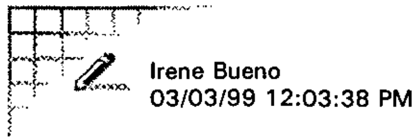
NLWJC - Kagan

DPC - Box 041 - Folder 011

Race-Race Initiative Policy - Civil Rights Enforcement [1]

Race-policy - civil rts enf.



Irene Bueno
03/03/99 12:03:38 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Paul J. Weinstein Jr./OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: Urban Institute Report on discrimination

FYI - On March 2, 1999, the Urban Institute issued a press release on a report that calls for a National Report Card on Discrimination in America and shows that paired testing can be used to audit discrimination. They argue that this report card would promote greater undersatnding of the prevelance of discrmination, provide strategic guidance to civil rights enforcement agencies, develop insight on on the changing pattern and impact of discrmination.

This report also provides strong support for the President's $10 million request for additional funding to fight discrimination that would expand the use of paired testing.
HUD has been using this method for two decades but this report proposes that pair testing expand into different areas including employment, and other daily consumer transactions such as car sales, taxi services, and health club memberships etc.

I will review a copy of this report and let you know if I find anything particularly interesting.

Let me know if you have any thoughts or comments. Thanks.

Race policy - civil rts enforcement

Jose Cerda III 01/08/99 06:37:39 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP

cc: Julie A. Fernandes/OPD/EOP, Leanne A. Shimabukuro/OPD/EOP
Subject: Civil Rights Initiative

BR/EK:

Spoke to Deich a short while ago. He wanted our helping in solving the Edley problem on new funds for states to focus more on civil rights prosecutions.

Deich, providing we're fine w/it, wants to add a new $5 million civil rights initiative that would give small grants to the states to better coordinate civil rights enforcement. He has found new money, or an accounting gimmick at least, so crime or civil rights funds already in the budget won't be affected. The program will be overseen by OJP, and it won't be linked to our prosecutors program. That said, he's hoping we won't oppose him simply sneaking this new $5 million initiative to the budget.

I told him that I would check w/you both, but -- with his assurance that our budget items aren't impacted -- he should go ahead and assume we'll be okay with the addition...so long as he called Edley for the flagrant process foul.

Hope you folks are okay with this; if not, let me or Michael know.

Jose'

DRAFT

Race policy - civil rights enforcement

RACE AND CIVIL RIGHTS IN THE FY 2000 BUDGET

(Budget authority in millions of dollars)

	1998 Actual	1999 Enacted	2000 Pres Budget	% CHANGE 2000 / 1999
Civil Rights Enforcement:				
EEOC	242	279	312	12
HUD: Fair Housing Activities	30	40	47	18
DOJ: Civil Rights Division	65	69	82	19
Labor: OFCCP	62	65	76	17
Education: Office for Civil Rights	62	66	71	8
HHS: Office of Civil Rights	20	21	22	5
Agriculture: Civil Rights Programs	17	21	24	14
U.S. Commission on Civil Rights	9	9	11	22
DOT: Office of Civil Rights	6	7	8	10
Labor: Civil Rights Center	5	5	6	20
EPA: Office of Civil Rights	2	2	2	---
DOJ: Attorneys General Grant Program				
Subtotal, Civil Rights Enforcement	520	584	661	13
Economic Development and Urban Programs:				
APIC				
HUD: Urban Initiative 1/	---	---	50	new program
HUD: Empowerment Zones 2/	5	45	150	233
HUD: Brownfields	25	25	50	100
EPA: Brownfields	88	91	91	---
HUD: Regional Opportunity Counseling	---	10	20	100
Community Development Financial Institutions	80	95	125	32
Commerce: Minority Business Development Agency	25	27	28	4
Transportation: Minority Business Resource Center	5	5	5	---
SBA: Minority Economic Development Program:				
8(a) business development program	5	5	5	-8
7(j) technical assistance program	3	3	5	92
SBA: New Market Venture Capital	---	---	45	new program
EPA: Environmental Justice Programs	26	19	23	21
Documenting Discrimination:				
Develop Research Agenda	---	---	0.5	new program
Begin Tracking in HHS, DOJ, DOL, ED	---	---	2.0	new program
HUD Fair Housing audits 3/	---	[7.5]	[7.5]	n/a
Education and Training:				
Head Start 4/	4,347	4,660	5,667	22
Historically Black Colleges & Universities	118	165	172	5
GEAR UP	---	120	240	100
Early Information/Awareness Campaign	---	---	15	new program
Advanced Placement Courses	3	4	4	---
TRIO Programs	530	600	612	2
Title I LEA Grants	7,375	7,676	7,676	---

DRAFT

RACE AND CIVIL RIGHTS IN THE FY 2000 BUDGET

(Budget authority in millions of dollars)

	1998 Actual	1999 Enacted	2000 Pres.Budget	% CHANGE 2000 / 1999
Education and Training (continued):				
Migrant Education	305	355	380	7
Pell Grants (program level)	7,345	7,704	8,009	4
Federal Work Study	830	870	934	7
America Reads/Reading Excellence	---	260	260	---
21st Century Community Learning Centers	**40**	**200**	**600**	**200**
Bilingual and Immigrant Education	354	380	415	9
Adult Education	361	385	575	49
Hispanic Serving Institutions	12	28	42	50
Minority Science	5	8	8	7
Tribal Colleges and Universities	---	3	6	100
Magnet Schools	101	104	114	10
Charter Schools				
Workforce Investment Act (WIA) adult programs	955	955	955	---
WIA formula grant youth programs	1,001	1,001	1,001	---
WIA Rewarding Achievement of Youth 5/	---	---	20	new program
WIA youth opportunity areas	---	250	250	---
Job Corps	1,246	1,308	1,348	3
Criminal Justice:				
COPS II				
Community Policing				
DOJ: Civil Rights Division 6/	[65]	[69]	[82]	n/a
DOJ: FBI - Hate Crimes Initiatives	29	30	31	3
Justice: Community Relations Service 7/	7	7	10	43
Health and Other:				
Race and Health Initiative	---	**65**	**135**	**108**
Farm Service Agency - Direct Farm Loans	6	8	11	38
Rural Development - Farm Labor Housing	24	30	37	23
Cooperative State Research, Education and Extension Service (historically black land-grant institutions and Tuskegee University)	53	56	53	-5
Outreach for Socially Disadvantaged Farmers	3	3	10	233
Women, Infants, and Children Program				
Improving Poverty Measurement in Census	---	---	5	new program
Total, Race and Civil Rights	**25,831**	**28,142**	**30,854**	**10**

1/ Final settlement redefines program structure as a regional connections / smart growth initiative.

2/ Empowerment Zones are funded on the mandatory side starting in Year 2000.

3/ The $7.5 m is included in HUD Fair Housing Activities in the Civil Rights Enforcement section.

4/ Includes proposal to target part of FY2000 expansion funds to underrepresented minorities, including limited English proficient children.

5/ Funded as a non-add. Funds included in youth opportunity areas total.

6/ Also included in the Civil Rights Enforcement section.

7/ In addition, appropriations language will be proposed to give the Attorney General authority to transfer $3 m from other accounts to CRS in FY 2000.

Race policy - civil rights enforcement

CIVIL RIGHTS ENFORCEMENT FUNDING (Budget Authority, in millions of dollars)							
Agency	FY 98 Enacted	FY 99 Proposed	Proposed Change	Percent Proposed Change	FY 1999 Likely	Likely Change	Percent Likely Change
EEOC	242	279	37	15 %	279	37	15 %
HUD-Fair Housing Activities	30	52	22	73 %	40	10	33 %
DOJ-Civil Rights Division	65	72	7	10 %	67	2	3 %
Labor-OFCCP	62	68	6	10 %	65	3	5 %
Education-Office for Civil Rights	62	68	6	10 %	66	4	6 %
HHS-Office of Civil Rights	20	21	1	5 %	21	1	5 %
Agriculture-Civil Rights Programs	17 [1/]	19	4	27 %	19	4	27 %
U.S. Commission on Civil Rights	9	11	2	22 %	9	0	0%
DOT-Office of Civil Rights	6	7	1	17 %	7	1	17%
Labor-Civil Rights Center	5	3	0	0	5	0	0 %
Total	***516***	***602***	***86***	***17 %***	***578***	***62***	***12 %***

1/ The FY 1998 supplemental bill added $2 million to civil rights programs at the Department of Agriculture, bringing the FY 1998 enacted level to $17 million, from $15 million. The President's initiative included the original $15 million for the Department of Agriculture, which is the number used in the totals on this spreadsheet

October 16, 1998
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DRAFT

Race Initiative policy – civil rights enforcement

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EDLEY

IV. The Workplan for Civil Rights Law Enforcement

A. Fully enforce civil rights laws to address discrimination and ensure equal opportunity

1. *Renovate and strengthen civil rights enforcement infrastructure.*

   - Increase coordination among Federal offices, strengthen pattern and practice enforcement capacity, and eliminate backlogs.
   - Strengthen state, local, and non-profit partners.

2. *Combat unjustified racial disparities by promoting compliance and strengthening effective enforcement of Title VI.*

   - Develop sanctions other than complete termination of Federal funds, and increase support for compliance reviews.
   - Promote compliance efforts to augment Federal enforcement, including requiring civil rights self-evaluations for recipients of Federal funds and enacting safe harbors for voluntary civil rights reviews.
   - Encourage "whistleblower" reports of discrimination, and/or "qui tam" safe harbors and incentives for individuals to report incidents of discrimination.

3. *Combat discrimination in retail sales of goods and services by amending Title II of the Civil Rights Act of 1964.*

B. Retool and refocus civil rights enforcement to fully address all forms of discrimination affecting our increasingly diverse population

1. *Ensure fair application of workplace protections for immigrants and language minorities.*

   - Increase enforcement against labor abuses, and enact limited immigration safe harbors for whistleblowers.
   - Combat language discrimination in employment.

2. *More aggressively challenge ineffective programs for Limited English Proficient [LEP] students as civil rights violations, using Title VI to attack excuses for the gaps in student achievement.*

3. *Guarantee the democratic rights of language minority citizens by fully enforcing the applicable provisions of the Voting Rights Act, including assistance and incentives for better state compliance.*

C. Promote voluntary efforts consistent with civil rights standards, including affirmative action, to promote equal opportunity and to reduce racial conflict

1. *Expand technical assistance and clarify legal standards.*

   - Increase support for technical assistance and training regarding civil rights standards and obligations for all protected classes.
   - Support public education efforts to inform people of their rights and responsibilities under civil rights laws, including outreach to underserved groups including language minority citizens.

2. *Support appropriate, properly constructed affirmative action to overcome discrimination and to promote access and diversity.*

   - Amend SBA 8(a) program to "mend, not end" affirmative action.
   - Provide technical assistance to encourage and support the appropriate use of affirmative action in higher education, law enforcement, and other settings.

3. *Support efforts by CRS to build racial understanding and reduce racial tensions in communities.*

   - Increase the capacity of CRS to address rapid response to local racial conflicts as well as to develop monitoring capability for pre-crisis interventions.
   - Increase support for CRS to build partnerships including establishing state and local agency equivalents and training local community leaders in identifying, preventing, mediating, and resolving racial problems and tensions.

Race init policy - civil rights enforcement

cc EK
+ file: Race Book

October 6, 1998

MEMORANDUM

TO: Charles Ruff
Eddie Correia

FROM: Christopher Edley, Jr.
Scott Palmer

Cc: Maria Echaveste, Minyon Moore, Elena Kagan, Josh Gotbaum

SUBJECT: Comments on Your Civil Rights Enforcement Decision Memorandum

Thank you for your leadership in creating a vehicle for some strategic decisionmaking. In a parochial sense, we look at your memorandum as a way to help get the President's book done. But there is certainly a greater good, too. We have three fundamental comments:

- *Programmatic issues:* The most valuable role for your memorandum is to present legal and enforcement options to the President. We should drop the programmatic material from the memorandum (except as context) and leave those matters to another memorandum, presumably developed in a timely way under policy council leadership with broad participation. Apart from turf issues, this would permit you to focus on the substantive comparative advantage of the Counsel's office -- which is in law enforcement rather than, say, programmatic strategies for K-12 improvement. Crucially, this would also eliminate a troubling conceptual flaw in the document: the false choice between enforcement and policy tracks, when quite clearly they are not mutually exclusive.

  Alternatively, if people feel that some or many of the President's enforcement decisions are inextricably linked to decisions about program policy, we need a more ambitious, omnibus memorandum. (On most issues, we do not believe this is necessary.)

- *Missing issues:* There are some thorny, important questions that should be added to the memorandum, in part because the President will want to address them in his race book. School and residential integration, for example, are plausible policy values that he might pursue through a combination of programmatic *and* enforcement activities, but doing so obviously requires some agency vetting and a careful presentation.

- *Enforcement philosophy:* The memorandum by implication discounts the function enforcers play in driving policy choices by regulated entities – e.g., in pressing college admissions officers to mend, not end, affirmative action – short of litigation. If there is disagreement about the desirability of this, let's sharpen and decide the question. Even more important, the memorandum adopts a philosophy of *minimal litigation risk* in the positions we press on Title VI and other matters, suggesting that enforcement action is appropriate only when standards and violations are fairly clear. That was not the Reagan-

Bush approach to civil rights, and we think that is the wrong way for President Clinton to create a legacy. Can't we give him an informed opportunity to push the envelope.

We are presently working on three core themes for the civil rights section of the President's workplan on race, and some related issues elsewhere in his book.

a. **Overcome Racial Disparities in Opportunity by Strengthening Civil Rights Laws and Enforcement:** This includes a substantial emphasis on more aggressive use of Title VI -- as the basis for technical assistance, administrative action, and litigation. It might also include an amendment to Title II (public accommodations) to address retail sector discrimination.

b. **More Fully Address All Forms of Discrimination Affecting Our Increasingly Diverse Population by Strengthening Civil Rights Laws and Enforcement:** We want to explore strengthening laws and enforcement efforts related to our growing diversity -- including the rights of new immigrants and LEP populations.

c. **Address Discrimination and Disparities by Promoting Voluntary and Collaborative Efforts to Live by Civil Rights Principles:** For example, we can expand civil rights consultations and clarify legal standards in affirmative action and other areas, and we can expand proactive, collaborative enforcement efforts. ? The difficulty in formulating the college admissions guidance suggests that presidential guidance would help.

d. **Reviving and pursuing the integration ideal:** Quite relatedly, in sections of the workplan related to *education* and to *jobs & economic development*, our "short list" of key themes includes a recommitment of the nation to the integration ideal in K-12 and housing patterns. This should imply a serious effort on our part to ask whether law enforcement can contribute more to the President's integrationist vision. (The answer, after hard thought, may be "No," but the hard thought has not yet been done.) Your decision memorandum can be used to frame these difficult choices for him.

e. **Racial Profiling in Law Enforcement:** This thorny issue is unavoidable for us, even if we were so inclined. Shouldn't the President be presented with an "enforcement" option in this arena?

We acknowledge the timing and coordination problem with the social policy process. He can't make a strategic decision about enforcement policy without *some* policy context. Arguably, enforcement strategy and program strategy should be made concurrently. In this less-than-ideal world, however, it seems reasonable to move forward with the enforcement issues above -- except perhaps racial profiling, where the basic data, values and policies require more cooking.

We will send you some detailed minor comments separately. We hope this is helpful.

'98 SEP 23 PM6:55

THE WHITE HOUSE

WASHINGTON

September 23, 1998

MEMORANDUM FOR THE PRESIDENT

FROM: CHARLES F.C. RUFF, COUNSEL TO THE PRESIDENT
EDWARD CORREIA, SPECIAL COUNSEL FOR CIVIL RIGHTS

SUBJECT: Civil Rights Enforcement

This memorandum emerges from discussions with Chris Edley and Maria Echaveste and seeks your guidance regarding civil rights enforcement policy in five areas -- higher education admissions, high stakes testing at the elementary and secondary level, school integration, business opportunities, and coordination of civil rights enforcement. It is intended to supplement Chris's broader memo of September 9, 1998, outlining the book on race policy, by suggesting an agenda of shorter-term civil rights objectives that are consistent with the longer-range policy goals reflected in the Advisory Board's recommendations and in the book. The initiatives described in this memo can be implemented (or be well on the way to implementation) during the next eighteen months. They will help shape agency priorities and demonstrate the Administration's commitment both to thoughtful policy development and to action.

Over the past three years, federal agencies, with the guidance of the Justice Department, have taken several steps to carry out your commitment to "mend, but not end" affirmative action. Most recently, for example, the administration instituted major reforms of federal procurement policies to target assistance to firms in industries that still show the effects of discrimination. Although critics of affirmative action continue to call on you to abandon support for any race-conscious policies, Congress itself has rejected efforts to eliminate affirmative action on three occasions during 1998. Carefully designed affirmative action programs are necessary and continue to receive wide public support.

We believe that our new procurement policies will survive constitutional attack, but it is possible that the courts will find them inadequate. There is also uncertainty whether race-conscious programs intended to achieve diversity, such as higher education admissions standards, will be upheld. At this point, California has been the only state to place a sweeping ban on affirmative action, but other states may follow suit. We can also assume affirmative

action will continue to be attacked by some in Congress. Finally, even supporters of affirmative action recognize that it is a temporary approach to equality. Our ultimate goal should be to ensure that all groups have an equal opportunity to succeed without the need for any affirmative action policies.

Under no circumstances do we envision the Administration's abandoning support for affirmative action. Instead, we believe that the Administration should continue to pursue a two-track strategy to achieve diversity and racial equality -- first, supporting traditional affirmative action policies and revising them where necessary; and second, devising race-neutral strategies that can also advance the goal of equality and sustain it on a permanent basis. There is no inconsistency in pursuing both tracks at the same time, but choices will need to be made regarding the emphasis to be placed on each approach.

The uncertain legal and political climate might suggest that we devote more effort to developing race-neutral solutions. We can be certain that these approaches will survive legal challenges, and they are more likely to attract bipartisan support. On the other hand, race-neutral approaches are inherently less targeted. For example, benefits that are made available based on income primarily benefit whites simply because there are more poor white families than poor minority families. Moreover, increasing our emphasis on race-neutral approaches can send the wrong message to disadvantaged minority groups who may believe that strengthening these efforts invariably means signaling a retreat from affirmative action. Each of the enforcement strategies discussed below should be evaluated in the context of these competing concerns.

I. HIGHER EDUCATION OPPORTUNITIES

One of the most important steps we can take toward racial equality is to increase the number of minority young people who complete some form of higher education. There are pressing needs in many areas. First, there is a large gap between white Americans and minorities completing college. For example, 29% of whites aged 25 to 29 have a college degree compared to 14% of African-Americans. A recent report shows that college enrollment rates for African-Americans in southern states is declining and that their likelihood of graduation is far below that of whites. Second, the California experience shows that there may be a drastic decline in minorities who attend top-ranking universities as well as professional schools if affirmative action in admissions is ended. Third, an extremely small number of minorities are pursuing careers in science. African-Americans, Hispanics and American Indians constitute 28.5% of the college-age population, but less than 6% of the engineering workforce and, in 1996, they comprised less than 10% of the bachelors degrees in engineering and less than 3% of the doctorates. While there has been an increase in the percentage of science and engineering degrees going to American Indians, African-Americans, and Hispanics since 1989, a recent study reported a 20% decline in African-American and Hispanic enrollment in first year graduate programs in science and engineering.

A. The College Admissions Process

As you know, the constitutional basis for taking race into account in admissions stems from the Supreme Court's 1973 Bakke decision. We intend to defend Bakke, but the reality is that Bakke may not survive, or, if it does, there may be severe limitations placed on how affirmative action to increase diversity can be implemented. Our goal, then, is to explore alternative means for ensuring diversity in our universities.

Standardized tests play a crucial, often determinative, role in the admissions decisions of almost all universities with competitive admissions standards. Minorities, particularly African-Americans and Hispanics, perform significantly less well on these tests than whites and Asian-Americans. As a consequence, the reliance placed on these tests has a disproportionately negative effect impact on these and other minority groups. There is general agreement between the enforcement and policy staffs that universities should place more emphasis on factors other than standardized tests and high school grades. Such an approach would require universities to commit more resources to the admissions process, but it could result in more diverse student bodies without sacrificing the academic success of admitted students.

1. An Enforcement Strategy

One means of achieving diversity is by enforcing federal regulations under Title VI of the 1964 Civil Rights Act. These regulations bar recipients of federal funds from pursuing policies if they have a racially discriminatory effect and either 1) the policies are unnecessary to achieve the institution's legitimate goals; or 2) there is a less discriminatory alternative that is equally effective to achieve these goals. The Department of Education could take the position that universities that rely too heavily on standardized tests violate these requirements. For example, the SAT is generally viewed as a good predictor of first year grades in college; however, even the Educational Testing Service, which developed the test, cautions that it can be overemphasized. Moreover, the experience of universities that have committed more resources to individualized review of applications suggests that greater reliance on non-quantitative characteristics can result in a more diverse enrollment without sacrificing academic success. In light of this experience, it could be argued that Title VI requires a more individualized review of applications and, correspondingly, less reliance on quantitative measures.

There are disadvantages to the litigation approach, however. While there is some case law supporting such a legal theory, the courts have not provided clear guidance in this area, and there are significant risks that they would reject the theory. Moreover, the empirical data regarding the relevance of standardized tests do not point in a clear direction. While the current admissions system can be improved, there is a great deal of uncertainty as to precisely how to do it. We are confident in saying that universities should rely on several factors, rather than one, and that individual evaluations should play an important role; however, it is difficult to strike the appropriate balance between use of quantitative measures, such as test scores and grades, and non-quantitative factors, such as a record of community service and leadership. Thus, courts may conclude that the role of the tests is an education policy issue to be decided by university administrators, rather than a matter of civil rights law to be decided by courts.

2. A Policy Development Strategy

A second option is for the Administration, while being prepared to take enforcement action in egregious cases, to urge changes in the admissions process as a matter of sound education policy and work with the higher education community to identify and implement the types of admissions procedures that will help to ensure greater diversity while preserving standards of academic performance. For example, Secretary Riley and other administration spokespersons could advocate de-emphasizing standardized tests and focusing more on personal characteristics as predictors of academic performance. Rather than challenge particular admissions procedures in court, the administration could work with the higher

education community to develop a consensus about reform of the admissions process. We can contribute to the debate by analyzing the latest and most reliable research demonstrating the limitations of conventional admissions criteria.

Such an approach can only be effective if leaders in higher education work with us to develop and communicate the appropriate message about admissions. White House staff has already worked with some of these leaders to promote the importance of diversity in general, and they can also form the core of an effort to develop alternative admissions procedures. On a narrower front, the Attorney General has expressed a strong interest in the issue of law school admissions, and we have discussed with her a project to work with law school deans to expand the admissions process.

Emphasize enforcement strategy ____ or policy strategy ____

Other:__________________

B. Improving Test Scores and Encouraging Careers in Science

While we believe that the role of standardized tests in the admissions process should be rethought, a more fundamental problem is that minority students are often poorly prepared for such tests. Thus, a parallel approach is to ensure that minority students can successfully compete under prevailing admissions standards. Improving academic achievement of all students is a long-term effort, which warrants federal intervention at the earliest stages. Administration efforts such as reducing class size and increasing the quality of teachers are central to this long-term strategy; however, we believe it is also important to identify effective intervention points to improve results in the short term, e.g., 3 to 5 years. Concerns about fairness and social cohesiveness require that we take actions that have a more immediate impact on the nation's teenagers, in addition to our longer-range efforts to improve the education of elementary and preschool children.

Low test scores explain almost the entire racial disparity in college admissions. Once earnings are adjusted for test scores, the earnings disparity between white and black applicants also drops dramatically.[1] Thus, equalizing test scores could substantially increase racial equality.

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[1] Jenks and Phillips, America's Next Achievement Test, The American Prospect, Sept.-Oct. 1998. In 1994, the earnings of all black employed men ages 31 to 36 were 67.5% of the comparable white group. However, if the two groups are adjusted for test scores, earnings of this group of black men were 96% of the comparable white group.

If current test score patterns continue, and affirmative action is eliminated or drastically restricted across the country, the effect on minority college enrollment could be serious enough to be socially divisive. There are, therefore, powerful reasons for addressing the problem of low test scores along with any effort to modify the admissions process.

At the high school stage, we believe one promising approach is to strengthen precollege preparation for inner city students. This approach could include providing funds for: 1) advanced science and math courses in inner city schools; 2) college credit courses to be offered during the summer; and 3) courses that would boost academic performance and improve performance on standardized tests. Research shows that test preparation courses often increase performance, and that such courses are largely taken by middle class, white students. On the other hand, there are sufficient doubts about the benefits of short-term test preparation courses that it may not be effective to subsidize them. Instead, it may be more appropriate to provide funding for more extended courses that include substantial academic content, but that can also boost test performance.

Improving the academic performance of minority undergraduate students can expand minority enrollment in professional and graduate schools. We believe a promising approach is to design programs for this group that will increase their graduation rate, increase interest in graduate school, particularly science programs, and improve grades and scores on standardized tests. Federal efforts can include expanding financial support for: 1) improving math and science programs at minority-serving institutions; 2) short-term courses that will boost performance on standardized tests; 3) tutors and counselors for students who are facing academic problems; and 4) science-related internships and research assistant positions. We understand the Department of Education will include some proposals in these areas in their budget submissions. At this point, we seek your guidance as to the general direction and priorities for these efforts.

Finally, another approach is to call on private industry to fund scholarships for minority students in order to pursue science careers. Because of the extremely low numbers of minorities in science careers now, and because we are facing an overall shortage in scientists and engineers, private industry has a stake in increasing minority enrollment in graduate programs in science. The private sector is already making scattered efforts in this area now, but we believe there is a good possibility that a coalition of the nation's largest corporations would set aside substantial funds if you called on them to do so. If you believe it worthwhile, we would be prepared to reach out to some of the leaders in the field of science education to discuss how to accomplish this.

Develop program to improve test scores: Approve ____ Disapprove ____

Develop program for minorities in science careers: Approve ___ Disapprove ___

Other ___________________

II. HIGH STAKES TESTING

High stakes testing is a critical issue in current civil rights enforcement. The Office of Civil Rights in the Department of Education (OCR) is conducting a number of investigations of states and school districts that rely on standardized tests for such important decisions as selecting students for academically accelerated programs and granting high school diplomas. For example, North Carolina requires high school seniors to pass a standardized test to graduate. As in the case of the SAT and LSAT, reliance on test scores has a significantly disproportionate effect on African-Americans and Hispanics. In 1998, the state reported that 93.3% of white students passed the test, but only 82.4% of black students passed. The disparity in some school districts was much more dramatic. In the most extreme case, 84.1% of white students passed, compared to 30% of black students. As you know, the civil rights community has expressed strong concerns about the use of high stakes tests. The question is whether and how we should attempt to influence the use of such tests.

A. An Enforcement Strategy

One option is to challenge the use of these tests under the Title VI regulations described above. The Department of Education's draft guidelines state that a test that has a disparate impact must be "valid and reliable for the purpose for which it is being used and [must be] the least discriminatory alternative that can serve the institution's educational purpose." Although the use of tests at the elementary and secondary level will raise many of the same questions raised by college admissions standards, there are significant differences in analysis. For example, because the alternative of a more individualized approach to measuring ability is probably less feasible where the goal is a widespread assessment of a minimum level of competence, states might argue that tests represent the only practical approach to identifying students who have achieved a minimum level of academic performance. Standardized tests also have the advantage of providing a way to compare the performance of school districts themselves. The administration itself has argued for standardized tests on these grounds.

For these reasons, we can expect that the states will often be able to meet their burden of proving that standardized tests are necessary to achieve a legitimate goal. As in the case of college admissions, the most disputed issue in a Title VI case is likely to be the existence of an equally effective, less discriminatory alternative. OCR argues that, in certain cases, it could establish in litigation that there are better ways to measure ability that have less discriminatory impact. There are, however, disagreements among experts about the predictive value of even the most respected tests, and a court might defer to a school district's decision to use a particular test as the best way to accomplish its educational objectives.

B. A Policy Development Strategy

As in the case of higher education admissions, the alternative is to emphasize the development of reliable tests as a matter of sound education policy. We would still continue to enforce Title VI in clear-cut cases, and, in fact, Secretary Riley has assured the civil rights community that we will do so. For example, OCR has challenged school districts that relied exclusively on IQ tests to place students in a gifted and talented program in elementary grades. In those cases, even those who designed the test were prepared to testify that the test should not be used for that purpose. In close cases, however, we would forego legal challenges in favor of working with educators to develop sound testing techniques that have less discriminatory impact. This approach would also be consistent with upcoming ED efforts to discourage social promotions. Both approaches are aimed at persuading school districts to adopt appropriate methods to evaluate student performance.

Emphasize enforcement strategy ____ or policy strategy ____

Other: ________________

III. SCHOOL INTEGRATION

One of the most discouraging aspects of race relations in America is the stubborn persistence of segregation in schools and residential areas. Recent data show that public schools are actually becoming more segregated. This segregation is driven by residential patterns, both within and among school districts. In 1995, about 56% of the enrollment in central city districts throughout the country was composed of African-American and Hispanic students. Nine of the ten largest districts had more than 75% minority enrollment. In contrast, 22.3% of the students in suburban schools and 19.3% of the students in rural schools were African-American or Hispanic. Students in many schools are often racially isolated. One third of African-American and Hispanic students attend schools with more than 90% minority enrollment.

Below, we discuss three possible approaches to achieving a higher degree of integration: pursuing litigation, promoting housing integration, and expanding magnet schools. These strategies are not mutually exclusive, and we seek your guidance as to the priority to be placed on each.

A. School Desegregation Litigation

Historically, DOJ has initiated or participated in most major school desegregation cases throughout the country. While there have been many successes, particularly in the south, there is no doubt that efforts to integrate large city school districts have been undercut by the movement of white families to the suburbs. In addition, the Supreme Court has limited court-ordered desegregation by prohibiting remedies that include the suburbs unless the constitutional violation has extended beyond a single school district. In practice, this has meant that almost all school desegregation decrees have involved only individual school districts.

Today, there are essentially no new school desegregation cases to bring. Instead, the enforcement questions concern the position DOJ should take in regard to efforts to modify or vacate decrees that have been in existence for many years. Many school districts, particularly in the south, are content to leave a desegregation plan in place as long as there is general public acceptance. Other districts have asked the court to vacate their decrees, encouraged by the fact that the Supreme Court has adopted a more permissive standard for doing so. Increasingly, courts themselves are raising the issue of vacating these decrees. In general, DOJ has taken a strong stand against vacating desegregation decrees so long as there are additional significant steps that can be taken to break down vestiges of discrimination. When there are no realistic possibilities for such steps, DOJ has joined with the parties in a motion to vacate a degree. In the absence of other guidance, DOJ intends to continue this approach. The reality, however, is that litigation is unlikely to achieve significant new gains in integration.

B. The Role of HUD

HUD administers a variety of programs that can assist minority families to purchase or rent low-cost housing. In many cases, HUD has considerable discretion as to where and how to target this assistance. Another approach to breaking down school segregation is to target housing subsidies in metropolitan areas where there is an opportunity to promote substantial school desegregation. To some extent this can be done with existing regulations and appropriation levels. A more significant effort would require additional funds.

Recently, for example, DOJ was involved in settlement discussions regarding a long-standing desegregation decree applicable to Indianapolis and the surrounding suburbs. Indianapolis presented an unusual example where the desegregation plan required bussing students to and from the suburbs. DOJ, along with the city and private parties, agreed to a settlement that will end bussing in seventeen years. The settlement also included a modest provision to increase housing integration. Under the terms of the settlement, the city established a center to assist low-income residents of Indianapolis in locating and financing housing in the suburbs, but the city was not required to help fund the center or any associated services. Although our role in this litigation is essentially at an end, HUD could provide financial assistance to increase the number of low-income families in the suburbs. This in turn could promote school desegregation, perhaps as effectively as judicially-ordered desegregation.

Approve: ______ Disapprove _____ Other _____

C. Inter-district Magnet Schools

The Department of Education now administers a modest (about $100 million) grant program for magnet schools that are formed for the purpose of increasing school integration. About 65 districts will receive grants this year. The Department of Education recently announced that magnet schools that use race as a factor in their admissions policies must satisfy strict scrutiny to comply with constitutional standards. After some initial concern about whether the districts could comply with that standard, virtually all districts were able to comply with modest adjustments in their admissions policies.

Magnet schools contribute to school integration, but their effect is limited. They usually enroll students from a single district that is already dominated by students of one race. In fact, the effect of magnet schools is often to create an integrated magnet school at the expense of increasing segregation at the "feeder" schools from which students come. Although the current statutory authorization allows for grants to magnet schools that serve more than one district, only

three grants were given to such schools because of the limited funding for the program. One option is to seek expanded funding for magnet schools and to earmark some of the funds for schools drawing students from more than one district. This would represent a voluntary, inter-district alternative to rarely obtained inter-district desegregation orders.

Approve _____ Disapprove _____ Other _______________

IV. EXPANDING BUSINESS OPPORTUNITIES

Since the Nixon Administration, both Republican and Democratic administrations have pursued efforts to expand opportunities for minority-owned businesses. This business-oriented strategy is the natural counterpart to an educational strategy. We have recently initiated several reforms of federal procurement programs that are designed to expand these opportunities. There are strong arguments that additional reforms, outlined below, are needed.

A. Current Programs

Several federal programs are intended to increase opportunities for minority-owned businesses. The largest and most significant of these is the SBA's 8(a) program, which provides a sheltered environment for newly developing firms to enable them to obtain the experience and record necessary to compete in an open marketplace. Federal agencies work through the SBA to arrange for contracts with qualified firms on a non-competitive, or at least limited-competition, basis. The 8(a) program arranges for over $6 billion in federal procurement contracts for SDB'S. This represents the lion's share of all federal procurement dollars going to these firms. Our recent procurement reforms implemented a separate price credit program that provides a boost to minority-owned firms in industries that reflect the ongoing effects of discrimination. The Department of Transportation's DBE program requires grantees to set goals for minority contracting. Finally, the new HUBzones program provides for preferences in federal procurement for all small firms located in inner cities. HUBzones, which was a Republican initiative pushed by Senator Bond, largely superseded the Empowerment Zone initiative, which was intended to accomplish similar objectives.

B. Applying Benchmarking to SBA's 8(a) Program

In order to identify industries that reflect the ongoing effects of discrimination, Commerce has developed "benchmarks," which are a measure of the value of contracts that would be expected to be awarded to SDB's in the absence of discrimination. While these benchmarking standards will not apply directly to 8(a), we stated that we would apply similar principles to the 8(a) program. DOJ believes we must do so or face the prospect that a court will find 8(a) unconstitutional.

DOJ recommends that we apply benchmarking principles to 8(a) by limiting contracts in certain industries and by limiting the firms that can participate in the program. In particular, DOJ recommends that, in industries where the gap between SDB's and other firms appears to have been closed, SBA should begin to limit all large contracts as well as contracts to firms that have

participated in the 8(a) program for a longer period. Although these steps may be met with political opposition, particularly by firms who face the prospect of a loss of contracts, the alternative is that the entire program may be struck down.

C. Further 8(a) Reforms

Applying benchmarking principles to 8(a) will go some way to reform the program, but additional reforms are needed. Critics have pointed to a number of weaknesses in 8(a):

(1) Wealthy individuals still participate since the cap on assets is up to $750,000 and equity in a business, as well as home equity, is not counted against this ceiling;

(2) Many firms participate that would be successful without the program; a 1994 survey showed that many companies in the program were stronger economically than average companies in the same industry;

(3) A large portion of 8(a) contracts goes to a relatively small number of firms; for example, about 25 % of 8(a) contract dollars in FY 94 went to 1% of firms; at the same time, 53% of the firms during FY 92-94 received no contracts;

(4) The program does not significantly expand minority hiring and economic development in the inner city; few 8(a) firms are actually located in inner cities; and

(5) The program does not provide significant business development assistance; the current funding for technical assistance is $2.5 million, only enough to provide advanced management courses for a limited number of executives; meanwhile, about half of the firms in the program are not awarded any federal contracts.

We recommend that the administration propose reforms in the 8(a) program to address these shortcomings. Some of these can be done administratively; others require statutory changes. In particular, we recommend that a working group be created to develop specific proposals to: 1) lower the cap on the wealth of participating firm owners; 2) lower the cap on the amount of contract dollars any 8(a) firm can receive; and 3) reduce the size of participating firms. These limitations on 8(a) should be balanced with a significant expansion of SBA's technical assistance program and with certain more permissive financing requirements, e.g., easing the bonding requirement. These reforms will be met with strong opposition by some members of the minority business community, but there is a good argument that 8(a) benefits a relatively small

number of firms now, while doing little for overall equality. A restructured 8(a) program can extend assistance to more firms in a more effective way.

Approve _____ Disapprove _____ Other ___________

D. Broader Procurement Reforms

In addition to these reforms, we believe that the administration should pursue the second track of strengthening race-neutral efforts to expand minority business opportunities. As in the case of education, one strategy is to target assistance to inner-city areas. This strategy reaches a disproportionate number of minority-owned firms while increasing minority employment in economically depressed areas. This is the approach of Empowerment Zones (an administration initiative) and HUBzones (a Republican initiative). The Empowerment Contracting initiative provided a preference in federal procurement for firms in Empowerment Zones, but this program was never implemented because of the enactment of HUBzones.

The Empowerment Zones and HUBzones programs provide structures upon which additional efforts can be built. One possibility is to expand technical and mentoring assistance to firms in HUBzones. Many HUBzone firms are already eligible for the SBA's technical assistance program, but funding is so limited that the SBA has restricted all technical assistance to 8(a) participants. A second possibility is to reinstitute a provision that was originally included in the Empowerment Zone proposal by providing a preference in federal procurement for large firms that operate in severely distressed inner city areas. In order to ensure that this preference is most effective, it can be limited to large firms that hire substantial numbers of inner-city residents.

Expand technical and mentoring assistance: Approve ___ Disapprove ___ Other ______

Preference in federal procurement: Approve ___ Disapprove ___ Other _______

V. COORDINATION OF CIVIL RIGHTS ENFORCEMENT

We believe that a civil rights coordinating council, composed of the heads of the major civil rights agencies, should meet periodically to coordinate enforcement and to report to you and other administration officials about their efforts. The council would be chaired by the Assistant Attorney General for the Civil Rights Division and would plan meetings and briefings with the aid of the Counsel's Office. White House staff or other administration officials would attend as appropriate.

The council is needed for several reasons. First, because civil rights enforcement plays a crucial role in achieving the administration's fundamental goal of economic and social equality, there is a particular need for the enforcement agencies to inform the White House of their priorities and policies. Second, civil rights enforcement decisions often relate closely to general administration policy. For example, the approaches to higher education admissions and testing discussed earlier in this memo necessarily raise important questions about education policy. Finally, civil rights enforcement responsibilities are shared by several agencies, including the Civil Rights Division in DOJ, the EEOC, the Office of Civil Rights in ED, and the Office of Civil Rights in HHS. Ensuring that these agencies coordinate their activities will promote consistency and more effective enforcement.

Approve _____ Disapprove _____ Other __________

Race Init PA - Civ Rts Enf

Bruce - FYI.

"Christopher Edley, Jr." <edley @ law.harvard.edu>
08/05/98 07:42:35 PM

Record Type: Record

To: Edward W. Correia/WHO/EOP, Maria Echaveste/WHO/EOP, Elena Kagan/OPD/EOP, Judith A. Winston/PIR/EOP

cc: Charles F. Ruff/WHO/EOP, Jacinta Ma/PIR/EOP
Subject: Re: next steps

Fabulous notes. Geez.

Small comments, in no particular order:

a. I would say that MAYBE these need elevation to POTUS. I favor developing the memo (with all the work that entails) and dropping out or adding as that process indicates. In other words, this shouldn't be viewed as a final list.

b. We really are killing four birds with one stone, and it makes sense to bear that in mind. The birds are: (1) updating POTUS on a few items; (2) plotting Administration priorities for the next two years and getting the needed policy signals to accomplish that; (3) flagging anything that has budget implications for FY 2000; (4) getting some bold thinking in front of POTUS for his race book.

c. In regard to the last item, b(4), we need a mini-working group not only to help process the memo, but also to think about ideas that may not be federal, or that may be longer range, or whatever. And, I dunno, maybe there's something about Native Americans. Maybe discrimination in the context of immigration enforcement. Anyway, I'd like a little working group, with charter not only to assist with Eddie's POTUS memo, but the broader brainstorming I need for the book.

d. I don't want any of this morning's discussion to leave the impression that I am anything but wildly enthusiastic about biting the bullet on 8(a) and SDB programs -- or at least putting before POTUS the option of doing so. I believe Maria agrees. BUT I DID NOT LEAVE THE DISCUSSION WITH A SENSE OF WHO HAS THE LEAD IN DRIVING 8(a) REFORMS FORWARD. If not WH COUNSEL, then who? Would be nice to get something signed off on by the time of the book. Erskine and Cassandra designed a package of changes that are sitting on the shelf to consider.

e. I just want to reiterate that there is serious intellectual work involved in many of these issues. There is hard conceptual stuff that ought to be framed in a way with the general way POTUS will discuss racial and ethnic justice, etc. Obvious point, but when the lawyers in the basement start arguing about everything, we'll have to remind folks to keep the big picture in mind. (Once we paint it.)

f. THis is a large agenda. I urge Eddie to make use of Jacinta Ma, an attorney with a strong civil rights background, from the PIR staff. In addition, Maria will have a White House Fellow starting in September, who

is an attorney with some civil rights experience and interest.

****

At 04:52 PM 8/5/1998 -0400, Edward_W._Correia@who.eop.gov wrote:
> Chris asked me to summarize my notes of our meeting this morning in
>order to review the civil rights enforcement issues we identified as
>particularly significant. I list these below, as well as my recollection of
>the remainder of our discussion. Please let me know if you have corrections
>or additions.
>
> We identified the following "frontier" civil rights enforcement issues
>as significant enough to warrant review by the President:
> 1) higher education admissions, including the use of standardized
>tests and the way we choose to articulate and support the Bakke decision;
> 2) high stakes testing in other settings, such as elementary and
>secondary schools;
> 3) single sex schools;
> 4) magnet and charter schools, including the appropriate use of race
>by these schools in creating a diverse student body and our enforcement
>strategy if schools exclude groups in violation of the civil rights laws;
> 5) the importance of testers in civil rights enforcement, as used by
>the EEOC and other enforcement agencies;
> 6) achieving diversity in employment and ownership in the broadcasting
>industry, including the status of the challenge to the FCC's employment
>rules and strategies to diversify ownership;
> 7) our efforts to achieve "environmental justice," i.e., challenging
>decisions of local government or other recipients of federal funds in land
>use planning decisions that have a discriminatory impact.
>
> In addition to these issues, we may, after further review, want to
>include language discrimination by employers and religious discrimination.
>Also, the question of reforms in the 8(a) program may warrant review, both
>as a legal matter based on our need to comply with Adarand and as a policy
>matter, based on the desire to make the program more effective.
>
> In regard to policy issues that Chuck and I contemplated including in
>a memo to the President, particularly pipeline strategies for higher
>education, there was a strong recommendation to include these as a part of
>the regular budget process. I will convey this recommendation to Chuck and
>discuss with Elena and Mike Cohen how that would be done. Finally, there
>was a consensus that we need some kind of regular White House review of
>civil rights enforcement policy and strategies. One possibility is a
>meeting every month (perhaps 6 weeks) involving DPC, Counsel's Office,
>other White House staff where appropriate, the heads of the enforcement
>agencies and some agency staff.
>
>
>

Race Init Policy — Civ Rts Enf

Julie A. Fernandes
07/15/98 04:26:50 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Maria Echaveste/WHO/EOP, Minyon Moore/WHO/EOP, Broderick Johnson/WHO/EOP

cc: Laura Emmett/WHO/EOP, Leslie Bernstein/WHO/EOP, Jocelyn Neis/WHO/EOP
Subject: EEOC mark-up

FYI. The EEOC survived the full committee mark-up with an unchanged $18.5 million increase and no riders re: testing. There was, however, a motion to reduce the EEOC's budget by $2 million by Rep. Dickey. He was apparently upset about some high profile case in Arkansas, and spoke about it at length. That started a discussion of lots of disliked EEOC cases by various Rep. members. According to Martha, Livingston then indicated that they had a deal with the EEOC and that neither he nor Rogers was supporting the reduction in funding. Dixon and Mollohan also spoke about the agency's need for increased funding. The motion failed on a vote of 37 to 11. EEOC is now in the process of transmitting a signed version of the letter to the various Chairs and ranking members. Martha indictated that either she or Larry Stein would call Gingrich to confirm his support to beat back similar motions when the bill gets to the floor.

Julie

Race Init Policy - Civ Rts Enf

▶ **Julie A. Fernandes**
07/15/98 04:28:20 PM
●●●●●●●●●●●●●●●●●

Record Type: Record

To: Elena Kagan/OPD/EOP, Maria Echaveste/WHO/EOP

cc: Laura Emmett/WHO/EOP, Leslie Bernstein/WHO/EOP
Subject: OFCCP and testers

Also FYI. Livingston did not offer a rider re: testers to the Labor/HHS appropriations bill yesterday.

jf

Race init pol -
civ rts enf

Julie A. Fernandes
07/13/98 03:24:07 PM
●●●●●●●●●●●●●●●●●

Record Type: Record

To: Maria Echaveste/WHO/EOP, Elena Kagan/OPD/EOP, Broderick Johnson/WHO/EOP, Martha Foley/WHO/EOP

cc: Leslie Bernstein/WHO/EOP, Laura Emmett/WHO/EOP
Subject: OFCCP and testers

I spoke with Gayle Black from OFCCP. The OFCCP started their testing program in 1995, and so far has run one test: on entry-level banking jobs in the D.C. area. They tested 13 banks and then shared the information with the banks. This was all done in the context of compliance, and there was no enforcement angle and no sanctions of any kind. The banks, though not happy that some discrimination was found, were pleased with the feedback that they received. On July 21st, the American Bankers Association is having a press conference to unveil a guidebook that was developed in conjuction with the OFCCP and others. According to Gayle, the ABA has said that they would be happy to support the use of testers by the DOL in compliance efforts.

The OFCCP has plans to do other tests in other areas and industries, however nothing has yet been finalized. They, like HUD, hired a not-for-profit organization to run the test, and thus did not themselves employ testers.

julie

Race init pol –
civ rts enf

Julie A. Fernandes
07/13/98 06:01:04 PM

Record Type: Record

To: Martha Foley/WHO/EOP

cc: See the distribution list at the bottom of this message
Subject: Re: OFCCP and testers

According to Larry Matlack, they have never (including our FY 99 proposed budget) had money specifically earmarked for testers. In the past, they have funded their tester activity out of their base. According to OFCCP, they contemplated continuing tester activity next year, and thus would likely fund this also out of their base (as just another compliance tool).

julie

Message Copied To:

Maria Echaveste/WHO/EOP
Elena Kagan/OPD/EOP
Broderick Johnson/WHO/EOP
Leslie Bernstein/WHO/EOP
Laura Emmett/WHO/EOP

Race init policy -
civil rts enforcement

FAX TRANSMISSION

WHITE HOUSE
DOMESTIC POLICY COUNCIL

TO: Elena Kagan

FAX NUMBER: 6-2878 **PHONE NUMBER:** 6-5584

FROM: Julie Fernandes

FAX NUMBER: 202/456-5581 **PHONE NUMBER:** 202/456-6558

TOTAL PAGES (including this page): 2

Comments: Here is a copy of the chart that Michael Deich provided at the CR enforcement meeting last week.

CIVIL RIGHTS ENFORCEMENT FUNDING (budget authority, in millions of dollars)						
Agency	FY 98 Enacted	FY 99 Proposed	Increase	Percent Change	Latest House	Latest Senate
EEOC	242	279	37	15 %	260	254
HUD-Fair Housing Activities	30	52	22	73 %	40	35
DOJ-Civil Rights Division	65	72	7	10 %	----	~~72~~
Labor-OFCCP	62	68	6	10 %	65	---
Education-Office for Civil Rights	62	68	6	10 %	62	---
HHS-Office of Civil Rights	20	21	1	5 %	21	---
Agriculture-Civil Rights Programs	17 [1/]	19	4	27 %	19	17
U.S. Commission on Civil Rights	9	11	2	22 %	9	9
DOT-Office of Civil Rights	6	7	1	17 %	---	---
Labor-Civil Rights Center	5	3	0	0	5	----
Total	***516***	***602***	***86***	***17 %***	***N/A***	***N/A***

1/ The FY 1998 supplemental bill added $2 million to civil rights programs at the Department of Agriculture, bringing the FY 1998 enacted level to $17 million, from $15 million. The President's initiative included the original $15 million for the Department of Agriculture, which is the number used in the totals on this spreadsheet

Race init pol - civ rts enf

Julie A. Fernandes
07/08/98 12:52:21 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: EEOC

Elena,
Yesterday, Maria convened a follow-up meeting with the LCCR folks to discuss our civil rights enforcement initiatives. Wade asked for a higher profile for our civil rights enforcement package. Maria and Minyon agreed that they would try to incorporate support for the cr package (as a package) in upcoming principal events. Next week the VP is speaking at the NAACP and the FLOTUS is speaking at La Raza. These were identified as two opportunities.

Wade also indicated the LCCR's intention to draft a letter to the Congressional leadership + committee members outlining the "package" concept and expressing strong support for the increases in the President's budget. Though this sort of sets them up in a way that may make them a target ("here is all the stuff that is important to us"), they believe that it would be an important rallying tool. Wade also indicated that LCCR plans to work on getting a bi-partisan letter from members of Congress and former EEOC commissioners expressing support for the use of employment testers.

Julie

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SALARIES AND EXPENSES

The Committee recommends $260,500,000 for the Salaries and Expenses of the Equal Employment Opportunity Commission (EEOC) for fiscal year 1999. This amount is $18,500,000 below the request, and $18,500,000 above the amount provided in the current year appropriation.

Additional resources are provided to support improvements to the investigation and resolution of actual individual charges of discrimination. The Committee expects that these additional resources will allow the EEOC to continue to reduce the backlog of pending charges, and to significantly expand the use of alternative dispute resolution (ADR) techniques, including mediation. The Committee notes that concerns about the EEOC's use of employment testers in fiscal year 1999 are being addressed in the form of a letter from the EEOC Chairman to the Congressional Committees of jurisdiction.

The increase of $18,500,000 is provided for the following purposes: $6,000,000 for adjustments to base, $8,000,000 for the development of the EEOC's ADR program, $3,500,000 for EEOC investigative staffing enhancements, $500,000 for additional EEOC attorneys, and $500,000 for additional reimbursement to State and local Fair Employment Practice Agencies. The Committee recommendation does not include the requested increase for automation, for reasons described below. Also the recommendation does not include the full amounts requested for personnel increases, as the requested amounts were based on full-year costs of added positions. The Committee expects the EEOC to submit a spending plan to the Committee in accordance with section 605 of this Act prior to the expenditure of funds for the program increases included in the Committee recommendation. The spending plan shall be supplemented by a report, submitted to the Committee on Appropriations and the Committee on Education and the Workforce detailing specific plans for the implementation of an ADR initiative.

ADR.—In addition to a detailed expenditure plan, the ADR implementation plan shall address the structure of the ADR program. The Committee urges the EEOC to submit a plan that will make ADR options available in most cases. The Committee expects that once an acceptable ADR plan has been approved, such a plan will be implemented in every EEOC field office within fiscal year 1999. The Committee further expects the EEOC to develop systematic data collection and monitoring of the Commission's ADR activities, to determine the impact on backlog, and to refine and improve future efforts.

Investigation.—The Committee provides additional resources in this area in recognition of the fact that the most of the charges in

the current backlog are "category B" and "category A" charges that require further investigation to determine merit. Additional resources for investigative staff will address the need to develop and resolve these cases.

Attorneys.—The Committee supports the hiring of additional attorneys specifically to encourage early and substantive involvement of attorneys in the "strategic" enforcement process, in which attorneys consult with investigators in screening charges to ensure the best use of resources. Also, the Committee encourages the EEOC to adopt other "no-cost" measures that might improve performance in this area, such as reorganizing work flows, assigning attorneys to investigative units, or changing attorney job requirements.

State and local Fair Employment Practice Agencies.—The Committee notes that the State and local FEPA's resolve approximately 42% of the national caseload, and that many FEPA's have a proven track record of effectively using ADR methods. The Committee expects that the EEOC will work with the FEPA's to achieve a fair and effective distribution of the additional resources provided, via the reimbursement of a set amount per charge resolution.

Automation requirements.—The Committee notes that the Agency's 1999 budget request included increases of $9,590,000 related to automation requirements. These increases are not included in the Committee recommendation. The Committee assumes that the EEOC will be able to request funding for automation needs from amounts that may be made available separately for Year 2000 compliance.

In fiscal year 1998, the Committee provided a modest increase to address the charge caseload and its growing backlog. Recent estimates indicate that by the end of fiscal year 1998, the backlog will total over 57,000 charges. The Committee notes that the additional resources provided for fiscal year 1999 are all specifically targeted toward reducing the backlog of private sector charges. The Committee therefore expects that the additional resources will support the level of charge resolutions projected in the budget request. The Committee expects the EEOC to keep the Committee informed regarding the Commission's progress toward the backlog reduction targets included in the request: 41,500 at the end of fiscal year 1999, and 28,500 by the end of fiscal year 2000. The EEOC may be able to achieve even greater backlog reductions depending on the intake rate for new charges and the extent to which ADR methods are adopted.

The Committee continues to be concerned about the allocation of resources to charge processing and to litigation. The Committee expects the EEOC to continue to develop the ability to track staffing and resources expended on particular EEOC activities, and expects the EEOC to be able to report to the Committee on the level of resources actually being spent on charge processing, how this level compares to previous years, whether resources need to be reallocated among activities or districts, and the productivity of charge processing by office. The Committee expects the processing of charges filed with the EEOC, including the reduction of the backlog of such charges, will remain the EEOC's first priority and directs the EEOC to implement a system of identifying the level of resources dedicated to this activity and other EEOC activities, such as litigation. The Committee understands that the EEOC is currently working on a project to track the use of EEOC attorneys' time that will provide greater clarity regarding the allocation of resources by activity.

The Committee is also concerned about EEOC interventions in ongoing lawsuits, and the initiation of lawsuits alleging a similar claim or claims as alleged in another lawsuit filed against the same defendant. The Committee expects that the EEOC will give priority to litigation on behalf of complainants not represented by counsel in other forums as opposed to duplicating independent litigation efforts.

The bill also includes language similar to that included in previous appropriations acts allowing: (1) non-monetary awards to private citizens; (2) up to $28,000,000 for payments to State and local agencies, an increase of $500,000 over fiscal year 1998; and (3) up to $2,500 for official reception and representation expenses.

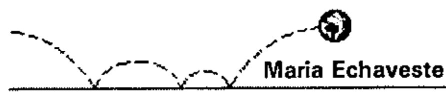
07/10/98 13:56 202 225 1808 HOUSE APPROPS 003

Dear xxx,

You have asked whether the Equal Employment Opportunity Commission (EEOC) intends to use Fiscal Year 1999 appropriated funds for employment testers. We understand this question arises in the context of the March 23, 1998 letter from Speaker Gingrich and Chairmen Fawell and Goodling to Chairmen Livingston and Rogers.

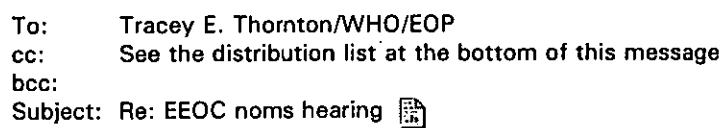
Employment testers are individuals who are matched in job relevant respects but differ by the characteristic being tested -- e.g., race, age, gender, disability or ethnicity. In employment tester programs, matched pairs of such testers are sent to apply for job openings. The FY99 budget request for the EEOC does not provide for the use of FY99 appropriated funds for employment testers, nor will the EEOC use FY99 appropriated funds for this purpose.

Race init policy -
civil rts enforcement



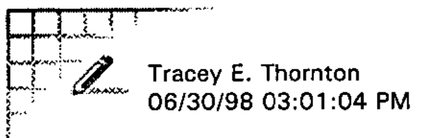
Maria Echaveste 06/30/98 06:26:55 PM

Record Type: Record



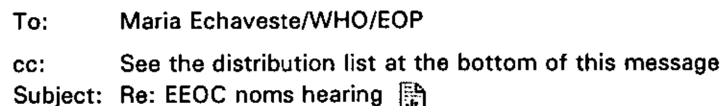
To: Tracey E. Thornton/WHO/EOP
cc: See the distribution list at the bottom of this message
bcc:
Subject: Re: EEOC noms hearing

I just spoke with Minyon to bring her up to date on our meeting re our civil rights enforcement budget strategy/EEOC tester issue--This office will coordinate a meeting with Wade and others early next week to review these issues and additionally talk to them about the nominations. I think for Ida, Virginia you should offer Ida an opportunity to meet with seniors, disabled, labor (Karen Tramontano is probably the best person there) in separate appointments that OPL could help organize--I think that's the best way to introduce Ida to those constituencies--they could talk about their issues, etc.
Tracey E. Thornton



Tracey E. Thornton
06/30/98 03:01:04 PM

Record Type: Record



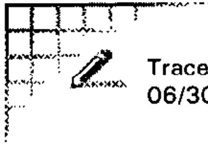
To: Maria Echaveste/WHO/EOP
cc: See the distribution list at the bottom of this message
Subject: Re: EEOC noms hearing

It is more helpful for legislative affairs and our process if we have a separate meeting for noms w/a broad range of groups. It may seem that because the nominees and these issues intersect that it is a waste of people's time to call some of them back but I think it will become evident from our meeting that the legislative/nominations processes are so different that they cannot be effectively mixed here, at least not initially. In addition, we need to be able to spend at least an hour w/folks in noms meetings so if folks are willing to hang around that long that will work too.

Message Copied To:

Virginia N. Rustique/WHO/EOP
Minyon Moore/WHO/EOP
Maritza Rivera/WHO/EOP
Julie A. Fernandes/OPD/EOP
Sylvia M. Mathews/WHO/EOP

Message Copied To:



Tracey E. Thornton
06/30/98 06:41:01 PM

Record Type: Record

To: Maria Echaveste/WHO/EOP

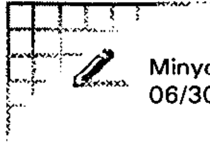
cc: See the distribution list at the bottom of this message
Subject: Re: EEOC noms hearing

I think that's a great idea for Ida/Paul to get to know the groups. Do you or Minyon have any suggestions about a venue for getting the groups plugged in to actually doing the work these two nominations will require? A coupla key folks have already called me and I have put them off. We have cut a deal w/repubs to get these done that is tenuous at best and we need specialized support from certain groups.

Message Copied To:

Maritza Rivera/WHO/EOP
Virginia N. Rustique/WHO/EOP
Minyon Moore/WHO/EOP
Broderick Johnson/WHO/EOP
Elena Kagan/OPD/EOP
Julie A. Fernandes/OPD/EOP

Race init policy -
civil rts enforcement



Minyon Moore
06/30/98 08:04:44 PM

Record Type: Record

To: Virginia N. Rustique/WHO/EOP

cc: See the distribution list at the bottom of this message
Subject: Re: EEOC noms hearing

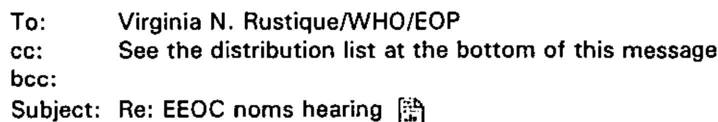
as a follow-up to the e-mail traffic that has been passed back and forth, I hope that this e-mail will clarify the process and bring closure to how we should proceed.

1. I spoke with Maria after reading the many e-mails and explained to her that I felt the appropriate place for all issues involving the EEOC should be directed out of her office. While she has been gracious in terms of allowing OPL to take the lead, I personally believe for the sake of continuity she should, if time permits, continue to organize us on this issue. All strategic decisions should be made around the work she is currently doing with the EEOC working group.
In fact, when Maritza raised in our staff meeting that she was working with leg. affairs on the nominee's, I told her to be sure and let Maria know so that our working group wouldn't be blind-sided.

2. I also believe that her working group can compliment the legislative strategy. We are already organized and they are somewhat vested in the process.

3. If a strategic decision is made to bring in groups sooner rather than later, let us know. I firmly believe that it should be done within the context of everything else we are doing.

---------------------- Forwarded by Minyon Moore/WHO/EOP on 06/30/98 07:50 PM ---------------------------



Maria Echaveste 06/30/98 04:35:18 PM

Record Type: Record

To: Virginia N. Rustique/WHO/EOP
cc: See the distribution list at the bottom of this message
bcc:
Subject: Re: EEOC noms hearing

Virginia--the note I sent to you was to follow up on your conversation with Maritza As I indicated Paul Igasaki is not a stranger, the civil rights groups/other groups should not be treated like props or puppets on string that come when we call--that's why I was suggesting that it be combined with an upcoming meeting we are planning with some of these groups; that's why I suggested you talk to Minyon; perhaps the way to address Ida's concerns, if I were in charge, would be to facilitate appointments for her with these various groups. As it turns out Wade called just now to make sure we had heard that there was in fact Senate committee report language that directs EEOC to report to the committee on the results of the employment tester pilots and also directs EEOC from pursing any policy that would make employment testing a standard practice (which we will be meeting

about, presumably in five minutes when we discuss the civil rights enforcement budget strategy). Anyway, I took the opportunity to tell him we now had a hearing date for Paul and Ida and asked him how we could proceed to build support and he said "why don't we talk about it when we get together later this week, hate to be jerked around to different meetings." Thus, my concern about how to enlist their help in a respectful way. Again, I suggest you talk to Minyon.
VIRGINIA N. RUSTIQUE

06/30/98 02:10:40 PM

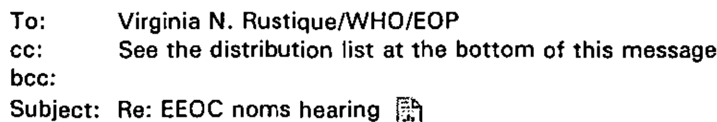
Record Type: Record

To: Maria Echaveste/WHO/EOP

cc: See the distribution list at the bottom of this message
Subject: Re: EEOC noms hearing

I talked to Maritza yesterday about putting together a group meeting for Paul & Ida sometime next week. Tracey and I met w/ Ida yesterday and she expressed interest in meeting w/ the groups, in particular, seniors, disability groups and labor. I passed all this info on to Maritza, who said she'd pull things together for Public Liaison.

---------------------- Forwarded by Virginia N. Rustique/WHO/EOP on 06/30/98 02:09 PM ---------------------------



Maria Echaveste 06/30/98 01:38:03 PM

Record Type: Record

To: Virginia N. Rustique/WHO/EOP
cc: See the distribution list at the bottom of this message
bcc:
Subject: Re: EEOC noms hearing

That's great news--Now that we have something concrete to work toward, it maybe time to engage the outside groups. As you'll recall from last week's meeting, we are following up on determining what our civil rights enforcement budget strategy is--and we are supposed to meet with those folks again early next week--talk to Minyon about whether it makes sense to use that meeting to more forcefully seek their assistance for the july 23 hearing or whether a separate meeting makes sense. I defer to Minyon.
VIRGINIA N. RUSTIQUE

VIRGINIA N. RUSTIQUE

06/30/98 12:27:53 PM

Record Type: Record

To: Maria Echaveste/WHO/EOP, Maritza Rivera/WHO/EOP

cc: See the distribution list at the bottom of this message
Subject: EEOC noms hearing

The hearing date for Ida Castro and Paul Igasaki is set for Thurs., July 23.

Race init pol-
civil rts enforcement

Julie A. Fernandes
07/01/98 02:32:05 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Laura Emmett/WHO/EOP, Leslie Bernstein/WHO/EOP
Subject: EEOC mtg. w/ Fawell staffer

All:
At the meeting this morning, David Frank (Fawell's staffer) had a fairly positive reaction to the draft letter. He seemed pleased that we were close to having a deal. However, according to Frank, Gingrich, Fawell and Goodling are concerned that information from the pilots would be used as the basis for a commissioner's charge. Ellen made clear to him that the agency could not commit to not bringing a commissioner's charge (or not doing an investigation that could lead to a charge) against an employer that was based on information received from the pilot. However, she also stated that it was unlikely that a commissioner's charge would ever be brought based solely on tester evidence. Frank stated that the members were concerned that an employer would have to defend against an EEOC investigation and/or charge that is based solely on "fabricated" and "subjective" evidence. We then discussed the agency's responsibility to do follow-up if there are indications that discrimination may have occurred (even though the pilot testers have agreed not to bring their own charges). Frank agreed in principle, but thought that he would have to sell the members on not micro-managing on this point. Frank stated that he will present our letter to Fawell and the Speaker's folks and get back to us early next week with whether this letter does the trick.

On the other five, we made clear to Frank that no deal could be final until we see a draft of the committee report language. Frank stated that Ringler hasn't shown him anything yet, but that Ringler would be back next week and Frank would put more pressure on him to see the draft. Frank agreed to let us see the language as soon as he does. Frank also stated that he had asked Ringler to include report language to the effect that the agency should receive $9 million from the Treasury/Postal pot for technology.

Frank's understanding seemed to be that the letter (if acceptable and agreement on the other five) gets us no rider. We asked whether a deal should also include a committment on the part of the Reps. (at least Gingrich, Fawell and Goodling) to support the full appropriation request. Frank stated that the Speaker had agreed (if all goes well with our negotiations) to call Livingston to ask for more money. Frank estimated that the agency would "end up" with $20 million (not counting the $9 million for technology).

Frank indicated that the committee report would do a neutral reference to the issue of testers being resolved by a letter from EEOC to whomever. That is consistent with what we anticipated, and we indicated that such a neutral reference would be o.k.

Ellen asked about the Senate. Frank stated that he has not had any communication with Gregg's staff, but that his sense is that Jeffords at least wants this all to be resolved amiably.

Julie

Race init policy - civil rts enforcement

THE WALL STREET JOURNAL. WEDNESDAY, JULY 1, 1998

BUSINESS & RACE

BY LEON E. WYNTER

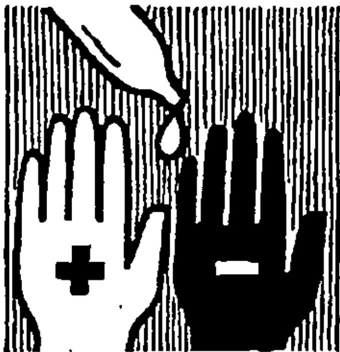
Testing for Discrimination Gains Wider Acceptance

FEDERAL AGENCIES, spurred on by nonprofit groups, are increasingly embracing the use of undercover investigators to identify discrimination in the marketplace.

The federal Equal Employment Opportunity Commission now has launched a pilot project using so-called matched-pair testers—investigators of differing skin colors who pose as consumers to compare how they are treated—to monitor hiring in Chicago and Washington D.C. The effort follows a similar move last year by the Office of Federal Contract Compliance Programs.

The embrace of such testing by federal agencies could have a big impact on businesses. Unlike abstract statistical arguments, evidence from direct testing has compelling "six o'clock news" credibility, says William Milani, an attorney with Epstein Becker & Green, New York. It can look convincing to a jury in a discrimination lawsuit, he adds.

Testing has long been used to fight housing discrimination, but its



Luba Lukova

legal status in employment cases has been doubtful, until recently. A 1994 district-court ruling in Washington, D.C., coupled with the 1991 amendments to the Civil Rights Act, allows testers to give evidence about their treatment in lawsuits seeking damages, says Avis Buchanan, a lawyer representing the Fair Employment Council of Washington, D.C. The nonprofit group has been a pioneer of testing for hiring discrimination.

Critics say that setting up fake encounters, rather than looking at statistical data, to test fairness is tantamount to entrapment. "In many ways, testing is a more intrusive approach in that you have people going into the workplace, initiating the process, without any intention of working for you," says Mr. Milani. "That's what many employers find troublesome."

But the EEOC says it is counting on the cooperation of most businesses. "We're hopeful that a responsible testing program will support the companies that do what they can to avoid discrimination and help us find those who are not," says acting EEOC Chairman Paul Igasaki.

In fact, more companies are seeking to test their own employees before they are tested by watchdog groups. The Fair Housing Council of Greater Washington, a private, nonprofit group, last year used testers to show disparate treatment of minority shoppers by a department store for a report by the ABC-TV news magazine "20/20."

Since the report aired, several retail and service businesses, as well as employer-liability insurers, have asked about the group's testing programs, says David Berenbaum, executive director of the Fair Housing Council of Greater Washington.

The FHC, in response, set up a separate, nonprofit consulting service called Fair Housing Partnership to work with the private sector. It offers model tests as well as testers for various consumer transactions in the marketplace.

"We're beginning to see the privatization of the civil rights movement," says Mr. Berenbaum. He says the group is working with eight corporations now and is in negotiations with six more.

"Wouldn't you want to make sure that your products are marketed consistently and professionally using a consistent service model?" asks Mr. Berenbaum. "That's what's winning over the CEOs."

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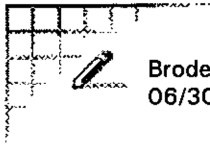
Race init policy -
civ rts enf



Broderick Johnson
06/30/98 07:35:10 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Leslie Bernstein/WHO/EOP, Laura Emmett/WHO/EOP
Subject: EEOC calls

I have placed calls to Hill people to read the letter to them, but all had either gone for the day or not been in at all. I can reach a few of them at home tonight and complete all calls by tomorrow morning.

I did connect with Wade and he was generally comfortable with the letter's content. I also explained to him that we view the Senate language very narrowly and will insist throughout the legislative process and in the end game that the EEOC is not agreeing to do anything other than what it did not intend to do in the first place with regard to testers in FY99. Wade appreciated hearing that position.

Message Sent To:

Martha Foley/WHO/EOP
Maria Echaveste/WHO/EOP
Elena Kagan/OPD/EOP
Julie A. Fernandes/OPD/EOP
Edward W. Correia/WHO/EOP

Race Init Policy — Civ Rts Enf

Elena,

Here is some background material on the EEOC.

1. Gingrich's March 13th statement before the authorizing subcommittee.

2. The March 23rd follow-up letter from Gingrich, Fawell and Goodling to Rogers and Livingston that includes the six criteria for support of the budget request.

3. Summary document (prepared by the EEOC) of their negotiation with Fawell's staff person on the other five criteria (besides testing).

4. Some background information on employment testing from the EEOC. It includes some q&as that they have prepared on the issue.

Please let me know if you need anything else to prepare for Monday's meeting.

Julie

Gingrich's
March 13th testimony

1/8

Selected Testimony on Future of EEOC to the House Committee on Education and the Workforce Subcommittee on Employer-Employee Relations

Testimony on House Speaker Newt Gingrich before the House Subcommittee on Employer-Employee Relations on "The Future Direction of the Equal Employment Opportunity Commission"
March 13, 1998

In addition to demeaning the human condition, discrimination is profoundly un-American. It is contrary to the principle first inscribed in the Declaration of Independence — "All men are created equal, endowed by their Creator with the inalienable rights of Life, Liberty and the Pursuit of Happiness." These are the words that precede the founding of the United States. Thus, to treat someone else differently due to race, color or gender is an offense against, not merely the individual, not merely the state, but in fact our Creator.

And, yes, it took America to completely live up to those first principles. We are human, yet fortunate to be blessed with the best continuing experiment in self-government the world has ever seen, we have progressed and continue to do so. Yet, we must work to guarantee that discrimination can never be tolerated.

It is vital that the EEOC, the nation's leading civil rights enforcement agency, function in a fair, efficient, and professional manner. If the Commission can demonstrate that it can do this, we will support additional funding for it.

Support for increased funding would be contingent on its being properly targeted to helping actual victims of discrimination, and not to litigating cases that seek to break new legal ground. The typical case of discrimination may seem mundane to EEOC lawyers, but it is vitally important to the individual victim. Until the 65,000 case backlog is reduced, and those real Americans receive justice, the EEOC should not be out trying to create new cases (through initiatives such as testers).

Unfortunately, this Committee heard testimony last October from individual victims of discrimination, civil rights lawyers, and small businessmen that the EEOC gives the investigation of individual charges of discrimination low priority in terms of staffing and resources, while litigation — especially high profile cases — has more than ample staffing and funding. This is a shocking situation.

While every office should be allowed certain latitude in assessing its mission priorities, continually putting individuals on the back-burner sends a horrific signal: Indeed, it could be said that the EEOC is in fact discriminating against individuals who happens to "only" be a single victim. That attitude, intentional or not, cannot be justified. For the individual awaiting resolution, justice delayed is justice denied. It must change if the EEOC is to be entrusted with a budget increase.

The average number of cases investigated and completed per investigator is 28.2 and the average caseload of pending cases is 70.0 cases per investigator. By sharp contrast, the average litigation caseload per attorney in the district offices is 1.4 cases — a "workload" which calls into question the very meaning of the word. This allocation of resources leads to questions about the EEOC's priorities. Lawyers must become more involved in the supervision of the intake and investigation process (and less focused on litigation).

Thus, any new money for EEOC must go to addressing the 65,000 case backlog, through such avenues as improvements in the investigative process and increased alternative dispute resolution. It should not go to initiatives that create new cases where no individual has alleged discrimination (such as employment testers or commissioner's charges). While the backlog is down from the record 1995 level of 103,000 cases, justice delayed is still unacceptable.

At the same time, we must insure that any backlog reduction by the EEOC does not result in a sacrificing of fairness — there should be no case dumping.

Should these concerns be addressed, we will give serious consideration to the President's increased funding request (15%, $37 million) for the Commission.

Is every commissioners' charge frivolous and unworthy of support? Of course not, but again, there are many obvious individuals out there who have suffered apparent discrimination. Why do out seeking discrimination haphazardly when it can be said that it is sitting on your doorstep?

Increased funding should be given in return for reforms such as:

1) improvements to the investigative and intake processes (including greater supervision of the process);

2) a significant reduction to the backlog of cases and the length of time of case processing;

3) appropriate allocation of resources between intake/investigation and litigation;

4) clarification of the criteria for litigation by the EEOC;

5) expanded use of alternative dispute resolution;

6) and an agreement by the EEOC not to use its scarce resources for employment testers.

The use of employment testers, frankly, undermines the credibility of the EEOC. The government should not sanction applicants' misrepresentation of their credentials to prospecitive employers. The use of testes not only causes innocent businesses to waste resources (interviewing candidates not interested in actual employment), but also puts a government agency in the business of entrapment. It assumes guilt where there has been no indication of discriminatory behavior.

In addition, there are serious concerns of fairness: for example, whether using testers would be a fair test, since not even identical twins are exactly alike (and testers may be overly motivated to find discrimination). Finally, the courts are also divided as to whether the whole concept of employment testers is even lawful (the D.C. Circuit Court of Appeals ruled that employment testers lack standing to bring claims of discrimination).

For these reasons, the use of testers must be seriously reviewed.

I am committed to working with you to ensure the EEOC is a fair, efficient, and effective enforcer of the nation's civil rights laws. We want to make sure that it has adequate funds to carry out its mission. We will support additional funding this year, provided the resources go to ensuring that actual victims of discrimina-tion receive more timely justice and

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the reforms outlined here are

Letter from
Gingrich, Fawell
and Goodling
to Rogers & Livingston
re: EEOC budget
(w/ 6 conditions)

Congress of the United States
House of Representatives
Washington, DC 20515

March 23, 1998

Rep. Bob Livingston
Chairman
Committee on Appropriations
Justice, State,
U.S. Capitol H-218
Washington, DC 20515

Rep. Harold Rogers
Chairman
Subcommittee on Commerce,
and Judiciary
U.S. Capitol H-309
Washington, DC 20515

Dear Mr. Chairmen:

We are writing to you concerning the budget of the Equal Employment Opportunities Commission (EEOC). The Administration has sought a 15% increase ($37 million) for the EEOC in FY 1999. It is vital that the EEOC, as the nation's leading civil rights enforcement agency, function in a fair, efficient, and effective manner. In order to ensure that the Commission is able to fulfill its mission in such a manner, we support giving it the full amount of money requested provided it institutes reforms that ensure the money is targeted to helping actual victims of discrimination.

We support the Speaker's recent testimony given before the Education and Workforce Committee's Subcommittee on Employer-Employee Relations regarding the future direction of the EEOC. This testimony set out six reforms that, if made by the Commission, would justify its receiving the full 15% increase. The criteria are:

1. Improvements to the investigative and intake processes (including greater supervision of the process by lawyers);

2. A significant reduction to the backlog of cases and the length of time for case processing;

3. A more appropriate allocation of resources to charge processing vis-à-vis litigation;

4. Expanded use of alternative dispute resolution;

5. Clarification of the criteria for litigation by the EEOC; and

6. An agreement by the EEOC not to use its scarce resources for employment testers.

We ask you to approve the $37 million increase for the EEOC with these conditions. Please contact the authorizing committee to develop in a timely fashion appropriate accompanying language to ensure that the Commission implements the above reforms as a condition of receiving the money.

Thank you for your continuing service in the important appropriations process.

Sincerely,

Newt Gingrich

Bill Goodling

Harris Fawell

Summary of negotiations btw EEOC and Fawell's staffer re: other 5 conditions

Race init prl-civ rts enf

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CONGRESSIONAL MEETING
EEOC'S FISCAL YEAR 1999 BUDGET REQUEST
APRIL 17, 1998

Attendees: David Frank, Committee on Education and the Workforce/Subcommittee on Employer-Employee Relations

Mike Ringler, Subcommittee on Commerce, Justice, State and the Judiciary

Ellen Vargyas, Office of Legal Counsel
Ken Morse, Office of the Chairman
Susan Oxford, Office of General Counsel
Bill White, Office of Communications and Legislative Affairs

Purpose: To discuss the six criteria upon which Speaker Gingrich, Rep. Goodling, and Rep. Fawell would support the 15% increase ($37 million) for the EEOC in fiscal year 1999. These criteria were outlined in a memorandum sent by Reps. Gingrich, Goodling, and Fawell to Rep. Livingston (Chairman, Committee on Appropriations, Justice, State, and the Judiciary) and Rep. Rogers (Chairman, Subcommittee on Commerce, Justice, State, and the Judiciary) on March 23, 1998.

Criteria:

1. ***Improvements to the investigative and intake processes (including greater supervision of the process by lawyers).***

2. ***A significant reduction to the backlog of cases and the length of time for case processing.***

Congressional Concerns

The first two criteria were combined for discussion. This was done because Mr. Frank viewed the second criteria as how you quantify improvements made under the first criteria.

David Frank reiterated the concern of Congress that further improvements be made by EEOC in the investigative and intake processes to reduce the inventory of charges and to reduce the length of time for case processing. Mr. Frank indicated that he is receiving complaints from EEOC investigators that speak to

problems which impede case processing progress. Specifically, he is hearing the following:

- investigators are not able to consult with attorneys and that there is a separation between field administrative enforcement and legal units despite HQ intentions to improve attorney-investigator collaborations;

- case processing decisions by investigators are being held by supervisors for long periods of time, calling into question the quality of EEOC's supervisors; and

- workload and resource inequities between the administrative enforcement and legal units facilitate lesser quality investigations (to be discussed under third criteria).

Mr. Frank indicated that it was likely that language which quantified inventory and case processing reductions and which institutionalized attorney supervision in case processing would be written in the Committee Report.

EEOC Response

It was pointed out that charge inventory reduction goals were already contained in EEOC's budget justification and that these goals had been coordinated with and approved by OMB. It, therefore, was unclear why additional report language would be needed in this area. Also, this approach appeared not to fully recognize the significant progress already made by EEOC in reducing its charge inventory (Note: Mike Ringler still expressed concern that EEOC's budget justification did not directly provide goals for average charge processing time reductions. Instead, it only spoke to reducing the months of pending inventory).

In the area of attorney-investigator collaboration, EEOC staff indicated that enhanced cooperative efforts were underway and that we were unaware of investigators being unable to consult with attorneys in the field. Mr. Frank indicated that the preponderance of the complaints he was hearing was coming from EEOC offices in Texas, Oklahoma, Louisiana, and Arkansas. He was also receiving input from union representatives. Moreover, he was concerned that the message from HQ regarding attorney-investigator cooperation was not filtering down to all levels in the field. It was explained that this was a priority area for the Commission and that the formal policies he is seeking will be memorialized by individual offices through their Local Enforcement Plans. It was also explained that supervision of the process by lawyers would be

problematic in that lawyers would need competitive status in order to supervise staff (as opposed to the Schedule A status they currently hold), in addition to problems presented by relative scarcity and cost of lawyers. It was suggested that the terms collaboration, cooperation, or involvement be substituted for supervision.

Perceived Outcomes

It appears that some sort of language will be written into the Committee Report, but David Frank suggested it could simply reflect the OMB goals. We are hopeful, moreover, that such language will recognize EEOC's efforts to reduce its charge inventory and case processing times. This will provide a positive context from which Congress can underscore the importance for further improvements to the charge processing system. It also appears that the Committee's language concerning "supervision" by attorneys of the charge process will be modified to require "enhanced cooperation" (Mr. Frank was most persuaded by the civil service problems). Mr. Frank also indicated that the recent issuance of the Charge Processing/Litigation Task Force Report suggests the EEOC is on the right track, and possible Committee language might state that the Committee expects the Commission to continue with its reforms reflected in the Task Force Report.

We are hopeful that the outstanding issues under these two criteria can be resolved.

3. ***A more appropriate allocation of resources to charge processing vis-á-vis litigation.***

Congressional Concerns

David Frank indicated that this is a hold-over issue from last year and remains important. Mike Ringler also expressed the continuing concern the Appropriations Committee has regarding EEOC's in-ability to track and report on how money and time is spent on both administrative enforcement and litigation activities. Both staffers indicated that there is a perception, right or wrong, among Members that litigation/intervention activities are being pursued at the expense of charge processing activities when there is still a tremendous backlog of charges.

EEOC Response

EEOC staff pointed out that current staffing ratios clearly show far more resources being devoted to administrative enforcement efforts. Moreover, less

than five percent of the staffing increase requested in the fiscal year 1999 budget will be for attorneys (these attorneys are needed to assist in supporting all the new investigators to be hired). The pilot study to determine the amount of time spent by attorneys on non-litigation activities was also discussed. Congressional staffers are extremely interested in seeing the results of the pilot.

Perceived Outcomes

This continues to be a sensitive area. Congressional staff recognize that it's not wise to develop litigation or administrative enforcement programs driven by numbers, but do believe the Commission must be able to track and report on resource allocations for each activity. This should be a component of EEOC's long-term technology plans. They did express interest in seeing any preliminary numbers we might have on time spent by attorneys on non-litigation activities. Mr. Frank also stated that attorneys need to receive positive reinforcement for their non-litigation work. It is unclear whether language regarding this point will be written into the Committee Report.

4. ***Expanded use of alternative dispute resolution.***

Congressional Concerns

Again, David Frank spoke to perceptual issues regarding an expanded EEOC ADR program. Congress is particularly concerned with the low employer acceptance rate and attributes this to employers being distrustful of EEOC staff who mediate cases. He seemed to suggest a direction that would limit (perhaps severely) the use of EEOC employees as mediators in favor of outside mediators. He also made clear that Congress wanted no restrictions on the cases that could go to mediation; all cases should be able to be mediated, including A1 cases. He has heard that some District Directors have been chastised for mediating A1 cases, inferring that legal staff want to keep these for litigation.

EEOC Response

EEOC staff made clear that they were well aware of and concerned with these issues. Staff stressed, however, the importance of not having restrictive Congressional language for a program in its formative stage. It was suggested that Congressional language depicting any kind of problem or issue with the use of internal EEOC mediators might prevent increased public acceptance of ADR. Furthermore, EEOC needs the flexibility to adjust for programmatic inconsistencies that will arise (*i.e.,* availability of external mediators, quality of contract mediations, etc.). We suggested that while it might be appropriate to

track resolutions by EEOC and non EEOC mediators, it would be counter-productive to mandate a particular mix.

We also discussed how difficult it would be to follow language which requires that all cases be considered for mediation. Points raised included the following: would this include C cases, and how would we ensure EEOC's ability to serve the larger public interest in charges that implicate a policy or practice that affects a number of employees in addition to the charging party or parties? We explained, also, that most A1 cases are different since, by definition, these are cases that EEOC has a substantive, institutional interest in. As a result, it would be inappropriate for EEOC simply to accept whatever the parties agree to in every A1 case.

It was suggested that the EEOC could provide Congress with progress reports on ADR activities.

Perceived Outcomes

Congressional staff understood the problems associated with trying to craft language for a program yet to be fully implemented. It appears that they will be willing to give the Commission the flexibility it needs to implement a program, but will want periodic reports (Note: Mike Ringler specifically requested that EEOC track data and report on success rates for both internal and external mediators). Mr. Frank also seemed to understand why all A1 cases should not simply be automatically put in the mix with the B cases. However, this whole area will likely be the subject of further discussion.

5. ***Clarification of the criteria for litigation by the EEOC.***

Congressional Concerns

David Frank indicated that this was also a hold-over issue from last year. Mike Ringler indicated that Congress needed a clearer understanding of why and when the Commission litigates, intervenes in lawsuits, and files parallel lawsuits. This is a particular concern given the fact that the Commission has delegated much legal authority to the field.

EEOC Response

Discussed the criteria already in place for interventions and parallel lawsuits (a copy of which was already provided to both Mr. Frank and Mr. Ringler). Also discussed the consistency built into the process by the NEP/LEPs, and agreed to

provide a statement explaining NEP/LEP standards for deciding to litigate a case.

Perceived Outcomes

Agreed that this issue could be handled informally.

6. ***An agreement by the EEOC not to use its scarce resources for employment testers.***

Congressional Concerns

The Speaker must have this agreement to gain support among the majority for EEOC's increased budget.

EEOC Response

EEOC staff indicated that the Commission must complete the fiscal year 1998 testers study. Staff also clarified that in fiscal year 1999, the Commission would be analyzing results and that there might be a need to pursue cases identified through the study. We explained that this issue needed to be resolved with the input of Administration officials.

Perceived Outcomes

The possibility exists for an agreement to be made outside of the Appropriations process. A letter, for example, from the Commission to Congress agreeing not to use fiscal year 1999 funds on testers might be acceptable, although no one was committing to what an acceptable resolution might actually look like. This is something to discuss among all relevant parties.

FAX TRANSMISSION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
1801 L STREET, N.W.
WASHINGTON, D.C. 20507
(202) 663-4637
FAX: (202) 663-4639

To:	Julie Fernandez	**Date:**	May 29, 1998
Fax #:	456-5581	**Pages:**	10, including this cover sheet.
From:	Ellen J. Vargyas		
Subject:	Testers		

COMMENTS:

I've attached two pieces we've done on testing. One is a Q and A while the other is a description of some actual situations which have arisen. Please let me know if there's anything else at all that we can do to be of help. Thanks again for yesterday's meeting -- it was very helpful.

Background info frm EEOC on employment testers.

TESTERS – QUESTIONS AND ANSWERS

Q1 Why did the EEOC decide to expend resources on a tester program?

A1 This pilot tester program is designed to help the Commission determine whether employment testing is a cost effective enforcement tool. The key to equal employment opportunity is for people to be able to get through the door. Yet hiring discrimination is extremely difficult to detect. The EEOC's enforcement process is primarily complaint driven. It is built on the premise that the individual victim will recognize the discrimination and complain about it. That premise is simply wrong in the case of hiring discrimination. Those who are subject to hiring discrimination have no way of knowing that discrimination has occurred. They do not know which individual was selected for the job and how the selectee's credentials compared with her own.

A well-managed employment testing program can be an exceptionally accurate and useful tool for exposing discriminatory hiring practices. By sending out pairs of testers who differ in their protected class status but who are matched in all job-relevant traits, the EEOC can evaluate employers' hiring decisions. For example, discrimination is evidenced if carefully matched Anglo and Hispanic testers are sent to a workplace and the Hispanics are told that there are no openings or that "we'll get back to you" and the white testers are offered jobs. Combating hiring discrimination is a critical aspect of the EEOC's enforcement program and testing is sometimes the only way to detect that discrimination. As the lead enforcement agency in combating hiring discrimination, we would be remiss if we did not use all tools at our disposal.

Q2 Why is a tester program needed now, when the EEOC has enforced the anti-discrimination laws without one for more than the last 30 years?

A2 There are two reasons that a tester program is a particularly useful adjunct to the EEOC's enforcement efforts at this particular point in time.

We all agree that everybody should have equal access to employment regardless of race, national origin, gender, age or disability and that nondiscriminatory hiring is the key to opportunity. Yet hiring discrimination is notoriously difficult to detect. We need more strategies to protect people from any discrimination that exists in the hiring process. The EEOC needs to determine whether employment testing can enhance its ability to detect hiring discrimination and do so in a cost effective way.

In addition, there are now organizations that have the expertise and the background to teach us how to do it right. It is very important that testing be done under conditions that ensure everyone -- employers, employees, EEOC, and the U.S. Congress -- that its results are credible and have been fairly obtained. The organizations selected for the pilot program both have extensive experience conducting testing. They know how to match testers to ensure that their credentials are comparable. They know how to screen testers to ensure that they have no grievance against any employer being tested. They have

developed testing methodologies that ensure accurate and objective data, including training the testers to record facts but not perceptions and establishing a second level of review to assess whether the test suggests that discrimination is in fact at work. The availability of this expertise is an important reason to proceed with a tester pilot now.

Q3 Are there any safeguards against abuse of the testing process?

A3 The pilot program has been carefully designed to ensure that the results are credible and are fairly obtained. The organizations conducting the pilot have had extensive experience in running testing programs. They will screen all testers to ensure that they have no grievance against any employer being tested. They will require that all testers participate in extensive training. The training will stress that the testers must act as neutral observers and recorders of events. The testers will be taught how to hone their observation skills. They will also be taught how to record meticulously and objectively the details of their contacts with employers. The testers will be trained to record facts -- what the employer said and did -- and not what the testers <u>think</u> about what the employer said and did. The testers will be instructed not to compare notes with other testers. Finally, the testers will be paid hourly rates for their work; they will reap no financial benefit from the outcomes of the tests.

Moreover, the EEOC will not simply be acting on the basis of the testers' reports. Under the pilot, after a test, a third party will review the testers' reports to determine whether the test suggests discrimination. If so, another pair or pairs of testers might be sent in. A charge will not be filed unless there is specific, credible evidence that a job has been denied on a prohibited basis.

Q4 Isn't this entrapment for employers? Doesn't testing waste the time of law-abiding employers who interview, evaluate, check references, and compile records on bogus job applicants -- and all because they are being forced to prove that they are in fact law-abiding?

A4 This is not entrapment. First of all, testers do not invite or induce employers to discriminate. They simply apply for employment and are specifically trained and instructed not to suggest, influence, or encourage the employer to discriminate. To the contrary, minority testers actually provide every opportunity for an employer <u>not</u> to discriminate because they are directed to make every effort to obtain an offer of employment, and typically are provided with qualifications superior to those of the non-minority tester.

More globally, moreover, testing will often be used to serve educational -- and not punitive -- purposes. The EEOC is certainly not engaged in a witch hunt to create, and then penalize, discrimination. While there may be a few "bad apples" out there -- that is, employers who intentionally discriminate based on bias against a particular group -- the hiring discrimination that does exist may in many cases be the product of employer efforts simply to hire people whose backgrounds and credentials seem familiar to them.

Because such decisions may reflect unconscious bias, testing can alert the employers that their processes may be having unintended consequences and can enable them to institute procedures that would avoid those consequences in the future. The remedies sought in such cases would, moreover, reflect the realities of the situation.

The testing organizations that were awarded the contracts for the EEOC's pilot program adhere to certain guidelines in an effort to minimize inconvenience to employers. For example, they instruct testers to reject job offers promptly, and they stop testing an employer immediately when the tests indicate an absence of discriminatory behavior.

The testing process may actually save time for both the Commission and employers. Currently, if a claim of hiring discrimination is brought, the investigation often requires the employer to submit extensive documentary and testimonial evidence about its hiring practices and procedures. This is time consuming and costly for both the employer and the Commission. If the Commission had an available pool of trained testers, in a case alleging hiring discrimination, the Commission could send in tester pairs and corroborate or refute the allegation. If the evidence tends to refute the allegations in the charge, that investigation could be halted. If it corroborates the allegation, much less additional evidence may be needed to confirm that discrimination occurred.

Q5 Isn't it distasteful, to say the least, for the EEOC to be condoning deception?

A5 If testers were to admit that they were testers, it would, of course, undermine the very purpose of the enterprise. There are, moreover, numerous examples from other contexts in which it is necessary to shield a person's identity. To choose an example we're all familiar with, dining critics do not announce themselves to restaurant management when they arrive to review the operation's cuisine and service; they instead assume the role of a private, anonymous consumer. To do otherwise would severely compromise their ability to evaluate the merits of the restaurant's operation.

Similarly, Congress has authorized agencies, such as the Department of Housing and Urban Development, to be involved in testing. It has thus recognized the efficacy of -- and approved the use of -- this investigative technique.

The EEOC takes its responsibility to ensure fair enforcement of the antidiscrimination laws very seriously. Thus, while the EEOC will condone representations that are necessary to protect the integrity of the testing program, it will not permit any unnecessary deception.

Q6 Doesn't the tester pilot itself violate Title VII because it involves race, gender or ethnic based hiring?

A6 No. Undercover enforcement work often requires that the investigator look like a member of the particular race, national origin, gender or other basis being tested. Title VII specifically recognizes that gender, national origin or religion may be a bona fide

occupational qualification for particular positions. While the statute does not specifically recognize a BFOQ for race, courts have recognized that there are circumstances in which taking race into account is not only permissible but necessary. In 1980, in *Miller v. Texas State Board of Bar Examiners*, 615 F.2d 650 (5th Cir.) *cert. denied, 449 U.S. 891,* the Fifth Circuit recognized that it may be necessary to take race into account in assigning an undercover agent to investigate barber shops in African-American neighborhoods. Similarly, in upholding the promotion of a black correction officer to "lietenant" at a "boot camp" prison, Judge Posner recently observed that while any use of race as a criteria for job selection is subject to very close scrutiny, it is not illegal per se and is permissible where employers are "motivated by a truly powerful and worthy concern and that the racial measure that they have adopted is a plainly apt response to that concern." *Wittmer v. Peters,* 87 F.3d 916,(7th Cir. 1996), *cert denied,* 117 S.Ct. 949 (1997).

Q7. Isn't it true that the fact that other kinds of testing have been so remarkably successful in ferreting out discrimination is irrelevant because the employement process involves controlling for more variables.

A7. Not really. Employment testing is not inherently more complex. The Commission is currently considering testing only entry level jobs for which there are minimal qualifications. Testing of the housing sales market and the credit industry involve use of far more variables. Similarly, testing of race discrimination in nursing homes has been done which requires controlling for the testers' medical condition. Finally, testing often detects the kind of discrimination that is far from subtle. Where Hispanic testers are told there are no openings while Anglo testers are offered jobs, the discrimination is evident.

Many federal agencies use testing as a tool to detect discrimination: HUD, DOJ, the FTC, even the military. DOD uses "verifiers" to check for discrimination against enlisted personnel in housing.

Charges received and processed by the EEOC involving employment testers have arisen from a wide variety of factual situations.

For instance, one EEOC district office received a charge from a woman who had applied and was rejected for a line job with an airplane servicing company. She had applied for the job because a friend, who was a vendor with the company, told her there were vacancies for which she was qualified (according to the company, the position required little or no experience). After she was rejected for the position, the friend called the company and asked the facility manager/general manager who was responsible for hiring why the woman was not hired. The manager said the company didn't hire women for "line" positions, only for office work, because women working in line positions tended to distract the men who were working the line jobs.

After the woman filed a charge with the EEOC, she contacted a private organization that conducts employment testing and explained what had happened. To help evaluate the accuracy of the vendor/friend's understanding of the manager's statement, the organization sent several testers to apply for line positions. Like the charging party, the female testers were rejected for the position.

The testers in that case helped confirm that the company did have a policy against hiring women for "line" positions. Absent the tester evidence the vendor/friend's account of the conversation with the manager responsible for hiring might well have been rejected as biased. The tester evidence also eliminated any argument that women did not hold the line positions because they were not interested in them.

Another district office received two charges that arose out of employment testing conducted by a private organization against several temporary employment agencies. The private organization had heard that employees in the area were experiencing a variety of problems when they applied for work through temporary employment agencies. In order to learn more about the nature of such problems, the organization spent a week talking with several "temp" workers who described problems relating to discrimination based on race, sex, disability, and other alleged statutory violations. At the end of this week-long briefing, the organization decided to investigate further two specific issues: pre-employment medical inquiries in violation of the Americans with Disabilities Act (ADA), and employer failure to satisfy a

requirement under state law that they provide the worker with a written statement of salary before the employment begins.

In conducting its testing program, the organization used persons who were actually looking for work and who agreed to take the job if offered a position. The organization "tested" ten different temporary employment agencies, and several testers then filed charges against two of the temp agencies for making unlawful pre-employment medical inquiries.

In this instance, the private organization used employment testing as a means of determining whether a "problem" that employees claimed existed was, in fact, a problem. In the organization's opinion, the results demonstrated the existence of a violation of the ADA in at least two agencies (no charges resulted from several other agencies that were tested by the organization). The EEOC can now investigate the validity of those discrimination claims and issue a "cause" finding, if appropriate.

In another situation, several testers filed employment discrimination charges with a district office alleging they were not considered for a receptionist position with a health provider. Two pairs of testers with similar credentials (each pair consisting of one African American and one Caucasian job applicant) were sent to apply for the receptionist position by a private organization that conducts employment testing. The organization became interested in this particular employer after the organization received suspicious responses to written applications it submitted to the employer in response to an advertisement for the position. Another private organization in the area had also indicated some concerns about the employer's hiring practices, and had referred a job applicant who was actually interested in a clerical position to the organization that was planning to conduct the test. This job applicant became one of the testers who went to the company to apply for the job.

Notwithstanding the close similarity in education, experience and relevant skills, the four "testers" received starkly different treatment. The two African American applicants were asked why they had come in person when the ad said to mail in a resume, and were further told there was no one they could speak to at the moment, and they would be called for an interview later. The two Caucasian applicants, who went to the company on the same days as the African American testers and who spoke to the same manager,

were immediately escorted to another building to meet other managers involved in the hiring process, and one of them was offered a job on the spot.

It is always possible that a manager making a hiring decision could end up feeling more comfortable with one job applicant over another after an interview. That does not account for what the testers reported happened here: the two African American applicants were both told that delivering their resumes in person was a mistake, and that there was no one present they could talk to about the job and no opportunity for an interview that day. The two Caucasian job applicants who were also delivering their resumes in person were welcomed warmly, were immediately interviewed, and one was offered the position on the spot. During the course of the investigation of the charges filed by the two African American testers, at least one other African American applicant was identified who was determined by the EEOC to have been a victim of race discrimination. Without the evidence of the contrasting testers' experiences, however, it would have been much more difficult for the Commission (or a court) to assess whether the rejection of the non-tester applicant amounted to discrimination based on race.

These are just a few examples of situations in which testers have been used to help determine whether a violation of federal employment discrimination law exists. They demonstrate some of the instances where the absence of documentary evidence might make the Commission's investigation much more difficult if it were not for the statements of the testers describing their experiences with the employer.

There are many other kinds of situations where testing could be similarly profitable, such as when minority and/or female job applicants report that they were denied the opportunity to even apply for a position they understood to be vacant, and suspect that the denial was based on their race, ethnicity, skin color or sex. Or when a job applicant indicates that she was inappropriately touched and/or propositioned when she applied for a job, and was led to believe that the job was available only if she agreed to submit to further sexual advances. In these situations, determining what occurred will often be one person's word against the other's unless there is an opportunity to recreate the scenario, using paired testers, and observe whether the same pattern recurs.

The Fair Employment Council of Greater Washington, Inc. (FEC) learned of a situation in 1990 in which a job applicant alleged that she had been sexually harassed at the time she applied for a job. The job applicant said, specifically, that the owner of the job referral company told her that his referral services cost between $300 and $1500, but that this amount could be waived if she would just "give a little bit part of [her] life," or, in other words, that "through sex, that's a way of taking care of the financial problem." See Molovinsky v. Fair Employment Council, 72 FEP Cases [BNA] 79, 80 (D.C. Ct. Of App., Oct. 3, 1996). FEC determined that Ms. Henderson's allegations warranted further investigation, so it sent four testers to the job site (two men and two women) to be interviewed by the same individual and report back their experiences.

The two female testers experienced the same general sexual propositioning that the first job applicant had reported. The two men had very different experiences: when they said they couldn't afford the agency's fees, the owner told them to get a job earn some money and come back later. 72 FEP Cases at 80. The case was tried before a jury in the District of Columbia, and the agency owner denied ever propositioning either the female testers or the original applicant, Ms. Henderson. 72 FEP Cases at 81.

In the face of such a "he said, she said" situation, the existence of the testers' testimony to corroborate the experience of Ms. Henderson was tremendously helpful in securing a court judgment that the employer was liable for a violation of the District of Columbia Human Rights Act.[1] As with the other

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[1] Ms. Henderson and the two female testers all testified that the owner's "eye contact and sexually suggestive hand gestures had made them uncomfortable, that they had felt humiliated, and that they had lasting negative impressions of their encounter with him." 72 FEP Cases at 80. In upholding the jury's award of $15,000 in compensatory and punitive damages to the two testers (as compared to $27,000 compensatory and punitive damages to the original job applicant), the court found that all three individuals had a statutory right not to be sexually harassed. Moreover, quoting the Supreme Court decision of Havens Realty Corp. V. Coleman, 455 U.S. 363, 373 (1982), the court held that the testers' right to be free of sexual harassment under the D.C. Human Rights Act existed notwithstanding the tester's

situations described above, where charges were filed with the EEOC, this case represents an additional factual context where the availability of testers provided a critically important tool to help establish whether discrimination was occurring at this referral agency. Moreover, since it is unlikely the referral agency would continue this harassing behavior and risk additional monetary "fines," the FEC's utilization of testers in its enforcement efforts was able to help eliminate this discriminatory activity in at least this one employment context.

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intentions in initiating the encounters with the owner of the referral agency. 72 FEP Cases at 81.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SALARIES AND EXPENSES

The Committee recommends $239,740,000 for the Salaries and xpenses of the Equal Employment Opportunity Commission for scal year 1998. This amount is a decrease of $6,260,000 below the :quest, and is the same amount provided in the current year appropriation.

In Fiscal Year 1997, the Committee supported additional re- ources for EEOC in order to address the charge caseload and its rowing backlog. The Committee expected that the additional re- ources and implementation of new charge handling procedures ould have an impact on reducing the overall caseload of the EOC and would improve response time for new complaints. EOC's workload information included with its 1998 budget jusfication reflects a reduction of 32,000 cases, a 30 percent reducon, in the backlog. The Committee is concerned however, that this ase reduction was a one-time occurrence instead of a sustained efrt. For FY 1998, EEOC estimates it will complete 16% fewer ases than they expect to complete in 1997. Furthermore, EEOC rojects that by 1999, its backlog of cases will grow to levels simi- r to 1995 when the new procedures for backlog reduction were rst implemented. The Committee is concerned that the additional sources provided in fiscal year 1997, in addition to other EEOC sources, are being diverted from case processing to increase other tivities, such as litigation. The Committee understands that the EOC currently does not track staffing or resources expended on articular EEOC activities. As a result, neither the EEOC nor the ommittee can determine the level of resources actually being ent on case processing, how this level compares to previous ars, whether resources need to be reallocated among activities or stricts, and the productivity of case processing of various offices. The Committee expects the processing of charges filed with the EOC, including the reduction of the backlog of such charges, will main the EEOC's first priority and directs the EEOC to implement a system of identifying the level of resources dedicated to this tivity and other EEOC activities, such as litigation. The Committe further directs the EEOC to provide by February 2, 1998, a report identifying the level of resources being used to support charge ocessing and the level of resources being used to support litigaon activities.

The Committee is also concerned that the EEOC does not have ecific criteria by which EEOC determines whether to intervene an ongoing lawsuit, or to initiate a lawsuit alleging a similar aim or claims as alleged in any other lawsuit filed against the me defendant. The Committee directs EEOC to set forth specific iteria for adoption by the Commission, that delineate how EEOC ill (a) intervene in an on-going lawsuit, including how such internation is in the general public interest, or (b) initiate a lawsuit ainst a defendant alleging a similar claim or claims of legal viotions or facts as alleged in any other lawsuit filed against the me defendant. The Committee expects that these criteria should aximize the responsiveness of the EEOC to complainants not adeuately represented by counsel in other fora. The Committee fur-

ther directs the EEOC that before any criteria are adopted, the EEOC shall submit such criteria, no later than February 2, 1998, to both the House Appropriations Committee and the House Education and Workforce Committee for review.

The bill also includes language included in previous appropriations acts allowing: (1) non-monetary awards to private citizens; (2) up to $27,500,000 for payments to State and local agencies; and (3) up to $2,500 for official reception and representation expenses.

FEDERAL COMMUNICATIONS COMMISSION

SALARIES AND EXPENSES

The Committee recommends total budget authority of $187,079,000 for the Salaries and Expenses of the Federal Communications Commission (FCC) for fiscal year 1998, of which $152,523,000 is to be derived from offsetting fee collections. This will result in a direct appropriation of $34,556,000, a decrease of $22,000,000 below the request, and $1,000,000 below the current year appropriation. The recommendation provides the full request for the operations of the FCC due to correction of an error contained in the original FCC budget submission which overestimated inflationary increases by $2,000,000.

The Committee has not provided the requested increase related to the cost of relocating the FCC headquarters into consolidated new space. The fiscal year 1998 request included $30,000,000 for the costs associated with the relocation, and the FCC anticipates that an additional $10,000,000 will be required in fiscal year 1999. The Committee remains concerned that, despite the admonitions of the Committee for the past three years, the FCC and the General Services Administration (GSA) have made no progress in reducing the costs of this relocation. Further, the Committee is concerned about recent actions by GSA and FCC to expand the total space in the facility. The Committee expects the FCC to continue to work to find lower cost alternatives to provide for the relocation, and to submit a reprogramming of funds under Section 605 of the bill to cover such costs FCC will incur from the move.

The Committee is concerned that the FCC has not taken sufficient actions to streamline and reduce its operations in response to passage of the landmark Telecommunications Act of 1996 (P.L.104-104). While the Committee understands that the Commission has experienced a short-term increase in workload in some areas, the Committee believes that further opportunities exist to streamline and downsize the Commission as a result of the de-regulation of the industry. Therefore, the Committee encourages the FCC to re-evaluate all of its functions, and to eliminate those unnecessary regulatory functions which have been reduced or eliminated by this Act. Such actions will enable the Commission to achieve budgetary savings while promoting greater competition in the industry, and at the same time assist the FCC is identifying the necessary resources to provide for other agency requirements.

The Committee is aware that concerns and questions have been raised regarding the authority and competence of FCC with respect to regulation of advertising. The Committee notes that Congress has granted the Federal Trade Commission (FTC) the authority to

Maria Echaveste 06/23/98 09:17:17 AM

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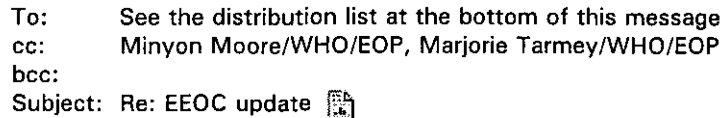


To: See the distribution list at the bottom of this message
cc: Minyon Moore/WHO/EOP, Marjorie Tarmey/WHO/EOP
bcc:
Subject: Re: EEOC update

I spoke with Nancy Zirkin last night who was on the phone call with the civil rights groups in the afternoon--1)they don't understand why EEOC went down the path it did other than the abused child syndrome (sort of like INS--they are always being kicked, so they move very cautiously hoping to avoid getting kicked again); 2) they (LCCR) are planning to send a letter to the committee outlining their concerns with Gingrich's objections (not all of them--testers is the most impt, but they are also worried about the directive that more resources be dedicated to charging processes and less to litigation); 3) they know we are not settled on the other issues 4) she indicated that it certainly was a good strategy to try to avoid a rider but they are still really upset with EEOC and want to know who at the White House was minding the store and what does the white house do when an agency takes steps that perhaps (they hope in this case) the White House is not in favor of -- she thought doing a small meeting with folks later in the week so they could tell us their views would be helpful-- so what do you all think? And where are we?
Julie A. Fernandes

Julie A. Fernandes
06/22/98 07:29:11 PM

Record Type: Record

To: See the distribution list at the bottom of this message
cc:
Subject: EEOC update

All:
Ellen Vargyas had a conversation with David Frank this afternoon. He told her that according to Mike Rengler, there has not yet been a committee report drafted for the subcommittee. On the $ front, he told her that the appropriators had not settled on a figure. One of the big issues is the part of the increase ($9 million) that is slated to improve technology at the agency. According to Frank, some on the subcommittee indicated that they were interested in having the EEOC fund its technology improvements (computers; e-mail; legal data bases) using discretionary dollars in the Treasury-Postal legislation ($ intended to be used to address the the Y2K problem). Frank further indicated that the agency should get "a big chunk" of the rest
($28 million).

Ellen told Frank that we want to make sure that we have resolution on the other five conditions as soon as possible. Frank told Ellen that he would try to get Rengler to focus on drafting conference language on this. Given this delay, he indicated that they could push back the date by which he

would want to know whether we had a deal on testers (they had originally talked about a July 1st deadline).

Julie

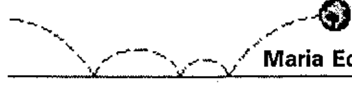
Message Sent To:

Martha Foley/WHO/EOP
Broderick Johnson/WHO/EOP
Elena Kagan/OPD/EOP
Maria Echaveste/WHO/EOP
Edward W. Correia/WHO/EOP

Message Sent To:

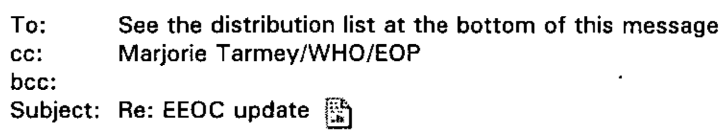
Julie A. Fernandes/OPD/EOP
Elena Kagan/OPD/EOP
Edward W. Correia/WHO/EOP
Broderick Johnson/WHO/EOP
Martha Foley/WHO/EOP

Race Init 7/1 - civ rts enf



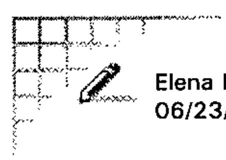
Maria Echaveste 06/23/98 01:30:47 PM

Record Type: Record



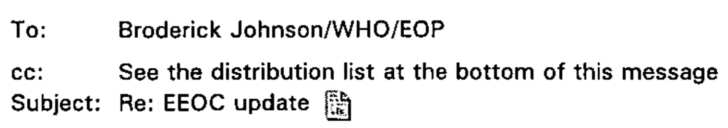
To: See the distribution list at the bottom of this message
cc: Marjorie Tarmey/WHO/EOP
bcc:
Subject: Re: EEOC update

I spoke with Wade a few minutes ago and he said that they wanted to take their cue as to letters etc from us--I think Nancy Z is pushing a letter now, and he asked me to call her and reinforce that we don't think right now is the time to do it inasmuch as we may be able to skate by subcttee mark--he said let's see where we are at end of day and then decided if the groups should come in later in the week, or early next week--(I've got a conflict with the 5:30 mtg today--but keep me posted and I'm hoping Minyon can attend--ciao)
Elena Kagan



Elena Kagan
06/23/98 10:54:47 AM

Record Type: Record



To: Broderick Johnson/WHO/EOP
cc: See the distribution list at the bottom of this message
Subject: Re: EEOC update

broderick is absolutely right -- no letters!!!

Message Copied To:

Maria Echaveste/WHO/EOP
Julie A. Fernandes/OPD/EOP
Edward W. Correia/WHO/EOP
Martha Foley/WHO/EOP
Minyon Moore/WHO/EOP
Marjorie Tarmey/WHO/EOP

Message Sent To:

Elena Kagan/OPD/EOP
Broderick Johnson/WHO/EOP
Martha Foley/WHO/EOP
Minyon Moore/WHO/EOP
Julie A. Fernandes/OPD/EOP
Edward W. Correia/WHO/EOP

From E. Holmes Norton 6/16/98 Cong. Record

POM-462. A resolution adopted by the Senate of the Legislature of the State of Michigan; to the Committee on Appropriations.

SENATE RESOLUTION NO. 172

Whereas, our country is strongly committed to equality of opportunity. An important government body working to put this commitment into action is the Equal Employment Opportunity Commission (EEOC), the nation's leading civil rights enforcement agency; and

Whereas, the EEOC currently has a backlog of 65,000 cases of discrimination to investigate to pursue justice for individual citizens victimized by unfair and illegal practices. The EEOC needs to direct its resources to these individuals, rather than to the pursuit of trying to find new instances of possible problems. It is much more prudent to handle specific cases of discrimination than to direct energies to test employers by using decoy job applicants to look for discriminatory behavior; and

Whereas, the administration's recommendation of increased spending for the EEOC is appropriate if the increased funds are targeted to address the backlog of discrimination cases that need to be investigated. The men and women victimized by discrimination deserve the protection of the EEOC and should not be made to wait longer while resources are directed to less

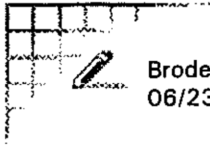
Whereas, the administration's recommendation of increased spending for the EEOC is appropriate if the increased funds are targeted to address the backlog of discrimination cases that need to be investigated. The men and women victimized by discrimination deserve the protection of the EEOC and should not be made to wait longer while resources are directed to less
productive activities; now, therefore, be it

Resolved by the Senate, that we memorialize the Congress of the United States to increase funding to the Equal Employment Opportunity Commission to handle the backlog of individual cases; and be it further

Resolved, that copies of this resolution be transmitted to the President of the United States Senate, the Speaker of the United States House of Representatives, and the members of the Michigan congressional delegation.

Race Init Policy - Civ Rts Enf

Race init pol -
civ rts enf



Broderick Johnson
06/23/98 09:26:04 PM

Record Type: Record

To: Minyon Moore/WHO/EOP

cc: Maria Echaveste/WHO/EOP, Julie A. Fernandes/OPD/EOP, Elena Kagan/OPD/EOP
Subject: Re: follow-up to the EEOC meeting

I talked with Wade, and he appreciated knowing that there will be no EEOC tester rider on the bill. The LCCR letter will not be released, and he looks forward to hearing from us about a Friday meeting.

Rau inir pR - civ rts enf

▶ **Julie A. Fernandes**
06/24/98 04:51:26 PM
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Record Type: Record

To: Elena Kagan/OPD/EOP, Maria Echaveste/WHO/EOP, Minyon Moore/WHO/EOP, Edward W. Correia/WHO/EOP

cc: Laura Emmett/WHO/EOP, Leslie Bernstein/WHO/EOP
Subject: EEOC -- Hill meetings + mark-up results

FYI. Broderick is trying to set up meetings with Hill staff for tomorrow afternoon (after 5:30pm). The group will likely include a mix of Democratic authorizers and appropriators (both within and without the CBC) and Cassandra from Gephardt's staff. Martha is still a bit worried that we will be talking to the staff before we have fully resolved all of the five remaining issues (particularly the one about allocation of lawyers' time between litigation and charge processing). However, she agrees that we have to talk to them soon to get them to understand where we are.

EK -- I am checking with Laura re: your availability.

Also, I just got word from Martha that the EEOC got **$18.5 million** in the subcommittee mark-up. This is half of the President's request of $37 million. There was no report or bill language and nothing in the mark-up notes. Also, there was very little discussion during the mark-up on this. Mollohan stated that he didn't know how the EEOC could address the backlog without the full amount requested and that he will work on this (getting more money) as the process continues. Dixon said that he wanted to work with the Chairman on report language (for the full committee's report).

julie

Race init pol - civ rts enf

Julie A. Fernandes
06/18/98 01:15:33 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: EEOC -- update and question

Elena,
Ellen Vargyas (EEOC legal counsel) had a conversation with Fawell's staffer (David Frank) this morning. The CJS appropriations subcommittee folks + the Speaker's folks have authorized him to begin discussions with EEOC about a letter as compromise. As long as they are assured that EEOC is trying to work with them on this in good faith, they will not include any "no tester" legislative language at the subcommittee mark-up (next Tuesday). Frank indicated that: (1) the letter should not indicate why a compromise is being made; and (2) there may also want report language that the issue of testers was resolved with a letter from EEOC.

Frank would like resolution on the letter issue by July 1st. The full committee mark-up could be as early as July 14th. Ellen is going to begin to work on a draft letter; however, Frank was still not clear on whether they would be satisfied with a committment to not employ testers with FY99 money or whether they would also want to preclude the agency either from using FY99 money (staff time, really) to analyze their pilot OR from bringing cases that are based on tester evidence. It is also not clear what precisely the "quo" would be on this deal -- an agreement that Gingrich (and others) would support the full appropriation? plus an agreement of no rider and no language?

According to Don Payne's staffer (ranking member on the authorizing subcommittee), Payne has had conversations with Dixon, Stokes, Clay , Lewis and Gephardt to inform them of the issue and that he is engaged. Payne's general position is: (1) we can defeat a "no tester" rider in the House; and (2) Congress should not dictate to agencies how best to enforce the law. Payne's staffer's gut is that he would be opposed to any compromise on testers. Rep. Norton has strongly indicated that she does not want a floor fight on testers. Her position is that we would lose, so we should (as quickly as possible) have EEOC send a letter to Fawell assuring no use of testers.

Martha and Broderick want to spend a little more time today figuring out whether Payne or Norton has a better read on our strength in the House (including a better read on the CBC folks) and on what the Dem. rxn. would be to a compromise. They are still of the view that we will either end up with a letter that does not signal a lack of faith in the testing enterprise OR with a rider on the appropriations bill that we fight on the floor.] ?

Martha and Broderick would like us (DPC) to call a meeting tomorrow to finalize the Administration's view on the balance between getting the money and the issue of testers (in the context of the broader CJS appropriations bill, the PIR, etc.). They recommend that this meeting include: DPC (us) , Leg. Affairs (Martha & Broderick); COS (Maria?); Counsel (Eddie and/or Chuck?); and PIR (Judy). Should I ask Laura to set this up? Are there others that should be included? Thanks.

Julie

Race Init Policy - Civil Rts Enf

Julie A. Fernandes
06/17/98 04:02:17 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: EEOC

Elena,
FYI. After a meeting today between civil rights enforcement agencies and the CBC, Eleanor Holmes Norton asked Bill White (leg. affairs from EEOC) why the EEOC had not made a deal with the Republicans on testers. Bill let her know that this was a WH issue. Rep. Norton then indicated that she may want to contact someone here to discuss.
As you know, the EEOC has worked out agreements with the Reps. on the other five points that Gingrich outlined in his testimony at the oversight hearing. Also, we (EEOC and us -- including Counsel's office and Leg. Affairs) have discussed offering a letter from EEOC to Fawell indicating that the agency would not use FY99 appropriated funds to employ testers. Ellen Vargyas (legal counsel EEOC) has had very preliminary discussions with Fawell's staff about this possibility. Also, Martha Foley and Broderick Johnson have been talking the Dems. over the past couple of days to better determine our strength on this issue.
Tomorrow morning (Thurs.) at 10am, Broderick, Martha, Eddie Correia, Susan Carr (OMB) and I are having a conference call to finalize where we are with the Dems. and Reps.

Julie