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THE BOSTON HERALD, Saturday, June 6, 1987

Herald photo by Steven LaBadessa

'He dragged me down the stairs'

A TEARFUL Pamela Foster, left, claims Harvard professor Glenn Loury, right, dragged her down four flights of stairs in a fit of anger the day he ended their love affair. Loury was arraigned yesterday in connection with the alleged assault. The professor of political economy had been nominated for the No. 2 spot in the U.S. Department of Education, but withdrew Monday, the day of his confrontation with Foster. The 23-year-old woman said she was in pain from neck injuries and abrasions stemming from the quarrel in the couple's South End condo. Story, Page 7.

Herald pool photo

Harvard prof 'dragged me down stairs'

By ROBERT CONNOLLY

A TEARFUL, shaken Pamela Foster yesterday charged that Harvard professor Glenn Loury "dragged me down four flights of stairs ... in the heat of rage" after he decided to end their love affair and return to his wife.

Foster said Loury came to their South End penthouse condo on Monday — the same day he told the U.S. Department of Education he didn't want its No. 2 post — and unexpectedly said their affair was over.

Foster said she was told she could continue to live in their 314 Shawmut Ave. condo, located in a trendy section of the South End.

"Wednesday night, in the heat of rage and anger, he dragged me down the stairs and threw me out. He's an adulterer and a liar," the 23-year-old woman said, dabbing her eyes and shaking as she spoke.

Loury, 38, was arraigned in Boston Municipal Court yesterday on charges of threatening to commit murder, assault and battery with a dangerous weapon, and malicious destruction of personal property. He was released on personal recognizance. A July 9 trial date was set.

Loury, interviewed at his Cambridge home, declined to comment on his relationship with Foster. Loury's lawyer, Martin Gideonse, said, "The most graceful thing is to not comment at this time."

Foster said she met Loury, a nationally known figure and a professor of political economy at Harvard's Kennedy School of Government, in 1983 when she was an economics student at Smith College.

She said their relationship, previously based on academic interests, "became intimate" last year when Loury said he had separated from his wife and was seeking a divorce. Foster said she left her Manhattan home and moved to the South End penthouse in February, at Loury's request.

"The man lied to me.... He said he was getting a divorce. I agreed to keep the relationship under cover while the divorce was being worked out because I thought I was in love," said the young woman, who wore a neck brace as her angry father helped to gather her belongings.

The New York woman said Loury told her he "never intended to get a divorce" when he stormed in and broke off their relationship.

"It's so ironic," she said. "He talks about rights and black-on-black crime and he is committing them himself. It's the height of irony."

Loury, who was born in poverty in Chicago, was educated at Northwestern University and the Massachusetts Institute of Technology. He joined the Harvard faculty in 1982 and lives in Cambridge with his wife, Linda Datcher, and their two children, according to sources.

Loury is known as one of the nation's foremost black opponents of widespread use of affirmative action. When President Reagan's intention to name Loury to the education post was reported in March, civil rights groups said they would oppose the nomination.

Education Department officials recently denied that Loury's nomination was being held up and said a security check had to be completed before the nomination would be officially announced.

Loury, in an interview, said he was certain his nomination would have been approved by the Senate. He said his decision to decline the impending nomination was based on "personal reasons" that had nothing to do with Foster's charges.

Had Loury been named to the post, he would have become the second highest-ranking black in the Reagan administration.

A neighbor in the five-story brick South End condo building said FBI investigators talked to residents, asking about Loury's relationship with Foster.

The question of where Loury actually lives arose in court yesterday when Judge Walter J. Hurley said he wanted to know if the Harvard professor lived in the South End or Cambridge.

Although he was told Loury lived at 581 Mt. Auburn St. in Cambridge, Loury's name was on the mailbox yesterday at 314 Shawmut Ave. Mail addressed to Loury and Foster was in open view in the lobby.

William Prignano, who runs a bakery in the building's first floor, said he had seen Loury and Foster together in recent months.

"They were a couple. They were always together," he said.

Another resident said raised voices were frequently heard from the Loury-Foster penthouse. The quarreling peaked Wednesday night when papers and other personal belongings were hurled out a back window, the resident said.

Loury, wearing a blue-checked suitcoat and carrying a New York Times, appeared calm during his brief arraignment. Hurley said Loury was barred from seeing Foster until the case is resolved. Loury told Hurley he made $65,000 a year as a Harvard professor.

Foster, standing in the lobby of the South End condo, said she was "in a great deal of pain," suffering from neck injuries and back abrasions, the result of "being dragged down the stairs."

"Four flights of stairs," her fuming father added.

Foster said she had worked as a weekend radio announcer since moving from New York, but was unsure of her future plans.

"This is what I came here for; I came here for this," she said, fighting back tears and pointing to her neck brace and what appeared to be bruises on her shoulder.

Herald photo by Stephen Lisbon

SCENE OF 'FIGHT': Harvard professor Glenn Loury shared a penthouse apartment with Pamela Foster in this building on Shawmut Avenue in the South End.

THE BOSTON GLOBE, Saturday, June 6, 1987

Globe staff photo/George Rizer

Glenn C. Loury (left) enters court with his attorney, Martin Gideonse, before his arraignment yesterday on assault charges.

Loury bows out of US job bid, is arraigned on assault charges

By Peter J. Howe
Globe Staff

Harvard political economist Glenn C. Loury has withdrawn his name from consideration for the No. 2 spot at the US Department of Education.

Loury was arraigned yesterday on charges of assaulting and threatening to kill a 23-year-old woman who said she and Loury shared an apartment in the South End.

Loury, 38, pleaded innocent in Boston Municipal Court to the charges in connection with the alleged attack early Thursday morning on Pamela Foster, a weekend disc jockey at a Cambridge gospel music radio station, at a Shawmut Avenue apartment. Loury broadcasts a weekly talk show on minority issues on the same radio station, WLVG-AM.

Loury, who is married to a Tufts University economics professor, had signed a lease with Foster for the apartment in the South End, Foster said in court documents.

According to a city directory, he also has had a residence with his wife, Linda Loury, on Mount Auburn Street in Cambridge since 1982.

In Washington, William Kristol, chief of staff to Education Sec-

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Loury bows out of US job bid, arraigned in assault

■ LOURY
Continued from Page 1

retary William Bennett, said that "on Monday, Mr. Loury called to say that, for personal reasons, he wished to withdraw his name from consideration for nomination for the position of undersecretary.

"On Thursday, I called to confirm that this was Mr. Loury's settled intention and asked that he write a letter to make his withdrawal formal," Kristol said. Aides said Loury sent the letter by overnight express yesterday to the department, but that it had not been received.

Despite Kristol's statement, Bennett's spokesman, Loye Miller, said Thursday night that the paperwork was being processed prior to Loury's official nomination, and that there were no hitches in the nomination process of which he was aware.

Loury's attorney, Martin Gideonse, said Loury's decision to withdraw his name "was for reasons unrelated to" the assault case.

"It's related to decisions about what his personal and professional life should be like," Gideonse said. He added that Loury notified the department last Monday or Friday, many days before Foster filed her complaint.

However, Gideonse did say that "probably the timing of the public announcement of his withdrawal is affected by this matter."

Loury is charged with threatening Foster's life, assault and battery with a dangerous weapon, his shod foot, and malicious destruction of property over $100. Boston Municipal Court Judge Walter J. Hurley released Loury on his own recognizance, ordered him not to go to the apartment, and set a July 9 trial date.

Shortly before 11 a.m. Thursday, two hours after she walked into the Boston Police Area D station on Warren Avenue to file the assault complaint against Loury, Foster obtained a temporary restraining order from Judge Sally Kelly barring Loury from coming into the apartment.

In her request for the restraining order, Foster said she and Loury "are members of the same household" and asked the court to order Loury "to continue to pay the rent at [the apartment] while I live there through the end of our lease (Aug. 31, 1987)."

"Professor Loury is deeply upset by this whole matter involving Miss Foster," Gideonse said. "To the extent that it is before the court it is a public matter . . . but it is really an unfortunate set of private circumstances."

Gideonse declined to comment on what the nature of Loury's relationship with Foster, but confirmed he is still married. "That's basically a private matter," the attorney said.

Foster could not be reached for comment yesterday, and the telephone at the Shawmut Avenue apartment was not answered. The police report taken at Area D indicates that there was "physical evidence" that Foster was beaten. Police would not give further details.

Foster, a Smith College graduate, has worked for WLVG-AM as the 4 to 8 p.m. weekend disc jockey for "two to three months," a source at the radio station said.

Loury, one of the nation's most prominent black opponents of affirmative action and minority hiring quotas, has been a tenured professor in political economy at Harvard's Kennedy School of Government since 1984.

Loury has written that inner-city blacks must look to themselves rather than government to solve problems of poverty, unemployment, teen-age pregnancy and crime, and that affirmative action has had the negative effect of casting doubt on whether blacks who receive promotions are actually qualified.

Before coming to the Kennedy School, Loury was a professor in Harvard's faculty of Arts and Sciences. He also taught at Northwestern, from which he received his college degree in 1972 on a minority scholarship after growing up in poverty in Chicago and attending two other colleges.

While the government was checking Loury's background in connection with the White House's planned nomination of Loury, he faced many questions about his delinquency in repaying loans he took out for his doctorate, which he received from the Massachusetts Institute of Technology in 1976.

The loans became several years overdue, but Loury, who makes $65,000 a year at Harvard, told the Globe earlier this year, "It is obviously something I am not proud of. I let it slide for a long time and eventually paid it off in a lump sum."

Regional Education Department representative Bayard Waring called Loury's withdrawal "a terrible thing, because he is a very bright, competent guy who could have been a real asset to the department. He's got his own drummer that he marches to . . . but he's identified a number of areas around the country where his ideas have been put into place and have worked."

The National Association for the Advancement of Colored People said earlier this spring it would fight Loury's nomination as undersecretary because he opposes affirmative action.

"We have made known our opposition to Glenn Loury [for the position] . . . based on our conviction that he was not the right person for the job," NAACP executive director Benjamin L. Hooks said in a statement. "However, we regret that an alleged personal incident that had nothing to do with his professional qualifications has produced this result."

Harvard University had no comment on the events. Albert Carnesale, academic dean of the Kennedy School, said that "If you are asking, is he a professor in good standing at the Kennedy School, the answer is yes. I'd rather not make any comment in the context of this event. I don't think that this relates to his professional life at the school."

(Globe reporters Steve Curwood, William F. Doherty and Ed Quill contributed to this story.)

Grim Anniversary

Detroit's Racial Woes Persist Two Decades After Devastating Riot

Despite Strides Downtown, Poor Inner-City Blacks Are Worse Off Than Ever

Paying a Call on 'Big Mama'

By John Bussey
Staff Reporter of The Wall Street Journal

DETROIT—In the still-steamy early-morning hours of July 23, 1967, police raided a suspected illegal drinking club in this city's west-side ghetto. Detroit has never quite recovered from what happened next.

The raid drew a crowd. As club patrons were loaded into patrol cars, hecklers began to jeer. Then a thrown bottle shattered a squad-car window—and the worst urban black rebellion in modern U.S. history suddenly ignited. In five days of rioting, quelled finally by federal troops and National Guard tanks, 43 people died, more than 600 were injured and entire blocks of the west side burned to the ground.

The Detroit riot and others occurring in the late 1960s shocked and alienated many but also lent force and urgency to white consideration of black America's plight. Rivers of money—for social programs, for low-income housing, for job training, for support of the poor, for redevelopment—were flowing into the cities then. Segregation began to crumble both in practice and in spirit.

BLACK AND WHITE

First in a series on race relations in the U.S.

All this helped Detroit, today the biggest U.S. city with a black majority. But it did not help enough.

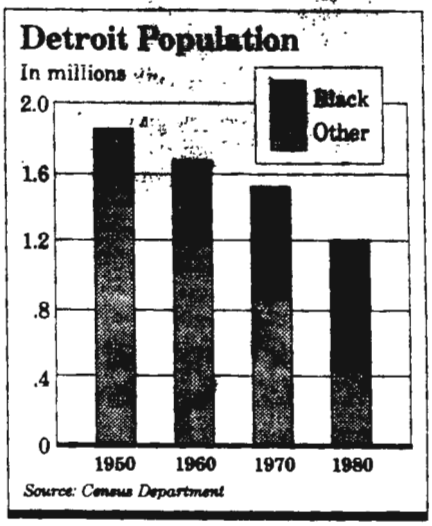
Yes, the glistening towers of the Renaissance Center now rise by the Detroit River downtown, the anchor of a hoped-for renewal of the city. Yes, government and private funds have dotted other parts of the city with new housing, new freeways, new shopping centers. But these represent only one of two Detroits. The other sprawls around and between these islands of prosperity, square mile after square mile of neighborhoods marked by decay, abandonment and despair, places whose black inhabitants are worse off than they were 20 years ago.

A New Mood

The whites have fled in droves, taking jobs, investment and tax revenues with them. Blacks, meanwhile, have divided into two groups, the inner-city poor and the middle class that has made it, and they understand each other less and less.

They are also less inclined to blame whites exclusively for everything that has happened to a city that has been black-controlled for many years. Lingering white racism and neglect still get a sizable share of the blame, but a new mood of introspection and self-criticism is also gaining intensity here.

"Ain't no white man in the world smart enough to do to us what we're doing to ourselves—teen-age pregnancy, dope, black-on-black crime," declares the Rev. James Holley, the fiery pastor of Detroit's Little Rock Baptist Church. "The white folk have left black people in charge of the plantation, and the black folk are doing as much harm."



Many still disagree with that. But walking the city's streets and talking with its people make this much clear: The resources poured into Detroit over the years have been largely overwhelmed by destructive social, demographic and economic forces. They may be beyond anyone's control, here or in other cities struggling with similar problems.

12th and Clairmont

A small park at this corner now marks the place where the riot exploded. A new shopping center and low-income housing project have been built down the street, adding a little life to the neighborhood, but it is still only a shadow of the bustling place it once was. A lot cleared after the riot is still vacant, and not far off is an abandoned building, its windows shattered and its parking lot cluttered with three overturned school buses.

Twenty years ago, Carl Perry, the black proprietor of a drugstore here, dished out ice cream, sodas and candy during the riot and hoped his business would be spared. But a market next door was torched, and his shop burned, too. Today, a graying Mr. Perry leans on a truck next to the weedy lot where his shop once stood. "I lost so much—everything," he says. "Even

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Grim Anniversary: Two Decades After Major Riot, Racial Problems Continue to Plague City of Detroit

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after 20 years, it's hard to recoup."

He is worse off today than he was then, he adds. So is much of the rest of Detroit. The city's crime rate is astronomical. Black income as a percentage of white has declined since the riot instead of growing, and poverty has increased.

The 1980 census found 28% of black households in Detroit drawing public assistance and 26% of blacks living below the poverty line, up from 22% in 1970. It is generally agreed that there has been no sizable improvement since, if there has been any improvement at all. And men like Martin Brooks can tell you what has happened to the job market.

Mr. Brooks, 37, and the father of two, lives in cramped quarters with his family in a housing project. It is within sight of the Renaissance Center, but the latter's moneyed towers might as well be on the moon; Mr. Brooks, a former tutor who lost his federally financed job when budgets were cut, is unemployed, on public assistance and embittered.

"In the '60s, people thought you had to sit next to a white kid at school," he says. "To integrate was the goal. But integration doesn't put bucks in our pockets. The answer is developing the economic strength to determine our own future. But the commitment white America made to the spirit of Martin Luther King—the spirit of human development—is gone."

When the riot broke out, black unemployment in the city was around 10%. But over the years, the decline of the auto industry, along with the flight of other jobs from the inner city and cutbacks in urban federal financing, has devastated the employment base. Last year, one of every four blacks in the labor pool was out of work.

Above Mr. Brooks's apartment door is a sign that reads, "Magnify the Lord Jesus Christ." Nothing will change, says Mr. Brooks, until Jesus comes again.

Incredible Shrinking City

"*This* is Detroit," says an east-side youth worker, indicating a block much like hundreds of others in the city. On the right, a one-story brick house, its windows smashed and its door broken and ajar, stands empty. Next door is a vacant lot full of beat-up autos. Farther down the street is a spot of color—a two-story white home with a neat fenced yard and a flower box full of pansies. But near it are more abandoned places, padlocks on the doors, plywood covering the windows.

Detroit is shrinking. In 1970, about 1.5 million people lived here, 44% of them black; today the estimated population is only one million, roughly two-thirds of it black. While there are still attractive outlying middle-class neighborhoods here, vast areas of Detroit are full of abandoned buildings. Some 30,000 have been torn down over the past dozen years, but private demolition contractors still can't keep up with the backlog, and the mayor has suggested that the city form its own crews

Part of the population collapse is due to the decentralization—as well as the decline—of the auto business. More is due to an exodus of whites—often to the booming suburbs—that has robbed the neighborhoods of jobs, taxes and economic diversity.

Detroit, along with other large Northern cities, had been losing whites long before the 1967 riot, which helped speed the flight. The whites' places were being taken largely by poor blacks, many of them rural Southern migrants who went north in the '50s and '60s. Today, they and their descendants form much of the underclass trapped in the ghettos.

The white flight has been accompanied more recently by another movement out of inner cities, this one by members of the burgeoning black middle class. Though inner-city black Detroit as a whole is worse off than ever, a growing slice of that population is prospering as professionals, managers, shop owners and entrepreneurs; there is increasing black ownership of firms in the steel business, architecture, finance, cable television and auto sales.

And many of the blacks who have made it prefer to live—and often work as well—in suburbs near the city's rim or just beyond it. They still don't feel welcome in white-dominated suburbs such as Grosse Pointe and Dearborn but for the most part are far freer than they once were to buy and live where they please.

To some of the poor left in the decaying neighborhoods, the middle-class blacks, especially those who have moved away, are seen as selfish, uncaring and materialistic. Some members of the middle class agree.

"Why are there no Martin Luther Kings today?" asks Joe Madison, 37-year-old former executive secretary of the National Association for the Advancement of Colored People in Detroit. "Because many of my generation, the buppie generation [black urban professionals], were out developing personal success but not sharing that success with those we left behind."

For their part, however, many in the black middle class condemn what they view as a moral collapse in the ghetto and express frustration and impatience with what they see as welfare mothers who keep having babies and absent fathers who have stopped looking for work.

"People have options," says Rudy Hendrix, a black father of two who owns a franchised computer store in the suburbs. Mr. Hendrix, who lives in a Tudor home in the city and who gives some of his spare time to helping Detroit youth, adds: "A guy who can stand on the corner plotting how to rob someone can put the same amount of energy into getting into a work-study program to better himself. I did it. I had two paper routes, I shined shoes. Get a job. Go get a job."

The Rock House

Cradling shotguns, a dozen flak-jacketed narcotics police suddenly crash through the door of the house on MacKay Street and pin its lone occupant to the floor. "Where are the guns, where are the guns?" one policeman screams at him. Terrified, the man shouts, "No guns! No guns!" as police fan out through the trash-littered house, flipping over furniture, looking for drugs. "God, what a pit," one narc mutters. Another is already beginning to count out 20-odd "rocks" of confiscated crack cocaine.

Over the past year, Detroit police have conducted hundreds of raids like this; but the drug problem here, as in so many cities, seems beyond control. So does violent crime, much of it drug-related.

Crime is often the first reason people give for leaving Detroit. The city has an enormous incidence of burglary, robbery and rape; and among major U.S. cities, it has far and away the highest murder rate—648 homicides last year. Even young children go armed here. Recently a 14-year-old boy with a .357 Magnum chased a 17-year-old rival through the halls of a high school, wounding another student in the face before catching his foe and killing him with a bullet in the head.

The violence has driven out many merchants and other businessmen, white and black. Among those who stay, some, like Pat Stanley, make their shops and businesses into fortresses and hope for better days. Mr. Stanley's 15-man woodworking plant was broken into five days in a row last summer. He has boarded up its lower windows and replaced the upper ones with bullet-resistant plexiglass. After five of his employees' cars were stolen, he put up a $3,000 parking-lot gate.

"I should be concerned with profit and loss, not car theft," says a disgusted Mr. Stanley. If he had it to do over, he adds, he wouldn't do it over in Detroit.

Big Mama and Brother Bill

Twenty-two years ago, Daniel Patrick Moynihan, then assistant secretary of labor and now a U.S. senator, wrote a controversial report stating that among inner-city blacks, the traditional nuclear-family structure was crumbling. The report was furiously attacked by many black leaders. Today, in a home on Detroit's east side, it takes on a prophetic validity.

The home is Cecile Johnson's. Everyone on the block knows her as "Big Mama," and the nickname fits. Mrs. Johnson is a large woman with a heart to match. She has raised five of her own children but still has a bigger family to care for than any 63-year-old needs. "How many kids here?" she repeats through two missing front teeth and pauses a moment to recall.

There are 11. Nine are the products of the broken marriages and out-of-wedlock births of her absent daughters, victims of drug addiction. The other two are babies—the children of two of her grandchildren, both 17. Mrs. Johnson and her second husband, Beauford, support them all on aid payments and on his $900 monthly pension from Ford Motor Co.

As children crisscross the room, Mrs. Johnson contemplates a motherhood that seems perpetual. "I've been a mamma ever since I had the first one of my own," she says with a sigh.

* * *

In another part of the east side, a 45-year-old one-time pool hustler pounds the pavements, looking for kids missing from school, pleading with junkie parents. He is Bill Howard, "Brother Bill" to the kids at Joy Junior High School, where he is a youth counselor financed by the Urban League. He is also one man with a finger in a dike that has sprung a thousand leaks.

In a recent assessment, Detroit public-school students scored below the national norm in seven of eight categories. Of all children entering the ninth grade here, 43% don't make it through high school. Truancy is rampant at many schools.

On the phone in his cluttered office at the school, Mr. Howard is haranguing one of those truants. "You've been out of school since January," he says, "and all you've been doing is getting dumber and dumber." He frequently tells youngsters like this that the ghetto will never change unless they learn the white man's rules, unless they stay in school—but he has no illusions about either the white man or the scant value that so many inner-city blacks now place on an education.

White society, he believes, has simply abandoned the idea of helping blacks help themselves ("Give the black people a little cheese and butter and let them create their own job market: stealing and robbing and hustling"). And his charges, who once had role models in the stable, successful black families who lived among them and heroes in the leaders of the civil-rights movement, have no one to emulate now. "All they see are people like themselves, from the college of hard knocks," says Mr. Howard.

Plans and Dreams

Detroit's veteran black mayor, Coleman Young, has a poem hanging in his office. The first stanza:

Cities have died, have burned,
Yet Phoenix-like returned
To soar up livelier, lovelier than before.
Detroit has felt the fire
Yet each time left the pyre
As if the flames had power to restore.

If these verses seem to be running quite a bit ahead of the facts, there is no shortage of people at City Hall who believe a Detroit renaissance is indeed attainable. Driving a visitor around town, Emmett Moten, the mayor's apostle of development, sees not blight but opportunities. "This area is going to be totally rejuvenated," Mr. Moten says again and again, waving at vacant lots, empty structures and some places where redevelopment is under way.

Detroit's past pattern of development has sometimes only contributed to the problems it faces today. For one thing, past city leaders allowed factories and warehouses to be built along its attractive river front, blighting one of its prime areas. There was little thought given then to making the city less reliant on an auto business that has since sunk into the doldrums.

At the same time, federally financed projects that were supposed to make Detroit a model city sometimes promoted the deterioration of stable black neighborhoods. Interstate 75, for example, was routed through Hastings Street, a one-time center of black business, and critics contend this speeded the neighborhood's decline. "This city was devastated by urban renewal," says Erma Henderson, the black president of Detroit's city council.

The combative but popular Coleman Young, mayor since 1974, has been pushing this prescription: Build a healthy downtown core, thus attracting conventions and new jobs in finance, commerce and other non-auto segments; as more businesses open, more will come; as jobs and businesses increase, so will tax revenues, and the new prosperity will spread into the neighborhoods.

The new downtown, anchored on a redeveloped sliver of river front, has been taking shape in recent years, sprouting luxury apartments, a new hotel, a river-front plaza, office towers and other trappings of a vital modern city. Through hefty tax abatements, Detroit also has persuaded General Motors Corp. and Chrysler Corp. to invest more in their city auto plants. Wall Street voiced its approval last year by restoring the credit rating Detroit lost when it nearly went bankrupt in 1981.

The mayor's focus on downtown, however, alarms City Councilman Mel Ravitz and others, who are particularly irate about a tax policy that pumps certain tax revenues from part of downtown back into that same area instead of spreading them out fully. But the mayor says the long haul will prove him right. "What I've been trying to do," he says, "is to develop downtown to make the hard conversion from automobiles to service and high tech, which is what we must do if this city is to survive. . . . There is no other answer."

But there is another question. Will tomorrow's Detroit be able to field a trained and willing work force to do the jobs the city is trying to attract—or will the pathology of the inner city destroy it before it can develop?

* * *

At the request of a visitor, Bill Howard, the youth counselor at Joy Junior High, passes out a questionnaire in two classes. It reveals that a third of the children have been offered drugs and that two-thirds know someone their age selling them.

But the answers to other questions uncover a resilience of spirit and a determination to enter the mainstream that offer Detroit some hope for its future. Asked if they expect to graduate from high school, a surprising number of the children are positive: They write that they want to be nurses, doctors, computer programmers, soldiers.

Whom do they admire? Martin Luther King, many answer. One writes: "My mother, because she is tough under pressure." These are the kinds of answers that could come from children in any school in any stable, decent community, and for a moment it is possible to forget that the moral and physical blight of the ghetto is just outside.

But suddenly it intrudes in a single line, tortuously written and full of misspellings, produced by a 15-year-old girl. Asked for her definition of the American dream, she writes: "To go to school and fenisch my Schooling whithout getting prenant."

UNITED STATES CATHOLIC CONFERENCE
Department of Social Development and World Peace
1312 MASSACHUSETTS AVENUE N.W., WASHINGTON, D.C. 20005 (202) 659-6820

Office of the Secretary

(C 100 rtd)

June 12, 1987

Honorable Edward M. Kennedy
United States Senate
Chairman, Committee on Labor
and Human Resources
Washington, D.C. 20510

Dear Senator Kennedy:

I am writing you about a particular concern which I have about S. 557, "The Civil Rights Restoration Act," which is now pending before the Senate.

As the representative of the United States Catholic Conference (USCC), I testified on the legislation before the Senate Labor and Human Resources Committee on April 1. I understand that a question has been raised about my testimony on the need for an amendment to the religious tenet exemption in S. 557. A careful reading of both the testimony and the transcript of the hearing would reveal that as a representative of the USCC, I stated that the Bishops'Conference is satisfied that the Committee bill adequately protects institutions controlled by religious organizations from Title IX requirements which conflict with their religious tenets.

However, it should be noted that my written testimony did not address the concerns of institutions, including Catholic and other religious higher education institutions which may not be considered as controlled by a religious organization. During the questions and answers period, however, I recognized these concerns, noting that an amendment in this area would have to be carefully done.

The problems facing these institutions were addressed in a statement of the National Asssociation of Independent Colleges and Universities (NAICU), submitted to your Committee for the record on April 10, 1987.

We are generally sympathetic to the concerns of NAICU and supportive of their recommended amendment, which I understand will be offered on the Senate floor by Senator Hatch. I trust that as manager of this bill you will do what you can to insure that our position is accurately understood by your Senate colleagues.

Thank you for your consideration of our views as you deliberate on this most important matter.

Sincerely yours,

+ Joseph M. Sullivan

Most Rev. Joseph M. Sullivan
Chairman
Committee on Social Development
and World Peace

cc: The Honorable Orrin G. Hatch

Questions and Answers Concerning the Grove City Legislation

Background

1. What statutes are amended by the bills dealing with the Grove City College v. Bell decision?

   a. Title VI of the Civil Rights Act of 1964, which forbids discrimination "on the ground of race, color, or national origin . . . under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

   b. Title IX of the Education Amendments of 1972, which forbids discrimination "on the basis of sex . . . under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a).

   c. Section 504 of the Rehabilitation Act of 1973, which forbids discrimination against an "otherwise qualified handicapped individual . . . solely by reason of . . . handicap . . . under any program or activity receiving Federal financial assistance. . . ." 29 U.S.C. § 794.

   d. The Age Discrimination Act of 1975, which forbids discrimination "on the basis of age . . . under any program or activity receiving Federal financial assistance." 42 U.S.C. § 6102.

2. What did the Supreme Court hold in the Grove City case?

   a. Even though the College refused all direct federal financial assistance, it was not entirely free from Title IX coverage because it enrolled students who themselves received federal education aid.

   b. The only "program or activity" receiving federal financial assistance was the College's student aid program, and not the entire College.

Flaws in "The Civil Rights Restoration Act of 1987"

3. Why is The Civil Rights Restoration Act not an appropriate measure to overturn the Grove City decision?

   The Civil Rights Restoration Act of 1987 -- like the Civil Rights Act of 1984 -- specifies extremely broad coverage principles for any entity which receives federal funds, regardless of the amount or purpose of the funding. In fact, The Civil Rights Restoration Act of 1987 does not

merely "restore" the pre-Grove City scope of coverage under the four civil rights statutes. This bill would vastly expand such coverage over local and State governments, private organizations, businesses, farmers, private and religious schools, and higher education.

4. In what specific ways would The Civil Rights Restoration Act expand pre-Grove City coverage?

Without being exhaustive, some examples are:

- o Farmers receiving crop subsidies and price supports will be subject to coverage.

- o Grocery stores and supermarkets participating in the Food Stamp Program will be subject to coverage solely by virtue of their participation in that program.

- o Every school in a religious school system will be covered in its entirety if any one school within the school system receives even one dollar of federal financial assistance.

- o An entire church or synagogue will be covered under Title VI, Section 504, and the Age Discrimination Act, if it operates one federally-assisted program or activity, as well as under Title IX if the federally-assisted program or activity is educational (with exceptions under Title IX in those circumstances where Title IX requirements conflict with religious tenets).

- o Every division, plant, store, and subsidiary of a corporation principally engaged in the business of providing education, health care, housing, social services, or parks and recreation will be covered in its entirety whenever one portion of one plant receives any federal financial assistance.

- o The entire plant or separate facility of all other corporations would be covered if one portion of, or one program at, the plant or facility receives any federal financial assistance.

- o A state, county, or local government department or agency will be covered in its entirety, whenever one of its programs receives federal aid. Thus, if a state health clinic is built with federal funds in San Diego, California, not only is the clinic covered, but all activities of the state's health department in all parts of the state are also covered.

- o A private, national social service organization will be covered in its entirety, together with all of its local chapters, councils, or lodges, if one local chapter, council, or lodge receives any federal financial assistance.

- o Every college or university in a public system of higher education will be covered in its entirety if just one department at one school in that system receives federal financial assistance.

- o A school, college, or university investment policy and management of endowment will be covered if the institution receives even one dollar of federal education assistance.

- o The commercial, non-educational activities of a school, college, or university, including rental of commercial office space and housing to those other than students or faculty, will be covered if the institution receives even one dollar of federal education assistance.

- o A new, vague catch-all provision would provide additional coverage in uncertain ways.

5. (a) Weren't grocery stores participating in the Food Stamp Program always covered; and (b) isn't there an exemption for grocers with less than 15 employees in the Department of Agriculture Section 504 regulations?

   (a) Grocery stores and other stores participating in the Food Stamp Program were not subjected to coverage under Section 504 or the other statutes prior to Grove City. See, e.g., Letter of Daniel Oliver, General Counsel, Department of Agriculture to Senator Jesse Helms, July, 1984.

   (b) Department of Agriculture Section 504 regulations cover all entities deemed recipients, even ones with less than 15 employees. The regulations, however, provide for slightly reduced compliance burdens in just a few areas for a recipient with less than 15 employees. Therefore, if The Civil Rights Restoration Act is enacted, all grocers, including small ones, will have to comply with all but a few of the Department of Agriculture's extensive Section 504 regulations. Among the regulations applicable even to the smallest grocery store are:

- o paperwork and notice requirements;
- o a requirement to consult with disabled persons or disability rights groups and to make a record of such consultations;
- o extensive employment regulations;
- o regulations applicable to new construction or alteration of an existing building;
- o a requirement to "take appropriate steps" to guarantee that communications with hearing-impaired and vision-impaired applicants, employees, and customers can be understood;
- o a requirement to undertake home deliveries or install wheelchair ramps.

Moreover, grocers with 15 or more employees -- which includes numerous small businesses -- have added burdens under the regulations such as:

- o the requirement of adopting "grievance procedures that incorporate appropriate due process standards";
- o the requirement of providing auxiliary aids for hearing-impaired and vision-impaired persons if necessary for them to work or shop at the store.

These requirements are generally applied to all other covered programs by all other federal agencies, as well.

6. What would be the consequences of an expansion of coverage under these federal civil rights statutes?

More sectors of American society will be subject to: increased federal paperwork requirements; random on-site compliance reviews by federal agencies even in the absence of an allegation of discrimination; thousands of words of federal regulations, including the Section 504 regulations mentioned above; and increased exposure to costly private lawsuits that will inevitably seek the most expansive interpretation of the already overbroad language of the bill.

Title IX and Abortion

The Department of Education's Title IX regulations require an educational institution to treat termination of pregnancy by employees like any other temporary disability "for all job-related purposes, including commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment." 34 C.F.R. 106.57(c). Moreover, the same treatment of termination of pregnancy applies to the provision of "a medical, hospital, accident or life insurance benefit to any of its students." 34 C.F.R. 106.39; id. at 106.40(b)(4) ("A recipient shall treat . . . termination of pregnancy . . . in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan, or policy" of the recipient with respect to students). Moreover, a recipient must provide leave for termination of pregnancy for both students and employees even when "a recipient . . . does not maintain a leave policy for its students [or employees, 34 C.F.R. 106.57(d)], or when a student [or employee] does not otherwise qualify for such leave under the recipient's leave policy." 34 C.F.R. §106.40(b)(5); id. 106.57(d).

The Civil Rights Restoration Act would expand the reach of these pro-abortion regulations.

In response to these pro-abortion regulations and their expansion under the bill, the House Education and Labor Committee adopted the following language as an amendment to Grove City legislation in the 99th Congress on May 21, 1985: "Nothing in this title shall be construed to grant or secure or deny any right relating to abortion or the funding thereof, or to require or prohibit any person, or public or private entity or organization, to provide any benefit or service relating to abortion." This is the Tauke-Sensenbrenner amendment. It is known as the Danforth amendment in the Senate.

Title IX and Religious Tenets

When Congress adopted Title IX in 1972, Congress also adopted language which excluded from Title IX coverage those practices of institutions controlled by religious entities which are based on religious tenets but which would conflict with Title IX. At that time, many religious institutions were directly controlled by religious entities. Many of these institutions today retain their religious mission but are controlled by lay boards, even though affiliation with religious entities and identification with religious values continues. To address the desire to assure tolerance for religiously based deviations from Title IX requirements, the House Education and Labor Committee adopted language excluding from Title IX coverage "any operation of an entity which

is controlled by a religious organization, or affiliated with such an organization when the religious tenets of that organization are an integral part of such operation, if the application of Section 901 to such operation would not be consistent with the religious tenets of such organization."

In the 100th Congress, the language which is proposed is slightly different: the language will exempt from coverage a policy of an entity which is controlled by, or closely identifies with the tenets of, a religious organization when that policy conflicts with Title IX. This language is based on language in a ban on religious discrimination enacted in the Higher Education Act of 1986. The language is supported by the National Association of Independent Colleges and Universities (NAICU) (over 800 independent colleges and universities with two million students); Agudath Israel, an orthodox Jewish group; the National Society for Hebrew Day Schools (approximately 500 elementary and secondary schools); and the Association of Advanced Rabbinical and Talmudic Schools (approximately 60 schools).

COMMITTEE MARK-UP
20 MAY 1987

100TH CONGRESS
1ST SESSION

S. 557

To restore the broad scope of coverage and to clarify the application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 19, 1987

Mr. KENNEDY (for himself, Mr. WEICKER, Mr. METZENBAUM, Mr. PACKWOOD, Mr. CRANSTON, Mr. STAFFORD, Mr. ADAMS, Mr. BAUCUS, Mr. BENTSEN, Mr. BIDEN, Mr. BINGAMAN, Mr. BRADLEY, Mr. BREAUX, Mr. BURDICK, Mr. CHAFEE, Mr. CHILES, Mr. COHEN, Mr. DASCHLE, Mr. DECONCINI, Mr. DODD, Mr. FORD, Mr. FOWLER, Mr. GLENN, Mr. GORE, Mr. HARKIN, Mr. HOLLINGS, Mr. INOUYE, Mr. JOHNSTON, Mr. KERRY, Mr. LAUTENBERG, Mr. LEAHY, Mr. LEVIN, Mr. MATSUNAGA, Mr. MELCHER, Ms. MIKULSKI, Mr. MITCHELL, Mr. MOYNIHAN, Mr. PELL, Mr. PROXMIRE, Mr. RIEGLE, Mr. ROCKEFELLER, Mr. SANFORD, Mr. SARBANES, Mr. SIMON, Mr. SPECTER, Mr. STEVENS, Mr. WIRTH, Mr. DIXON, Mr. RUDMAN, Mr. DURENBERGER, Mr. EVANS, Mr. BOSCHWITZ, and Mr. HEINZ) introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

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A BILL

To restore the broad scope of coverage and to clarify the application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Civil Rights Restoration Act of 1987".

FINDINGS OF CONGRESS

SEC. 2. The Congress finds that—

(1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964; and

(2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

EDUCATION AMENDMENTS AMENDMENT

SEC. 3. Title IX of the Education Amendments of 1972 is amended by adding at the end the following new section:

"INTERPRETATION OF 'PROGRAM OR ACTIVITY'

"SEC. 908. For the purposes of this title, the term 'program or activity' and 'program' mean all of the operations of—

"(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

"(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

"(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

"(B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

"(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

"(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

"(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

"(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corpo-

ration, partnership, private organization, or sole proprietorship; or

"(4) any other entity established by ~~combination comprised of~~ two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 901 to such operation would not be consistent with the religious tenets of such organization.".

REHABILITATION ACT AMENDMENT

SEC. 4. Section 504 of the Rehabilitation Act of 1973 is amended—

(1) by inserting "(a)" after "SEC. 504."; and

(2) by adding at the end the following new subsections:

"(b) For the purposes of this section, the term 'program or activity' means all of the operations of—

"(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

"(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each State or local government other entity) to which the assistance is extended, in the case of assistance to a State or local government;

"(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

"(B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

"(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

"(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

"(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

"(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

"(4) any other entity established by ~~combination comprised of~~ two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

"(c) Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on the date of the enactment of this subsection.".

AGE DISCRIMINATION ACT AMENDMENT

SEC. 5. Section 309 of the Age Discrimination Act of 1975 is amended—

(1) by striking out "and" at the end of paragraph (2);

(2) by striking out the period at the end of paragraph (3) and inserting "; and" in lieu thereof; and

(3) by inserting after paragraph (3) the following new paragraph:

"(4) the term 'program or activity' means all of the operations of—

"(A)(i) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

"(ii) the entity of such State or local government that distributes such assistance and each State or local government such department or agency (and each other entity) to which the assistance is extended, in the case of assistance to a State or local government;

"(B)(i) a college, university, or other postsecondary institution, or a public system of higher education; or

"(ii) a local educational agency (as defined in section 198(a)(10), of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

"(C)(i) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

"(I) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

"(II) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

"(ii) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

"(D) any other entity established by ~~combination comprised of~~ two or more of the entities described in subparagraph (A), (B), or (C);

any part of which is extended Federal financial assistance.".

CIVIL RIGHTS ACT AMENDMENT

SEC. 6. Title VI of the Civil Rights Act of 1964 is amended by adding at the end the following new section:

"SEC. 606. For the purposes of this title, the term 'program or activity' and the term 'program' mean all of the operations of—

"(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

"(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

"(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

"(B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

"(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

"(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

"(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

"(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

"(4) any other entity established by ~~combination comprised of~~ two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.".

RULE OF CONSTRUCTION

SEC. 7. Nothing in the amendments made by this Act shall be construed to extend the application of the Acts so amended to ultimate beneficiaries of Federal financial assistance excluded from coverage before the enactment of this Act.

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100TH CONGRESS
1ST SESSION

H. R. 1881

To clarify the meaning of the phrase "program or activity" as applied to educational institutions that are extended Federal financial assistance, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 31, 1987

Mr. SENSENBRENNER (for himself, Mr. STENHOLM, Mr. HYDE, Mr. DEWINE, Mr. EMERSON, Mr. COBLE, Mr. SKEEN, Mr. LAGOMARSINO, Mr. COMBEST, Mr. CRAIG, Mr. SHUMWAY, and Mr. HUBBARD) introduced the following bill; which was referred jointly to the Committees on Education and Labor and the Judiciary

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A BILL

To clarify the meaning of the phrase "program or activity" as applied to educational institutions that are extended Federal financial assistance, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1987".

SEC. 2. (a) Title IX of the Education Amendments of 1972 is amended by adding at the end thereof the following new section:

"SEC. 908. (a) Notwithstanding the decisions of the Supreme Court in Grove City College and others, versus Bell, Secretary of Education, and others, and in North Haven Board of Education and others, versus Bell, Secretary of Education, and others, the phrase 'program or activity' as used in this title shall, as applied to educational institutions which are extended Federal financial assistance, mean the educational institution.

"(b) In any other application of the provisions of this title, nothing in subsection (a) shall be construed to expand or narrow the meaning of the phrase 'program or activity' and that phrase shall be construed without reference to or consideration of the Supreme Court decisions in Grove City and North Haven.

"(c) Nothing in this title shall be construed to grant or secure or deny any right relating to abortion or the funding thereof, or to require or prohibit any person, or public or private entity or organization, to provide any benefit or service relating to abortion.".

(b) Section 901(a) of title IX of the Education Amendments of 1972 is amended by striking out subsection (3) and inserting in lieu thereof the following:

"(3) this section shall not apply to an educational institution which is controlled by, or which is closely identified with the tenets of, a particular religious

organization if the application of this section would not be consistent with the religious tenets of such organization;".

(c) Section 504 of the Rehabilitation Act of 1973 is amended by inserting "(a)" after the section designation and by adding at the end thereof the following new subsection:

"(b)(1) Notwithstanding the decisions of the Supreme Court in Grove City College and others, versus Bell, Secretary of Education, and others, and in North Haven Board of Ecucation and others, versus Bell, Secretary of Education, and others, the phrase 'program or activity' as used in this section shall, as applied to educational institutions which are extended Federal financial assistance, mean the educational institution.

"(2) In any other application of the provisions of this section, nothing in paragraph (1) shall be construed to expand or narrow the meaning of the phrase 'program or activity' and that phrase shall be construed without reference to or consideration of the Supreme Court decisions in Grove City and North Haven.".

(d) The Age Discrimination Act of 1975 is amended by adding at the end thereof the following new section:

"SEC. 310. (a) Notwithstanding the decisions of the Supreme Court in Grove City College and others, versus Bell, Secretary of Education, and others, and in North Haven

Board of Education and others, versus Bell, Secretary of Education, and others, the phrase 'program or activity' as used in this title shall, as applied to educational institutions which are extended Federal financial assistance, mean the educational institution.

"(b) In any other application of the provisions of this title, nothing in subsection (a) shall be construed to expand or narrow the meaning of the phrase 'program or activity' and that phrase shall be construed without reference to or consideration of the Supreme Court decisions in Grove City and North Haven.".

(e) Title VI of the Civil Rights Act of 1964 is amended by adding at the end thereof the following:

"SEC. 606. (a) Notwithstanding the decisions of the Supreme Court in Grove City College and others, versus Bell, Secretary of Education, and others, and in North Haven Board of Education, and others, versus Bell, Secretary of Education, and others, the phrase 'program or activity' as used in this title shall, as applied to educational institutions which are extended Federal financial assistance, mean the educational institution.

"(b) In any other application of the provisions of this title, nothing in subsection (a) shall be construed to expand or narrow the meaning of the phrase 'program or activity' and that phrase shall be construed without reference to or consid-

eration of the Supreme Court decisions in Grove City and North Haven.".

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SPECIAL ANALYSIS J

CIVIL RIGHTS ACTIVITIES

"The explicit promise in the Declaration of Independence that we are endowed by our Creator with certain inalienable rights was meant for all of us. It was not meant to be limited or perverted by special privilege, or by double standards that favor one group over another. It is a principle for eternity, America's deepest treasure."—PRESIDENT REAGAN, August 1, 1983

"Our ruling in *Teamsters* that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination is consistent with the policy behind section 706(g) of Title VII . . . That policy, which is to provide make-whole relief only to those who have been actual victims of illegal discrimination, was repeatedly expressed by the sponsors of the Act during the congressional debates . . . Senator Humphrey explained the limits on a court's remedial powers as follows: 'No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination.' " *Firefighters* v. *Stotts,* (104 S.Ct. 2576 (1984))

"Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held . . . The effects of racial prejudice, however real, cannot justify a racial classification . . ."—*Palmore* v. *Sidoti* (104 S.Ct. 1879 (1984))

A "MOVEMENT OF LAW AND POLICY"

"I am pleased at the movement of law and policy in the direction of a color-blind society."—PRESIDENT REAGAN, October 26, 1984

Some 130 Federal statutes prohibit discrimination based on sex, race, color, religion, national origin, age, or handicap in employment, housing, education, credit, and public accommodations (as well as in the exercise of such rights and responsibilities of citizenship as voting and jury service). Taken as a whole, these laws express the vision Americans have come to share of the nation we want to be: a nation in which every man and woman is treated according to individual effort and ability; a nation in which one's race, sex, religion, color, or national origin are truly irrelevant to the judgment of what a person is worth and what he or she can contribute.

Despite this clear expression of national intent, however, decisions affecting who will be hired, promoted, or laid off; where children will attend school and what courses they may take; who shall be permitted to live, or to continue to live, in public housing;

and who shall be admitted to colleges or to graduate and professional schools, continue to be made on the basis of race, national origin, or sex—not the qualifications and needs of individuals. And too frequently, such discrimination occurs not despite of, but in asserted compliance with the very constitutional and statutory mandates designed to make color, or sex, or national origin irrelevant.

The worthwhile concept of affirmative action to end discrimination and to ensure equal opportunity has come to mean, in some quarters, that government should require that selections be made so as to attain specified numerical proportions of this group or that. And the consequences of this drift (for society as a whole, and for its purported beneficiaries) are becoming increasingly obvious:

- Quotas institutionalize the making of distinctions on the basis of race and sex. Already, we have the distasteful spectacle of institutions reviewing the ancestry of individuals to establish who is qualified, or not qualified, for opportunities on the basis of being "Hispanic", or "black", or "American Indian", or "Asian and Pacific Islander" or "white".[1]
- Quotas accustom us as a nation to think in terms of group, not individual, entitlements. The lesson of quotas is that advantages are to be won or lost on the basis of our ancestry—not on what we, as individuals, have struggled to become. Ultimately, they teach that opportunities are earned not by individual effort, but by groups who use political alliances to negotiate "a piece of the action" for their members. At the end of that quota road is a society divided into racial and ethnic groups; of separate fiefdoms competing for jobs and power.
- In mandating preferences rather than rigorous nondiscrimination, quotas falsely teach that members of the preferred groups would not be selected without them. The attainments of women and members of minority groups are made to appear benefits conferred by the Federal government—not the rewards of hard work. By casting a broad and tangible shadow on the real achievements of minorities and women, quotas promote the very prejudices they were initiated to overcome.
- Quotas rarely benefit the poorest, the most unskilled, the most economically hopeless. Often those who benefit most from group preferences are those who have already come furthest in freeing themselves from past burdens. Indeed, the primary beneficiaries of quotas may be the armies of lawyers and administrators whose task is not to increase opportunities for all, but to mediate between institutions and the Federal government.
- Institutions, large and small, are increasingly finding it more expedient to move towards mechanical quotas under various guises and euphemisms instead of providing fair treatment for all workers.
- The moral opprobrium which should accompany a finding of discrimination (and constitute, as it did in the early and successful days of the civil rights movement, a powerful weapon against discrimination) has decreased, and threatens to be lost entirely, as the clear concept of discrimination is replaced by complicated numbers games played by lawyers and government administrators.

By contrast, true affirmative action (to which this nation, and this administration, are committed) bears no relationship to quotas or preferential treatment. Affirmative action properly means expanding opportunities by:

- vigorously recruiting qualified minority and women candidates;
- encouraging qualified minority and women candidates to apply for educational, employment, and other opportunities in which they have been traditionally underrepresented;
- identifying barriers to opportunities for women and minority group members;
- assisting unions, community groups, educational institutions, public and private institutions, and employers in devising training programs to overcome such barriers.

This administration has continued to accord a relatively high budgetary priority to Federal civil rights programs. It is committed to the principle of nondiscrimination, and accordingly to correcting those errors of law and policy, encrusted in many Federal regulations, which are inconsistent with that principle.

1984 was a year of considerable accomplishment, not only in terms of enforcing Federal civil rights mandates, but in the progress of the ineluctable movement of law and policy through which they are being restored to their original meaning and purpose. The analysis which follows details those accomplishments—and the work which remains to be done.

[1] The above categories are not self-defining, however, and need even further and continuous elaboration by learned Federal administrators. E.g., the *Manual* developed in the prior administration for use by presonnel of the Department of Labor's Office of Federal Contract Compliance Programs provides the following detailed guidance:

"The Indian Subcontinent is now included under 'Asian or Pacific Islander' and itself includes: India, Pakistan, Bangladesh, Sri Lanka, Nepal, Sikkim, and Bhutan."

"Not all persons from Central and South American countries will be included in the Hispanic category. Persons from Brazil, Guyana, Surinam, or Trinidad, for example, are classified by race, and are not always Hispanic."

"Persons of Portugese ancestry will not be included in the Hispanic category, but will be classified by race." U.S. Department of Labor, *Federal Contract Compliance Manual*, p. 2-31.

and who shall be admitted to colleges or to graduate and professional schools, continue to be made on the basis of race, national origin, or sex—not the qualifications and needs of individuals. And too frequently, such discrimination occurs not despite of, but in asserted compliance with the very constitutional and statutory mandates designed to make color, or sex, or national origin irrelevant.

The worthwhile concept of affirmative action to end discrimination and to ensure equal opportunity has come to mean, in some quarters, that government should require that selections be made so as to attain specified numerical proportions of this group or that. And the consequences of this drift (for society as a whole, and for its purported beneficiaries) are becoming increasingly obvious:

- Quotas institutionalize the making of distinctions on the basis of race and sex. Already, we have the distasteful spectacle of institutions reviewing the ancestry of individuals to establish who is qualified, or not qualified, for opportunities on the basis of being "Hispanic", or "black", or "American Indian", or "Asian and Pacific Islander" or "white".[1]
- Quotas accustom us as a nation to think in terms of group, not individual, entitlements. The lesson of quotas is that advantages are to be won or lost on the basis of our ancestry—not on what we, as individuals, have struggled to become. Ultimately, they teach that opportunities are earned not by individual effort, but by groups who use political alliances to negotiate "a piece of the action" for their members. At the end of that quota road is a society divided into racial and ethnic groups; of separate fiefdoms competing for jobs and power.
- In mandating preferences rather than rigorous nondiscrimination, quotas falsely teach that members of the preferred groups would not be selected without them. The attainments of women and members of minority groups are made to appear benefits conferred by the Federal government—not the rewards of hard work. By casting a broad and tangible shadow on the real achievements of minorities and women, quotas promote the very prejudices they were initiated to overcome.

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"Persons of Portugese ancestry will not be included in the Hispanic category, but will be classified by race." U.S. Department of Labor, *Federal Contract Compliance Manual*, p. 2-31.

- Quotas rarely benefit the poorest, the most unskilled, the most economically hopeless. Often those who benefit most from group preferences are those who have already come furthest in freeing themselves from past burdens. Indeed, the primary beneficiaries of quotas may be the armies of lawyers and administrators whose task is not to increase opportunities for all, but to mediate between institutions and the Federal government.
- Institutions, large and small, are increasingly finding it more expedient to move towards mechanical quotas under various guises and euphemisms instead of providing fair treatment for all workers.
- The moral opprobrium which should accompany a finding of discrimination (and constitute, as it did in the early and successful days of the civil rights movement, a powerful weapon against discrimination) has decreased, and threatens to be lost entirely, as the clear concept of discrimination is replaced by complicated numbers games played by lawyers and government administrators.

By contrast, true affirmative action (to which this nation, and this administration, are committed) bears no relationship to quotas or preferential treatment. Affirmative action properly means expanding opportunities by:

- vigorously recruiting qualified minority and women candidates;
- encouraging qualified minority and women candidates to apply for educational, employment, and other opportunities in which they have been traditionally underrepresented;
- identifying barriers to opportunities for women and minority group members;
- assisting unions, community groups, educational institutions, public and private institutions, and employers in devising training programs to overcome such barriers.

This administration has continued to accord a relatively high budgetary priority to Federal civil rights programs. It is committed to the principle of nondiscrimination, and accordingly to correcting those errors of law and policy, encrusted in many Federal regulations, which are inconsistent with that principle.

1984 was a year of considerable accomplishment, not only in terms of enforcing Federal civil rights mandates, but in the progress of the ineluctable movement of law and policy through which they are being restored to their original meaning and purpose. The analysis which follows details those accomplishments—and the work which remains to be done.

Table J–1. **BUDGET OUTLAYS FOR PRINCIPAL FEDERAL CIVIL RIGHTS ACTIVITIES,* 1980–1986**

(In millions of dollars)

	Total outlays	% Change
Fiscal year:		
1980 (actual)	286.8	
1986 (proposed)	337.5	+18

*Includes the Equal Employment Opportunity Commission; the U.S. Commission on Civil Rights; the Civil Rights Division, Department of Justice; the Office for Civil Rights, Department of Education; the Office of Civil Rights, Department of Health and Human Services; the Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development; the Office of Federal Contract Compliance Programs, U.S. Department of Labor; and the Architectural and Transportation Barriers Compliance Board.

A "MOVEMENT OF LAW AND POLICY": REAFFIRMING FUNDAMENTAL CIVIL RIGHTS . . .

"A core purpose of the Fourteenth Amendment was to do away with all governmentally-imposed discrimination based on race . . . Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category . . ."—*Palmore* v. *Sidoti* (104 S.Ct. 1879 (1984))

In addition to guarantees embodied in the Constitution itself, the following statutes prohibit violations of fundamental civil rights:

—The Voting Rights Act of 1965, as amended (42 U.S.C. 173 et seq.), and the Overseas Citizens Voting Rights Act (42 U.S.C. 1973 dd), which guarantee the right of all qualified citizens to register and vote without discrimination on account of race, color, membership in a language minority group, age, or absence from legal residence.

—Title 18 of the United States Code, which prohibits deprivations of rights and privileges guaranteed under the Constitution of the laws of the United States, including 18 U.S.C. 241 (conspiracy against the rights of citizens), 18 U.S.C. 242 (deprivation of rights under color of law), 18 U.S.C. 245 (interference with Federally protected rights), 18 U.S.C. 1581 (prohibition against peonage), and 18 U.S.C. 1584 (prohibition against involuntary servitude).

—42 U.S.C. 3631, which prohibits interference with housing rights.

—30 other civil rights criminal statutes (in addition to those cited above).

Within the Department, the Civil Rights Division is primarily responsible for investigating and prosecuting violations of the Federal civil rights criminal statutes. The Division annually processes a large number of complaints alleging criminal interference with civil rights. During 1984, the Division reviewed 3,410 matters which had been investigated by the Federal Bureau of Investigation and 5,207 other inquiries and complaints; and presented the results of 48 investigations to Federal grand juries. Thirty-six indictments were returned and ten informations were filed charging

a total of 93 defendants. Trials were conducted in 29 cases, resulting in the conviction of 40 defendants. An additional 33 defendants tendered guilty pleas.

The Division gave particular emphasis to investigating and prosecuting cases involving racial violence. The 13 racial violence cases filed during 1984 represent the largest number of such prosecutions in the history of the Division's criminal section. Charges were brought against 36 defendants, 13 of whom tendered guilty pleas. Successful prosecutions included the conviction of four members of the Ku Klux Klan for their roles in two separate acts of intimidation (a fifth defendant entered a guilty plea); the conviction of a defendant for causing the death of a Chinese-American in Highland Park, Michigan; and the conviction of three defendants in Milwaukee, Wisconsin, on charges of intimidating a biracial family. Two Klansmen from Oakdale, Louisiana, tendered guilty pleas for their involvement in a series of acts of intimidation. Nine Klansmen are awaiting trial on charges stemming from a violent confrontation in Decatur, Alabama, and a tenth has tendered a guilty plea for involvement in that incident.

The Civil Rights Division also continued to encourage the involvement of the United States Attorneys in civil rights prosecutions, since experience demonstrates that prosecutions handled jointly by United States Attorneys and the Division have a greater likelihood of success. The success rate (convictions plus guilty pleas) for joint prosecutions rose from 65 percent in 1982 to 84 percent in 1983 and 1984.

The Division actively prosecuted alleged violations of civil rights by government officials. As a result of the Division's efforts in 1984, a 44-count indictment was returned charging 10 officers of the Police of Puerto Rico with conspiracy to obstruct justice and numerous substantive counts of perjury regarding the unlawful killing of two independence advocates. Successful prosecutions included the conviction of a police sergeant in Massachusetts for violating the civil rights of a person whom he had thrown off a pier (and who subsequently drowned). A police officer in Hawaii was sentenced to five years imprisonment and a second officer was sentenced to three years imprisonment for violating the civil rights of an arrestee and then committing perjury during the grand jury investigation. One of these defendants was also convicted along with another police officer for his involvement in a separate incident in which a handcuffed arrestee was beaten after being taken to an isolated area. Three Federal corrections officers were convicted for beating and gassing several inmates and then attempting to obstruct investigations by the FBI and Federal grand jury by asking witnesses to lie. A police chief in Texas pled guilty in a shooting death of an individual in his custody; and a California

defendant licensed by the State to operate a foster home pled guilty to charges of sexually assaulting quadriplegic and retarded children.

The Division also continued its efforts to protect migrant workers and other minorities against violations of the involuntary servitude and peonage statutes. Particularly significant cases resulted in the guilty plea of a defendant in Texas on charges of illegally transporting 19 Mexican aliens across the State in an enclosed vehicle and forcing them to work on a farm without providing adequate food or water; and the conviction of three defendants in Michigan for compelling two elderly, retarded men to work without pay and live in unsafe and unhealthy conditions.

The Department also successfully appealed a District Court's dismissal of 24 counts of a criminal indictment alleging violations of the involuntary servitude statutes. The Ninth Circuit held, in that case, that involuntary servitude may be accomplished through coercion without the use or threatened use of physical force or imprisonment.

Under the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997, the Department of Justice's Civil Rights Division participates in litigation to vindicate the constitutional rights of persons confined to publicly operated residential institutions. These include prisons, jails, mental health and retardation facilities, juvenile detention centers and publicly operated nursing homes.

During 1984, the Division entered into three significant consent decrees resolving four of its CRIPA investigations. The consent decree in *U.S.* v. *Indiana,* stemming from the Division's investigations of two mental health facilities in Indiana, was the first settlement agreement concerning institutions for the mentally ill negotiated by the U.S. under CRIPA. The agreement requires the State to improve staffing; provide adequate medical care; improve the monitoring of the use of psychotropic medication, seclusion and restraint; improve recordkeeping procedures; and correct fire safety deficiencies. A decree entered in *Davis and U.S.* v. *Henderson* requires a Louisiana State institution for the criminally insane to substantially comply with applicable State and Federal standards governing health, safety, and patient rights. The third settlement agreement, in *U.S.* v. *Michigan,* remedied unconstitutional conditions of confinement in several prisons in that State.

During 1984, the Division also filed a suit (*U.S.* v. *City of Newark*) alleging unconstitutional conditions of confinement at the Newark City Jail; and initiated nine investigations pursuant to CRIPA (a total of twenty-two investigations were pending at the end of 1984).

The Civil Rights Division is primarily responsible for enforcing statutes guaranteeing the right to vote. Under the Voting Rights

Act, for example, it is solely responsible for designating counties where Federal personnel are necessary to conduct registration or observe polling places; and for determining whether proposed changes affecting voting in 926 political subdivisions in 21 States (including nine States in their entirety) covered by the Act's pre-clearance provisions are discriminatory. In conjunction with the Director of the Census, the Department determines which States and subdivisions of States will be subject to those pre-clearance requirements. In addition, the Office of Personnel Management is responsible for providing Federal observers as necessary to assure the fairness of elections.

The Civil Rights Division's Voting Rights Section participated in 24 new cases during 1984, 6 as plaintiff, 9 as plaintiff-intervenor, and 1 as *amicus curiae.* This was the largest number of new cases for any fiscal year since 1977. The Division received over 3,400 submissions involving more than 15,200 voting changes under section 5 of the Voting Rights Act, and objections were made to 75 changes that were contained in 33 different submissions. These figures represent the largest number of changes ever submitted under section 5 in a single year, and the largest number of submissions ever received under section 5 in a single year.

A total of 1,220 Federal observers were assigned to cover 20 elections in 37 counties in 6 States during 1984. These locations include 10 counties that were among the 13 counties certified for Federal examiners by the Attorney General this year under section 6 of the Voting Rights Act. This is the largest number of counties to have been certified under section 6 of the Act in any fiscal year since 1967—and included the first county ever to be certified in the State of North Carolina.

During 1984, the Department of Justice's efforts to enforce these fundamental civil rights contributed to a particularly significant reaffirmation, by the Supreme Court, of the right of individuals to be free from official discrimination based on race. In *Palmore* v. *Sidoti* (104 S.Ct. 1979 (1984)), a lower court had revoked a parent's child custody because the parent had married a person of a different race, asserting that ". . . despite the strides that have been made in bettering relations between the races in this country, it is inevitable that [the child would] if allowed to remain in her present situation and attain school age and thus [become] more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come." The Department of Justice filed an *amicus* brief emphasizing that the Equal Protection Clause prohibits just such "race conscious" decisionmaking by Government.

In a unanimous opinion the Supreme Court, noting that ". . . it is clear that the [lower court's decision] would have been different

had petitioner married a Caucasian male of similar respectability," decisively agreed with the Department's position:

> "The question . . . is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. 'Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.' "

A "MOVEMENT OF LAW AND POLICY": REASSERTING EQUALITY OF EMPLOYMENT OPPORTUNITY

> "Your question concerning whether my administration would pursue mandatory quotas to ensure equal employment opportunity, however, contains a contradiction in terms. I do not believe that you can remedy discrimination by discriminating—and I remain unalterably opposed to discrimination by quota, an idea that would undermine the very concept of equality itself.
>
> "Moreover, in its recent decision in *Firefighters* v. *Stotts*, the Supreme Court clearly stated that the policy behind Title VII 'is to provide make whole relief only to those who have been actual victims of illegal discrimination'—and quoted numerous statements by Senator Hubert Humphrey and other primary sponsors rejecting the proposition that Title VII would authorize the EEOC or the courts to impose employment quotas."—PRESIDENT REAGAN, October 26, 1984

The principal statutes and Executive orders prohibiting discrimination in employment are:

—Title VII of the Civil Rights Act, which prohibits employment discrimination based on race, color, religion, national origin, or sex.

—The Equal Pay Act (EPA), as amended which prohibits discrimination in compensation based on sex.

—The Age Discrimination in Employment Act (ADEA), which prohibits discrimination against persons aged 40 through 70 based on age.

—Executive Order 11246, as amended, section 503 of the Rehabilitation Act of 1973, and section 402 of the Vietnam Veterans Readjustment Act, which prohibit employment discrimination by Federal contractors based on race, color, sex, national origin, religion, handicap, service-connected disability, or Vietnam era military service, and require Federal contractors to take affirmative action to assure that such discrimination does not occur.

Both in language and intent, Title VII is a model of clarity. On its face, it clearly prohibits employers from, e.g., limiting, segregating, or classifying "employees or applicants for employment in any way which would deprive or tend to deprive *any individual of employment opportunities or otherwise affect his status as an employee, because of such individual's race, color, religion, sex, or national origin*" (emphasis added). To cite only one of many statements by its sponsors, Senator Hubert Humphrey (the principal author of that title) emphasized that:

> "Contrary to the allegations of some opponents of [Title VII], there is nothing in it that will give any power to the [EEOC] or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance."
>
> "That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, the very opposite is true. Title VII prohibits discrimination."

Indeed, Senator Humphrey thought the idea that Title VII would permit or mandate quotas so ludicrous that he challenged one Senator:

> "If the Senator can find in Title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color . . . I will start eating the pages one after another, because it is not in there."

During 1984 the Supreme Court made clear, in its decision in *Firefighters* v. *Stotts* (104 S.Ct. 2576 (1984)), that, like Hubert Humphrey, it as well could find no such language in Title VII.

In *Stotts,* the plaintiffs had obtained a court order prohibiting the City of Memphis, TN, from implementing a seniority-based layoff of firefighters if doing so would reduce the percentage of black firefighters employed by the department. Subsequently the City laid off some firefighters with greater seniority than other firefighters who were retained—solely because of their race. The Department of Justice filed a brief in this case reiterating this administration's position that, as a matter of law and policy, courts may not order as purported "relief" under Title VII, the very discrimination that the statute itself prohibits. In language sweeping broadly beyond the narrow issue of layoffs, the Court agreed; citing, among other evidence of Congressional intent, the statement by the principal Senate sponsors that under Title VII:

> ". . . not even a Court, much less the [Equal Employment Opportunity] Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this Title."

Two other noteworthy decisions in which the Supreme Court significantly clarified and strengthened protections against employment discrimination in opinions adopting positions taken by the Department of Justice were *Consolidated Rail Corporation* v. *Darrone* (104 S.Ct. 1248 (1984) and *Hishon* v. *King & Spalding* (104 S.Ct. 2229 (1984)).[1] In *Consolidated Rail Corporation* v. *Darrone,*

[1] Note.—The Department enjoyed considerable success in appellate litigation concerning civil rights issues (employment and non-employment). During 1984, the Civil Rights Division filed a total of 28 papers in the Supreme Court and 49 in the circuit courts of appeals regarding civil issues. 85 percent of the merits decisions in these cases were in full or partial accord with the Division's positions.

the Court agreed that section 504 of the Rehabilitation Act of 1973 prohibits employment discrimination by Federal aid recipients based on handicap even where the primary purpose of the Federal aid is not to provide employment. In *Hishon* v. *King & Spalding,* the Court agreed that Title VII prohibits discrimination by law firms and other voluntary professional associations in partnership decisions.

In the Fifth Circuit, the Department succeeded (in *Williams* v. *City of New Orleans* (729 F.2d. 1154 (1984))) in forestalling the imposition of a quota system governing promotions in the New Orleans Police Department. The Department had entered the litigation at the behest of female, Hispanic, and white police officers who would have been excluded from promotion opportunities solely because of their race had the quota system been allowed to go into effect.

The Department of Justice's Civil Rights Division is responsible for litigating alleged violations of Title VII by public employers and of Executive Order 11246, as amended, by Government contractors. The Department is also responsible for litigating any equal employment issues arising under Title VI and other provisions requiring nondiscrimination in federally assisted programs and activities. During 1984, the Division filed 19 new suits and obtained agreement to 14 consent decrees in employment discrimination cases. Ten of those decrees have been approved and the remaining four were submitted for approval. The decrees reflect the Department's commitment to vindicating the rights of victims of discriminatory practices, while at the same time opposing preferential treatment in hiring, promotion, assignment or layoff which would create new victims. The consent decrees approved and other orders entered during 1984 provided for the payment of over $900,000 in backpay awards to persons identified as having been harmed by prior practices, plus the elimination of unlawfully discriminatory practices, and enhanced recruitment of members of the group(s) previously excluded. Four additional consent decrees, which were conditionally approved just after the beginning of 1985, provide for backpay awards totaling almost $2,000,000.

Many of the suits filed by the Division during 1984 involved large employers alleged to have engaged in a pattern or practice of employment discrimination; and several entailed new litigation initiatives, including:

- Four lawsuits under the Pregnancy Discrimination Act which were the first such suits the Division has brought to equalize health benefits coverage for employees' spouses. The Division alleged that the defendants had discriminated against their male employees on the basis of sex by providing less comprehensive health insurance coverage for the pregnancy-related medical expenses incurred by spouses of male employees;
- A suit under Title VII involving discrimination against women by a corrections department which refused to hire or promote women into any correctional officer position involving work within the male cell blocks of the local jail. This policy not only precluded females from occupying entry level correctional officer positions assigned to the male housing units but also (because supervisory positions entail work within the male cell blocks) precluded women from attaining any supervisory position within the jail; and,
- The first suit the Division has brought against a State bureau of investigation, which seeks to eliminate discrimination against women in the hire, promotion and assignment of female agents.

Clearly if (as the Supreme Court made clear in *Stotts*) quotas cannot be imposed by the courts as "remedies" for identified discrimination, such inherently unfair and stigmatizing statistical measures are equally unavailable to administrative agencies as "remedies" for such "deficiencies" as "underutilization" and "adverse impact." Yet such an approach may still be at the heart of the regulations, inherited by this administration, for the Department of Labor's Office of Federal Contract Compliance Programs.

Executive Order 11246, as amended (upon which OFCCP's regulations are largely based) was issued by President Johnson in 1965. Like Title VII, it was originally intended [1] to assure that employment by Federal contractors was *without regard* to race, sex, or national origin. As the Office of Federal Contract Compliance Programs' regulations for implementing this Executive order have grown (from 16 pages as recently as 1970 to 192 pages today), however, they have become the most widely applicable *requirement* that employers base employment decisions on those very factors.

During the 1970's, the OFCCP regulations which this administration inherited were perhaps chiefly responsible for converting the worthwhile concept of affirmative action, in the public mind, into a simple euphemism for quotas. Indeed, a recent and widely publicized study of OFCCP's impact during the years 1974–80—prior to this Administration's assumption of office—by economist Jonathan S. Leonard was modeled on the (not widely publicized) assumption that, under those regulations, "Affirmative Action [in the sense mandated by OFCCP regulations] may be thought of as a tax on

[1] E.g., Senator Daniel Moynihan has observed: "I was an Assistant Secretary of Labor in the administration of Lyndon Johnson and helped prepare Executive Order 11246, on equal employment opportunity. This continues to be the basis of the affirmative action programs of the Federal government. It was directed against a specific evil and accomplished much good. But who in the executive branch fifteen years ago would have dreamed the day would come when the Federal courts would require a census in which all employees and judicial officers would be classified by 'race/national origin groups' including 'Arabic' and 'Hebrew'? This was just the sort of thing we assumed we were working against." *Harper's,* December, 1980.

the employment of white males in the contractor sector. If they are immobile, white male workers bear the tax burden and their relative wages fall:"

> "Intuitively, an increase in the affirmative action 'tax' shifts the demand curve for white male labor down."
>
> ". . . The difference between the change in the employment of white males at contractor firms . . . and at non-contractor firms . . . is then simply a function of affirmative action pressure."
>
> ". . . This is the central equation to be tested, . . . *If affirmative action has been effective, these employment shifts will be greater among contractors*" [emphasis added].[2]

Indeed, Leonard's work contains considerable evidence (also unpublicized) supporting the observation of former Solicitor of Labor Lawrence Silberman (who helped draft OFCCP's regulations) that:

> "Once [OFCCP] got into the numbers game, it stopped being equal opportunity. It had to lead to efforts to impose more equal outcomes."

Leonard found, for example, that the pattern of OFCCP compliance reviews he studied for the years 1974–80 was "consistent with an affirmative action effort that is primarily concerned not with attacking the grossest prima facie forms of current employment discrimination, but rather with redistributing jobs to minorities and women." Indeed, during that period, establishments which employed *above average* percentages of blacks and women were *most likely* to be reviewed, while establishments which employed few women or minorities (or none at all) were *least likely* to be reviewed: ". . . just the opposite of what one would expect from a program targetted against the most simple sort of prima facie discrimination" (Leonard reports, e.g., that the percentage of minorities, before review, was *24 percent greater* at reviewed establishments than at unreviewed establishments). Moreover, OFCCP was more likely to review establishments with shrinking employment than those with growing employment.

Thus, it would appear that the establishments that were *least* likely to discriminate against minorities and women were also the establishments most likely to be subjected to OFCCP pressure. OFCCP compliance officers, Leonard noted:

> ". . . tend to be evaluated on fulfilling goals for compliance review, rather than on successfully bringing discriminators to heel . . . The fastest way to fill a production goal for compliance reviews is to review firms with good records and good behavior. In practice, these will usually be large firms with well-established systematic record keeping for internal personnel bureaucracies. They will also tend to be the good corporate citizens who

[2] Jonathan S. Leonard, "Employment and Occupational Advance Under Affirmative Action," *Review of Economics and Statistics*, August, 1984, p. 378. See also Jonathan S. Leonard, "The Impact of Affirmative Action on Employment," *Journal of Labor Economics*, pp. 440–445; and Jonathan S. Leonard, *The Impact of Affirmative Action* (report submitted to the Department of Labor, 1983), pp. 51–55. Leonard judges OFCCP to have been generally successful in these terms during 1974–1980: "White males . . . did significantly worse at contractor establishments." Leonard, "Employment and Occupational Advance Under Affirmative Action," *Review of Economics and Statistics*, August, 1984, p. 379.

> have been reviewed before and found in compliance. If this were in fact the internal incentive system for field officers, it would not be surprising to find [Note: as Leonard in fact found] that compliance reviews are concentrated on the largest firms that have already been reviewed in the past, and that already employ the most females and minorities." [3]

Indeed, Leonard's evidence regarding the impact of OFCCP goals on the actual employment of minorities and women confirms this redistribution emphasis:

> *"Neither absolute minority or female employment increased* but both minority and female *shares* did increase. This is because the contraction in employment that did occur was almost lily-white and predominantly male. . . . *while white males averaged 57 percent of initial employment, they accounted for 78 percent of the employment decline . . ."* [emphasis added].[4]

Other of Leonard's evidence and observations—lost in remarkable public assertion that his study validated the preadministration work of OFCCP—are also of interest:

- Although OFCCP's requirements for "race and sex conscious" hiring purportedly benefit white women, black men, black women, Hispanic men, Hispanic women, Asian American men, Asian American women, American Indian men, and American Indian women equally, *this did not occur in practice.* In fact, establishments governed by OFCCP ". . . did not increase non-black minority employment significantly faster than non-contractors" during the 1974–80 period. Moreover, OFCCP compliance reviews were found to have *"significantly retarded the growth in . . . white female representation"* at reviewed establishments [emphasis added]." [5] Moreover, Leonard presents evidence showing that when OFCCP's impact is measured by job category, OFCCP ". . . has had a mixed, and often negative impact on white females. For technical, sales, clerical, craft, and trainee workers, [OFCCP coverage] is associated with a significant decline in white females' employment share. Compliance reviews have also often had a negative impact." [6]
- Although OFCCP's quota requirements are most frequently defended in terms of assisting the disadvantaged, Leonard found that the impact of OFCCP-induced job-redistribution has been greatest for skilled, higher paying positions [7]—in other words, positions for which only those minorities and

[3] Jonathan S. Leonard, *The Impact of Affirmative Action* (report submitted to the Department of Labor, 1983), pp. 336–360.

[4] Leonard, *The Impact of Affirmative Action*, p. 370.

[5] Leonard, "Employment and Occupational Advance Under Affirmative Action," *Review of Economics and Statistics*, August, 1984, pp. 379–380. As economists James P. Smith and Michael P. Ward note in *Women's Wages and Work in the Twentieth Century* (Rand Corporation, 1984, pp. xiii–xiv): "A substantial number of economic studies have . . . found little effect of [OFCCP's version of] affirmative action on the economic status of white women."

[6] *Ibid.*, p. 384.

[7] *Ibid.*, pp. 382–385.

women who were already *most advantaged* in education, skill attainment, and other terms could compete.

- Leonard reports that the employment of black men at OFCCP-covered establishments (as a percentage of the total black men employed at all of the establishments he studied, OFCCP-covered and non-OFCCP covered) actually *fell* between 1974 and 1980. Leonard notes that this occurred because *establishments not covered by OFCCP grew much more rapidly than those covered by its regulations:*

"Establishments not covered by OFCCP absorbed more black males as they grew, and from our previous results we know that *growing establishments increase their employment of minorities and women more quickly".*[8]

- There was a significant difference between the "goals" established through costly and time-consuming negotiations between OFCCP compliance officers and corporate representatives and their real world results. Indeed, Leonard's data indicate that establishments that *refused to increase* goals deemed unacceptably low by OFCCP increased their *actual employment* of black men *faster than establishments whose goals OFCCP approved.* Leonard found that a goal to increase the employment percentage of black men by 10 percent resulted in an actual increase of only 1 percent; a goal to increase the employment percentage of Hispanic, Asian, and American Indian men by 10 percent resulted in an actual increase of only 1.8 percent; a goal to increase the employment percentage of black women by 10 percent resulted in an actual increase of only 2.5 percent; and a goal to increase the employment percentage of white women by 10 percent resulted in an actual increase of only 2 percent.[9]
- Finally, two observations by Leonard highlight what may be the most significant aspect of the OFCCP compliance process as it evolved in prior administrations (and which, it has been estimated,[10] cost firms in the "Fortune 500" over $1 billion during 1980 alone): That the process of defining "underutilization" (for the purpose of establishing the "goals" discussed above) ". . . has kept many lawyers, economists, and statisticians employed, and given birth to a whole new breed: affirmative action professionals"; and that "An internal affirmative action bureaucracy has become entrenched in the largest corporations, and this internal bureaucracy has goals of its own . . .", one of which is to ". . . enhance their [own] employment prospects by keeping the threat of external pressure alive".[11]

[8] *Ibid.*, pp. 123–124.
[9] *Ibid.*, pp. 371, 375, 381.
[10] By the Equal Employment Advisory Council as cited in Daniel Seligman, "Affirmative Action is Here to Stay," *Fortune*, April 19, 1982, p. 156.

Important new research by economists James P. Smith and Finis Welch provides an overview of the impact of the "race conscious" Federal enforcement policies of the late 1970's. The greatest wage gains for black men and women, and the greatest shifts in minority employment to firms under the jurisdiction of the OFCCP and EEOC, came prior to *1974* [12] and prior to the widespread application of "race conscious" employment requirements by those agencies during the latter half of the 1970's.

There is an alternative to the zero-sum version of "affirmative action" (based on the premise that opportunities for some can be achieved only by taxing the opportunities of others), that was written into the OFCCP regulations during the 1970's—a true affirmative action about which the President has frequently spoken:

> "No American should be discriminated against because of race, ethnic background, sex, or religion in hiring, education, or in any other way . . . [P]rograms, whether government or private, which make an extra effort to find qualified minority applicants are beneficial. They ensure that minority members will not be overlooked, and help provide them with equal opportunity for further advancement . . . However, we must not allow this noble concept of equal opportunity to be distorted into Federal guidelines or quotas which require race, ethnicity, or sex—rather than ability or education. Increasing discrimination against some people in order to reduce it against other does not end discrimination. Instead, we should make a bold commitment to economic growth, to increase job and education opportunities for all Americans." [13]

Through 1986, the Administration will work to achieve substantial reforms in OFCCP's regulations which, pursuant to the principles set forth by the President, will assure that:

- Discrimination, where found, must be swiftly and vigorously attacked—particularly when it affects members of groups historically victimized by discrimination, such as minorities and women.
- Affirmative action is understood to include affirmative outreach, recruitment, counseling, and training activities designed to assure that qualified minorities and women are considered for employment opportunities.
- Recruitment is inclusive, and selection is exclusive—based on individual merit and excellence alone and that affirmative action administrators are no longer permitted to take credit for the earned accomplishments of individual minorities and women.

[11] Jonathan Leonard, *The Impact of Affirmative Action*, pp. 16, 319.
[12] James P. Smith and Finis Welch, "Affirmative Action and Labor Markets", *Journal of Labor Economics*, Volume 2 Number 2, April, 1984, p. 269.
[13] Issue paper, "affirmative action", Reagan-Bush Committee, 1980.

- There is no place for quotas, either as a limit on the obligation to recruit affirmatively, or on the obligation to hire on a nondiscriminatory basis. Both obligations must apply to all vacancies.

Such an approach, to be sure, would not pretend to mandate any "bottom line" result other than nondiscrimination. It would, however, benefit all workers by assuring that all persons, regardless of race or sex, have the fullest opportunity to compete for available jobs—and by reaffirming that the most capable person can always be hired regardless of race or sex.

Since 1981, the Department of Labor has effected substantial improvements in OFCCP's management and procedures—particularly its procedures for selecting contractors for compliance reviews and assuring their quality and timeliness. As a result, the OFCCP was able to complete 5,025 compliance reviews of contractor facilities employing 2.94 million workers during 1984 (compared with only 2,632 compliance reviews of facilities employing 1.05 million workers during 1980, the last year of the prior administration). During 1984, OFCCP also conducted 1,246 investigations of discrimination complaints.

The Equal Employment Opportunity Commission has made particularly significant strides in overcoming management problems which had been allowed to develop in prior administrations. Of these, the Commission's financial management problems were particularly serious. In an audit conducted in 1981,[14] the General Accounting Office found that many of the recordkeeping and financial management practices it had identified five years earlier remained uncorrected. The Commission had no accurate records of the money owed it; personnel responsible for handling the Commission's funds were found to be poorly supervised and trained. The GAO identified 19 areas of concern which in sum were so serious as to pose the threat of "unnecessary cancellation of programmed activities, slippage of required programs, and even job losses for agency employees." In 1984, by contrast, the GAO gave its full approval to the EEOC's financial accounting system for the first time in the almost 20 years EEOC has been in existence.

Through 1986, the EEOC will be particularly concerned with reviewing its body of policy and regulations in light of the policy of nondiscrimination called for by the President and the legal principles set forth by the Supreme Court in *Stotts* (e.g., the EEOC has voted to review its "Uniform Guidelines on Employee Selection Procedures" (29 CFR 1607)).

Civil and Military Service Equal Employment Opportunity.—The Federal Civil Service and Military Services are built on the principle of appointment and advancement on the basis of merit—irrespective of race, color, religion, national origin, sex, age, or handicap. Particularly in this period of resource stringency, the Federal government has a particularly strong obligation to appoint only the most able and diligent candidates to available vacancies.

[14] See "Continuing Financial Management Problems at the Equal Employment Opportunity Commission," General Accounting Office, May 17, 1982.

Under the Equal Employment Opportunity Act of 1972, as amended, the EEOC is responsible for coordinating the efforts of Federal agencies to assure equal employment opportunity in their employment practices. In addition, the Office of Personnel Management, under the Civil Service Reform Act, coordinates agency efforts under the Federal Equal Opportunity Recruitment Program (FEORP).

This administration has worked to strengthen (and where necessary, to reaffirm)[15] the complementary principles of affirmative recruitment and merit selection, and the employment of minorities and women in white collar civil service positions and their percentages among military officers are substantially higher than when this administration took office:

Table J–2. **WHITE COLLAR [1] EMPLOYMENT OF MINORITIES AND WOMEN IN THE FEDERAL GOVERNMENT, 1980–1984**

	Percentage of full time white collar employment	
	November 1980	March, 1984 [2]
Minorities	20.8	23.1
Women	45.1	47.2

[1] Nonpostal civilian employment in General Schedule and equivalent positions.
[2] Latest available figures.

Source: Office of Personnel Management.

Table J–3. **PERCENTAGES OF MILITARY OFFICERS WHO ARE MINORITIES OR WOMEN**

	Percentage of total officers	
	1980	1984
Minorities	9.1	10.5
Women	8.2	9.4

The inequities and inefficiencies of current procedures for processing discrimination complaints filed against Federal agencies have previously been extensively documented by the General Ac-

[15] In 1982, for example, a Presidential Task Force forcefully rejected the argument advanced by some in recent years that opportunities for minorities to enlist in the armed services should be limited to their percentage in the population at large: "Some observers express concern about the high proportion of blacks in the enlisted force . . . [We] do not look on this as a problem. In a volunteer force, both blacks and non-blacks who can qualify have equal freedom to enlist. The fact that many blacks volunteer is a tribute to their patriotism. Black service-members have served the nation ably and honorably. It would be both unnecessary and unfair to move to a quota-based recruitment system to achieve some arbitrary notion of a proper racial balance."

counting Office and this administration.[16] At the onset of the current fiscal year the Equal Employment Opportunity Commission voted to consider major changes in these procedures.

A "MOVEMENT OF LAW AND POLICY": ASSURING NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

It is fundamental that activities funded by the Federal government itself must be conducted without discrimination. This principle is embodied in a substantial body of legislation including in addition to numerous program-specific statutory provisions prohibiting discrimination:

—Title VI of the Civil Rights Act of 1964 prohibits discrimination in all federally assisted programs and activities based on race, color, or national origin.
—Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in federally educational programs and activities.
—The Age Discrimination Act of 1975 prohibits discrimination based on age in all federally assisted programs and activities.
—Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of handicapped in all federally assisted programs and activities.

During 1984, the Supreme Court handed down two particularly significant decisions regarding these statutes, both of which agreed with the Department of Justice's positions regarding their interpretation. The Court's opinions in *Consolidated Rail Corporation* v. *Darrone* (104 S.Ct. 1248 (1984)) (discussed above in the section dealing with equal employment opportunity) and *Grove City College* v. *Bell* (104 S.Ct. 1211 (1984)) significantly clarified the scope, respectively, of Section 504 of the Rehabilitation Act of 1973 and title IX of the Education Amendments of 1972. In *Grove City,* the Supreme Court agreed with the Department of Justice's position that:

—By its terms, title IX explicitly covers an institution's "education program[s] or activit[ies] receiving Federal financial assistance" but does not cover other "programs or activities" within the institution that do not receive Federal financial assistance.
—Pell grants to students constitute Federal financial assistance to the colleges and universities they attend.

The administration had made clear throughout the *Grove City* litigation that its position with respect to the coverage of educational institutions by title IX was one of legal interpretation rather than policy. After the Supreme Court's *Grove City* decision had

[16] See U.S. General Accounting Office, "Problems Persist in the EEO Complaint Processing System", April 7, 1983; Special Analysis J: Civil Rights Activities, Special Analyses, Budget of the United States Government, 1983, 1984, and 1985.

confirmed its interpretation of the existing statutory language, the administration made clear its support for legislation that would extend coverage of title IX and related nondiscrimination statutes to all of the education programs and activities of institutions receiving Federal financial assistance.

Subsequently, legislation was introduced in Congress which, it was stated, would simply restore the coverage of title IX and related statutes to their "pre-*Grove City*" scope. In fact, however, the legislation (styled "The Civil Rights Act of 1984") would have enabled Federal agencies, for the first time, to assert regulatory authority over *any* program or activity of a State or local government, business, or non-profit organization which received Federal financial assistance for any purpose—regardless of whether the program or activity received Federal assistance, or was even related to the purposes for which Federal assistance was provided. As the President observed at his May 22, 1984 press conference, the legislation was "so broad that actually it would open the door to Federal intrusion in local and State governments and in any manner of ways beyond anything that has ever been intended by the Civil Rights Act."

The administration supports, and hopes to see the enactment during 1985, legislation recently introducted by Senate Majority Leader Dole to assure that schools receiving Federal assistance will not be allowed to discriminate in any phase of their operations (e.g., against women in their athletic departments even if those departments received no Federal funds).

In other significant appellate activity during 1984, the Fifth Circuit held that section 504 of the Rehabilitation Act applies to hospitals receiving federal financial assistance in the form of Medicare and Medicaid payments, and that the applicable "program or activity" is the hospital's inpatient services.

There were noteworthy accomplishments, with respect to assuring nondiscrimination on the basis of handicap, in non-litigation areas as well during 1984. With regard to the Federal government's own practices, the General Services Administration, the U.S. Postal Service, and the Departments of Defense and Housing and Urban Development jointly issued the final uniform Federal Accessibility Standards on August 7, 1984. The uniform standards are designed to ensure that Federal and federally-funded facilities are designed, constructed, and altered so as to achieve a high level of access and use by persons with physical disabilities. In other important regulatory activity, the Department of Justice's Civil Rights Division coordinated the efforts of 91 Federal entities to develop regulations implementing Section 504, as it applies to their federally conducted programs and activities.

Among enforcement agencies, the Department of Health and Human Services secured several significant remedies for violations of Section 504, including establishment, by more than fifty hospitals, of procedures to ensure emergency medical treatment for hearing impaired persons; and agreement, by a State group insurance commission, to make group health insurance available to all State employees regardless of medical history.

HHS compliance reviews also produced significant remedies for violations of Title VI as well. One State, for example, agreed to revise adoption and foster care procedures which were racially discriminatory; and another State established procedures to assure that children are not referred to or denied placement in group boarding homes and residential centers based on race, color, national origin (or handicap). During 1984, HHS compliance reviews and complaint investigations resulted in agreements by over 700 to take steps to comply with non-discrimination requirements.

Since 1980, management improvements and a declining complaint workload have enabled the HHS Office for Civil Rights to shift increasing percentages of its personnel resources from complaint investigations to compliance reviews:

Table J–4. DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE FOR CIVIL RIGHTS PERCENTAGE ALLOCATION OF STAFF RESOURCES

	Complaint investigations	Compliance activities*	Miscellaneous activities**
Fiscal year:			
1981 (actual)	43	34	23
1984 (actual)	30	51	19

* Includes pre-grant reviews, compliance and project reviews, and monitoring and outreach activities.
** Program management and legal services.

A similar combination of improved procedures and declining complaint workloads has enabled the Department of Education's Office for Civil Rights (the largest of the Title VI enforcement agencies) to significantly improve its complaint closure rate, (resulting in a 58% reduction in its backlog of pending complaints since 1980):

Table J–5. DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS COMPLAINT CLOSURE RATE; 1980–1984*

	Fiscal year	
	1980 (actual)	1984 (actual)
Percentage closure rate*	57.1	69.3
Number, complaints pending end of year	2,051	861

* Complaints closed/complaints pending or received for processing.

In 1982, reports of the death of a handicapped infant[17] first focused widespread public attention on the question of whether infants with disabilities were being denied the care and treatment necessary to sustain life. As President Reagan was quick to emphasize, Section 504 "forbids recipients of Federal funds from withholding from handicapped citizens, simply because they are handicapped, any benefit or service that would ordinarily be provided to persons without handicaps. Regulations under this law specifically prohibit hospitals and other providers of health services receiving Federal assistance from discriminating against the handicapped."

The Department of Health and Human Services has primary responsibility for enforcing the requirements of Section 504 and similar nondiscrimination requirements with respect to federally assisted providers of health care. During 1984, the Department (together with the Department of Justice) devoted considerable effort to attempts to enforce the rights of handicapped infants under Section 504. On January 12, 1984, HHS (following extensive consultations with medical professionals, disability rights organizations, a wide range of other interested parties) issued a final rule implementing Section 504's protection of handicapped infants.

In June 1984, a Federal court invalidated this regulation and enjoined further investigations of alleged discriminatory withholding of medical treatment from handicapped infants—requiring HHS to administratively suspend investigations of 28 complaints of such alleged discrimination (HHS had received a total of 67 such complaints during 1983 and 1984). HHS appealed this decision, and the Administration will continue its legal efforts to protect the rights of handicapped infants. As the President has emphasized:

> Our nation's commitment to equal protection of the law will have little meaning if we deny such protection to those who have not been blessed with the same physical and mental gifts we too often take for granted.

During 1984, the Justice Department's Civil Rights Division established a special unit, the Equal Educational Opportunity Section, to represent the Federal Government in school desegregation suits throughout the nation based on Title VI and other statutory and Constitutional grounds. The Federal Government has been party to suits involving approximately 525 elementary and secondary school districts, most of which are located in southern states. Approximately 150 of these districts have been declared unitary (no longer segregated by law) and the cases have either been dismissed or deactiviated by the courts. During 1984, the Equal Education Opportunity Section devoted a considerable amount of its resources monitoring and seeking full compliance with the approximately 375 orders which remain in effect. And major remedial orders

[17] The infant, who has Down's Syndrome, died in Bloomginton, Indiana, after treatment to repair detached ecophagus had been withheld.

involving school desegregation issues were entered in cases in Lawrence County, Mississippi, Ector County, Texas, Lubbock, Texas, and Huntsville, Alabama.

The Division also focused on pursuing several equal educational opportunity cases in which initial orders had been entered. In a suit involving the Massachusetts Maritime Academy alleging sex discrimination in admissions, the court found illegal discrimination and is now considering appropriate relief. Consent decrees were entered in suits involving school districts in Bakersfield, California (a case which was filed at the same time that the order was entered); Marion County, Florida; and Lima, Ohio which required implementation of desegregation plans relying primarily on the use of magnet schools to encourage voluntary student desegregation.

In developing these remedies, the Division has rejected the proposition that future discrimination in pupil assignment is an appropriate remedy for past discrimination in pupil assignment. Such mandates, which frequently include forced busing, not only exclude students from educational programs based solely on their race or national origin; but frequently serve simply to reassign students from one poor school to another, and typically produce significant enrollment losses—followed by more severe racial isolation than existed before such measures were ordered.

In this regard, the experience of the Norfolk, Virginia school system after 13 years under a court ordered "race conscious" pupil assignment plan is all too typical. Since 1971, when court-ordered busing was initiated, the student population in Norfolk has decreased by 37 percent—and the white student population has dropped by 59 percent. There are 21,290 fewer students in the system than in 1971—and 19,259 fewer white students. The Department of Justice has intervened (in litigation currently pending before the Fourth Circuit Court of Appeals) in support of the local board's efforts to modify this order. In so doing, the Department is acting to defend the abiding interests of black and white students and parents against those who would (in the name of desegregation) resegregate school systems and denude local citizens and their school boards of the capacity to engage in a critical set of good-faith educational policy decisions.

A "MOVEMENT OF LAW AND POLICY": FAIR HOUSING AND EQUAL CREDIT ENFORCEMENT

". . . [L]et us once again dedicate ourselves to the great work of assuring fair housing for all. And let us continue that work until fair housing becomes a permanent reality in our national life."—PRESIDENT REAGAN, April 10, 1984

Title VIII of the Fair Housing Act of 1968, as amended, prohibits discrimination based on race, color, religion, sex, or national origin in the sale, rental, or financing of housing or provisions for brokerage services. During 1983, the administration not only continued its vigorous enforcement of the Fair Housing Act's current provisions, but offered legislation that would fill significant gaps in the protection now afforded by the Act.

The Department of Housing and Urban Development's Office for Fair Housing and Equal Opportunity is responsible for investigating complaints of alleged violations of title VIII. Where it concludes that violations of title VIII have occurred, HUD attempts to resolve them through informal conference, conciliation, and persuasion.

Title VIII also provides that such complaints filed with HUD may be deferred to State and local fair housing agencies with equivalent statutory authority. During 1984, HUD continued its aggressive efforts to expand the involvement of the private sector and State and local governments in assuring fair housing. Through direct grants and technical assistance, HUD helped State and local agencies develop procedures, train staff, and complete other tasks necessary to develop the capacity to process fair housing complaints. As a result, the number of State and local agencies participating in charge processing grew from 79 at the end of 1983 to 90 at the end of 1984, an increase of 14 percent (and a 180% increase over the number of such agencies at the end of 1980).

Through 1986, HUD expects to increase the number of participating State and local agencies to 110. The number of title VIII complaints processed at the State and local rather than the Federal level will further increase in 1986. To help defray these costs of State and local complaint processing, Federal support of $4 million is planned for 1986.

Table J–6. **TOTAL FAIR HOUSING COMPLAINTS PROCESSED BY HUD AND STATE AND LOCAL AGENCIES**

Year	Total closures	Percent change, 1980–1984
1980	2,860	+62
1984	4,642	

During 1984, HUD also provided financial support for local Community Housing Resource Boards. These Boards initiate affirmative marketing and other voluntary efforts to assure fair housing. It is expected that over 589 of these Boards will be in existence at the end of 1985, 50 more than existed in 1984. An estimated $1 million will be spent to support the activities of these boards in 1986. (In addition, the President's budget would make $10 million available to support fair housing initiatives by State and local governments *and* private organizations during 1986.)

Table J–7. FAIR HOUSING COMPLAINTS REFERRED TO STATE AND LOCAL AGENCIES

	Actual				
	1980	1981	1982	1983	1984
Complaints received	3,039	4,209	5,112	4,551	4,533
Complaints received	410	1,661	2,679	2,736	3,062

HUD's investments in the abilities of the private sector and State and local governments will reduce the incidence of violations which give rise to complaints. Where complaints are filed, more will be resolved by the States and communities in which the parties reside. During 1984, for example, HUD referred 68 percent of the complaints it received to State and local agencies for processing (compared with only 13 percent in 1980). As a result of this cooperation between HUD and State and local agencies, there has been a substantial increase in the service provided to persons filing complaints under title VIII, with 62 percent more complaints closed in 1984 than in 1980.

Table J–8. NUMBER OF STATE AND LOCAL AGENCIES WITH CHARGE PROCESSING AGREEMENTS

End of fiscal year:	
1980	32
1981	42
1982	67
1983	79
1984	90
1985 (estimate)	100
1986 (estimate)	110

The Civil Rights Division of the Department of Justice is responsible for bringing suits to enjoin alleged patterns and practices of discrimination prohibited by title VIII. During 1984, the Division established a separate unit, the Housing and Civil Enforcement Section, to handle housing and credit matters. The section represents the United States in pattern or practice lawsuits brought pursuant to the Fair Housing Act (42 U.S.C. 3601–3619) or the Equal Credit Opportunity Act (15 U.S.C. 1691–1691f). The housing cases involve such prohibited actions as refusal to sell or rent a dwelling to a person on the basis of race, religion, national origin or sex; zoning and other exclusionary practices; and interference with persons who have exercised rights protected by the statute.

As a result of this new arrangement a greater percentage of the Civil Rights Division's resources are now devoted to housing and credit matters, resulting in a significant increase in the number of housing cases initiated in 1984. During 1984, the section filed 17 housing discrimination cases and successfully negotiated consent

decrees in 8 housing suits. Six of the cases filed attack alleged racial steering of home buyers by Chicago area real estate brokers. Two other new cases alleging racial discrimination were filed against large companies (one with 24 complexes, the other with 13) that develop and manage apartment buildings in the eastern United States. And since the onset of the current fiscal year, the Department of Justice has filed suits in Texas and Ohio to enjoin a practice widely assumed to have been eliminated—restrictive racial covenants in real estate deeds.

This administration's fair housing enforcement efforts are directed at eliminating the evil that the Fair Housing Act was designed to address: the denial of housing opportunities to individuals solely because of their race, color, religion, sex, or national origin. And as the Justice Department's 1984 filing in *Starrett City* demonstrated, this administration has not hesitated to act against attempts to perpetuate that evil under color of the Fair Housing Act itself.

Starrett City, a 6,000 unit housing project in New York City, had for a number of years set aside 65 percent of its units for whites—generating a private suit to enjoin this apparent violation of title VIII's nondiscrimination mandate. In 1984, the parties to the suit agreed to a "remedy" which, rather than ending the discriminatory quota system, simply provided a modest increase in the quota of units which individuals from minority groups would be permitted to occupy in Starrett City. In addition, the agreement called for 86 other developments throughout the State of New York to "work toward 20 minority occupancy within 15 years".[18]

Just as the lower court in *Palmore* v. *Sidoti* (see above) cited "the reality of private biases and the possible injury they might inflict" in attempting to deny custody to a mother because she had chosen to marry a man of a different race, the Starrett City quotas were argued to be necessary (in light of that same reality) to prevent segregation and subsequent deterioration of the project.[19] By explicitly linking the health of a housing project to the race (rather than the character) of its tenants, however, such arguments simply reemphasize the truth of the Supreme Court's teaching the *Palmore* that "Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns . . ."[20] Accordingly, the Department of Justice has entered the *Starrett City* case to obtain a genuine remedy for Starrett City's

[18] Walter Goodman, "Dispute Over Quotas at Starrett City," *The New York Times*, July 13, 1984, p. A26.
[19] Jefferson Morley, "Double Reverse Discrimination", *The New Republic*, July 9, 1984, pp. 14–18.
[20] Indeed, the Court's opinion in *Palmore* pointedly quotes a 1917 opinion (*Buchanan* v. *Warely*, 88 S.Ct.16 (1917)) in which the Supreme Court rejected a rationale for housing discrimination strikingly similar to that employed by defenders of the Starrett City quotas. "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."

previous discrimination against blacks and other minorities: an end to discrimination.

Housing discrimination to maintain racial quotas has not been limited to tenant selection. In recent years, pursuant to judicial and administrative orders, public housing tenants have been selected on the basis of their race and required to move from their existing units.[21] Through 1986 this administration will work to assure (through litigation and administrative reform) that the moving van does not join the school bus as a symbol for policies which restrict opportunity in the name of equalizing it.

Since the passage of the 1976 amendments to the Equal Credit Opportunity Act, the Division has worked closely with federal regulatory agencies and significant suits have been filed challenging the lending practices of banks, cash loan companies and retail creditors as well as the activities of real estate appraisers and mortgage lenders. The suits include cases against four nationwide creditors—one defendant had over $38 billion in credit outstanding in 1982—and it is clear that this litigation program will have a substantial impact on the industry.

In 1984 the section continued its enforcement efforts under the Equal Credit Opportunity Act by working out consent decrees in three cases against nationwide creditors. These decrees were filed shortly after the year ended. Also, in 1984 the United States Court of Appeals for the Third Circuit affirmed a favorable district court decision that the section had obtained in a suit against a retail sales company that discriminated on the basis of race, sex, national origin and marital status.

A "MOVEMENT OF LAW AND POLICY": THE U.S. COMMISSION ON CIVIL RIGHTS

> "I think we need a new dialogue in America. It might begin with an intellectual housecleaning in Washington, D.C. . . . In the words of Morris Abram . . . 'It's time for some people to stop shouting the slogans of the past and begin dealing with the facts, figures, and conditions of the present'."—PRESIDENT REAGAN, August 1, 1983.

Congress established the Commission on Civil Rights in 1957 to study the enforcement of statutes guaranteeing equal protection of the law regardless of race, color, religion, or national origin. The Commission's early work contributed significantly to the national recognition that it is immoral to limit any person's opportunities because of his or her sex, race, religion, national origin, or other factors irrelevant to character and ability—a recognition that led to the passage of the Civil Rights Act of 1964, the Voting Rights

[21] In a widely noted instance in 1983, thirty families many of them elderly were forced to move from their homes for the sake of racial balance "Kicked Out of My Home," *Newsweek*, December 26, 1983, pp 19 20

Act, the Fair Housing Act, the Rehabilitation Act of 1973, and other landmark legislation.

During recent years, however, the Commission often seemed to lose sight of those principles (at times, even to explicitly reject them) as its definition of "civil rights" steadily expanded to include other elements of its members' political and economic agendas. In 1983, the President nominated several new members with distinguished civil rights backgrounds to the Commission. An impasse over these nominations was terminated by the passage of compromise legislation, supported by the President and the Congressional leadership of both parties, creating a new Commission.

The new Commission's reaction to the Supreme Court's decisions in *Stotts* and *Hishon* was but one of several demonstrations, during 1984, that the nation once again had an official "conscience" with respect to civil rights prepared to challenge, with equal force, the denial of any American's civil rights on the basis of race, color, religion, national origin, sex, or handicap:

> "We believe the cause of equal justice under law is well served by the Stotts decision. While more needs to be achieved, we trust that the tide has begun to turn decisively against preferential treatment, such as quotas, on the basis of race, national origin, and gender, and in favor of evenhanded civil rights enforcement for all American citizens.
>
> ". . . The Court's opinion in *Hishon* v. *King and Spalding* makes clear that the partnership decisions of voluntary professional associations may not be made in a discriminatory fashion. The decision is a significant step toward assuring equality of opportunity for women and minorities in a variety of professions."

The new Commission also initiated a number of significant studies and consultations. A consultation on comparable worth[22] at which experts ranging from strong opponents to strong supporters of the concept delivered papers, was particularly significant (and provided, both in its timeliness and the variety of opinions represented, further contrast between the approach of the new Commission and what had come, in recent years, to be the practice of its predecessor). Other achievements by the Commission to date include publication of a *Directory of State and Local Fair Housing Agencies* and *A Citizen's Guide to Understanding the Voting Rights Act;* and initiation of a magazine *(New Perspectives)* which is providing a platform for significant and diverse thinking on civil rights issues.

[22] See *Comparable Worth: Issue for the 80's*, Volume I, U.S. Commission on Civil Rights, 1984. The Administration's position on "Comparable Worth", while continuing to evolve, is that employees and employers should remain free to establish the "worth" of jobs through bargaining—and the Federal government should continue to vigorously enforce the obligation of employers to provide equal pay for equal work, without regard to sex. On the other hand, substitution of a Federally imposed standard (assuming that one could be agreed upon) for the individual judgments of employers, employees and their collective bargaining representatives is, as the ranking member of the Council of Economic Advisors recently noted in understated terms, (see *The New York Times*, October 19, 1984, p. 14) highly problematic idea to say the least See also William French Smith, "Forcing Equal Pay for Different Jobs is a Bad Idea", *Washington Post*, January 27, 1985, p [illegible]

In addition, the new Commission is currently pursuing studies focusing on a wide variety of concerns, including violence and bigotry against Asian and Pacific Island Americans; trends in income and unemployment by sex, race, and ethnicity; civil rights enforcement by State and local governments; affirmative action in higher education; voluntary and involuntary methods of achieving school desegregation; and the employment of Americans of Eastern and Southern European Ancestry.

Through 1986, the Commission will continue to serve as the America's primary forum for debate on the "facts, figures, and conditions of the present" as they affect civil rights.

"A MOVEMENT OF LAW AND POLICY": FINISHING THE JOB

"I believe these figures demonstrate a commitment to civil rights that is firm and far-reaching. But let me go beyond statistics to speak from my heart . . . All Americans have the right to be judged on the sole basis of individual merit and to go just as far as their dreams and hard work will take them. And we won't have finished the job until, in this country, whatever is done to or for someone is done neither in spite of nor because of their religion or their color, their difference in ethnic background . . ."—PRESIDENT REAGAN, June 25, 1984

". . . we will not concede the moral high ground to those who show more concern for Federal programs than they do for what really determines the income and financial health of blacks—the Nation's economy."—PRESIDENT REAGAN, June 29, 1981

Thus 1984, the twentieth anniversary of the passage of the Civil Rights Act of 1964, saw substantial progress toward the color-blind society which was the objective of that historic legislation. This administration will continue to promote this "movement of law and policy" through 1986 by continuing to effectively enforce the civil rights guaranteed to all Americans: as the President has emhasized, "guaranteeing equality of treatment is government's proper function."

While an agenda for opportunity must necessarily include vigorous enforcement of statutory guarantees of equal treatment, it will be insufficient if it does not also address the barriers to economic opportunity for minorities and women which have been erected by Government itself at all levels (which have, to cite only one effect, well-intentioned minimum wage laws frequently serve to discourage employers from creating jobs which would provide income and skills for minority youths). Where prior administrations attempted to address the symptoms of such barriers by attempting to administratively reinterpret our civil rights laws into demands for special treatment, this administration will enforce the civil rights laws as they were written—and proceed to address the barriers themselves.

The necessity for such a total approach has come to be recognized by a growing coalition of persons in government and the

private sector who (while frequently concurring on little else) are agreed on the necessity to fully open the doors of economic opportunity to minorities and women. Through 1986, this administration will accord a high priority to working with these individuals to refine and implement an economic opportunity agenda of special relevance to America's minority citizens. Because, for America to truly "finish the job," a platform of opportunity for all Americans must be built on which all Americans, consistent with our special place in history, can stand.

Table J–9. **BUDGET AUTHORITY FOR PRINCIPAL FEDERAL CIVIL RIGHTS ACTIVITIES**

(In millions of dollars)

	1984 actual	1985 estimate	1986 estimate
Architectural and Transportation Barriers Compliance Board	1.9	2.0	1.9
Commission on Civil Rights	12.0	12.9	12.1
Department of Education, Office for Civil Rights [1]	44.4	44.5	42.9
Department of Health and Human Services, Office for Civil Rights [2]	21.3	20.2	19.6
Equal Employment Opportunity Commission	154.0	163.7	158.8
Department of Housing and Urban Development, Fair Housing Activities	28.2	33.3	41.3
Department of Justice, Civil Rights Division	21	23	22
Department of Labor, Office of Federal Contract Compliance Programs	43.9	47.2	43.4

[1] Includes effects of 1985 recission of 541,000 proposed pursuant to section 2901 of the Deficit Reduction Act of 1984.
[2] Total obligational authority, including both budget authority and trust fund transfers.

National Association
of Independent
Colleges and Universities

June 10, 1987

The Honorable Brock Adams
United States Senate
Washington, D.C. 20510

Dear Senator Adams:

On behalf of the National Association of Independent Colleges and Universities (NAICU), I would like to express our support for S. 557, the Civil Rights Restoration Act of 1987. I also want to express support for a religious liberty amendment that will be offered on the Senate floor. This amendment would clarify the existing Title IX religious tenet exemption language in order to protect religious liberty at the nation's numerous church-related colleges and universities.

NAICU represents a broad range of more than 800 independent colleges and universities, from the largest research universities to small church-related colleges. We want first and foremost to express our strong commitment to the social policy goals of equal opportunity for educational advancement regardless of race, sex, age or disability. We embrace these social policy goals as part of our fundamental responsibility as institutions of higher learning. We, therefore, support the bill's broad coverage of our colleges on an institution-wide basis.

We do, however, have a serious concern about the existing Title IX religious tenet exemption language. NAICU believes that the current statutory exemption for institutions that are "controlled" by a religious organization should be revised to correspond with the changing pattern of religious higher education in this country. NAICU recently surveyed its church-related institutions to ask whether the existing exemption was adequate and reflective of their concerns in the area of Title IX, which prohibits discrimination based on sex. More than 200 responded, and almost half, from a variety of church denominations, confirmed the importance of this religious liberty issue by saying they would consider claiming the revised exemption.

The Hatch amendment, which we support, would allow an institution which is "controlled by or which is closely identified with the tenets of a religious organization," to seek an exemption from specific Title IX regulations. The same language was included in another context as part of last year's Reauthorization of the Higher Education Act.

122 C Street N.W. • Suite 750 • Washington D.C. 20001-2190 • 202 383-5950

The purpose of this amendment is to appropriately clarify which institutions may seek limited exemption from specific Title IX requirements. The amendment will protect important religious liberty interests, and will not undermine the important non-discriminatory principles embodied in Title IX and other civil rights statutes.

We urge your support for the religious liberty amendment and for S. 557, as amended. Thank you for your consideration of our views.

Sincerely,

Richard F. Rosser
President

National Association
of Independent
Colleges and Universities

June 10, 1987

The Honorable Brock Adams
United States Senate
Washington, D.C. 20510

Dear Senator Adams:

On behalf of the National Association of Independent Colleges and Universities (NAICU), I would like to express our support for S. 557, the Civil Rights Restoration Act of 1987. I also want to express support for a religious liberty amendment that will be offered on the Senate floor. This amendment would clarify the existing Title IX religious tenet exemption language in order to protect religious liberty at the nation's numerous church-related colleges and universities.

NAICU represents a broad range of more than 800 independent colleges and universities, from the largest research universities to small church-related colleges. We want first and foremost to express our strong commitment to the social policy goals of equal opportunity for educational advancement regardless of race, sex, age or disability. We embrace these social policy goals as part of our fundamental responsibility as institutions of higher learning. We, therefore, support the bill's broad coverage of our colleges on an institution-wide basis.

We do, however, have a serious concern about the existing Title IX religious tenet exemption language. NAICU believes that the current statutory exemption for institutions that are "controlled" by a religious organization should be revised to correspond with the changing pattern of religious higher education in this country. NAICU recently surveyed its church-related institutions to ask whether the existing exemption was adequate and reflective of their concerns in the area of Title IX, which prohibits discrimination based on sex. More than 200 responded, and almost half, from a variety of church denominations, confirmed the importance of this religious liberty issue by saying they would consider claiming the revised exemption.

The Hatch amendment, which we support, would allow an institution which is "controlled by or which is closely identified with the tenets of a religious organization," to seek an exemption from specific Title IX regulations. The same language was included in another context as part of last year's Reauthorization of the Higher Education Act.

122 C Street N.W. • Suite 750 • Washington D.C. 20001-2190 • 202 383-5950

The purpose of this amendment is to appropriately clarify which institutions may seek limited exemption from specific Title IX requirements. The amendment will protect important religious liberty interests, and will not undermine the important non-discriminatory principles embodied in Title IX and other civil rights statutes.

We urge your support for the religious liberty amendment and for S. 557, as amended. Thank you for your consideration of our views.

Sincerely,

Richard F. Rosser
President

STATEMENT

TO THE

COMMITTEE ON LABOR AND HUMAN RESOURCES

UNITED STATES SENATE

—

SUBMITTED FOR THE RECORD OF

THE APRIL 1, 1987 HEARING ON S. 557,

THE CIVIL RIGHTS RESTORATION ACT OF 1987

ON BEHALF OF

THE

NATIONAL ASSOCIATION OF INDEPENDENT

COLLEGES AND UNIVERSITIES

APRIL 10, 1987

Introduction

The Civil Rights Restoration Act of 1987, S. 557, is of critical importance to the National Association of Independent Colleges and Universities (NAICU) and we support the bill. NAICU was established in 1976 in order to provide a unified national voice for the concerns of independent higher education. NAICU's membership includes more than 800 college and universities whose variety in size, curriculum, and mission exemplifies the rich diversity of independent higher education (membership list attached). More than two million students attend NAICU member institutions, from the large research university to the small church-related college.

NAICU is deeply committed to the goals of non-discrimination and equal opportunity in higher education. We embrace these social policy goals as part of our fundamental responsibility as institutions of higher learning. NAICU, therefore, supports the bill's broad coverage of our colleges on an institution-wide basis. We are strongly committed to the elimination of any discriminatory acts or practices on any college campus in the country, and hope that the higher education community may serve as an example to the rest of the nation.

As detailed in this statement, NAICU supports S. 557 but urges the Congress to add a religious tenet amendment to Title IX. In addition, NAICU hopes that the Congress will confirm, through legislative history, that S. 557 is not intended to affect the tax-exempt status of higher education institutions, nor is it intended to affect the current statutory exemption such as that afforded to single-sex institutions.

The Title IX Religious Exemption

The area of most serious concern to NAICU is the limited religious tenet exemption for religious educational institutions which is contained in Title IX. The current exemption was adopted as part of the original enactment of Title IX in recognition of the important need to protect and guarantee the full exercise of religious liberty by church-related schools, and to ensure that students in such schools can utilize federal support. This exemption allows religious educational institutions, which are "controlled by a religious organization," to claim an exemption from specific Title IX regulations if there is a conflict with particular religious tenets of the controlling religious organization.

Under the regulations promulgated by the Department, educational institutions wishing to claim the exemption must submit "in writing to the Assistant Secretary, a statement by the highest ranking official of the institution, identifying the provisions of Title IX which conflict with a specific tenet of the religious organization." It is important to keep in mind that this does not provide a blanket exemption from all Title IX requirements but, rather, is limited to the particular regulation(s) which are inconsistent with religious tenets.

Between enactment of the regulations in 1975 and now, there have been 218 exemption applications submitted by various institutions across the country, most submitted in the late 1970's. Until 1985, the Department of Education engaged in no substantive action upon these applications, and institutions were left uncertain of their status. Clearly, this had a chilling effect on

the full exercise of religious liberty. While we applaud the Department's recent action to process these claims, allowing several years to lapse before beginning such action is unwarranted and unreasonable. We hope that the Committee will encourage the Department of Education to avoid such delays in the future.

It appears that part of the difficulty encountered by the Department in resolving religious exemption requests is determining whether an educational institution is "controlled" by a religious organization. The Department has interpreted the "control" requirement under current law as requiring that church-related colleges meet one of the following conditions:

(1) be a school or department of divinity; or

(2) be a school that requires its faculty, students or employees to be members of, or otherwise espouse a personal belief in, the religion of the organization by which it claims to be controlled; or

(3) be a school whose charter and catalog, or other official publication, contains explicit statement that it is controlled by a religious organization or an organ thereof, or is committed to the doctrines of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization or an organ thereof.

The current statutory exemption does not meet Congress' goal of protecting the religious integrity of church-related institutions. While this exemption may have covered a substantial number of church-related colleges when first enacted, changes in church-related higher education make the current exemption outdated and ineffective.

More specifically, the governance of religious colleges and universities has changed over time. While most religious colleges were in the past formally linked to churches, this is no longer the usual practice. Boards of directors are now often independent and self-perpetuating. It has also become more difficult for religious organizations to provide full financial support for church-related institutions. Lastly, the denominational affiliation of religious institutions has changed in character over the years.

Thus, many church-related colleges now have lay boards of trustees, diverse funding sources, and less formal denominational affiliations, but retain the same commitment to their religious tenets. Religiously-oriented schools not "controlled" by churches are clearly entitled by the Constitution to religious liberty protection as well.

The Proposed Religious Tenet Amendment

In order to remedy this problem, NAICU suggests that the current Title IX religious tenet exemption be clarified and modernized. The proposed change to the Civil Rights Restoration Act would provide an exception to the bill's definition of "program" or "activity." The proposed new language (underlined below) would provide that:

> such term ["program" or "activity"] does not include any operation of an entity which is controlled by or which is closely identified with the tenets of a religious organization if the application of section 901 to such operation would not be consistent with the religious tenets of such organizations.*/

The purpose of this proposed amendment is to appropriately clarify which institutions may seek the limited exemption from certain Title IX requirements. The amendment will protect important religious liberty interests, and will not undermine the important non-discriminatory principles embodied in Title IX and other civil rights statutes.

The proposed language has been carefully drafted. First, the exemption is limited in scope and does not allow a college to unilaterally claim a blanket exemption from all Title IX requirements. Rather, there must be a particular religious tenet and a particular Title IX regulation in conflict before the exemption will apply. Title IX coverage will properly apply to all other aspects of the institution's activities.

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*/The language of this religious tenet exemption has recently been adopted into law in another educational context. More particularly, during consideration of the Higher Education Amendments of 1986, Congress added an identical religious tenet provision to the College Construction Loan Insurance Association Program. (The exemption in this context was based on a religious anti-discrimination requirement, not an anti-discrimination requirement based on sex.) See Section 752(e)(2) of the Act.

In addition, under the regulations, a college must apply for the exemption. The Department of Education reviews each exemption request submitted, and grants or denies the request based on the facts presented. The limited nature of the exemption is further highlighted by the fact that the Department retains jurisdiction to investigate any college which receives an exemption and it may rescind a grant previously made.

It should be noted that only a limited number of schools closely identified with the tenets of a religious organization will have problems with the Title IX regulations and will seek the specified exemption. In addition, only a very few title IX regulations will be a problem for religious institutions. Many religious schools will comply fully with the regulations and will not seek an exemption, despite its availability.

Conclusion

We strongly support S. 557. In urging certain changes, our intent is to improve and clarify the legislation, so that our colleges and universities have a clear understanding of their duties and responsibilities in the area of civil rights.

NAICU supports the laws affected by S. 557, and its member institutions re-pledge their efforts toward fulfillment of the goals underlying those laws.

Thank you for allowing NAICU to submit this statement for the record.

בס"ד

Agudath Israel of America
אגודת ישראל באמריקה

David Zwiebel, Esq.
Director of Government Affairs
General Counsel

April 7, 1987

Honorable Edward M. Kennedy
Chairman
Senate Committee on Labor and Human Resources
113 Russell Senate Office Building
Washington, D.C. 20510-6300

Honorable Orrin G. Hatch
Ranking Minority Member
Senate Committee on Labor and Human Resources
135 Russell Senate Office Building
Washington, D.C. 20510-6300

Re: S.557, the "Civil Rights Restoration Act of 1987"

Dear Senators Kennedy and Hatch:

On March 12, I wrote to say that I would appreciate receiving an invitation to appear before the Committee on Labor and Human Resources to testify on behalf of Agudath Israel of America regarding the proposed Civil Rights Restoration Act of 1987, just as I testified on the similar bills introduced in years past.

It has now come to my attention that the committee has since held two days of hearings on the bill, and that no further hearings are scheduled. That being the case, I am taking the liberty of enclosing herewith a memorandum summarizing the points I would have made had I been invited to testify. If timely and appropriate, I would appreciate it if you would have the memorandum included in the record.

As detailed in the memorandum, Agudath Israel of America supports the basic objectives of the bill but remains concerned about several of its potential implications for faith related institutions. I believe that many if not all of our concerns can be resolved through simple amendment or even legislative history that will not dilute the basic impact or objectives of the bill.

I hope the Committee will give serious attention to our concerns and work with us in resolving them. Many thanks.

Sincerely,

David Zwiebel

Enclosure
cc: Members of the Senate Committee on Labor and Human Resources

84 William Street, New York, N.Y. 10038 (212) 797-9000

בס"ד

Agudath Israel of America
אגודת ישראל באמריקה

COMMISSION ON LEGISLATION AND CIVIC ACTION

April 7, 1987

M E M O R A N D U M

TO: Members of the Senate Committee on Labor and Human Resources

FROM: David Zwiebel, Director of Government Affairs and General Counsel

SUBJECT: S.557, The "Civil Rights Restoration Act of 1987"

Agudath Israel of America is a national Orthodox Jewish movement with chapters in 30 states, tens of thousands of members, and 19 divisions operating out of central headquarters in New York. Among its other activities, Agudath Israel of America frequently presents to government bodies perspectives on public policy issues reflecting the views and concerns of the approximately 500 elementary and secondary schools under the umbrella of the National Society for Hebrew Day Schools and the approximately 60 secondary schools affiliated with the Association of Advanced Rabbinical and Talmudic Schools.

This memorandum sets forth our views on S.557, the "Civil Rights Restoration Act of 1987." In a nutshell, we support the basic objectives of the bill but remain concerned about some of its potential implications for faith related institutions.

Agudath Israel of America and its constituents are no strangers to issues of civil rights. Since its inception 65 years ago, Agudath Israel has been in the forefront of advocating and defending the civil rights of American Orthodox Jews, whose dress, diet and religious observance often set them conspicuously apart from the mainstream of American society. Agudath Israel is thus extremely sensitive to abrogations of civil rights, and has consistently supported laws designed to combat invidious discrimination.

84 William Street, New York, N.Y. 10038 (212) 797-9000

In that connection, Agudath Israel has long emphasized that the right freely and fully to practice one's religion is one of the most fundamental of all the civil rights. Accordingly, we have reviewed S.557 with a particular eye toward its potential impact on faith related institutions. Having done so, we reluctantly must express our reservations about the bill as it is currently written.

Specifically, our concerns regarding the bill's potential impact on religiously affiliated organizations are these:

1. "School System". In amending four separate civil rights laws, the bill would define "program or activity" to include "all of the operations of " . . . a "school system" . . . "any part of which is extended Federal financial assistance." In this context, would the phrase "school system" -- which the bill does not formally define -- include all Orthodox Jewish institutions across the country? Would extension of federal financial assistance to one such school trigger coverage of all the others? We would hope not; any affiliation or connection among the Jewish schools whose views and concerns we represent is loose, at best. But whether or not a court ultimately would uphold our view on that question is almost beside the point, inasmuch as any "private attorney general" could tie up a school for years in burdensome, expensive and vexatious litigation until the issue would be resolved.

We are thus opposed to having the bill's coverage extend to an entire "school system" when one school within the system is a recipient of federal aid. At a minimum, Congress should define "school system" with precision and circumspection, so that the phrase would encompass only closely related entities whose policies and practices are determined by one central body at one central location.

2. Coverage of Non-Funded Activities. The bill would interpret "program or activity" in a way that could be read to require a religious or charitable organization that operates one federally funded activity to comply with each of the civil rights laws in all of its non-funded activities as well. This would impose an onerous and unwarranted burden -- in terms of paper work and substantive compliance -- that might have an unfortunate "chilling effect" on any religious or charitable organization seeking federal financial assistance to help provide charitable services to needy persons.

Consider, for example, a religious organization that operates a number of privately funded charitable social service projects. To be eligible for federal financial assistance to help it carry

out one of its projects, the organization would have to expend considerable sums to make all of its facilities and projects accessible to the handicapped. It would also have to hire additional administrative and clerical personnel to ensure organization-wide compliance with the civil rights laws and to fill out the plethora of forms necessary to satisfy an voracious federal bureaucracy. Obviously, the organization would think twice before applying for the federal assistance.

The likely impact of this provision would thus be to restrict the pool of federal financial assistance applicants to wealthy organizations that could afford to pay the clerical and substantive costs of civil rights compliance not just in connection with the funded program, but on an organization-wide basis. Does Congress really want, in the name of civil rights, to preclude less affluent groups from obtaining federal dollars to help the needy?

3. Title IX Religious Exemption. Given the expansive definition of "program or activity" that would govern Title IX, and given the pro-abortion and other religiously objectionable provisions of the Title IX regulations, it is especially important that the statutory exemption in Title IX for religious schools be broad enough to cover any entity that legitimately cannot comply with certain aspects of Title IX without compromising its tenets. Unfortunately, the language of the existing exemption -- which permits a recipient institution that is "controlled by a religious organization" to claim exemption from specific aspects of Title IX that are not consistent with the controlling organization's religious tenets -- may not go far enough.

Agudath Israel supports expansion of the Title IX exemption so that it would cover not only entities that are "controlled by a religious organization," but also those that are "closely identified with the tenets" of a particular denomination. It is noteworthy that there already exists precedent for such language; section 752(e)(2) of the Higher Education Amendments of 1986 states that the College Construction Loan Insurance Association Program's prohibition against discrimination on the basis of religion "shall not apply to an educational institution which is controlled by or which is closely identified with the tenets of a particular religious organization if the application of this section would not be consistent with the religious tenets of such organization." [Emphasis added.]

4. Determining Recipiency of Federal Financial Assistance. Finally, there is the need to clarify the circumstances under which an institution will be deemed a recipient of federal

financial assistance. In the first part of its Grove City ruling, the Supreme Court held that indirect aid to an educational institution -- i.e., aid provided by government to the student, who in turn chooses to use it at a particular institution -- renders the institution itself a recipient. We are troubled by that expansive reading of the statutory phrase "receiving federal financial assistance," especially in view of S.557's expansive definition of "program or activity."

We believe that when an institution's connection with federal assistance is only tenuous, the law should not be so quick to assert federal civil rights jurisdiction. At a minimum, Congress should clarify that an institution's tax exempt status would not, in and of itself, be deemed a sufficient basis upon which to trigger statutory coverage.

In addition, if Congress does agree with the first part of the Grove City decision, it should remove the existing ambiguity in the language of Title IX which speaks in terms of institutional recipiency when it really means student recipiency. We would recommend that the operative language of Title IX be amended to state explicitly that coverage is triggered not only when the institution itself receives federal financial assistance, but also when it admits students who receive such assistance. That could be achieved by adopting language along the following lines: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination by, any education program or activity conducted at any educational institution that receives, or enrolls any student who receives, federal financial educational assistance."

* * *

Note that most, if not all, of the concerns identified in this memorandum can be allayed by simple amendment or legislative history without affecting the basic structure or objectives of the bill. Agudath Israel would be happy to work together with committee staff to help design appropriate amendment language or legislative history to alleviate these concerns.

In conclusion, we reiterate that Agudath Israel of America is fully supportive of laws that promote civil rights. We urge only that in doing so, Congress not overlook the important fact that religious rights are civil rights too.

D.Z.