have involved your agency?*

#### III. POSSIBLE PROPOSALS TO IMPROVE CIVIL RIGHTS ENFORCEMENT IN AGENCY PROGRAMS

- *Are there any ongoing initiatives currently being implemented?*
- *What proposals or ideas are there to improve civil rights enforcement at your agency? E.g. Increased funding, more legal authority, agency reorganization.*

#### IV. TIME LINE FOR NEXT MEETING

August 22, 1997  
CIVIL RIGHTS ENFORCEMENT Meeting

Name	Agency	Phone	FAX
Kathleen O'Brien	HHS	202 619-1002	202 619-3437
Norma V. Cantu	OCR/ED	202 205 5557	205-5381
Ellen Vargyas	EEOC	663-4637	663-4639
Jerry L. Malone	DOT	366-6800	366-3956
Nancy McFadden	DOT	366-4702	366-3388
Isabelle F. Loekhad	DOE/DOL	219-8927	219-5658
Shirley J. Wilcher	DOL/OFCCP	219-9475	219-6195
Stephanie Y. Moore	USEER	376-8368	376-7558
Reba Pittman Evans	USDA	720-3631	640-2911
SHARRON HARRIS	USDA	720-7117	720-3001
Carolyn B. Cooksie	USDA	720-4671	720-3001
MARK STEPHENS	SBA	205-6860	205-6846
ERLINE M. PATRICK	SBA	205-6750	205-7580
Tanya Martin	DPC	456-5228	456-5581
Denise Jordan	SOL/DOI	208-3401	219-1791
Elyzabeth Gomez	OS/DOI	208-3338	208-7503
Omar Guerrero	OCR/HHS	619-0403	619-3437
Tom Heebman	DPC	456-5587	-
Mary Smith	DPC	456-5571	-
Emil Parker	NEC	456-2609	-
JOSE CERDA	DPC	456-5568	456-7028
MERCEDES MARQUEZ	HUD	708-2467	708-3389
LISA JACOBS	DOJ	616-2732	514-0239
Isabelle Pinzer	DOJ/CRO	514-6715	307-2572
Jusan Carr	OMB	395-7881	395-6889
Chris Lehane	HUD	708-2244	708-3389

and  
Race-Hate Crimes

U.S. Department of Housing and Urban Development  
Washington, D.C. 20410-0500



Tom/Tom -

FYI. See p. 3

especially for  
ideas that could  
be used in hate  
crimes conference  
or civil rights initiative.  
Elena

DEPUTY GENERAL COUNSEL

SEP 16 1997

MEMORANDUM FOR: Elena Kagan, Deputy Assistant to the President  
for Domestic Policy

FROM: Mercedes M. Márquez, Deputy General Counsel for Civil  
Rights and Fair Housing

RE: Race Policy Report - Update

Attached please find an updated version of the Department's race policy proposals. I also have included statistics on the number of cases received by the Department in recent years. I apologize for the delay in transmitting this update to you. Many of our staff members, from whom we were awaiting data, have been on leave. Please feel free to contact me at (202) 708-2467 with any questions regarding this piece.

Attachment





**U. S. Department of Housing and Urban Development**  
Washington, D.C. 20410-0500

DEPUTY GENERAL COUNSEL

**HUD ENFORCEMENT IN THE 21ST CENTURY**

○ **ENFORCEMENT POLICY INITIATIVES:**

In 1996, the Department took action on 12,037 cases of alleged housing discrimination in violation of the Fair Housing Act (Act). In 3,271 of those cases, the Department concluded that there was no reasonable cause to believe that discrimination in violation of the Act had occurred. In 330 cases, the Department concluded that there was reasonable cause to believe that discrimination had occurred. The Department conciliated 2,846 cases. The statistics for the three previous years are as follows:

**Total cases:**  
1995 - 8,206  
1994 - 9,672  
1993 - 10,190

**Cases Taken Action On:**  
1995 - 7,407  
1994 - 8,402  
1993 - 9,225

**Cases no-caused:**  
1995 - 2,095  
1994 - 2,151  
1993 - 1,738

**Cases caused:**  
1995 - 414  
1994 - 514  
1993 - 432

**Cases conciliated:**  
1995 - 3,126  
1994 - 3,303  
1993 - 3,061

This policy piece sets forth initiatives designed to double - in the next four years - the number of housing discrimination actions taken by the Department.

### Combatting covert discrimination in the '90s

Housing discrimination in the 1990's is no longer limited to overt acts such as a landlord's bold assertion that he will not rent to persons of color. Today, housing discrimination is often so subtle that an individual buyer or renter cannot recognize that they have been discriminated against. In order to root out today's more covert discriminator, the Department must broaden its working definition of discrimination, it must assess discrimination within the marketplace, and it must consequently expand the parameters of fair housing compliance and enforcement. The Department has begun this process by focusing on discrimination in the following areas:

- Lending
- Insurance
- Zoning Decisions

Current fair housing law encompasses even these novel forms of discrimination. As the discriminator becomes more sophisticated in his acts, however, the Department must look beyond these fair housing laws and make full and creative use of its statutory and regulatory enforcement arsenal. When appropriate, RESPA, the Truth in Lending Act and other non-civil rights vehicles must be used in lieu of, or at times, in conjunction with customary civil rights enforcement laws. When current statutory and regulatory mechanisms do not adequately address the new discrimination, the Department will be prepared to propose new legislation on the issue.

### Hate Crimes: Make 'Em Pay

While acts of housing discrimination have expanded to more sophisticated forms, acts of violence taken against people or their property, or threats of violence made to people, because of their race or ethnic background are on the rise. Such hate crimes constitute a major barrier to the ability of people to live where they want and otherwise could. Currently, HUD investigates hate crimes in the housing context and refers appropriate cases to the Department of Justice for criminal prosecution. When hate crime perpetrators are prosecuted for their acts, the judicial system may profess that justice has been served and that society at large may now rest assured that a barrier to housing choice has been eradicated. For the individual victim, however, the acute pain of being targeted because of race or ethnicity lingers and may not be assuaged by a remedy that does not change that reality and the ever-present possibility of its reoccurrence.

HUD's Make 'Em Pay initiative, through use of the Fair Housing Act, affords the victim a civil remedy whereby he can take from the wrongdoer to compensate for what was stripped from him. Thus, when a group of teenagers speed by in their prized possession hotrod and fire shots into the bedroom of a sleeping African-American family because of their race, those teenagers relinquish their car to that couple because of their crime.

The Department can significantly increase the number of Make 'Em Pay complaints by:

- Proactively monitoring newspaper and other media reports,
- Establishing close contact with local fair housing groups who agree to inform HUD of all such acts that become known to them,
- Requiring FHIPs to report to HUD all such acts that become known to them,
- Setting up a Hotline for the report of such actions.

#### HUD Testing Program

Fair housing testing is a widely accepted, powerful weapon used to establish the existence of discrimination in housing. A tester assumes the role of a verifiable profile and purports to be a home-seeker for the specific purpose of gathering information concerning the manner in which a housing provider does business. The Department of Justice currently runs its own fair housing testing program out of main Justice. Over 350 non-attorney DOJ employees have participated in the program.

With regional offices nationwide, HUD proposes to create its own program to train and utilize testers throughout the country. The Department can thereby more closely direct and control its own fair housing investigations. Furthermore, a testing program presents an ideal opportunity to galvanize the Department's employees and expose them to civil rights enforcement in a wholly hands-on manner.

#### ○ AGENCY REFERRAL OF FAIR HOUSING ACT MATTERS TO HUD:

In a January, 1994 Executive Order (Executive Order 12892), President Clinton declared that it is the responsibility of Executive Agencies to forward, upon receipt of a complaint or other information alleging facts that may constitute a violation of the Fair Housing Act or suggesting a violation of the Act, to the Secretary such facts or information for processing under the Act. The Secretary can remind federal agencies of the Executive Order directive and require that the agencies submit information to the Department pursuant to it.

○ **THE PRESIDENT'S FAIR HOUSING TASK FORCE:**

In the January, 1994 Executive Order, President Clinton also established the "President's Fair Housing Council" and named the Secretary of HUD as chair of that Council. The President directed the Secretary to work closely with the Secretary of Health and Human Services, the Secretary of Transportation, the Secretary of Education, the Secretary of Labor, the Secretary of Defense, the Secretary of Agriculture, the Secretary of Veterans Affairs, the Secretary of the Treasury, the Attorney General, the Secretary of the Interior, the Chair of the Federal Reserve, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Chair of the Federal Deposit Insurance Corporation and such other officials of executive departments and agencies as the President may, from time to time, designate. The Secretary can develop memoranda of understanding with these executive agencies and in July, 1997, did so with the Department of Agriculture. The unprecedented memorandum of understanding grants HUD the jurisdiction to handle all future Fair Housing Act complaints received in connection with Agriculture's housing financing and rental assistance programs. HUD also intends to convene, for the first time, the Council so that it can fulfill its mandate to review the design and delivery of Federal programs and activities to ensure that they support a coordinated strategy to affirmatively further fair housing.

○ **PUBLIC EDUCATION CAMPAIGN:**

Coinciding with the 30th anniversary of the Fair Housing Act - to be celebrated in the spring of 1998 - the Department proposes to launch a three pronged public education campaign. Educating the public about their right to fair housing will enable them to recognize when discriminators violate their rights and allow them to take aggressive action with HUD to combat that discrimination.

**Media Drive**

The Department will commence an extensive media drive designed to educate the public about their rights under the Fair Housing Act and the resources available from HUD to vindicate their rights if violated. The Department intends to use print ads and other media forms to convey its pertinent message. It will solicit the help of major entertainers and public figures committed to the principle of fair housing.

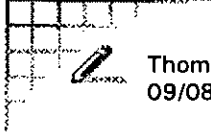
**Fair Housing Fora**

The Department will host a series of local, regional, and then a national forum celebrating the accomplishments and promise of the Fair Housing Act and reaffirming HUD's commitment and duty

to enforce the Act and other related civil rights laws.

#### **Performance Awards**

The Department proposes creating an award which recognizes communities' outstanding work in the area of fair housing and in formulating good partnership programs which foster integration. Not unlike the Blue Ribbon Practices awards given by the Secretary last month at the meeting of the Conference of Mayors, the Civil Rights Excellence award would recognize a community's outstanding performance. We must encourage civil rights best practices and recognize those practices when they succeed, just as we must enforce them when they fail.



Thomas L. Freedman  
09/08/97 11:54:28 AM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:

Subject: race issues new and pending

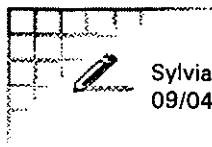
1. What do you think of a race and technology project? Finding some symbolic but tangible ways to make sure that all of America has access to the potentials for new technologies. There is some stuff going on in wiring urban schools that it might be worth highlighting.

2. Hate crimes conference continues to move along. The issues to be resolved will be exactly what's in the substantive announcement, when in the event the President should speak, who should be there, and where it occurs. Ann Lewis had a meeting where not much happened. And she seemed satisfied. The substantive announcement seems like it will be the package we talked about in the meeting with Ogden-- the only dispute will be about the legislation expanding the categories of crimes to include gender. Ogden is still working to find a compromise that works for the groups and law enforcement. We may need to intervene. The issue on attendees will be that this will likely become a high profile forum for the leading civil rights leaders and the commission to attend. we should make sure that validators are in place, and this is a clear win. It should be. Marsha Scott came to a meeting to discuss who are the appropriate group representatives to attend (evidently her schtick). I'm inclined to leave the bulk of that to her and Richard S. The current thinking on place was the new jewish center in DC. We should probably have a meeting late this week, early next to stay on top of this.

3. Have you started to get the reports from agencies' civil rights divisions? I volunteered to do whatever work you wanted, and I'm happy to go through their suggestions and organize them. I suspect a special emphasis on the EEOC and when we get their memo I think we should do some meetings with various folks from over there to put together a plan.

Welcome back. Tom

Race-hate crimes



Sylvia M. Mathews  
09/04/97 01:15:00 PM

Record Type: Record

To: Richard Socarides/WHO/EOP  
cc: See the distribution list at the bottom of this message  
bcc:  
Subject: Re: Hate Crimes Conference update

Richard, this looks great. In a sentence or two, what do we hope to accomplish through our conference? TY

Richard Socarides 09/04/97 12:36:45 PM

focus on the problem  
highlight specific actions we are  
taking + will take  
encourage effective state + local  
initiatives

Richard Socarides 09/04/97 12:36:45 PM

Record Type: Record

To: See the distribution list at the bottom of this message  
cc: Elena Kagan/OPD/EOP, Michael Wenger/PIR/EOP, Thomas L. Freedman/OPD/EOP, Mary L. Smith/OPD/EOP  
Subject: Hate Crimes Conference update

We are 10 weeks out from the Nov. 10th Hate Crimes Conference and I wanted to give you a brief update on the status of our planning.

Policy issues: Tom Freedman, Mary Smith (from DPC) and I have been meeting with the folks at DOJ (David Ogden and his team) to formulate specific policy announcements. Elana has also been in some of these sessions. Thanks largely to the work DOJ had already started (before the President's radio address announcing the conference) we are pretty far along on specifics. Under discussion is a legislative proposal to expand federal hate crimes jurisdiction, a law enforcement proposal and enhanced data collection efforts, among other things. DOJ is preparing a memo outlining the specifics which we should have soon.

Outreach: We have written to over 600 organizations and individuals forwarding a copy of the President's radio address and asking for their input on the conference. We have had ten briefings here at the WH, which included 45 people from over 35 organizations. I'm meeting with hate crimes advocates next week in LA and we are hoping to send a POTUS video to an important hate crimes conference in the Northwest later this month. We are working closely with the important outside groups in planning.

Participants: Marsha Scott from the Personnel office is leading the effort on the selection of participants. We expect to have about 1000 nominations for about 210 slots. We expect an inclusive and diverse group.

Logistics: We have met with Jen Palmieri and have tentatively decided to do the main staging off-site, at a local high school, community college or university. The day would open with remarks

from the VP or AG, followed by 7 break-out or working groups of about 30 people each. Each group would have a pre-assigned Administration official, moderator and reporter. After lunch, the conference will reconvene and hear remarks from the President; thereafter he will chair a panel during which reports from each of the morning working groups will be presented. A reception back here at the WH will conclude the day.

Cabinet Affairs: We briefed the Chiefs of Staff at their breakfast on 8/12 and are working closely with Cabinet Affairs. We expect to call on Ed, HHS, Treasury, HUD (in addition to DOJ) to play a part in the conference.

Communications/Press: We are meeting with Communications and press later today. We are hoping to make a satellite feed of the afternoon conference session widely available.

Message Sent To:

Sylvia M. Mathews/WHO/EOP  
Maria Echaveste/WHO/EOP  
Bruce N. Reed/OPD/EOP  
Judith A. Winston/PIR/EOP  
Ann F. Lewis/WHO/EOP

Message Copied To:

Maria Echaveste/WHO/EOP  
Bruce N. Reed/OPD/EOP  
Judith A. Winston/PIR/EOP  
Ann F. Lewis/WHO/EOP  
Elena Kagan/OPD/EOP  
Michael Wenger/PIR/EOP  
Thomas L. Freedman/OPD/EOP  
Mary L. Smith/OPD/EOP



Rac-hate crimes

**Richard Socarides** 10/22/97 01:47:45 PM

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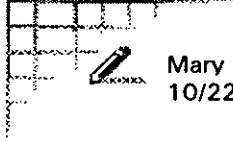
Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Mary L. Smith/OPD/EOP, Bruce N. Reed/OPD/EOP, Thomas L. Freedman/OPD/EOP

Subject: Re: Hate Crime Legislation 

I ran into LD Acheson this morning. She was in the mtg w/ the AG on Tuesday and felt she was leaning to option 1.



Mary L. Smith  
10/22/97 01:23:04 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Bruce N. Reed/OPD/EOP, Thomas L. Freedman/OPD/EOP  
cc: Richard Socarides/WHO/EOP  
Subject: Hate Crime Legislation

Janna Sidley at the VAWA office discreetly tried to feel out the position of the women's groups on the hate crimes legislation. Janna talked to NOW. It seems that NOW would prefer the most wide-reaching option including gender (Option 1 in the DOJ memo), but they could probably live with legislation that had an animus requirement (Option 4B). It seems, however, they don't want to start out with the animus option, but would live with it if that's where a compromise ended up.

It does seem that they have 2 non-negotiable points:

1. Gender has to be included.
2. Gender has to be treated the same as sexual orientation and disability.

Regards, Mary

## HOW OFCCP FITS IN . . .

The Secretary of Labor recently asked the agencies to identify its programs that contribute, in the President's words, "to preparing America for the 21<sup>st</sup> century with a strategy of opportunity for all, responsibility from all . . . ." Here is what was submitted by the Employment Standards Administration's Office of Federal Contract Compliance Programs (OFCCP).

The OFCCP programs prohibit discrimination by federal contractors and subcontractors and require contractors to take affirmative action to ensure that all individuals have an equal opportunity for employment, without regard to race, sex, national origin, religion, disability or veteran status. The laws and EEO clause, enforced by the OFCCP, are designed to ensure that federal taxpayers' dollars do not perpetuate employment discrimination. The Executive Order 11246 program fits the President's "vision of a just, unified America" and implements a solution in a critical area, economic opportunity.

Executive Order 11246 prohibits discrimination in hiring or other employment opportunities on the basis of race, color, gender, religion, and national origin. The Order applies to all contractors and subcontractors holding any federal or federally assisted contracts worth more than \$10,000 annually. In addition, the Executive Order requires contractors and subcontractors with a federal contract of \$50,000 or more, and 50 or more employees, to develop a written affirmative action program that sets forth specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort.

To carry out its mission, OFCCP conducts compliance reviews, investigates complaints of systemic discrimination, monitors the self-audit affirmative action requirements, works with employers to help them recruit and retain qualified workers, and offers technical assistance.

OFCCP programs provide a tool through which qualified individuals have a chance to compete for jobs that have been historically closed to minorities and women. The programs expand opportunities to ensure maximum participation for a strong economy.

OFCCP programs also effectuate Labor Secretary Herman's goal to guarantee every worker a safe and equal opportunity workplace. As the Secretary has said, "In this intensely competitive new economy, smart employers must utilize all of the talent that is available to them."

The agencies were also asked to cross-reference our programs to the President's speech at San Diego. The OFCCP programs clearly serve a national purpose. As President Clinton said in a number of speeches, diversity is our greatest strength and "we must continue to expand opportunity" because "full participation in our strong and growing economy is the best antidote to envy, despair and racism". The President added in his June 14 remarks at the University of California at San Diego, "in our efforts to extend economic opportunity, we must consider the role of affirmative action. . . . When used in the right way, it has worked." The President also has said "we must strive to give all our citizens, whatever their backgrounds, an opportunity to achieve their own greatness." The OFCCP has a key role to play if the theme of "remaining strong as a just and unified America" is to be realized. Moreover, the Federal government has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.

OFCCP priorities that may complement the President's Race Reconciliation Initiative include:

- Strengthening families by breaking the glass ceiling and eradicating discriminatory policies that impede access and employment opportunities for all qualified individuals (OFCCP conducts reviews and engages in linkage [partnership] efforts that result in jobs for real people);
- Conducting Town Halls and Special Events (EVE Awards/ Best Practices Summit/Luncheon) to educate the nation about solutions and to provide guidance on the best corporate EEO practices and federal contractor responsibilities. Much has been accomplished in the past thirty years, but discrimination persists.

- Implementing a Fair Enforcement Strategy to more effectively combat discrimination in federal contractor establishments by focusing on substantive violations, reducing the paperwork, and enhancing technical assistance and training.
- Working in partnership and outreach alliances with all of our stakeholders to ensure that all our citizens, whatever their backgrounds, have an opportunity to participate in the workplace; and encouraging employers to highlight their proven methods to bring about true equal employment opportunity and promote racial harmony (EVE awards & Best Practices Summit); and
- Educating the public about what equal employment opportunity through affirmative action means.

Without the EO 11246 affirmative action and other government EEO programs, it will be more difficult to build the society we need in the 21<sup>st</sup> century. The programs open doors of opportunities, that were previously closed and works to ensure equal employment opportunity for all Americans.

**THE FACTS ON EXECUTIVE ORDER 11246  
AFFIRMATIVE ACTION**

Revised April 17, 1997

***Affirmative Action: Creating Economic Opportunity and Security For All Americans***

**I. Facts About the OFCCP Programs**

**A. OFCCP Mission Description**

The Department of Labor's Employment Standards Administration's Office of Federal Contract Compliance Programs (OFCCP) enforces the Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended and the affirmative action provisions (Section 4212) of the Vietnam Era Veterans' Readjustment Assistance Act, as amended. Taken together, these laws ban discrimination and require Federal contractors and subcontractors to take affirmative action to ensure that all individuals have an equal opportunity for employment, without regard to race, color, religion, sex, national origin, disability or status as a Vietnam era or special disabled veteran.

- OFCCP's jurisdiction covers approximately 26 million or nearly 22% of the total civilian workforce (92,500 non-construction establishments and 100,000 construction establishments). The Federal Government awarded more than \$179 billion tax-payer dollars in prime contracts in Fiscal Year 1995.
- OFCCP requires a contractor, as a condition of having a federal contract, to engage in a self-analysis for the purpose of discovering any barriers to equal employment opportunity. No other Government agency conducts comparable systemic reviews of employers' employment practices to ferret out discrimination. OFCCP also investigates complaints of discrimination. In Fiscal Years 1996, OFCCP conducted 3,476 compliance reviews. **Since 1994, OFCCP has recovered more than \$100 million dollars in total financial settlements for victims of discrimination.** Moreover, OFCCP programs prevent discrimination. Further information about the OFCCP programs may be obtained from the Internet. The DOL address is: <http://www/dol/gov>.

**B. Operation of the Executive Order Program. The EEO clause**

Each contracting agency in the Executive Branch of government must include the equal opportunity clause in each of its nonexempt government contracts. The equal opportunity clause requires that "the contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin." American Indian

or Alaskan Native, Asian or Pacific Islander, Black, and Hispanic individuals are considered minorities for purposes of the Executive Order. This clause makes equal employment opportunity and affirmative action integral elements of a contractor's agreement with the government. Failure to comply with the non-discrimination or affirmative action provisions is a violation of the contract.

A contractor in violation of E.O. 11246 may have its contracts canceled, terminated, or suspended in whole or in part, and the contractor may be debarred, i.e., declared ineligible for future Government contracts. However, a contractor cannot be debarred without being afforded the opportunity for a full evidentiary hearing. Debarments may be for an indefinite term or for a fixed term. When an indefinite term debarment is imposed, the contractor may be reinstated as soon as it has demonstrated that the violations have been remedied. A fixed-term debarment establishes a trial period during which a contractor can demonstrate its commitment and ability to establish personnel practices that are in compliance with the Executive Order.

If a matter is not resolved through conciliation, OFCCP may refer the matter to the Office of the Solicitor of Labor, which is authorized to institute administrative enforcement proceedings. After a full evidentiary hearing, a Department of Labor Administrative Law Judge issues recommended findings of fact, conclusions of law, and a recommended order. On the basis of the entire record, the Secretary of Labor issues a final Administrative Order. Cases also may be referred to the Department of Justice for judicial enforcement of E.O. 11246, primarily when use of the sanctions authorized by the Order is impracticable, such as a case involving a sole source supplier.

The regulations implementing the Executive Order establish different affirmative action provision for non-construction (i.e., service and supply) contractors and for construction contractors.

### **C. Executive Order Affirmative Action Requirements**

#### **i. For Supply and Service Contractors**

Non-construction (service and supply) contractors with 50 or more employees and government contracts of \$50,000 or more are required, under Executive Order 11246, to develop and implement a written affirmative action program (AAP) for each establishment. The regulations define an AAP as a "set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort." The AAP is developed by the contractor (with technical assistance from OFCCP if requested) to assist the contractor in a self-audit of its workforce. The AAP is kept on file and carried out by the contractor; it is submitted to OFCCP only if the agency requests it for the purpose of conducting a compliance review.

The AAP identifies those areas, if any, in the contractor's workforce that reflect utilization of women and minorities. The regulations at 41 CFR 60-2.11 (b) define under-utilization as "having fewer minorities or women in a particular job group than would reasonably be expected by their availability." When determining availability of women and minorities, contractors consider, among other factors, the presence of minorities and women having requisite skills in an area in which the contractor can reasonable recruit.

Based on the utilization analyses under Executive Order 11246 and the availability of qualified individuals, the contractors establish goals to reduce or overcome the under-utilization. Good faith efforts may include expanded efforts in outreach, recruitment, training and other activities to increase the pool of qualified minorities and females. The actual selection decision is to be made on a non-discriminatory basis.

#### **ii. For Construction Contractors**

OFCCP has established a distinct approach to affirmative action for the construction industry due to the fluid and temporary nature of the construction workforce. In contrast to the service and supply affirmative action program, OFCCP, rather than the contractor, establishes goals and specifies affirmative action which must be undertaken by Federal and federally assisted construction contractors. OFCCP issued specific national goals for women. The female goal of 6.9 percent was extended indefinitely in 1980 and remains in effect today. Construction contractors are not required to develop written affirmative action programs. The regulations enumerate the good faith steps construction contractors must take in order to increase the utilization of minorities and women in the skilled trades.

#### **D. Goals, Timetables, and Good Faith Efforts**

The numerical goals are established based on the availability of qualified applicants in the job market or qualified candidates in the employer's work force. Executive Order numerical goals do not create set-asides for specific groups, nor are they designed to achieve proportional representation or equal results. Rather, the goal-setting process in affirmative action planning is used to target and measure the effectiveness of affirmative action efforts to eradicate and prevent discrimination. The Executive Order and its supporting regulations do not authorize OFCCP to penalize contractors for not meeting goals. The regulations at 41 CFR 60-2.12(e), 60-2.30 and 60-2.15, specifically prohibit quota and preferential hiring and promotions under the guise of affirmative action numerical goals. In other words, discrimination in the selection decision is prohibited.

## **II. Examples of Affirmative Action Programs**

Executive Order 11246 affirmative action in action is exemplified by the Secretary's Opportunity 2000 Award and Exemplary Voluntary Efforts (EVE) recipients. These



awards are given to contractors with outstanding affirmative action programs. Affirmative action means aggressive recruitment programs, mentoring, training, and family programs that work to recruit and retain qualified individuals. Corporate programs nominated for a Secretary 2000 or EVE award include innovative outreach and recruitment, employee development, management development and employee support programs. Past award winners include Pacific Telesis Group of California (Secretary 2000 1996); Xerox Corporation of Connecticut (Secretary 2000 1995); Procter & Gamble of Ohio (Secretary's 2000 1994); The Rouse Company in Columbia, Maryland (EVE, 1996); CIGNA in Philadelphia (EVE, 1996); CBS in New York (EVE, 1995), Seafirst of Washington (EVE, 1995); The Law Company of Kansas (EVE, 1995); Rohm and Haas of Pennsylvania (EVE, 1994) and the Council for Tribal Employment Rights and Cheyenne River Sioux Tribe of South Dakota (EPIC, 1994).

### III. Successes

OFCCP efforts benefit real people through its systemic investigations and linkage agreements (partnerships with private industry and state and local agencies) and the Executive Order 11246 affirmative action requirements for Federal contractors.

- In general, OFCCP programs assisted 129 of the Fortune 1,000 companies and other major corporations to break the "glass ceiling" for women and minorities. In 1970, women accounted for 10.2 percent of the officials and managers reported on the EEO-1 form. In 1993, women were 29.9 percent of all officials and managers.
- Many minorities and women have been successfully placed on large construction projects. For example, on the Oakland Federal Building project, 8 percent of the hours worked on the site were performed by women. On the New York Federal courthouse project, 35 percent of the hours were worked by minorities and approximately 6 percent by women. In addition, OFCCP has recognized the affirmative action efforts of award recipient construction contractors like the Hyman Construction of Manhattan, New York and the Law Company of Kansas.
- Working women moved from welfare to forklift operator jobs and other non-traditional construction jobs in Philadelphia and Chicago through OFCCP linkage (outreach) efforts.
- Native Americans are now employed on Federal highway construction projects in conjunction with the Council for Tribal Employment Rights and the Cheyenne River Sioux Tribe TERO. Both were recognized for Departmental awards in 1994 for their efforts, including the placement of Native Americans on highway construction projects.
- Individuals with disabilities are now employed in computer positions in Columbus, Ohio. This linkage partner to Goodwill Industries employs more than 70

individuals with special needs and is a prototype of an employer's workplace that has been specifically designed to welcome persons with severe disabilities, utilizing great community outreach.

- OFCCP has taken steps to outreach to the veterans community and has had two highly publicized veterans cases. A Seattle company hired a specialist to address Vietnam era veterans' issues.
- Because of affirmative action requirements, Federal contractors are reviewing their employment policies and training their managers and supervisors on ways to identify and correct discrimination and harassment in the workplace.

The following are additional examples of real people who have been identified as benefiting from federal affirmative action, according to the Council of Presidents' Women Speak Out : Affirmative Action Resource Guide:

- Bernadette of Washington, DC. works as a carpenter because of a federal affirmative action program. She is an African-American single parent with two children, who says "Because a company had an affirmative action program, I got on the job site".
- Janice became an astronaut with NASA at the Johnson Space Center, in July 1991, because of NASA's EEO/affirmative action program. She has since logged over 438 hours in space. She describes the NASA EEO policy: "Under NASA's developing equal opportunity and diversity policies, all hiring and advancement decisions are based on individual qualifications and merit, but recruitment and development programs are structured such that high quality candidates are available to help achieve a representative workforce."
- Paulette is now an Officer of NYNEX, responsible for the Market Areas of Maine, New Hampshire, Rhode Island and Vermont. She says that "Without NYNEX's willingness to actively pursue Affirmative Action goals, my talents and skills would have never taken me this far in the business world."
- Lisa is a Laborer in Hammond, Indiana, employed at an expansion project. Before she entered the trades, she worked for \$5.00 an hour, without benefits as a seamstress. She now earns over \$20 an hour with benefits. She says that without affirmative action, she would probably still be working for \$5.00 an hour and have no opportunity for advancement.
- Judy is a Journey Structural Ironworker and single parent of two teenage sons in Chicago, Illinois. Before entering the trades, she worked two jobs, with no room to advance. She credits her new job to affirmative action and says "employers will not hire without affirmative action." She was one of 20 women in her union of 2,321 members.

- Kathy worked in the Skilled Trades in Chicago, said that “the affirmative guidelines allowed me to earn a higher wage than all of the service jobs that I had worked before. Working construction gave me the confidence and strength to know that I could excel in any field if given the opportunity.”
- On November 19, 1996, OFCCP published its “Egregious Discrimination Case List”. That list included the following incidents:

Black welders fired because white welders did not want to use their welding helmets.

A hostile working environment, including racial slurs, sexually inappropriate statements, graffiti on bathroom walls, offensive drawings in the workplace, racial jokes at an aircraft maintenance facility.

Black professionals required to scrub toilets and subjected to racial harassment.

Individual with disability (Native American amputee) subjected to verbal harassment because of his disability, physically assaulted, and denied benefits and opportunities provided to his non-disabled colleagues.

**Affirmative action is necessary to prevent discrimination and to address stereotypical thinking and biases that still impede employment opportunity.**

- The Fairfax Hospital in Virginia revised its policies to remedy wage disparities and open doors previously closed to women and minorities after signing a conciliation agreement with the OFCCP in 1993. At that time, for example, there were no (0) black physicians among the 37 benefit eligible physicians at the Fairfax Hospital. The hospital agreed to take action oriented steps to improve the inclusion of black physicians at the hospital. In 1995, the total number of black physicians increased and is more reflective of the available skilled physicians in the Washington, DC. area.
- HARSCO Corporation in Camp Hill Pennsylvania is another OFCCP success story. Before OFCCP’s compliance review, HARSCO employed no (0) African-Americans, Hispanics or Native Americans on its payroll. Since its first OFCCP compliance review in 1994, the contractor implemented a full inclusion hiring plan and has made consistent EEO progress.
- Overall findings from a 1980 - 1993 survey found that the growth rates are higher for women in contractor firms than for women in non-contractor firms.
- Contractors have also changed the corporate climate in ways that are not statistically measurable because of the requirements of Executive Order 11246. For example,

corporations now post job announcements and do not rely solely on word of mouth recruitment. Corporate sensitivity to issues like sex and race harassment have increased, as has the awareness of the benefits of a family friendly environment.

Race Initiative Policy -  
Civil Rights Enforcement

20 AUG 1993

Ms. Nancy E. McFadden  
Deputy Associate Attorney General  
United States Department of Justice  
10th & Constitution Avenue, N.W.  
Washington, D.C. 20530

Re: Civil Rights Division's "Backstop" Policy

Dear Nancy:

I wanted to follow-up on our conversation earlier this week concerning the Civil Rights Division's current policies pertaining to the relationship between federal and local law enforcement agencies in the prosecution of criminal civil rights cases.

As you know, the mission of the Civil Rights Division's Criminal Section is to lead the national effort to combat police and other official misconduct as well as violent crime perpetrated on account of the victim's race, religion, or national origin. I believe the current policies pertaining to the relationship between federal and local law enforcement agencies do not allow us to achieve this mission fully. As a result, the Department, and the Civil Rights Division in particular, have been the subject of criticism by Congress, by state and local political leaders, by civil rights organizations, and by ordinary citizens. With a few fundamental changes -- with some imaginative leadership and a long-term strategy of developing cohesive relationships in the law enforcement community -- I believe the Department can increase its impact nationally in prosecuting and ultimately preventing violations of federal criminal civil rights laws. These changes could also help restore the Department to the leadership role it has played before in civil rights. And finally, I believe this can be done with no additional allocation of resources.

From data collected by numerous civil rights organizations, including the Southern Poverty Law Center and the Anti-Defamation League of B'nai Brith, it is clear that hundreds, if not thousands of violations of federal criminal civil rights laws occur each year in this country. These violations consist mostly of incidents of police brutality and racially motivated violence. The current Criminal Section policy is to take a passive approach to most of these incidents, allowing local law enforcement to

cc: Wroblewski

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proceed without any federal assistance or intervention. The terminology used over and over again by Section management and by Assistant Attorneys General in congressional testimony is that the Criminal Section is a "backstop" -- taking action only if other law enforcement fails on its own.

As a result, each year, the Department receives between 8,000 and 10,000 complaints of federal criminal civil rights violations. From these complaints, the Criminal Section initiates only 50 to 60 grand jury investigations. This small number of prosecutions has been the subject of repeated criticism by Congress, political and civil rights leaders, and ordinary citizens. The implication of the "backstop" policy to Congress and citizens alike is that civil rights enforcement is not a priority of the Department. In drug enforcement, for example, a clear Department priority for years, the Department has been highly aggressive, working together with local law enforcement to better carry out enforcement objectives. Comparisons with other priorities are inevitably made and criticism follows. In addition, the "backstop" policy has resulted in a lack of enthusiasm among FBI agents, who are forced to investigate thousands of complaints that their own experience shows will not be prosecuted federally, and a considerable morale problem among the Criminal Section line attorneys.

Another serious consequence of the "backstop" policy is that the Department is repeatedly called upon to prosecute federally many controversial cases where a state has already brought a prosecution resulting in an acquittal. The best example of this is the Rodney King case. The convictions in that case were certainly a tremendous victory for the lawyers who worked on the case. But the larger picture is very different: the Criminal Section declines most calls for a successive prosecution. This is so for many reasons, not the least of which is that the state verdict is often rendered a year or more after the underlying incident. By that time, additional federal investigative efforts are usually futile. As you know, crimes need to be investigated within hours and days. Because of enormous publicity surrounding the King case, however, citizens around the country are repeatedly asking for a federal prosecution where a state jury renders a verdict contrary to public opinion. Examples range from the acquittal of Lemrick Nelson in the Crown Heights racial killing in Brooklyn, New York to the recent acquittal of a Louisiana man who shot and killed a Japanese exchange student. We are harshly and repeatedly criticized when we do not bring these cases. And perhaps most importantly, our "backstop" policy sends a destructive message: when a state jury renders a verdict contrary to public opinion, even if the state vigorously prosecuted the case, the verdict need not be respected.

A few policy changes, I believe, could dramatically change the enforcement program, could lead to many times the number of

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federal civil rights convictions, could alleviate the successive prosecution problem, and could restore the Civil Rights Division to the leadership role it played in past decades. First, I believe the Department should take a more aggressive approach when incidents first occur. This does not necessarily mean the filing of federal charges. Rather, in most cases, FBI agents or Criminal Section attorneys would work with local law enforcement to support their investigation. As Zach Carter pointed out in our meeting the other day, in some jurisdictions, this may mean setting up a formal joint civil rights task force between local and federal agencies. In other jurisdictions, the relationship may not be so formal. However, I believe we must reach out to law enforcement agencies across the country to inform those agencies of our enforcement program and of our desire to take an active role and to be a dynamic and timely partner in investigating and prosecuting criminal civil rights violations. Second, the Criminal Section must be prepared to respond immediately when violations occur. Our current policy requires substantial memoranda that often takes four to eight weeks of management review before attorneys can respond to violations. This policy is not consistent with a vital crime-fighting operation. Third, we must be ready to cross-designate state prosecutors and investigators into the federal system so that they can participate in federal prosecutions and we must be ready to be cross-designated into the state system. Many civil rights cases will be prosecuted best in the state system and others in the federal system. If we want to work closely with state and local prosecuting attorneys and investigators, if we want to develop good relations with them, we will have to ensure that all participate in the prosecutions. Fourth, we must utilize the offices of the United States Attorneys more effectively. For many smaller cases, it would be far more efficient for Criminal Section lawyers to work closely with Assistant United States Attorneys, local prosecutors, and local FBI agents only in the early investigative stages of a case. The Section expertise could be shared, the cases investigated properly, and the litigation left to those permanently on the scene. The Section attorneys could then be utilized to prosecute those high publicity and controversial cases that the attorneys now only review following acquittals.

These policies would bring the federal expertise and federal resources into hundreds of cases. The federal expertise is real, and it bears results. The policies would bring the expertise to bear early on and in all civil rights prosecutions to guarantee that they are done right the first time. And the Department would be taking a leadership role that is now lacking.

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The issues and the answers are certainly more complex than outlined in this letter. I would be glad to discuss them with you in more detail at any time.

Sincerely,

Jonathan J. Wroblewski



Race - admin of justice policy -  
EEOC reform

## MEMORANDUM

**TO:** ELENA KAGAN  
**CC:** BRUCE REED  
**FROM:** TOM FREEDMAN, MARY L. SMITH  
**RE:** EEOC REFORM  
**DATE:** JUNE 6, 1997

---

### SUMMARY

Attached is a concise history and description of the workings of the EEOC, a categorization of its problems, including case backlog and limited authority, and potential ameliorating reforms.

### I. BACKGROUND

The EEOC was created in 1964 to investigate employment discrimination charges relating to race, color, religion, sex, or national origin. Since that time, the EEOC has become responsible for administering additional laws: (1) the Equal Pay Act of 1963, (2) the Age Discrimination in Employment Act of 1967, (3) the Equal Employment Act of 1972, (4) Section 501 of the Rehabilitation Act of 1973, (5) the Americans With Disabilities Act (ADA) of 1990, and (6) the Civil Rights Act of 1991.

Critics of the Commission assert that the 1964 Civil Rights Bill did not provide the EEOC with sufficient remedies for victims of discrimination because of Southern opposition to the bill. Numerous commentators, including Bill Bradley, Shelby Steele, and Jesse Jackson, have noted the delays and ineffectiveness associated with the Commission, the major administrative enforcement mechanism designed to remedy discrimination in our country. They note that the Commission's failure to promptly and effectively remedy claims of discrimination demoralizes individual victims of prejudice and sabotages national efforts at creating a society based on equal opportunity.

### II. PROCESS

("EEOC Process Chart" attached)

- Plaintiff has 180 days to file a charge of discrimination with EEOC.
- EEOC investigates whether there is cause to believe discrimination occurred
  - However, even if EEOC investigation is not completed, 180 days after the charge is filed, a plaintiff can request a "right to sue" letter, which permits the filing of the case in federal court
  - Plaintiff has 90 days to file complaint in federal court after receiving "right to sue" letter
- If the EEOC does investigation, then it either issues a "cause" finding or a "no cause" finding
  - "Cause" finding issued: EEOC encourages the parties to enter into conciliation procedures which either result in a settlement or if no settlement, the plaintiff is given a "right to sue" letter
  - "No cause" finding issued: potential plaintiff is given a "right to sue" letter and the EEOC's determination of "no cause" is entitled to no deference in court

### III. STRUCTURE

- EEOC carries out its mission through 50 field offices that receive, investigate, and resolve charges of discrimination in the private sector, and it coordinates these activities in the public sector.
- A 5-member commission heads the EEOC. The President appoints the members, with the consent of the Senate, for rotating 5-year terms. No more than 3 members can be from the same political party. The President designates one member to serve as Chairman and another as Vice Chairman. The current chairman is Gilbert F. Casellas.

### IV. CURRENT STATUS

- For 1998, the EEOC has requested a budget of \$246 million, an increase of \$6 million, or 2.65 over the current level for 1997.
- During 1994, the EEOC issued 36,377 determinations following a full investigation, and 94.7% or 34,451 resulted in "no cause" findings in favor of the defendant. There were only 1,926 determinations of "cause," a mere 5.3% of the total determinations.
- In 1992, the EEOC filed 347 substantive lawsuits, 26% involved sex discrimination, 21% involved age discrimination, and 19% concerned race discrimination. The majority, 53% involved unlawful termination, 18% concerned discriminatory hiring.

## V. PROBLEMS

- **Backlog.** The backlog of cases or number of charges awaiting investigation. At one time the backlog was over 100,000 cases, but recently Mr. Casellas testified before Congress that this backlog has been reduced to 75,000.
- **Delay.** The increasing time it takes EEOC to investigate and process charges. In 1994, the EEOC stated that the average investigation of a claim took 328 days and that its backlog would take 18.8 months to clear. Attorneys at DOJ report that it is not uncommon to commence cases after 5 years have elapsed since the the incident that prompted the original complaint.
- **Scope.** The limited number of litigation actions and systemic investigations initiated by the EEOC. In 1992, the EEOC filed 347 substantive lawsuits.
- **Impact.** The EEOC spends its time and effort collecting statements, investigating charges, and issuing determinations. But these determinations are without legal impact.

## VI. POSSIBLE SOLUTIONS

- **Resources.** More funding for staff to address the backlog
- **Authority.** Give the EEOC "cease and desist" authority, that is, authority to issue injunctions in cases of egregious violations
- **Authority.** Give judicial deference to an EEOC determination of "cause" or "no cause," permitting only appellate review based on a "substantial evidence" standard of review
- **Authority.** Encourage binding ADR on an accelerated schedule before EEOC does investigation
- **Possible Criminalization.** Strengthen inducements to changing behavior, as the Army has done. Criminalize job discrimination in the strongest cases, where there is profound damage and willful violations of the law with direct economic impact. Professors Moskos and Butler note in their study of the military that "racist behavior ends a person's career. That racial remarks are rarely heard among Army NCOs and officers, even in allwhite groups, reflects how strictly this norm is adhered to....criminalizing racial discrimination has, in a manner of speaking, been accomplished de facto in the military."

- **Structure.** Transform the EEOC structure, streamlining its decisionmaking into something more similar to the National Labor Relations Board (NLRB). Key components include: General Counsel appointed by the President and consent of the Senate responsible for overseeing investigation and prosecution of unfair labor practices; regional field officers appointed by the General Counsel; minimal backlog; consider use of Administrative Law Judge (ALJ); and
- **Structure.** Improve quality of EEOC training and staff

## VII. POTENTIAL CRITICISMS OF PROPOSALS

- More bureaucracy and ineffective.
- Interferes too much in private employers relationships. Making the EEOC's determinations binding will cause an uproar among businesses.
- Does not solve the problems.
- Denies complainants their day in court.

## VIII. SOLUTIONS THE EEOC HAS ADOPTED ALREADY

- In 1996, the EEOC adopted a national enforcement plan that sets priorities for the processing of charges and litigation on the national and local level. Priority is placed on class-action lawsuits, claims that involve allegations of company-wide discrimination, and those that are likely to develop key legal principles. The reforms mark a fundamental change for the agency because it no longer fully investigates every charge it receives. Instead, charges are prioritized so those with little merit are dismissed without a probe while priority cases are investigated.
- The EEOC beefed up its mediation strategy, using many volunteer mediators under the Administrative Dispute Resolution Act.
- The agency is also targeting high-profile cases to bring suit such as the Mitsubishi sexual harassment suit in Illinois.

## **IX. CRITICISMS OF EXISTING SOLUTIONS**

- The priority system creates incentives to dismiss cases and avoid investigations.
- EEOC gets involved in court cases only in big cases after private attorneys have made some progress.

## I. EEOC

### A. Problems

- \* There is a 75,000 case backlog.
- \* It is routine for cases to take 5 years to be investigated and referred to DOJ.
- \* EEOC is understaffed.
- \* EEOC cannot legally do cease and desist orders.
- \* EEOC is a commission and has trouble coordinating policy.

### B. Solutions

- \* Increase EEOC budget, it has requested \$246 million.
- \* Give it power to do cease and desist orders, like NLRB.
- \* Let it do industry wide appraisals and suggest solutions.

### C. Other

- \* The history of the EEOC is that it was passed, but was weak on remedies because of Southern opposition to the bill.
- \* There have been some programs recommending more wide-ranging reform in the Anti-Discrimination bureaucracy. We should pursue this.

Race Initiative Policy -  
Civil Rights Enforcement

Tom -  
This was helpful. Let's  
talk Monday so we can  
set up a meeting  
for this week.

Elena

## MEMORANDUM

**TO:** ELENA KAGAN  
**FROM:** TOM FREEDMAN, MARY SMITH, TANYA MARTIN, JULIE MIKUTA  
**RE:** FEDERAL ENFORCEMENT OF CIVIL RIGHTS LAWS cc: Porace  
**DATE:** AUGUST 1, 1997

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### SUMMARY

Attached is a brief description of the structure and legal authority of the civil rights offices across the federal government, the current status of the office and potential improvements that might be pursued as a part of the Race Initiative. The last section describes a process/timetable for potential next steps for the workgroup addressing administration of justice.

### I. OVERVIEW OF FEDERAL CIVIL RIGHTS ENFORCEMENT

- Prior to the Civil Rights Act of 1957, the federal civil rights effort was limited to the enforcement of a few post-Civil War criminal statutes.
- Since 1957, Congress and the President have expanded greatly the Federal civil rights effort through the creation of additional substantive rights and additional enforcement agencies.
- The Civil Rights Act of 1964, the Voting Rights Act of 1965 and the Fair Housing Act of 1968 are among the initial pieces of legislation that were enacted to address barriers to equal opportunity in employment, voting, public accommodations, education and federal financial assistance.<sup>1</sup>

#### A. Methods of Enforcement

Every government agency, department and commission is involved in some aspect of civil rights enforcement -- external or internal -- and in most cases, both:

- **External** - agencies are responsible for prohibiting discrimination by recipients of federal financial assistance (Title VI of the Civil Rights Act of 1964); moreover, some agencies have additional freestanding civil rights enforcement authority;
- **Internal** - Equal Employment Opportunity Commission (EEOC) regulations apply to all agencies in their own hiring activities.

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<sup>1</sup>Attached as Appendix A is a list of the relevant civil rights laws.

While this memorandum focuses on external enforcement activities, information on internal compliance with civil rights requirements should also be gathered from agencies, as agency hiring practices and external enforcement of programs are often discussed in tandem. (see Section XIV).

## **B. Federal Agencies**

The July 15 memorandum on the race initiative policy process, identified nine participating agencies for the workgroup on the administration of justice. All nine, along with the U.S. Commission on Civil Rights, are discussed in this memorandum. Brief descriptions are provided of civil rights activities in other federal agencies.

- **Agencies with broad overview.**

These agencies have responsibility across the government for civil rights enforcement:

- U.S. Commission on Civil Rights -- civil rights monitoring and reporting
- Justice Department -- government-wide civil rights enforcement
- EEOC -- employment

- **Agencies with principal responsibilities.**

The U.S. Commission for Civil Rights identified the following agencies, along with Justice, as having principal responsibility for civil rights enforcement:

- Department of Education -- educational opportunity
- HHS, Office for Civil Rights -- health care; welfare
- HUD --housing
- Labor -- federal contracts

- **Other agencies with civil rights enforcement activity participating in workgroup.**

- Treasury -- fair lending
- Interior - Indian civil rights
- USDA - minority farmers

- **Other agencies with civil rights enforcement activities.**

Finally, there are a number of other agencies that have active civil rights issues including the Small Business Administration (Section 8/minority businesses); Commerce (minority business development); EPA (environmental justice); Transportation (road/transit system location and maintenance); and the FCC (broadcaster preferences).

## **II. U.S. COMMISSION ON CIVIL RIGHTS**

### **A. Structure**

The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- **Investigate complaints** alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of



fraudulent practices;

- **Study and collect information** relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice
- **Serve as a national clearinghouse** for information with respect to discrimination or denial of equal protection of the laws;
- **Submit reports, findings, and recommendations** to the President and Congress;
- **Issue public service announcements** to discourage discrimination or denial of equal protection of the laws.

**B. Current Status**

- In FY 1998, the Commission requested a budget of \$11 million, an increase of \$1.3 million over the 1997 level of \$8.7 million.
- In July 1997, GAO reported the Commission lacks basic management and financial controls: key documents are lost or nonexistent; accurate cost data on programs or project is unavailable; and reports take so long to complete that published data is often outdated or inaccurate.
- The Citizens' Commission on Civil Rights, which monitors civil rights enforcement, has also recently released a report critical of the U.S. Commission.

**III. JUSTICE -- CIVIL RIGHTS DIVISION (CRD)**

**A. Structure**

- Unless otherwise specified by law, the conduct of government litigation is reserved to the Department of Justice. CRD enforces a broad range of civil and criminal statutes and presidential executive orders. Although its initial focus was on voting and post-civil war criminal statutes, the Civil Rights Act of 1964 greatly expanded its authority.
- CRD can receive, investigate, and litigate complaints of discrimination in places of public accommodation, in school and colleges, in public facilities owned by State or local governments, in programs or activities receiving Federal financial assistance, and in employment.

- CRD has an office of Redress Administration (WWII internment/national origin), an office of Administrative Management, and 10 subject-matter sections:
  - Appellate;
  - Civil Rights Prosecution (criminal prosecutions e.g., hate crimes);
  - Coordination and Review (coordination of enforcement activity of all federal agencies);
  - Disability Rights (ADA);
  - Education Opportunities (school desegregation);
  - Employment Litigation;
  - Housing and Civil Enforcement;
  - Special Litigation (civil rights of institutionalized persons);
  - Voting; and
  - the Office of Special Counsel.

**B. Process**

The various sections of CRD have broad authority to receive, investigate, and litigate complaints of discrimination under the Constitution and civil rights laws. Alternatively, the sections can initiate litigation upon referral from the designated federal agency conducting investigations under the applicable civil rights law.

**C. Current Status**

- For FY 1998, CRD has requested a budget of \$67.4 million, an increase of \$6 million (8%) from FY 1997 level, to enhance prosecution of hate crimes and police misconduct, as well as for enforcement of the Americans with Disabilities Act.
- CRD started FY 1996 with 1,406 cases pending, received 366 new cases and terminated 406, ending the year with 1,366 cases pending.
- CRD started FY 1996 with 8,359 matters pending, received 4,358 new matters and terminated 4,177, ending the year with 8,720 matter pending.
- For FY 1998, Justice requested \$7.5 million for the Community Relations Service, established by the Civil Rights Act of 1964, to provide assistance to communities in preventing and resolving disputes arising from discriminatory practices.

**D. Possible Improvements**

- Caseload improvements -- because of the vast jurisdiction of the CRD, its overall workload is affected by nearly every expansion of civil rights protections.
- Coordination -- improve data collection/dissemination among agencies.

#### IV. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

##### A. Structure

- The EEOC was created in 1964 to investigate employment discrimination charges relating to race, color, religion, sex, or national origin.
- Since that time, the EEOC has become responsible for administering additional laws: (1) the Equal Pay Act of 1963, (2) the Age Discrimination in Employment Act of 1967, (3) the Equal Employment Act of 1972, (4) Section 501 of the Rehabilitation Act of 1973, (5) the Americans With Disabilities Act (ADA) of 1990, and (6) the Civil Rights Act of 1991.
- EEOC carries out its mission through 50 field offices that receive, investigate, and resolve charges of discrimination in the private sector, and it coordinates these activities in the public sector.
- A 5-member commission heads the EEOC. The President appoints the members, with the consent of the Senate, for rotating 5-year terms. No more than 3 members can be from the same political party.

##### B. Process

- Plaintiff has 180 days to file a charge of discrimination with EEOC.
- EEOC investigates whether there is cause to believe discrimination occurred.
  - However, even if EEOC investigation is not completed, 180 days after the charge is filed, a plaintiff can request a "right to sue" letter, which permits the filing of the case in federal court
  - Plaintiff has 90 days to file complaint in federal court after receiving "right to sue" letter
- If the EEOC does investigate, then it either issues a "cause" finding or a "no cause" finding.
  - "Cause" finding issued: EEOC encourages the parties to enter into conciliation procedures which either result in a settlement or if no settlement, the plaintiff is given a "right to sue" letter
  - "No cause" finding issued: potential plaintiff is given a "right to sue" letter and the EEOC's determination of "no cause" is entitled to no deference in court

##### C. Current Status

- For 1998, the EEOC has requested a budget of \$246 million, an increase of \$6 million (2.65%) over the current level for 1997.
- During 1994, the EEOC issued 36,377 determinations following a full investigation, and 94.7% or 34,451 resulted in "no cause" findings in favor of the defendant. There were only 1,926 determination of "cause", a mere 5.3% of the total determinations.

- In 1994, the EEOC filed 347 substantive lawsuits, 26% involved sex discrimination, 21% involved age discrimination, 19% concerned race discrimination. The majority, 53% involved unlawful termination, 18% concerned discriminatory hiring.
- At one time the backlog was over 100,000 cases, but recently the Chairman testified before Congress that this backlog has been reduced to 75,000.
- In 1994, the EEOC stated that the average investigation of a claim took 328 days and that its backlog would take 18.8 months to clear.

**D. Possible Solutions**

- More funding for staff to address the backlog.
- Give the EEOC “cease and desist” authority, that is, authority to issue injunctions in cases of egregious violations.
- Give judicial deference to an EEOC determination of “cause” or “no cause,” permitting only appellate review based on a “substantial evidence” standard of review.
- Encourage binding ADR on an accelerated schedule before EEOC does investigation.
- Criminalize job discrimination in the strongest cases, where there is profound damage and willful violations of the law with direct economic impact.

**E. Solutions the EEOC Has Adopted Already**

- In 1996, the EEOC adopted a national enforcement plan that sets priorities for the processing of charges and litigation on the national and local level. Priority is placed on class-action lawsuits, claims that involve allegations of company-wide discrimination, and those that are likely to develop key legal principles. The reforms mark a fundamental change for the agency because it no longer fully investigates every charge it receives.
- The EEOC beefed up its mediation strategy, using many volunteer mediators under the Administrative Dispute Resolution Act.
- The agency is also targeting high-profile cases to bring suit such as the Mitsubishi sexual harassment suit in Illinois.

**V. DEPARTMENT OF EDUCATION – OFFICE OF CIVIL RIGHTS (ED-OCR)**

**A. Structure**

- ED-OCR is responsible for ensuring that no person is unlawfully discriminated against on the basis of race, color, national origin, sex, disability, or age in the delivery of services or

the provision of benefits in programs or activities of schools, and institutions receiving financial assistance from ED.<sup>2</sup>

- Its enforcement authorities are rooted in five statutes: Title VI of the Civil Rights Act of 1964 (race/ethnic); Title IX of the Education Amendments of 1972 (sex); section 504 of the Rehabilitation Act of 1973 (disabilities); the Age Discrimination Act of 1975 and the Americans with Disabilities Act of 1990.
- ED-OCR has field staff in each of ED's regional offices whose activities include complaint investigations, compliance reviews, corrective action plan monitoring, enforcement litigation, policy development and program reviews. The majority of ED-OCR staff and resources are devoted to complaint investigations and compliance reviews.

#### **B. Process**

- ED-OCR conducts investigations and compliance reviews to ensure that federal assistance recipients adhere to nondiscrimination requirements. If a determination is made that a violation has occurred, an attempt is made to achieve voluntary compliance by the recipient.
- If ED-OCR cannot obtain voluntary compliance, it proceeds in one of two ways: it initiates an administrative enforcement proceeding seeking to terminate Federal financial assistance, or it refers the matter to the Department of Justice to seek injunctive relief in Federal Court.

#### **C. Current Status**

- For 1998, ED-OCR has requested a budget of \$61.5 million, an increase of \$6.5 million over 1997.
- In FY 1996, OCR received 4,828 complaints and resolved 4,886; it also initiated 146 compliance actions and resolved 173. By comparison, during FY 1991, OCR received 3,809 complaints and resolved 3,497 --- and initiated 41 compliance actions and resolved 22. During this same period FTEs have decreased from 820 in 1991, to 763 in 1996.
- OCR recently announced an investigation of complaints made against the admissions process at the University of California law schools following the implementation of Proposition 209.

#### **D. Potential Improvements**

- Reduce delay -- some education civil rights groups have complained to the Department about the speed of enforcement actions and delivery of the Elementary and Secondary

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<sup>2</sup>Civil rights enforcement for programs and services provided by schools of medicine, dentistry, nursing and other health-related schools remains with HHS.

School Survey data.

- Provide more proactive technical assistance/guidance to school districts/states.

## **VI. HEALTH AND HUMAN SERVICES -- OFFICE FOR CIVIL RIGHTS (HHS-OCR)**

### **A. Structure**

- HHS-OCR administers numerous statutes that prohibit discrimination by providers of health care and social services: (1) Title VI of the Civil Rights Act of 1964; (2) Title IX of the Education Amendments of 1972; (3) section 504 of the Rehabilitation Act of 1973; and (4) the Age Discrimination Act of 1975 which prohibit discrimination by recipients of Federal financial assistance based on race, color, national origin, sex, age and disability.
- HHS-OCR estimates that approximately 230,000 group and institutional providers of federally assisted services are subject to the nondiscrimination laws it enforces.

### **B. Process**

- HHS-OCR relies on a compliance program that includes complaint investigations, compliance and other reviews, monitoring of corrective action plans, and voluntary compliance and other outreach activities.
- If a matter cannot be resolved voluntarily to the satisfaction of all parties, HHS-OCR may effect compliance by terminating Federal financial assistance, referring the matter to the Attorney General for enforcement proceeding, pursuing HHS administrative proceedings or invoking applicable State or local law.

### **C. Current Status**

- The FY 1998 budget request for HHS-OCR is \$20.5 million, a \$1 million (5%) increase over the FY 1997 budget authority of \$19.5 million.
- This \$1 million increase will be used to help implement initiatives that address discriminatory issues involving immigration, inter-ethnic adoption, managed care, Medicaid waivers, nursing home care, home health care and welfare reform.
- The number of complaints received in FY 1993 (2,094) reflected an 82 percent increase over the FY 1987 level (1,148). This rise in complaints was, in part, attributable to large increases in the number of AIDS-related complaints and other §504 disability cases. These cases focus on protecting persons with AIDS against unlawful discrimination and ensuring that minorities have an equal opportunity to participate in federally assisted programs and activities designed to combat AIDS.
- In the North Carolina Law Review, Professor Sidney Watson criticizes HHS-OCR as

being “ineffective in ending the health care discrimination caused by the myriad policies that disproportionately exclude minorities.” Although numerous studies document the underutilization of health services by minorities, few studies have analyzed Title VI compliance by health-care facilities.

**D. Potential Improvements**

- Increase funding -- HHS-OCR is below its FY 1981 funding and FTE levels, while the number of complaints is increasing.
- Increase the availability of data on Title VI compliance by health care facilities

**VII. HOUSING AND URBAN DEVELOPMENT  
OFFICE OF FAIR HOUSING AND EMPLOYMENT OPPORTUNITY (FHEO)**

**A. Structure**

- The majority of FHEO's civil rights responsibilities lie in its authority to enforce Title VIII of the Civil Rights Act of 1968 and the Fair Housing Amendments Act of 1988, which prohibit discrimination on the basis of race, color, religion, sex, disability, familial status or national origin in the sale or rental, provision of brokerage services, or financing of housing.
- FHEO also enforces provisions of Title VI (race/ethnic), section 504 (disability), Section 109 (housing and community development), the Americans with Disabilities Act, and related executive orders to ensure nondiscrimination in federally assisted programs and activities relating to housing and urban development
- FHEO's fair housing duties include the administration of two programs: (1) the Fair Housing Assistance Program (FHAP) provides financial assistance to supplement the enforcement activities of State and local enforcement agencies to ensure the prompt processing of Title VIII complaints; (2) the Fair Housing Initiatives Program (FHIP) provides support to public and private organizations for the purpose of eliminating or preventing discrimination in housing and for enhancing fair housing opportunities.

**B. Process**

- FHEO investigates complaints received from any person who claims to have been injured by a discriminatory housing practice or believes that an injury is about to occur.
- Those Title VIII complaints that fall within the jurisdiction of a substantially equivalent State or local agency are referred to those agencies for initial processing.
- After investigation, FHEO issues a determination indicating whether reasonable cause exists to believe that discrimination has occurred.

- If reasonable cause is found, any of the parties may elect to resolve the matter in Federal court through a HUD referral to Justice. Otherwise, the matter is resolved through the HUD administrative process.
  - FHEO also conducts investigations, and compliance reviews to enforce the provisions of civil rights laws applicable to federal assistance recipients. If a violation is found, HUD may refuse to approve an application for federal funds, or terminate funds of a current recipient.
- C. Current Status**
- The FY 1989 budget request for FHEO is \$39 million, a \$9 million (30%) increase over FY 1997.
  - Of the amount requested, \$15 million is for the FHAP (state/local enforcement) and \$24 million is for the FHIP (public/private initiatives).
- D. Potential Improvements**
- Increase the number of state/local agencies qualifying as “substantially equivalent” under the FHAP program. The number decreased due to the implementation of more stringent requirements in the Fair Housing Amendments Act of 1988. In 1990, approximately 125 agencies were certified, by 1993 the number qualifying was 52.
  - In 1994, the Civil Rights Commission found that in most cases HUD did not reach a conclusion as to just cause within the 100-day benchmark set by Congress. The average case-processing time in 1993 was 151 days.

**VIII. DEPARTMENT OF LABOR (DOL)  
OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (OFCCP)  
OFFICE OF CIVIL RIGHTS**

- A. Structure**
- The enforcement authority of OFCCP encompasses several statutes and Executive Order 11246, as amended, to ensure nondiscrimination in employment based on race, sex, religion, color, national origin, disability or veteran status by Federal contractors at 290,000 sites with a total workforce of 22 million people.
  - OFCCP is also responsible for reviewing employers policies and practices for adherence to the Family and Medical Leave Act of 1993.
  - The Office of Civil Rights that is charged with ensuring compliance with Title VI and other nondiscrimination provisions in programs receiving federal financial assistance from DOL, as well as handling internal EEOC compliance.



**B. Process**

The enforcement activities of OFCCP focus in primarily four areas:

- conducting compliance reviews and investigating complaints,
- negotiating compliance agreements and letters of commitment, and monitoring subsequent compliance;
- providing technical assistance to contractors; and
- recommending enforcement actions by DOL or Justice.

**C. Current Status**

- In FY 1998, OFCCP requested a budget of \$69 million, an increase of \$10 million over FY 1997
- In 1998, OFCCP will conduct approximately 6,000 compliance reviews, 900 complaint investigations, and 4,100 other compliance actions.
- In FY 1998, the Office of Civil Rights requested a budget of \$4 million, a decrease of \$1 million from 1997.

**D. Potential Improvements**

- OFCCP's FY 1998 budget includes resources for a tiered-review process, which will reduce the paperwork burden on federal contractors and increase coverage of the contractor universe.
- Increase amount of compliance assistance provided to contractors

**IX. TREASURY/COMPTROLLER OF THE CURRENCY (OCC)**

**A. Structure/Process**

- As with all federal agencies, Treasury must enforce Title VI provisions that prohibit discrimination in programs and activities receiving federal financial assistance.
- The Community Redevelopment Act (CRA) regulates banks and other financial institutions to ensure that fair-lending practices are followed.
- The Office of the Comptroller of the Currency, an independent office within Treasury, responsible for regulating commercial banks, promulgates and enforces CRA regulations. Treasury and Justice also pursue investigations against financial institutions that are violating fair-lending practices.
- Internal EEOC enforcement is part of Treasury's departmental management and administration function.

**B. Current Status**

- ~~Line~~-item data on civil rights enforcement activities at Treasury was not provided in its FY 1998 budget.
- OCC has made enhanced CRA regulations and enforcement a priority.

**X. INTERIOR - BUREAU OF INDIAN AFFAIRS (BIA)**

**A. Structure/Process**

- The Indian Civil Rights Act of 1968 (ICRA) imposed restrictions on tribal governments similar to those found in the Bill of Rights.
- Other than *habeas corpus* actions, enforcement of ICRA takes place in tribal forums, tribal courts and Courts of Indian Offenses. Interior does not enforce or oversee enforcement of ICRA. Exception: Tribes without their own courts can go to BIA courts for ICRA actions. The Office of Tribal Justice at DOJ reviews the administration of tribal justice across the federal government.
- Interior is also responsible for enforcing Title VI nondiscrimination requirements for all programs and activities that receive federal financial assistance.

**B. Current Status**

- BIA is working on a initiative to improve the way tribal courts provide services to tribe members.

**C. Potential Improvements**

- Enhance programs to strengthen tribal courts

**XII. USDA - CIVIL RIGHTS ACTION TEAM**

**A. Structure**

- Over the years, USDA has had a number of different offices responsible for Title VI and EEOC concerns at the agency.
- Title VI requires that programs and activities receiving funds from USDA be delivered free of discrimination. The Equal Credit Opportunity Act makes discrimination in USDA lending programs illegal as well.
- In December 1996, a group of black farmers demonstrated outside the White House calling for fair treatments in agricultural lending programs. The Civil Rights Action Team (CRAT) was appointed to report on civil rights issues across the agency and make recommendations for changes. Included in their report was a recommendation for a

consolidated, visible Office of Civil Rights.

**B. Procedure**

- Currently, USDA has a civil rights policy office, civil rights enforcement (which is handled in regional offices), small & disadvantaged business office and a National Appeals Division.
- The CRAT report points out that the process for filing Title VI complaints at USDA is fragmented --generally, complaints are filed with the agency within USDA responsible for the program/activity at issue.

**C. Current Status**

- The budget requests for civil rights at USDA is not separately reported. The U.S. Commission on Civil Rights expressed concern that absence of specific funding for Title VI contributed to inadequate enforcement.
- The CRAT issued its report in February 1997, which documents the absence of adequate Title VI and EEOC enforcement at the agency.

**D. Possible Improvements**

- Implementation of centralized office for civil rights enforcement.
- Compilation and dissemination of reliable data on civil rights enforcement within USDA.
- Revision of regulations -- according to CRAT, the civil rights enforcement regulations have not been revised since 1973.

### **XIII. OTHER AGENCIES**

In addition to enforcing Title VI protections for their programs and activities, these other agencies are also active on a variety of civil rights matters:

- **Small Business Administration** -- provides assistance to Section 8 disadvantaged businesses, many of which are minority-owned.
- **Commerce** -- has programs to provide assistance to minority owned businesses.
- **EPA** -- pursues "environmental justice" cases. Minority communities have alleged that their communities are being used as dumping grounds for toxic substances, or are last priority for clean-ups of hazardous materials.
- **Transportation** -- complaints have been filed by communities alleging discrimination in the placement service delivery and maintenance of roads and public transit systems.

- **FCC** -- faces controversial issues around ensuring that minority broadcasters have access to wireless telephone, data-service, radio and other communication licenses.

#### **XIV. POSSIBLE NEXT STEPS**

- Initial planning meeting in early August with agency race initiative contacts and possibly one person from the agency's civil rights office. Possible participants:

<u>Agency</u>	<u>Race Initiative Contact</u>	<u>Office of Civil Rights</u>
Education	Leslie Thornton	Norma Cantu
EEOC	[Not listed by Cabinet Affairs]	
HHS	Clay Simpson	
HUD	Mercedez Marquez	
Labor	Virigina Apuzzo	
Justice	David Ogden	
Interior	David Montoya	
Treasury	Michael Froman	
USDA	Reba Evans	

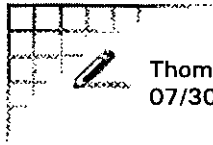
- Follow-Up Meetings by mid-September:
  1. Agencies -- discuss preliminary recommendations for improvements
  2. Outreach -- meet with groups monitoring civil rights enforcement for suggestions of possible improvements, such as:
    - Citizen's Commission on Civil Rights
    - ACLU
    - American Council on Education
    - NAACP
    - National Urban League
    - National Council of La Raza
    - National Asian-Pacific American Legal Consortium
    - Urban Institute
  3. Coordination Issues -- possible separate discussion with Justice on coordination of civil rights effort across the government.
- Feedback to agencies on improvement proposals in early October.
- Progress meetings on implementation of improvement proposals/ideas in Oct-Dec.

## APPENDIX A

Major congressional and presidential landmarks affecting civil rights enforcement are the:

- Equal Pay Act of 1963
- Civil Rights Act of 1964
- Voting Rights Act of 1965
- President Johnson's Executive Order 11246 in 1965
- Age Discrimination in Employment Act of 1967
- Title VIII of the Civil Rights Act of 1968
- Equal Employment Opportunity Act of 1972
- Title IX of the Education Amendments Act of 1972
- Rehabilitation Act of 1973
- Voting Rights Act Amendments of 1975
- Age Discrimination Act of 1975
- President Carter's Reorganization Plan No. 1 and equal opportunity executive orders
- Voting Rights Amendments of 1982
- Civil Rights for Institutionalized Person Act of 1986
- Housing and Community Development Act of 1987
- Civil Rights Restoration Act of 1987
- Civil Liberties Act of 1988
- Fair Housing Amendments Act of 1988
- Americans with Disabilities Act of 1990
- Civil Rights Act of 1991
- Voting Rights Language Assistance Act of 1992

Race initiative - policy - civil rights  
enforcement



Thomas L. Freedman  
07/30/97 02:50:50 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:

Subject: Re: civil rights etc.

1. We will insert ourselves into the hate crimes stuff. Thanks. Mary has been talking to Socrates(sp.!) about it.
2. We should have a good background memo for you on the civil rights legal agencies Thursday: it will include a summary of what they do, how they do it, what has been said about the agencies, and a timetable/process for our meeting with them and when we expect stuff back from them.
3. We will get the Hopwood meeting together. I'm still learning the stuff.

Regards, Tom

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Race Init Policy

last 2 pages to  
Race Init Policy - Administration of  
Justice - Civil Rights Enforcement  
CHRISTOPHER F. EDLEY, JR.  
Professor of Law

7/4/97  
Bruce -  
I think I may  
never have given this  
to you.  
EJ

To: John Hope Franklin  
Minyon Moore  
Sylvia Mathews  
Elena Kagan

From: Christopher Edley, Jr.

Re: Agenda Ideas for Advisory Board on the President's Race Initiative

I'm told the bulk of the July 14<sup>th</sup> agenda will be devoted to organizational matters. It is unfortunate that these couldn't have been handled by conference call, given the difficulty and delay in assembling people, and the press of time. I write primarily to urge a certain set of substantive agenda items as well. In particular, I suggest a few items below that I believe will advance the thinking of the Advisory Board, the Administration, and others around the nation who are ready and able to share in this great undertaking. In each case, what I recommend is a preliminary Advisory Board discussion to shape the task and provide guidance for further work by the staff.

Task 1: Outreach

- I assume that this set of tasks, which several of us discussed informally during the trip to San Diego, will be covered under the rubric of "organizational issues." I only want to add one thought: In addition to political and civic organizations and leaders, I hope that this will include consideration of how the Advisory Committee and White House staff might effectively coordinate their outreach to the policy community.
- We also had some discussion about subcommittees holding regional meetings to hear presentations and collect information and advice. It would be useful to reach some consensus on how that might best be undertaken, in both logistical and substantive terms.

Task 2: Defining and Identifying Effective Leadership

- My strong conviction is that there is no more important task for the President's initiative than identifying the ingredients and examples of effective leadership on racial and ethnic justice. My own work leads me to believe that such leadership will most likely be in the form of work that connects communities across lines of class and color, probably in efforts that include honest dialogue but go beyond that to tackle important community problems.

- Independent of my own hypotheses, however, the more basic premise is that effective leadership on race is both researchable and teachable: we can figure out what works, and describe it in a way that others can learn and adapt to their own situations, with positive results.
- The challenge for the President and the Advisory Board has four dimensions. *First*, we must develop evaluative criteria – and do so in a manner that confers legitimacy on those criteria. *Second*, we need a process that combines investigation and nominations to create a pool of leaders, projects and programs that may be examples of success and failure. *Third*, we need a mechanism to apply the criteria to the examples, documenting the stories and separating good publicity from good results. *Fourth*, we need a way to disseminate the findings.
- For the July 14<sup>th</sup> meeting, I suggest the Advisory Board try to develop a tentative strategy with regard to the first three dimensions of this task, together with concrete instructions for the staff concerning timetable and next steps.

*Task 3: Hard Questions for Community Conversations*

- Based on the experience of the White House review of affirmative action, and perhaps drawn from my own disciplinary prejudices as a law professor, I think there is a great deal of promise for the “national conversation” on race in focusing on a limited set of hard questions or examples. Rather than law school hypotheticals, however, these can be questions that are on the minds of many thoughtful people, or situational problems modeled quite accurately after conflicts common in our lives. We have urged, and the President has charged, that Americans think deeply and honestly about the most vexing conflicts in perceptions and values. (My words, not his, I guess.) To do so, I recommend that the Advisory Committee frame a set of such discrete questions. If framed well, these will provoke learning, if not healing.
- I would like the Board to suggest ten questions initially, and add more later. I’d like the President to mention some of these in his speeches the week of July 14<sup>th</sup>. I’d like them to become the focus for public discussion in the coming months, in countless forums. And I’d like people to learn how to identify ways of addressing these questions, distinguishing between foolish and wise, divisive and constructive. The Board and the President can lead that effort.
- What are some possible questions? A quick list is appended.

*Task 4: Assembling Research Data on Race in America*

- I have recommended to White House staff an extensive effort to review literature and assemble authoritative data under four headings: *Demography*, *Disparities*, *Discrimination*, and *Race Relations*. Each of these then subdivides into subdivisions – easily the work of a career. Nevertheless, a preliminary outline of the task headings should be ready by now, and certainly could be reviewed by the Advisory Board on July 14<sup>th</sup> to ensure that all of the



information you would like compiled is in fact within the scope of work for this exercise. The President's Council of Economic Advisors is coordinating this effort, under the direction of Member Alicia Munnell, a very distinguished economist. (She did seminal work on mortgage lending discrimination, by the way.)

- There will be several areas in which the data are not authoritative because of important disagreements about methodology or purpose. For example, people disagree about the soundness of econometric methods for inferring wage discrimination from underlying data on wage rates and human capital. In race relations, people disagree about whether surveys of self-reported social beliefs provide reliable information about prejudicial attitudes. The Advisory Board might want to consider how and whether efforts might be taken to engage the academic community in consensus-building efforts in selected areas of disagreement.
- The National Academy of Sciences-National Research Council mechanism would be useful, but it needs a good lead time to get engaged. *That's why I raise it for immediate consideration.*

*Task 5: Evidence, Law and Arguments Concerning "Reverse Discrimination"*

- In the White House review of affirmative action we concluded based on available data that there is far more rhetoric than reality to the "reverse discrimination" problem. Nevertheless, a thorough consideration of the facts and values at stake will be taken by many to be a litmus test of the intellectual and moral integrity of the Board's work. For that reason, a discussion of how to pursue a reasoned analysis of this problem makes sense, sooner rather than later.
- I recommend a multi-pronged effort, including a review of data, a consideration of the state of the law, and an assessment of some leading ethical statements on the subject, including development of balanced critiques intended to educate the public about the dangers of simplistic thinking in this area. (See Task 3, above.)

*Task 6: Evidence, Law and Arguments Concerning the "Rollback" of Affirmative Action*

- Another litmus test for the effort will be a candid assessment of the "Rollback" of affirmative action, starting with the developments in Texas and California. There are several subtasks, starting with an effort to track what is known about the numbers – the actual consequences, good and bad, of the new policies.
- Another subtask involves an assessment of the policy, ethical, and legal claims made for and against the rollback. This will quickly require a dissection of the claims concerning merit, diversity, educational mission, and so forth. The Board should consider commissioning one or more analyses to provide a framework for discussing this subject.
- A third subtask is to identify and assess the kinds of claims and arguments that are made by both sides in these contentious political decisions about rolling

back affirmative action. Events in California and elsewhere might provide important case studies for the quality of discourse on race, with lessons for the future. The Board might commission such a study – a “content analysis” of the Proposition 209 campaign, for example – to identify the good, bad and ugly in public advocacy, journalism and campaign tactics.

- Ultimately, it is important to distinguish between “mending” efforts and “rollback” efforts, and the Board should try to illuminate the distinction.

*Task 7: National Report Card on Race*

- The Board should consider making a concrete policy recommendation at the first meeting, albeit in tentative form. Specifically, something like: *The Federal government should develop and publish a periodic national report card on racial and ethnic justice, tracking trends in discrimination, disparities, demographics, and race relations.* I suggest that any such recommendation be framed in tentative or provisional terms, with an invitation to the public and relevant agencies to comment on the idea.
- There is already some movement in this direction within the bureaucracy. The Civil Rights Commission and HUD are among those contemplating expanded efforts to measure discrimination in an ongoing manner, and a proposal of this sort was included in the President’s February budget submission to Congress. (I proposed to OMB that this item be inserted, along with some modest enhancements in civil rights enforcement budgets.)
- The premise is simple: Knowing the facts and creating an authoritative research data base should be unobjectionable to anyone concerned with racial and ethnic justice. Even those who vehemently oppose particular remedial or other measures, such as affirmative action, condemn discrimination. So, measuring it seems a reasonable undertaking. Moreover, in a climate of increasing interest in measuring program performance, tracking our progress in combating discrimination seems reasonable. (Cf., the Government Performance and Results Act [GPRA].)

## HARD QUESTIONS

*draft 1*

- 1) **Integration:** Is racial integration an important goal? That is, to what extent, if at all, do we want to move toward a society in which racially identifiable communities and organizations are unusual? If integration is important, is it important only as a voluntary matter? Or should the goal be encouraged by public policies? When should it be required? Should we consider the "separatism" and "clan" behavior of some members of minority groups troubling in any way?
- 2) **Street crime stereotypes:** Studies indicate fear of crime linked to racial and ethnic difference. So, is it wrong to fear a group of teenagers of a different race approaching you on an otherwise deserted street late at night? Is it *unreasonable*?
- 3) **Bilingualism:** To what extent should we expect various public and private institutions to operate in languages other than English? Schools? Municipal offices? Restaurants? The gas company? The bank? For which institutions can non-English speakers reasonably insist that their language be used, or at least be an option?
- 4) **Diversity:** In what settings is it important to pursue racial and ethnic diversity? A police force in a diverse city? A college student body? The reporting staff of a newspaper? The loan officers in a bank? Supervisors in an auto parts plant?
- 5) **Vision:** How should we define racial and ethnic "justice"? How will we know when we have achieved it, and how can we measure our progress?
- 6) **Values, history, community:** How was it possible for so many avowedly religious individuals and institutions to condone and even advocate slavery and then segregation? How was it possible for entire communities to tolerate and even embrace racist violence and mob behavior? Are these pathologies permanently cured?
- 7) **Census:** How should we count ourselves? What are the appropriate racial and ethnic categories?
- 8) **Discrimination and prejudice:** How much discrimination and prejudice still exist? In what settings? How significantly do they undermine equal opportunity?

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7/7/97

To: Sylvia Mathews  
Elena Kagan  
Michael Waldman

From: Christopher Edley, Jr.

Re: POTUS Speeches, Week of July 14<sup>th</sup>

Just back from vacation, I have very limited information about the planned content for these speeches. I'd like to offer a few thoughts, for whatever they are worth. I apologize in advance if these comments seem hyper-critical or harsh. I'm writing quickly, on the plane back from the Caribbean. I want to be constructive, clear and concise. Not off-putting. Don't know if what follows meets that test. But I'd like to help.

1. As I communicated before I left, these speeches must advance the ball rather than restate the U.C. San Diego themes. I mean this on two distinct levels: understanding of the race issue, and policy ideas. I also think that at least one of the speeches must be perceived as a "race" speech. He can't give general domestic policy speeches that don't directly deal with color, because then he won't be advancing the ball. He'll be hiding it.
2. I also think it is imperative to give one or all of these presidential statements some moral lift, keeping them above the customary plane of political rhetoric. We must obsessively avoid resorting to the familiar devices of rehearsing achievements and restating campaign-style themes. I just can't think of any way to persuade you "insiders" that, to someone even slightly outside, every time you fall back to those themes you drag down an otherwise lofty speech. San Diego was an excellent speech that could have been even better by skipping the political rituals. (And I realize that a lot of this is POTUS himself inserting lines that have been politically effective for him.) Everyone must remember that these are speeches for history. For legacy. When a poet writes for the ages, she doesn't pen jingles and limericks, however valuable those might be as communication tools or entertainment. Think *gravitas*. But of course, it doesn't have to be tendentious to be momentous.
3. Back to content. On policy, I don't know the details of the teachers program that will be unveiled, but I assume it is some hybrid of the old National Health Service Corps and the Teacher Corps. I also assume it is cheap, funded with discretionary dollars, and has no prominent GOP supporters who are likely to guarantee appropriation support. As such, it will be a hollow authorization.

The more serious problem, which I hope will not materialize but am fairly confident in predicting, is that almost everyone in the civil rights community will dismiss this as a symbolic gesture. My guess is that serious education policy analysts will do the same – with dismissive assessments such as, “Probably won’t hurt.” Am I being too cynical? How do you know? The reason I feel so strongly about this is that if I were not part of the team, I myself would be one of the vocal critics.

I think the education challenges related to the opportunity gap are far more serious and daunting than a teacher incentive program suggests. And this little piece of it invites criticism that we don’t understand the true dimensions of the problem, or don’t have the will to address it.

4. **Alternative Education Themes:** Instead, if we want to raise hard questions about race and opportunity in the education context, the President should talk about the problem honestly – as he challenged all Americans in his San Diego speech. Here’s a list of serious education-related issues that could command serious attention and demonstrate a more compelling (and inspiring) engagement with the underlying issues:

- *Must we do something about the increasing concentrations of minority kids in failing high-poverty public schools?* The declines in racially isolated schools that were one hallmark of the civil rights struggle have turned around, and racially identifiable schools for minorities are quite often associated with concentrated poverty. These schools struggle to provide a decent education, but far too many fail. Are we committed to racial and economic integration? Should we be? What if it conflicts with traditions of local control and local finance?

- *Have minority communities been well-served by the school reform efforts of the past generation? Why not?* Something isn’t working to produce the needed changes as quickly as needed to save children and their communities. Why? If local political action hasn’t worked well enough, and market-oriented schemes are snake oil, and expert-driven bureaucratic reforms seem spotty and sluggish – how do we explain all of that failure, why is it fair to be so patient, and what is to be done?

- *Standards-based school reform, with tests and tough love, is intended to foment change. But if tests create high expectations and accountability for students, what will create high expectations and accountability for schools and educators?* The conventional response is that parents will get the test results and rise up and use their political power to effect change. But that hasn’t worked with countless other problems facing poor and minority communities, in part because state and local politics simply don’t work well for these groups. Look at the facts and stop pretending otherwise, if you are serious about helping. The “political incentive” solution, like the “market incentive” solution, will only work *some* of the time.

What's a more constructive issue to wrestle with? Secretary Riley is implementing the national voluntary test initiative, which along with other developments, moves toward national standards for student achievement. But why can't we also have an effort to develop "*opportunity to learn*" standards, so parents and voters will know when schools and politicians fail to provide the environment, resources and skill that will give all students a fair chance? Congress rejected the Administration's earlier proposal along these lines, but Congress hasn't authorized the national voluntary test program, either.

- *Diversity in higher education – how important is it for educational excellence, and for the nation?* This is an incredibly important problem for selective higher education. POTUS cares about it, and many are shocked by the catastrophic numbers that seem to be developing in California and Texas. But the nation needs a serious discussion of why diversity is important. About the relationship between this and "merit." About the wrong, mechanical, set-aside way of doing affirmative action in admissions. About the broader mission of universities in preparing leaders for all of America's communities, and citizens who will understand all of America's communities.

There are also tough questions. Like explaining why in one breath we say diversity is important for excellence, but in the next say that black and women's colleges are okay. Or, explaining why experts are correct in saying that the SAT shouldn't be used as the sole basis for measuring merit and deciding admissions. (And being ready to explain why a test should be used as a basis for deciding that a K-12 student should be retained in grade, or denied a diploma – a view the President reportedly holds (!!)) despite the strong expert consensus that such high-stakes decisions should be based on multiple factors, not a single standardized test.) Again, the purpose of this initiative is to wrestle with tough issues. Let's do it.

5. **Alternatives to Education: – Discrimination?** If you are willing to think about something outside of education, then consider *Discrimination*. What is it? How much is there? To what extent is it the full measure of our problems – social, economic, moral? What's the relationship to intolerance? Or the relationship to our simple human tendency to prefer people who are like us? Can we do a better job of combating it, not just in our courts, but in our hearts? Why are there such different perceptions of whether this is still a major problem, and what can we do about those different perceptions? How hopeful should we be? How patient should we be? What is the role of government? Here are some specifics that the Federal Government can do: (1) strengthen the safety net of law enforcement, building on the down payment in the President's budget (ask Deich at OMB); (2) commit to comprehensive, regular national report card measuring discrimination, like we measure other important social and economic indicators; (3) ask National Academy of Sciences to recommend a design for this national report card, shaping expert consensus on appropriate methodologies; (4) strengthen the U.S. Civil Rights Commission in various ways (ask chairman Mary Frances Berry for proposals); (5) provide more support to strengthen

the network of activities by state human rights commissions.

6. For the NAACP speech, I have a specific recommendation. As a grass roots membership organization with 1700 chapters (allegedly), this is the perfect audience in which to make a strong pitch for something like the following theme: *We must recruit, train and deploy Soldiers for Justice*. Soldiers for Justice are men and women in communities and organizations all across the nation who are committed to building bridges to connect communities across lines of color and class, who have the skills to do that bridge-building, and who understand that our best hope for the future we want is to take that circle of people and families and neighbors we care about, and make a bigger circle. There are examples from our history of Soldiers for Justice, such as ...; and there are examples today, such as .... The NAACP and similar organizations, such as ... , can help us identify today's Soldiers for Justice, and help swell their ranks with new recruits.

What I'm looking for here is a theme that combines an evangelical tone with a Battle Hymn of the Republic fervor and a civil-rights-movement passion. But the substantive dimension of this is to discuss: the elements of effective leadership on racial justice, the fact that leadership must be directed towards concrete community problem solving around issues such as education, and the need for this kind of grass roots commitment and focus from organizations like the NAACP, La Raza, American Jewish Committee, National Council of Churches, Urban League. This would be a great subject for a town meeting. *Ask the Advisory Board to figure it out.*

Good luck.

Race Initiative Policy  
and

Sylvia M. Race Init Policy -

That is very  
good  
OK

THE PRESIDENT HAS SEEN

Lincoln/Park

Admin of Justice - 6-25-97  
Civil Rts Enforcement  
THE SECRETARY OF AGRICULTURE  
WASHINGTON, D. C. 20250-0100

Sylvia -  
we should send  
a copy of this to  
all cabinet  
members  
to do  
something  
to do  
something  
Sylvia

June 11, 1997

MEMORANDUM FROM SECRETARY GLICKMAN

To: Thurgood Marshall, Jr.,  
Deputy Counsel and Legislative Director to the Vice President

Subject: The President's Civil Rights Initiative

Jan Glickman  
Sylvia

As the Administration prepares to embark on its Civil Rights Initiative and an ambitious effort to promote racial healing in America, I am increasingly concerned about a growing enemy from an unlikely corner that unites civil rights advocates and opponents alike. That enemy is cynicism.

Given the Department of Agriculture's recent efforts to overcome a history of insensitivity to diverse employees and customers, I thought some practical, on-the-ground advice might be of some use to you. It's not the makings of a moving speech, just some practical wisdom that might actually get the job done. Here's what I've learned from the trenches:

1) *Talk and walk at the same time.* Most leaders are quite willing to say a few uplifting words in favor of civil rights, but precious few have followed it up with concrete actions. Too often, the result has been that when America's leaders talk about improving civil rights, few people believe them, and for good reason -- they *have* heard it all before.

In wading through USDA's problems, I quickly found that there is no substitute for action. We set clear goals. We laid out an aggressive timeline, and we're sticking to it. The result is credibility. From the people who run our agencies to the people who answer the phones, folks clearly see that something real is happening, and they want to be a part of it.

2) *Commissions need clear missions.* If we swept together all the dust that's settled on the countless reports of past civil rights commissions, all of Washington would sneeze. It is useful to gather a braintrust, just make sure they have a strict deadline and clear

Sylvia -  
we considered  
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to do it by -

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direction from the top that their dialogue must be constructive. Without concrete recommendations for action, it's all just talk, and we fuel the very cynicism that we're trying to root out.

I did establish a civil rights commission at USDA. It was headed by an esteemed career civil servant. They travelled the country for 3 months listening not just to the experts, but real people---farmers, rural Americans, and USDA employees. Given those perspectives, they delivered a 121-page report which was almost entirely a series of bullets recommending specific actions.

Here's a sampling of what they came up with:

-- Eliminate the years-old backlog of civil rights complaints in 120 days.

-- Freeze all foreclosures where a civil rights complaint has been filed until an independent review can be performed.

-- Make it a condition of employment at USDA that every employee treat every co-worker and customer fairly and equitably, with dignity and respect.

-- Establish a results-oriented National Commission on the Small Farm to pull together the threads of economics, civil rights, and rural conditions and weave a national strategy to stem the alarming loss of America's small farms -- many of which are minority-owned.

Taken as a whole, these recommendations form a detailed road map for how USDA can get out from under a history of discrimination and become a federal civil rights leader.

Finally, when the report gets passed up to you, be ready to run. When I received my civil rights report, there certainly were bureaucrats who recommended we form a committee to report on the committee's report and make recommendations on the recommendations. Instead, I disbanded our civil rights commission and formed an action team.

The day after I received the report, I went before my entire department and the media and announced that we would immediately get down to business. This sustained the momentum, and since the report contained a clear set of goals and deadlines, people knew that they could expect -- and hold us accountable for -- quick, concrete progress.

3) *Learn to like paper cuts.* Speeches are the fun part. But it's the dogged, day-to-day staying on top of the specific initiatives that keeps the ball moving forward.

..... more

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*just idea*

I have a meeting every week with my top civil rights advisor. He gets whatever resources he needs. His staff files a 20-page report every week detailing the progress that's been made in each agency -- on hiring, on complaints resolution, on customer service. The results? A strong sense of accountability throughout our ranks and crystal clear progress.

4) *Report regularly to the shareholders.* If we ask the American people to set aside their doubts and come along with us in this effort, we've got to be a broken record and regularly hold ourselves accountable to them for making real progress.

Virtually every time I give a speech I talk about civil rights. Eventually, it sinks in that this really is a very big deal. I talk about the big picture of America's racial divide, but I also catalog what we're doing about it. People need to hear that we are making real progress.

5) *One small step per man is one giant leap for mankind.* History will judge our Civil Rights Initiative by the simple meter of how Americans treat one another and function as a society in the 21st century. But the Chinese have a saying, 'the journey of a thousand miles begins with a single step.' As leaders in this effort, we must plot a methodical strategy and give people concrete ways that they can help piece our people back together. We change the world by each person changing their little corner of the world -- in their homes, churches, schools, workplaces, and communities.

This is how we are finding some success in changing the culture of the Department of Agriculture. I hope that our experiences may be of some use in healing America's old wounds.

There will always be a few rotten apples in the barrel, but my belief is that the vast majority of Americans yearn to be called on in a meaningful way to be a part of the solution. Too many of us have experienced firsthand the pain of mindless divisions. But too many of us, too, have been given false hope by uplifting words from our leaders that in the end turn out to be thin air.

This President and this Administration are uniquely qualified to rise above mere talk. But if we are to give the American people hope, first and foremost we must give them action.

..... more



edley @ law.harvard.edu  
07/13/97 12:26:00 PM

Record Type: Record

To: Elena Kagan, Andrew J. Mayock  
cc:  
Subject: EEOC backlog

Sylvia asks for process on getting EEOC backlog funded. The process is straightforward, as these things go. Elena should call OMB and ask them to prepare and present two or three options. Call could be Michael Deich (the PAD), Josh Gotbaum, or Jack Lew. Doesn't matter. They work to deadlines, so give them a deadline of anything between 24 hours and three days. Have the options presented at a small meeting of WH and OMB policy folks. Make a decision.

Here are some hard questions:

1. Just EEOC backlog, or are we also concerned with backlog in other civil rights enforcement programs? If you want to restrict it to employment, you should include OFCCP enforcement. If you go broader, you should include fair housing, credit discrimination, and education (OCR). But the big ticket item is EEOC.
2. Over what time frame? (The maximum rate will be limited by EEOC capacity to absorb growth.) Could probably help this by contracting out the work to state EEO agencies, somehow.
3. Are we getting the best deal we can from the FY 1998 appropriation process? Note that the FY98 Pres Bud included an enforcement investment, but only enough at EEOC to keep the backlog from growing. Do we want to consider a budget amendment to put additional pressure on this year's appropriations process?
4. It is the season for agencies to assemble their budget plans for submission to OMB this September. Now is the time to instruct agencies that they must include in their recommendations sufficient funding to meet priorities X, Y, and Z. OMB handles this. The policy meeting I described above can pursue this.

If anyone wants more info on the budget process, chat with me or Michael Deich (5-3120).

Michael Deich at OMB and ask OMB to prepare  
Christopher Edley, Jr.  
Professor of Law  
Harvard Law School  
Cambridge MA 02138

Andrew J. Mayock  
07/11/97 04:59:21 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, edley @ law.harvard.edu @ INET @ LNGTWY  
cc: Sylvia M. Mathews/WHO/EOP  
Subject: EEOC

Sylvia asked that I e-mail you folks on this issue:

On the need to consider how to set up a process to lower/eliminate the backlog of EEOC cases (i.e. Cong. Wynn's proposal), what are your thoughts and we do we proceed?

Many thanks.

File: Race Inclusion Policy

and

" " " - Education and

" " " - Admin & Justice - Civil Rts Enhancement

cc: Ek, Jose + return ASAP

MEMORANDUM

To: President Clinton
From: Henry Cisneros
Subject: Saturday Speech in San Diego

There are huge expectations for your Saturday speech. The advance press coverage is more extensive than for any other Presidential speech I can recall. It ranges from intense hopefulness to dismissive skepticism that you will go beyond exhortation to substantive action.

The following are some ideas that can be fleshed out in the time remaining. They are intended to fall within budget constraints. If these ideas cannot be described at length in the speech, they can be part of the substantive actions you ask the advisory committee to review and recommend:

Handwritten notes: Mike - Can we do something like this? What would it mean? Ebera

- 1. Direct that specific parts of the massive education spending you have championed be targeted to central city schools and depressed areas.
2. Request that General Colin Powell's follow-up to the Philadelphia volunteerism summit have as a component explicit actions to address the racial divide.
3. Launch a public-private project to raise scholarship money for blacks and other minorities...
4. Direct the Department of Housing and Urban Development to strengthen its efforts to combat discrimination in housing transactions.
5. Re-emphasize the welfare-to-work connection, including new training and employment efforts with the states.
6. Call on corporations to incorporate in their training programs for employees explicit and firm policies concerning any kind of racial discrimination.

7. Call on national church leaders to create a national coalition of youth organizations to bring minority and white youth together. A few churches have made efforts at adult multi-racial dialogue, but the real hope for the future is in creating understanding among our young people. Linking the well-intentioned, mainstream resources of the nation's white churches with the central city centers of Boys and Girls Clubs, YMCA, YWCA, athletic leagues, and schools could create opportunities for one-on-one understanding.

**Underlying Themes:**

- Now that the economy is so strong it is time to make it work for everyone. You have worked to create durable and unprecedented prosperity for a purpose: so that the American dream can be brought within reach of all our citizens. Aside from their poverty, the common denominator that most characterizes those for whom the American dream is denied is race and ethnicity.
- This great unresolved issue of American history -- racial hatred -- is one of the very few things that can stop us in the next century. If we fail to address it, we will be more divided and squander our energies. If we master it, the next century will be an American Century of even greater accomplishments.
- Though skeptics will say there are insufficient new laws and new money in this initiative, the fact is that what is needed at this time is to execute the laws we have and to live out our creed through the resources we have. The challenge is to make our institutions work for racial fairness and our hearts value racial justice.

Race Int. Policy - Civil Rights -  
Fed Employees

# EEOC Seeks New Process For Bias Claims Against U.S.

By Kirstin Downey Grimsley  
Washington Post Staff Writer

EEOC, From G1

The chairman of the U.S. Equal Employment Opportunity Commission moved yesterday to change the process under which the federal government handles discrimination complaints brought by its own employees.

While supervisors say many meritless cases have been brought creating a bureaucratic morass, workers and civil rights groups have charged that current procedures have left the fox in charge of the henhouse by allowing government agencies to investigate themselves. The agencies then can overturn the EEOC when it rules against the agencies in favor of workers.

Government agencies reverse decisions that are unfavorable to them nearly 63 percent of the time, according to the EEOC, while they reverse decisions favorable to them in less than 1 percent of cases.

EEOC Chairman Gilbert F. Casellas, who announced his resignation earlier this week, said he will recommend that:

- Government agencies be required to implement dispute resolution programs to encourage parties in discrimination cases to resolve cases before they go to hearings.
- The EEOC implement a mandatory training program for equal employment officers inside the government agencies.
- EEOC administrative judges resolve cases faster.
- Government agencies be prohibited from overturning EEOC rulings that find in favor of workers while giving agency officials the right to appeal EEOC rulings.

At a congressional hearing last month, Rep. Albert R. Wynn (D-See EEOC, G2, Col. 1

Md.), whose constituents include 72,000 federal employees, called discrimination in the federal government "a festering sore," blaming part of the problem on what he called an "underfunded and ineffective EEOC process, which currently has a huge backlog of cases in various agencies." About 13,000 new federal discrimination complaints are filed each year, excluding those filed by the Postal Service, which has its own grievance process.

Wynn said workers are intimidated when they try to complain. But officials at various government agencies have charged that many meritless cases are brought by poor performers, allowing the system to founder in a bureaucratic morass.

At a hearing last week, G. Jerry Shaw, general counsel to the Senior Executives Association, which represents managers in federal agencies, said polls of managers show they have little confidence in the current system of resolving discrimination complaints.

"Sadly, 56 percent of the ... executives said they believed that legitimate complaints were not being filed in their agencies because the system is so clogged with non-legitimate complaints," Shaw said.

Shaw also said the percentage of female and minority executives in the government is climbing sharply, even as the number of total executive positions has dropped, making the promotion process more "contentious."

"This will generate even more EEOC complaints and charges of discrimination, not necessarily because the discrimination is real, but

because more people will be denied the opportunity for promotion because the promotions are not there," Shaw said in a statement.

Under the federal system, workers who believe they have suffered illegal discrimination must first take their case to an equal employment officer at their own government agency, who investigates the complaint. If the worker is displeased with the official's response, he or she may file a formal, written complaint and submit the case to an administrative judge employed by the EEOC, who conducts hearings to determine the facts in the case. Then the agency can decide if it wants to accept or reject the EEOC judge's findings. Ultimately the worker can decide to hire a lawyer and take the case to court.

In one sense, government workers have more employment-discrimination protection than private-sector employees because they have access to this procedure. But many argue the process is unduly cumbersome and time-consuming, exposing them to reprisals by employers who can taint the process by conducting poor investigations. In addition, the EEOC cannot sue on behalf of workers, even if substantial wrongdoing is uncovered, as it can with private-sector complainants.

The EEOC's proposed changes could occur administratively within the agency, with no legislation needed. The agency's four commissioners, including Casellas, (a fifth commission seat remains vacant), need to vote to approve the changes in procedures before they could be implemented. The process could take up to a year even if no serious obstacles emerge because of requirements involving public notice on regulatory changes.

## The Washington Post

FRIDAY, OCTOBER 3, 1997

Yes  
Yes  
Yes  
Yes