WITHOUT JUSTICE*

The Leadership Conference on Civil Rights**

INTRODUCTION AND SUMMARY

The Attorney General of the United States serves as the government's chief law enforcement officer and runs the largest office in the country. His authority stems principally from two sources—the Constitution and Acts of Congress.[1] Under the Constitution the President is charged with the duty to "take care that the laws be faithfully executed;"[2] the Attorney General is a principal instrumentality for carrying out that responsibility. The basic limitations on the authority of the Attorney General under our constitutional framework are also clear. Simply stated, the Attorney General does not make the law (a power which belongs to Congress), nor does he definitively interpret the Constitution and laws (a power which resides in the Supreme Court); rather, as part of the executive branch, his duty is to enforce the law.

As enforcer of laws enacted by Congress, the Attorney General is responsible for administering a host of statutes designed to protect the rights of citizens. For the past quarter of a century, the implementation of civil rights statutes has been a central role of the Department of Justice. These statutes cover a broad range, authorizing the Department to file suits in federal court to protect the rights of minorities, women and other disadvantaged groups to equal treatment in such areas as education, employment, housing, voting and public facilities.[3]

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** The Leadership Conference on Civil Rights is a voluntary, multi-ethnic, bi-partisan civil rights organization comprised of slightly more than 160 organizations from throughout the nation. A common commitment to legal and political equality, human rights, and human dignity has been the hallmark of the Leadership Conference since its inception 33 years ago.

1. *See*, Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 587 (1952).

2. U.S. CONST. art. II, § 3.

3. The principal statutes include the Civil Rights Act of 1957, 71 Stat. 637, which established the Civil Rights Division in the Department of Justice and authorized the Department to sue for denials of the right to vote; the Civil Rights Act of 1964, 78 Stat. 241 which authorized Justice Department suits to redress discrimination in public schools, public facilities, employment, federally financed activities and other areas; the Voting Rights Act of 1965, 42 U.S.C. 1973 (1965), which gave the Department additional special responsibilities for preventing voting discrimination; and the Civil Rights Act of 1968, 82 Stat. 81 which authorized the Department to file suits against housing discrimination. More recent legislation has given the Department additional authority to seek redress for sex discrimination, discrimination against handicapped persons and discrimination against persons confined to mental and penal institutions.

Prior to 1957, the Department's principal statutory duties concerned the enforcement of criminal civil rights laws. It did take positions in other cases however. In 1838, Attorney General Grundy intervened to aid the Spanish government in recovering black Africans who had been kidnapped by Spaniards and escaped to the United States. The Attorney General claimed that the Africans were "merchandize" returnable under a treaty with Spain providing for the return of "ships and merchandize"—a position rejected by the Supreme Court. United States v. Schooner Amistad, 40 U.S. (15 Pet.) 518 (1841). In 1851, Attorney General Cushing issued an opinion that fugitive slaves could be reclaimed as property under the laws of states and territories—a view later

During these twenty-five years, except in one period,[4] the Department of Justice has adhered to its basic responsibility to enforce the laws as enacted by Congress and interpreted by the courts. Now, in the Reagan Administration, there has been a radical change. As is documented in the pages of this report,[5] under the leadership of Attorney General William French Smith and Assistant Attorney General William Bradford Reynolds, the Justice Department, in the short span of one year has:

a) repudiated the Supreme Court's definitive interpretation of the Constitution and laws and announced that it would refuse to enforce the law of the land;[6]

b) abruptly switched sides in cases pending before the Supreme Court and announced that it would seek the overturning of Supreme Court decisions of very recent vintage, in disregard of the importance of certainty and continuity in the law;[7]

c) sought to undermine confidence in the judiciary by launching a sweeping attack on the federal courts for performing their constitutional role of protecting the rights of minorities from intrusions of majority will;[8]

d) established itself as the locus of anti-civil rights activity in the federal government, reaching into other agencies to try to curb policies deemed overly protective of civil rights;[9] and

e) cooperated in the corruption of the legal process by allowing its decisions to be shaped by appeals from politicians not based on law.[10]

The common thread running through these actions is a desire by the Reagan Administration's Justice Department to narrow the remedies available to minorities, women, handicapped people and others when their rights have been denied. In fact, even when the protection of civil rights was being accomplished through means that the Administration says it favors, the voluntary initiatives of local officials or of business and labor, the Justice Department has announced its opportunities.[11]

But the ramifications of the Justice Department's conduct go far beyond the positions it has taken in any particular case or on any set of issues.[12]

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relied upon in Dred Scott v. Sanford, 60 U.S. (19 How.) 397 (1857). In contrast, in 1954 the Attorney General as a friend of the court in Brown v. Board of Educ., 347 U.S. 483 (1954), forcefully argued for the invalidation of state laws mandating segregation in public education.

4. During the tenure of Attorney General John Mitchell under President Nixon, the Justice Department renounced the use of certain enforcement techniques provided by Congress and failed to enforce school desegregation decisions of the Supreme Court. *See*, REPORT BY THE LAWYERS' REVIEW COMMITTEE TO STUDY THE DEPARTMENT OF JUSTICE (1972).

5. The principal sources of information for this report are testimony, speeches and other public utterances of officials of the Department of Justice and other members of the Administration. The report also relies on legal briefs, departmental memoranda and correspondence that have come into our possession. In a few instances information has come from sources who do not wish to be indentified. We have used this information only when corroborated by another source.

6. *See infra* Chapter 1.

7. *See infra* Chapters 1, 3 and 4.

8. *See infra* Chapter 2.

9. *See infra* Chapter 3.

10. *See infra* Chapter 5.

11. *See infra* text accompanying notes 41 and 85.

12. People may disagree vigorously with a Supreme Court decision that busing is required to remedy state-imposed school segregation or that affirmative action is proper to redress employment discrimination, and yet realize that under our constitutional system, the Court is the final arbiter. If our constitutional system is ignored in dealing with the rights of one group, the rights of all are endangered.

When a citizen, an institution, or a state or local government violates the Constitution, the damage done to our legal system is unfortunate but remediable. If, however, the actions of the highest law enforcement officials in the nation place the powerful executive branch in conflict with the Constitution and the courts, the rule of law itself is imperiled.

The restraints upon unlawful and improper activities by the executive branch are fragile indeed. Curbing the excesses reported in these pages requires a Congress prepared to put aside political considerations in order to protect our constitutional system, lawyers conscious of their obligation to defend the judicial system, an alert press and an informed citizenry. It is to all of these audiences that this report is addressed.

CHAPTER I: EDUCATION

I. *Repudiating Brown v. Board of Education*

Perhaps the boldest initiative taken by the Attorney General and the Assistant Attorney General for Civil Rights has been their effort to turn the federal government's course concerning school desegregation. It is here—where the Department's responsibility to protect the rights of students has been clear at least since 1964,[13] and substantive constitutional law was established even earlier—that the Justice Department has most explicitly rejected settled law and defaulted on its enforcement role.

The sharp conflict that the Justice Department has entered into with the courts is revealed most explicitly in the following quotations from Supreme Court decisions and congressional testimony of Assistant Attorney General William Bradford Reynolds:

> a) *The Supreme Court*: "The burden on a school board today is to come forward with a plan that promises to work realistically *now* . . . . [I]f there are reasonably available other ways . . . promising speedier and more effective conversion to a unitary, non-racial system, 'freedom of choice' must be held unacceptable." [*Green v. County School Bd.*, 391 U.S. 430, 438-39 (1968)]. (emphasis added).
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> *Mr Reynolds*: "We are not going to compel children who don't choose to have an integrated education to have one." [N.Y. Times, Nov. 20, 1981, p. A14.]
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> b) *The Supreme Court*: "All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest to their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation . . . . [T]ransportation has been an integral part of the public education system for years . . . . Desegregation plans cannot be limited to the walk-in school." [Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28-30.
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> *Mr. Reynolds*: "We have concluded that involuntary busing has failed to advance the overriding goal of equal educational opportunity. Adherence to an experiment obviously makes little sense." [Testimony before the House Subcommittee on Civil and Constitutional Rights, Nov. 19, 1981].
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> c) *The Supreme Court*: "In short, common sense dictates the conclusion that racially inspired school board actions have an impact beyond the

13. 42 U.S.C. § 2000(c)(6)-(d) (1964).

particular schools that are the subjects of those actions. This is not to say, of course, that there can never be a case in which the geographical structure of, or the natural boundaries within, a school district may have the effect of dividing the district into separate identifiable and unrelated units. Such a determination is essentially a question of fact to be resolved *by the trial court* in the first instance, but such cases must be rare." [*Keyes v. School Dist. No. 1*, 413 U.S. 189, 203 (1973)] (emphasis added).

Mr. Reynolds: "In deciding to initiate litigation, we will not rely on the *Keyes* presumption but will define the violation precisely and seek to limit the remedy only to those schools in which racial imbalance is the product of intentionally segregative acts of school officials." [Nov. 19, 1981 testimony, p. 13].

A brief summary of the current state of the law and of the historical context may serve to clarify the extent of the Department's retreat from its legal responsibilities. Since *Brown v. Board of Education*,[14] state law or policy which requires the separation of black from white students in public schools has been unconstitutional. Beginning in the late 1960's, attention focused on remedies for the failure of many segregated school systems to dismantle their dual systems. Despite the principles enunciated in *Brown*, these school systems, through inaction or massive resistance, lived outside the law for fifteen years. In a series of important and still binding decisions,[15] the Supreme Court announced the following guiding principles:

(1) State-imposed or state-fostered segregation, whether rooted in state legislation or local practice, violates the Equal Protection Clause of our Constitution.[16]

(2) Just as state authorities have created segregated schools, they are responsible for dismantling segregation and providing "just schools" for all pupils, regardless of race.[17]

(3) In curing state-imposed segregation, school authorities must affirmatively act to ensure desegregation. "Freedom of choice" plans, which allow black students to attend white schools and vice versa, are inadequate as remedies because they do not remove the racial identification of public schools, and place the burden of change on students rather than requiring government to undo what it has done.[18]

(4) Federal courts have broad equitable power to shape school desegregation decrees which promise effectively to eradicate state-imposed segregation "root and branch" as expeditiously as possible.[19]

(5) School buses, long used in many areas of the country to segregate as well as for racially-neutral purposes, may be used in the desegregation process. Busing will not be used so extensively as to impair the health or safety of children.[20]

(6) The implementation of desegregation plans may not be avoided or

14. 347 U.S. 483 (1954).

15. *See, e.g.*, Green v. County School Bd., 391 U.S. 430 (1968); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

16. *Brown*, 347 U.S. 483.

17. *See Green*, 391 U.S. 430.

18. *Id.*

19. *Id.*

20. *Swann*, 402 U.S. 1.

thwarted by opposition or resistance by some members of the community.[21]

(7) In northern and western school districts, where public schools often are as segregated as they were in the South, a remedy is available if it is shown that racial segregation was a deliberate policy or practice of government officials. If it is proved that a substantial number of schools were intentionally segregated, all schools in the district will be desegregated unless public education officials demonstrate that some of the schools were unintentionally segregated or that desegregation is not feasible.[22]

The Supreme Court has not required that racial balance be achieved at each school. Most court decrees have provided ranges (for example, within 15% more or less than the system average), and required each school in a formerly segregated system to fall within this range. For instance, a school system like Kalamazoo, Michigan, in which black students comprise 30% of the total population, will have schools which range from 15-45% black.[23]

The Department's top officials have not openly disputed the proposition that state-imposed segregation is unconstitutional. However, with respect to each of the other principles, they have either expressed their refusal to follow the law or distorted its current requirements. Most critically, the Department argues that despite the role played by state authorities in creating dual systems and requiring students to attend racially separate schools, these officials need not be required to undo their wrong by reassigning students to desegregated schools. In the view of Assistant Attorney General Reynolds, it will suffice if previously segregated students now are permitted to choose between segregated and desegregated schools. Thus, in direct contravention of settled law reaffirmed by the Supreme Court most recently in 1979,[24] he proposes to relieve state officials who have created segregation of their obligation to undo it.[25]

Starting from this misconceived premise, other critical strands of administration policy follow. If state authorities have no responsibility more substantial than allowing students to choose to attend desegregated schools, reliance upon "voluntary" desegregation techniques is appropriate. Moreover, mandatory transfers, whether or not they entail busing, become unnecessary because state officials have no obligation to ensure that students are able to attend desegregated schools. Likewise, there is no need to be concerned with whether a system's schools are actually desegregated; student choice is the goal, not desegregated schools.

This position is directly contrary to the equal protection law developed during more than twenty-five years of litigation involving nearly 2,000 separate lawsuits. Simply stated, state authorities have an *affirmative obligation* to dismantle dual systems and cannot pass this obligation off to students and parents. In furtherance of their affirmative constitutional duty, school au-

21. Cooper v. Aaron, 358 U.S. 1 (1958).

22. *Keyes*, 413 U.S. 189, *Columbus*, 443 U.S. 449. Dayton Bd. of Educ. v. Brinkman, 443 U.S. 576 (1979). This is the burden that the Assistant Attorney General seeks to life from the shoulders of school boards.

23. Oliver v. Michigan Bd. of Educ., 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

24. Columbus Bd. of Educ. v. Penick, 443 U.S. 449; Dayton Bd. of Educ. v. Brinkman, 443 U.S. 576.

25. Transcript of Hearings, Nov. 19, 1981, at 53-54.

thorities must utilize desegregation techniques which promise to work effectively. For example, if magnet schools can in fact replace formerly segregated schools with "just schools," they are constitutionally sufficient. However, their permissibility is determined, not by reference to a system's "good faith," but rather by the results achieved in dismantling its dual school system. Thus, if voluntary techniques do not promise expeditious and maximum desegregation, then mandatory desegregative re-assignments must be made to replace the previous mandatory segregative assignments. And, if these techniques require buses to get the students to their proper schools, buses may (indeed, must) be used.

The Department of Justice has sought to substitute for the constitutional imperative of eradicating state-imposed segregation a commitment that segregated black students are assured equal access to resources and staff. As justification, the Assistant Attorney General has suggested that a misplaced emphasis on school segregation has led to a neglect of educational quality.[26]

Nothing could be further from the truth. In many major school desegregation cases, plaintiffs have aggressively challenged educational inequality, and the Supreme Court has held that state and local authorities may be required to provide additional resources and services to students to compensate for past discrimination.[27] In other cases, plaintiffs have sought revision in state systems for financing public schools that shortchange students in poor and minority areas.[28]

Further, Reynolds' suggestion that new attention to equalizing resources may serve as a substitute for desegregation betrays either ignorance of his Administration's successful efforts to reduce federal aid to poor and minority schools or a pervasive cynicism.

In any event, the proposal that minority schools be upgraded as a substitute for desegregation is a red herring. The heart of the *Brown* decision was a repudiation of the doctrine of "separate but equal"—the claim by state authorities that if they assured that black and white schools were made tangibly equal in resources, they should be permitted to segregate them. The Justice Department seeks to revive that discredited doctrine.

II. *Changing Sides and Ignoring the Law*

Beyond its policies on public school desegregation, the Justice Department has ignored or repudiated settled legal doctrine in areas affecting the rights of children to equal educational opportunity. In still other areas where the Supreme Court has not previously resolved the specific issues at stake in a particular controversy, the Reagan Administration's Justice Department has abruptly reversed the legal positions of its predecessors, switching sides while cases were pending before the Supreme Court. While each new Administration certainly is entitled to develop its own legal views and priorities, past Attorneys General, recognizing the values of continuity,

26. Transcript of Hearings, Nov. 19, 1981, at 56-58.

27. Milliken v. Bradley, 433 U.S. 267 (1977). [*Milliken II*]

28. Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1141 (1971); Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187 (1972); Rodriguez v. San Antonio Bd. of Educ. 411 U.S. 1 (1973).

have generally respected the views of their predecessors in *pending* cases, opting instead to promulgate their policies in *new* cases.

The Reagan Administration's Justice Department has departed from past practices in a wholesale manner, changing course in the Supreme Court in three major cases in the 1981 term. In each case, the Department has acted against the claims of minorities to equal educational opportunity.

A. *Tax Exemptions for Discriminatory Private Schools*

On October 13, 1981, the Supreme Court granted review of two circuit court decisions which upheld Treasury Department regulations denying tax exempt status under the IRS code to two schools which practice racial discrimination in admissions and other policies, *Bob Jones University v. United States* and *Goldsboro Christian Schools Inc. v. United States*.[29] On January 8, 1982, the Department of Justice switched sides and asked the Supreme Court not to hear the cases in light of a new Treasury Department decision to change federal policy and allow such schools tax-exempt status. In short, the United States has changed its legal position and requested the Supreme Court to drop the case because there is no longer a controversy between the United States government and the discriminatory schools.

While the Justice Department sought to portray its action as a simple change in executive policy, that is not the case. Rather, the Justice Department repudiated a congressional statute interpreted by the courts to bar tax exemptions to discriminatory private schools.

Prior to 1970, the IRS extended tax exempt status to all private schools, regardless of racial discrimination, under 26 U.S.C. 501(c)(3).[30] In 1970, black Mississippi parents and children obtained a preliminary injunction prohibiting the IRS from according such privileged status to schools in Mississippi which discriminated on the basis of race.[31] The IRS then announced that it would no longer allow charitable contributions and deductions or tax exempt status to racially-discriminatory schools, regardless of whether church affiliated, anywhere in the country.

On June 30, 1971, the three-judge district court in *Green v. Connolly* ruled that the issuance of tax exempt status to racially discriminatory private schools was *illegal* and issued a permanent injunction enjoining the Commissioner of IRS from approving tax exempt status to any school in Mississippi that did not publicly maintain a policy of non-discrimination.[32]

Following the Supreme Court's affirmance without opinion in 1971, the IRS formalized the non-discrimination policy in a number of Revenue Rulings including Rev. Rul. 75-231, 1975-1 Cum. Bull. 158 (which relates specifically to church operated schools). Under this ruling, to receive "charitable" status a private school must be able to show that all its programs and facilities are operated in a non-discriminatory manner.[33] Bob

29. 639 F.2d 147 (4th Cir. 1980), *cert. granted*, 454 U.S. 892 (October 13, 1981); 644 F.2d 879 (4th Cir. 1981), *cert. granted*, 454 U.S. 892 (October 13, 1981) (consolidated).

30. 26 U.S.C. 501(c)(3).

31. Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970).

32. Green v. Connolly, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd.*, 404 U.S. 997 (1971) (*per curiam*).

33. 639 F.2d at 150.

Jones University and Goldsboro Christian Schools, Inc. both were denied tax exempt status on the basis of overt racially discriminatory policies and practices and each challenged (a) the legal authority of the IRS to enforce such nondiscrimination provisions, and (b) the constitutionality of any such regulation in light of claimed infringements on the Free Exercise and Establishment Clauses of the first amendment.

In the clearest and most precise lower court decision, the Fourth Circuit upheld both the statutory authority of the IRS' non-discrimination policy and its constitutionality. Upholding the refusal of the IRS to consider as "charitable" an institution practicing racial discrimination, the court concluded, citing Judge Leventhal's opinion in *Green v. Connally*,[34] "that to be eligible under Section 501(c)(3), an institution must be 'charitable' in the broad common law sense and therefore must not violate public policy."[35] And, the Court found that "Bob Jones University's racial policies violated the clearly defined public policy, rooted in our Constitution, condemning racial discrimination and, more specifically, the government policy against subsidizing racial discrimination in education, public or private."[36]

Rejecting the free exercise argument, the circuit court held the government's duty to "steer clear of any expression of support for racial discrimination in education" was fundamental and compelling, particularly in light of the fact that by failing to extend tax exempt status, the government does not "prevent the University from teaching the scriptural doctrine of nonmiscegenation. Nor is any individual student . . . forced to violate his beliefs. . . ."[37] Finally, facing the more complex issue raised by the Establishment Clause, the Fourth Circuit cited many precedents of government prohibitions of religious practices, (e.g., polygamy), and concluded: "[T]he principle of neutrality embodied in the Establishment Clause does not prevent government from enforcing its most fundamental constitutional and societal values by means of uniform policy, neutrally applied."[38]

It is conceivable, certainly, that the Supreme Court would have differed with the lower courts on the claims of Bob Jones or Goldsboro that tax exemptions should be granted where racial restrictions are imposed as part of religious doctrine. But the Justice Department went far beyond any appropriate role by repudiating the statutory basis for the decisions. Thereby, in a single stroke it ignored the Supreme Court's decision in *Green* (upholding the interpretations of tax law to deny exemptions to discriminatory institutions), and sought to prevent the Court from ruling on the particular issues involved in the *Bob Jones* and *Goldsboro* cases.

In the aftermath of the Administration's decisions, it was revealed that the initiative for the government's action came from Mr. Reynolds and other Justice Department officials and that it was implemented over the objections

34. 330 F. Supp. at 1156-1160.

35. *Bob Jones University*, 639 F.2d at 151.

36. *Id. See* Runyon v. McCrary, 437 U.S. 160 (1975) (the equal right to contract under 42 U.S.C. § 1981 prohibits racial discrimination in non-public school admissions); Norwood v. Harrison, 413 U.S. 455 (1973).

37. 639 F.2d at 154.

38. *Id.*

of the Solicitor General's office and top Treasury Department officials.[39] In testimony before a Senate committee, Deputy Attorney General Edward C. Schmults acknowledged that Justice was aware of the *Green* case, stating that, nevertheless, the IRS policy was legally unjustified.[40]

B. *Education for the Children of Illegal Aliens*

The State of Texas adopted in 1975 a statute which requires local school districts to exclude the children of illegal or undocumented aliens from the public schools or to admit them only upon payment of tuition. The statute, which affects many aliens who lived in this country for years, was challenged by lawyers representing the children of Texas' aliens as violative of the fourteenth amendment's mandate that no state deny "to any person within its jurisdiction the equal protection of the laws."

The Justice Department, supporting the position of the aliens, argued successfully in the district court and the Fifth Circuit Court of Appeals that the Texas statute violates the Constitution.[41] But when the case reached the Supreme Court, Rex Lee, the Solicitor General appointed by President Reagan, declared that the United States would abandon the position it had previously taken in the lower courts. He stated that the United States no longer had an interest in how the courts interpret the fourteenth amendment on the issue and had no view on whether the Texas statute violated the Equal Protection Clause.

C. *State Interference with Local Action to Desegregate Schools*

The third instance of an abrupt change of the government's position in the Supreme Court involves a controversy between the State of Washington and three local school districts over public school desegregation.[42] Seattle and two other districts had *voluntarily* adopted and carried out plans to desegregate their public schools. The State of Washington responded with a state-wide referendum which, after voter approval, required the districts to undo the desegregation they had achieved.

In the district court and the Ninth Circuit Court of Appeals, the Justice Department argued in support of Seattle and minority parents that the State's interference with voluntary desegregation was racially based action, which violated the fourteenth amendment. This position was sustained by both courts.

The case reached the Supreme Court after the Reagan Administration took office. The Justice Department shifted sides and asked the Supreme Court to uphold the State of Washington. The Department claimed that the state has authority to instruct local districts on how to assign students to school and that its action in invalidating the voluntary desegregation plans was not prompted by racial considerations. The Justice Department switch came after a heavy lobbying campaign directed at the Department and White House officials by the State Attorney General and after Lyn Nofziger,

39. N.Y. Times, Feb. 3, 1982, at A1, A21. The impetus for Justice action was an objection by a Mississippi Congressman, see Chapter 5.

40. N.Y. Times, Feb. 2, 1982, at A13.

41. *See* summary of the case, *Doe v. Plyler*, in 50 U.S. L. W. 3457 (Dec. 8, 1981).

42. Washington v. Seattle School Dist. No. 1, — U.S. —, 102 S. Ct. 3187 (1982).

then the President's chief political advisor, called upon the Department to change its position.[43]

D. *Chicago: The Emasculation of a Court Decree*

When the Justice Department exercises its statutory authority to file suit to end discriminatory treatment of minority students, it has a responsibility to assure that the constitutional rights of the students are protected. One standard method for resolving such litigation is a consent decree—a court approved settlement in which the defendants, without admitting wrongdoing, agree to end the challenged practice. In Chicago, the Reagan Administration's Justice Department has defaulted on its obligation to students by agreeing to the violation of a consent decree entered into by its predecessors.

In September 1980, the Justice Department and the Chicago Board of Education entered into a consent decree designed to end two decades of struggle in that city over desegregation. In the decree, the school board committed itself to develop a full desegregation plan by March 1981 with implementation in September 1981. In light of the history of fierce opposition to desegregation in Chicago, it was apparent that the Justice Department would have to be firm lest the consent decree not be carried out and desegregation once again be delayed.

Just the opposite occurred. Chicago did not come close to meeting the March 11, 1981 deadline for the submission of a desegregation plan, or, for that matter, either of the extensions consented to by the governments. In late May, the federal district court, which had accepted the decree, ordered Chicago to file "principles" which would guide the development of a full desegregation plan. The court requested comments from the United States, which was the plaintiff, and interested community groups.

In July, the United States strongly criticized as inadequate the principles proposed by the school board. Focusing on the definition of a segregated school (schools 70% white were to be defined as desegregated in a city with 20% white enrollment), the Board's preference for voluntary desegregation devices and the proposed delays in implementing the plan which would rely entirely on voluntary transfers until September, 1983, the Department of Justice stopped just short of condemning the principles as unconstitutional. It did label them inadequate in light of the consent decree's command that maximum feasible desegregation be achieved.

The Justice Department's comments prompted a series of meetings between the attorney for the School Board and the Assistant Attorney General. Then, in August 1981, the Department retreated. It told the court that it was (1) dropping its demands for information which would assist the court and interested parties in evaluating the efficacy of the proposed principles; (2) joining with Chicago in requesting the court not to rule on the adequacy of the submitted desegregation principles; and (3) willing to give Chicago two school years to experiment with previously unsuccessful voluntary desegregation devices.[44] While the NAACP, representing black students, has

43. *See infra* Chapter 5.

44. On February 11, 1982, the Justice Department reaffirmed this position in an *Assessment of the Chicago School Board's Comprehensive Student Assignment Plan* [hereinafter cited as *Assess-*

protested the agreement of Chicago and the Justice Department to do less than the consent decree and the law require, the organization has not yet been granted status as a party in the case.

The Chicago case is a neat example of the Department's new approach which substitutes the hope of voluntary reform by the lawbreaker for insistence on compliance with the law, that is, for law enforcement. The consent decree had expressly committed Chicago to the use of transportation if other methods of desegregating do not promise to do the job effectively. Now that commitment is to be ignored despite reports from the school board that not a single predominantly minority school has ever approached measurable desegregation through these voluntary techniques. This triumph of ideology over experience was trumpeted by the Assistant Attorney General for Civil Rights in testimony before a House subcommittee in November, 1981:

> *Rep. Washington*: "You seem to have great confidence in a voluntary student transfer program. Are you using Chicago as an example of a voluntary program that could work?"
>
> *Mr. Reynolds*: "I think Chicago is a volunteer program that will work . . . . I think that overall the plan that is being followed in Chicago is one that people are very optimistic and positive about, and *I think it is working*"[45] (emphasis added).

It was suggested that this country end its military involvement in Vietnam by declaring victory and then abandoning the scene. That is apparently the Justice Department's prescription for dealing with continuing unconstitutional school segregation.

E. *Higher Education: The Abandonment of Legal Principles*

Consistent with its views about elementary and secondary schools, the position of the Reagan Administration on equal opportunity in higher education is that a high degree of segregation in a state-supported university system is tolerable as long as steps are taken to upgrade black institutions. The difficulty with this position is that it contravenes legal principles declared by the courts and the government's own legal standards.

In *Brown v. Board of Education II*, the Supreme Court referred to its opinion in *Brown I* as "declaring the fundamental principle that racial discrimination in *public education* is unconstitutional."[46] As the Sixth Circuit Court of Appeals ruled in *Geier v. University of Tennessee*, after reviewing the behavior of state officials faced with a historically racially dual system of state higher education, "these actions and failures to act constitute a violation of the constitutional duty to dismantle a dual system of public education . . . . Where an open admissions policy neither produces the required desegregation nor promises realistically to do so, something further is re-

ment]. The Department said its attitude was one of "cautious optimism" that the plan, which relies almost wholly on "freedom of choice," would work. *See* N.Y. Times, Feb. 14, 1982, at 35.

45. Transcript of Hearings, Nov. 19, 1981, at 79. Note that while Mr. Reynolds was "very optimistic" on November 19, the Justice Department expressed only "cautious optimism" in its later filing on February 11, 1982. Its enthusiasm may have been tempered by the fact that the Chicago Board's own projections for 1982 and 1983 showed smaller increases in integration than the token improvements that had occurred in earlier years. *See Assessment, supra* note 43.

46. 349 U.S. 294, 298 (1955).

quired."[47] The circuit went on to uphold a lower-court-ordered merger of University of Tennessee at Nashville with Tennessee State University:

> It was the State, acting through its legislature, which required for many years that black persons pursuing an education in a public institution of higher education be isolated from white persons engaged in the same endeavor . . . . After the doors of all institutions were opened to all qualified applicants without regard to race, the effects of the previous segregation lingered. TSU remained an almost totally black university in student body, faculty and administration. Its efforts to desegregate were directly affected by competition from the expanding UT-N (a white school). Since the policies and actions of the UT Board contributed to the perpetuation of the dual system there [is] no legal reason why it should not be required to participate in the court-ordered plan for dismantling that system.[48]

Geier expressed the "state of the law" when the Department's present leadership inherited responsibility for several major higher-education cases, among them cases in Louisiana, Mississippi and North Carolina. Instead of following the *Geier* remedial principles, the Administration has again acted as if the only issue were institutional inequality rather than state-sanctioned segregation. All these higher education cases raise one fundamental issue: how are segregated higher-education systems to be replaced by a unitary system in which formerly black institutions are strengthened and play an integral role? As the court ruled in *Geier*, eliminating program duplication between adjacent historically white and black schools is a minimal positive step, short of merger.

Yet in Louisiana and North Carolina, again reversing the position of the Justice Department in these suits, against the advice of lawyers most familiar with the cases and without explanation, the Department has settled for remedies which, while calling for some improvements in black colleges, allow a high degree of problem duplication, thus insuring the continuation of segregation. The settlements in these cases also violate the Department of Education's published criteria for determining the acceptability of plans to desegregate institutions of higher education[49]—standards adopted pursuant to a court decision requiring that the Department articulate its rules so that all those affected would know their rights and responsibilities.[50] The Administration is free, of course, to publish new criteria so long as they are consistent with constitutional principles. But it has chosen not to do so, with the Justice Department arguing instead the novel proposition that the legal standards have no application once settlement discussions are underway.[51] In short, as in Chicago, the federal government claims that it is free to make any deal it wishes with law violators, regardless of the impact of the settlement on the rights of minorities.

47. 597 F.2d 1056, 1067, *cert. denied*, 444 U.S. 886 (1979).

48. *Id.* at 1070.

49. Amended Criteria Specifying Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education, 42 Fed. Reg. 40780 (1977), *revised* 43 Fed. Reg. 6658 (1978).

50. *See* Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973).

51. *See* Brief of Appellees, the United States, in Adams v. Bell, No. 81-1715 (D.C. Cir. 1981) at 31-36.

III. *Reneging on Enforcement*

Having formulated and announced views on school desegregation remedies that are diametrically opposed to legal principles declared by the Supreme Court in the *Brown, Green, Swann* and *Keyes* cases, Justice Department officials were faced with several choices on how they would implement their views. One responsible course of action would have been to continue in pending and new cases to implement the law as declared by the Supreme Court, awaiting a day when the Court might modify its previous decisions. A second course would have been to seek actively a case which might serve as a vehicle for impelling the Court to reconsider its earlier decisions (an initiative the Department has decided to take with respect to affirmative action as detailed below), while continuing to enforce existing law until modified.

The third course was to treat Supreme Court decisions on school desegregation as a nullity and to implement instead the Department's view of what the law should be. This apparently is the course the Department has chosen. In his November 19th testimony, Assistant Attorney General Reynolds announced that "the Department will *henceforth*, on a finding by a court of *de jure* segregation, seek a desegregation remedy that emphasizes ('freedom of choice' plus 'separate but equal'), *rather than* court ordered busing."[52]

While the ramifications of this decision have not emerged fully, they are evident in the Department's emasculation of the Chicago consent decree, in which the school board's proposals were judged by their conformity with the Department's views, not with settled law. In several other cases—among them Charleston, SC and Yonkers, NY—complaints were filed in 1980 alleging serious violations which, if proved, would call for systemwide mandatory relief. While these cases have yet to be tried, Assistant Attorney General Reynolds has instructed the Justice Department attorneys handling the cases to seek settlements conforming with the Department's preference for piecemeal, voluntary remedy rather than settlements that comply with the law.[53] In another case involving a Texas school district, a federal court of appeals had previously rejected a voluntary plan and the district court had entered an order calling for a mandatory remedy.[54] Yet, late in 1981, Assistant Attorney General Reynolds advised school district officials that he would settle for voluntary relief if the district would drop its new appeal.[55] Stays of the appellate proceedings have been requested by both parties, while the Department proposes to give away a remedy previously ordered by the court in exchange for the abandonment of the appeal.

Neither the Assistant Attorney General nor any other Justice Department official has explained how this action can be squared with a fundamental tenet of our legal system, that: "It is emphatically the province and duty of the judicial department to say what the law is."[56] Nor has Mr. Reynolds

52. Transcript of Hearings, Nov. 19, 1981, at 53 (emphasis added).

53. Educ. Week, Oct. 12, 1981, at 1, 12.

54. United States v. Texas Educ. Agency (South Park I.S.D.), 647 F.2d 504 (5th Cir. 1981); order of Judge Parker, Aug. 5, 1981.

55. Conversations with sources—Dec. 1981 and Jan./Feb., 1981.

56. Marbury v. Madison, (1 Cranch) 137, 177 (1803). Another high official of the administra-

said whether he perceives any conflict between his actions and the binding oath he took under Article VI, Section 3, "to support this Constitution."

CHAPTER 2: UNDERMINING THE COURTS

Among the Attorney General's pronouncements concerning civil rights, none have been more startling, strident and significant than his attacks upon the federal courts for carrying out the courts' constitutionally-appointed role of protecting the rights of minorities.

In a major address in October 1981, and with increasing frequency since then, Attorney General Smith has accused the federal courts of invading the domain of the legislatures, states and federal, by decisions and orders that overruled the majority will. He referred to cases in which the courts had decided that what the majority had willed deprived a minority of a constitutionally-protected right. In these speeches, the Attorney General, attacking the federal courts for "their use of mandatory injunctions and attempts to fashion [remedies] for perceived violations,"[57] has focused special attention on civil rights cases. He has assailed court ordered pupil transportation to remedy unconstitutional school segregation, affirmative action requirements in employment discrimination cases, and systemwide relief in school districts operating dual systems—all of which the courts have found to be essential to full relief in many cases. In contrast to legal scholars or experts who have criticized one or another aspect of Supreme Court decisions, the Attorney General has not engaged in analysis of the decisions he finds abhorrent. Thus, for example, in none of his speeches does Mr. Smith note that the Supreme Court has emphasized that local school districts must be given the first opportunity to devise plans to correct constitutional wrongs; nor does he take account of decisions in which the Court has rejected remedies which it found exceeded the scope of the proven violation.[58]

Most troubling, the Attorney General has called upon the courts to heed "the groundswell of conservatism evidenced by the 1980 election."[59] And he warned the American Bar Association that if the courts persist, we would see "serious attacks on the independence and legitimacy of the courts," by persons who see majority rule being "thwarted by the legal system itself."[60]

Such remarks betray an ignorance of the basic workings of our legal system. It is the genius of the Constitution that majority rights to determine most policy questions are balanced by minority rights to be protected from the interference of a hostile majority—whether that hostility be based upon dislike for particular actions such as speech or religious belief, or upon an

tion has spoken on the subject. Michael Uhlmann, Assistant to the President in charge of Civil Rights Policy Development, told a journalist that it was inaccurate to say the Administration was not enforcing the law of the land, "unless you call all of the decisions of the Supreme Court the law of the land." (St. Louis Post Dispatch, Dec. 8, 1981, at 1, 7). Mr. Uhlmann's view of *Marbury v. Madison* did not appear in the article.

57. Prepared remarks of Attorney General William French Smith before the Federal Legal Council in Reston, Va., Oct. 30, 1981, as quoted in N.Y. Times of that date, at A22.

58. *See, e.g.*, Brown v. Board of Educ., 349 U.S. 294 (1955); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977) [*Dayton I*]; and Milliken v. Bradley, 418 U.S. 717 (1974).

59. N.Y. Times, Jan. 26, 1982, at B8.

60. *Id.*

enduring characteristic such as race. The protection of minority rights is a task specially entrusted to the courts. In the words of Justice Stone, enactments directed against "discrete and insular minorities" which tend "to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . may call for . . . more searching judicial inquiry."[61] In his blithe assertions that courts should deal with race (and other forms of) discrimination by heeding the "groundswell of the 1980 election," Attorney General Smith reveals not only an insensitivity to the needs and rights of minorities, but a lack of understanding of the special role of the courts in protecting those rights.

Mr. Smith's attacks on the federal courts have not occurred in a vacuum. They come at a time when some members of Congress have been gathering support for legislation to curtail or even eliminate the jurisdiction of federal courts to enforce constitutional rights. The proposals now pending in Congress use the device of simple legislation to overrule Supreme Court decisions interpreting the Constitution with which the bills' sponsors disagree. Leading constitutional scholars of all political persuasions have argued convincingly that these bills are unconstitutional.[62] David Brink, president of the American Bar Association, has termed the bills "a legislative threat to our nation that may lead to the most serious constitutional crisis since our great Civil War."[63]

Yet the Attorney General, although asked by Brink and others to oppose the bills as unconstitutional, has refused to take a position. Indeed, the day after Mr. Brink's remarks, Mr. Smith renewed his assault on the courts in a speech to the ABA, declaring that "the federal courts have overstepped their constitutional authority and removed questions of policy from resolution by the political branches."[64]

As columnist Anthony Lewis has noted, "Attorneys General above all have traditionally felt an obligation to protect the courts and the rule of law."[65] William French Smith has flouted the tradition in ways that imperil both the courts and the rule of law.

CHAPTER 3: EQUAL EMPLOYMENT OPPORTUNITY—IGNORING THE EXPERIENCE OF DECADES

The mandate of equal employment opportunity contained in Title VII of the Civil Rights Act of 1964—the right to be free of discrimination on the basis of race, sex, national origin, color, or religion in public and private employment—is a fundamental mandate of this nation's commitment to

61. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

62. *See, e.g.*, Sager, *The Supreme Court, 1980 Term—Foreward: Constitutional Limitations on Congress Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L.L. REV. 129 (Summer 1981); Taylor, *Limiting Federal Court Jurisdiction: The Unconstitutionality of Current Legislative Proposals*, 65 JUDICATURE No. 4, 199 (Oct. 1981); August 1981 ABA Resolution adopting the Recommendation of the Special Committee on Coordination of Federal Judicial Improvements; Robert Bork, at Confirmation Hearing for Appointment to D.C. Circuit, Jan. 27, 1982, Senate Committee on the Judiciary; Resolution I of the Conference of Chief Justices, adopted at the Midyear Meeting in Williamsburg, Va., Jan. 30, 1982.

63. N.Y. Times, Jan. 25, 1982, at A19.

64. N.Y. Times, Jan. 26, 1982, at B8.

65. N.Y. Times, Jan. 28, 1982, at A23.

civil rights. In its roles both as chief lawyer for the Government and as a statutorily-mandated public prosecutor of employment discrimination cases, the Department of Justice has traditionally been in the forefront of enforcing this key law. But the present Attorney General and Assistant Attorney General for Civil Rights have unilaterally adopted policies that effectively reverse this tradition. While ostensibly adhering to the general goal of equal employment opportunity (EEO), their policies explicitly reject the use of "race conscious" measures to remedy racial discrimination. In so doing, the Justice Department has removed from the repertoire of remedies it will advocate those which have proved most effective in achieving its stated goal. It has also placed itself at odds with the courts.

I. *Background*

During World War II, federal policy outlawed race discrimination by war contractors.[66] Since then a series of Executive Orders has expanded and refined this principle for federal contractors;[67] in 1964, the Civil Rights Act was passed prohibiting discrimination by all private employers; and in 1972 that Act was extended to cover public employers as well.[68] Almost from the start, it was clear that mere injunctions against future discrimination would be insufficient to reform long-standing practices and the effects of ingrained prejudices. Some sanctions against those who discriminate are necessary to make the prohibition effective. At the same time, federal policy recognized that victims of unlawful discrimination are entitled to recompense for their losses. To serve both these goals, awards of backpay and other retroactive relief have been authorized, and the courts and administrative agencies are also given broad discretion to fashion other relief as necessary or appropriate to eradicate discriminatory practices.[69]

Experience in administering the Executive Orders covering federal contractors and in ordering relief in cases brought under Title VII of the 1964 Act proved that, especially where patterns or practices of discrimination were involved, the award of damages for *past* violations is insufficient to remove their effects in the *future*.[70] Thus, the courts and agencies began to require, in addition to restitution for identified victims of discrimination, that concrete steps be taken, with goals and timetables for measurement of progress, to ensure that members of the previously-deprived class in the future be hired and promoted without discrimination.

66. The first Executive Orders expressing this policy were Exec. Order No. 8802, 6 Fed. Reg. 3,109 (1941), 3 C.F.R. §§ 1938-43 Comp. 957 (June 25, 1941), and Exec. Order No. 9001, 6 Fed. Reg. 6,787 (1941), 3 C.F.R. §§ 1938-43 Comp. 1054 (Dec. 27, 1941).

67. A summary of the development of the Executive Orders, since their origin under President Franklin Roosevelt, is set forth in Contractors Assn. of E. Pennsylvania v. Secretary of Labor, 442 F.2d 159, 168-170 (3rd Cir. 1971), *cert. denied*, 404 U.S. 854 (1971).

68. 42 U.S.C. 2000(e)(1) (1964) amended by the Equal Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

69. 42 U.S.C. 2000(e)(5)(g); see Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) ("The central statutory purposes [of Title VII are] eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination"). The authorization of back pay as a remedy under Exec. Order No. 11246, as amended, is found in a number of places in the OFCCP regulations, including 41 C.F.R. 60-1.33, and 60-2.1(b).

70. U.S. COMM'N ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN THE 1980S: DISMANTLING THE PROCESS OF DISCRIMINATION 19 (1981) [hereinafter cited as U.S. COMM'N ON CIVIL RIGHTS].

Such affirmative, prospective requirements—generally known as "affirmative action plans"—necessarily involve individual members of a protected class who may not themselves have suffered past discrimination by the employer in question. Virtually all the federal courts of appeals have upheld such affirmative action plans, including goals and timetables for hiring and promotion when necessary to remedy proved discrimination.[71] They have done so out of a recognition that, where ingrained practices of discrimination are involved, relief available only to the few readily identifiable victims of discrimination is insufficient, even when combined with a general promise not to discriminate; specific requirements are needed to assure non-discrimination in the future.[72] The courts have also acted out of a realization that past discrimination based on race, sex or other proscribed grounds has a continuing impact on people that cannot be erased overnight. Institutions that have used race conscious policies to disadvantage minorities cannot remedy their wrong by converting immediately to "color blindness." As Justice Blackmun reminded us in his opinion in *Regents of the University of California v. Bakke*,[73] "[i]n order to get beyond racism we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."[74]

In weighing remedies for job discrimination, the courts also have sought to encourage voluntary action by employers and unions to provide affirmative opportunity for those who have suffered discrimination and exclusion. In *United Steelworkers v. Weber*,[75] the Supreme Court held that it is altogether appropriate and lawful for employers and labor unions, voluntarily through collective bargaining, to adopt carefully structured and time-limited affirmative action plans including numerical preferences in order to ensure the inclusion of minorities in job and job-training programs previously closed to them.

II. *Justice Department Reaction*

The Justice Department's recent actions and statements repudiate the history and principles just described in various ways.

A. *The Department Refuses to Use Remedies that the Courts Have Authorized to Redress Employment Discrimination*

In a series of interviews and public statements, Assistant Attorney General for Civil Rights Reynolds has announced unambiguously the Department's intention to abandon the advocacy of goals and timetables as a remedy to correct systemic discrimination in employment discrimination

71. The cases are collected at U.S. COMM'N ON CIVIL RIGHTS, *supra*, at note 70.

72. "[W]e . . . approve this course only because no other method was available for affording appropriate relief. . . ." Vulcan Society v. Civil Serv. Comm'n, 490 F.2d 378, 198 (2d Cir. 1973); "[Q]uota relief was essential to make meaningful progress" as "no Negroes were hired in DPR support positions until the *Allen* court ordered affirmative relief. . . ." NAACP v. Allen, 493 F.2d 614, 620-621 (5th Cir. 1974); "[A]ffirmative hiring relief . . . is necessary . . . : a mere injunction against continued . . . discrimination was not effective." Morrow v. Dillard, 580 F.2d 1284, 1296 (5th Cir. 1978).

73. 438 U.S. 265 (1978).

74. *Id.* at 307.

75. 443 U.S. 193 (1979).

suits.[76] Even when the Department has proved in court that an employer has engaged in a pattern or practice that discriminates against women of minorities, it will no longer urge or in any way support "the use of quotas or any other numerical or statistical formulae designed to provide to non-victims of discrimination preferential treatment based on race, sex, national origin or religion."[77] Hereafter, he has said, the Department will seek to eliminate discrimination by confining its requests to three kinds of relief:[78] (1) injunctive relief, to bar discrimination in the future; (2) increased efforts to recruit minorities and women for jobs, including goals and timetables applicable only to the recruitment pool; and (3) backpay, retroactive seniority, and other retroactive relief for identified victims of discrimination.

Mr. Reynolds attempts to justify this shift, first, by claiming that these limited remedies are sufficient to eliminate even systemic patterns of discrimination; and, second, by asserting that the Constitution's "color-blind ideal of equal opportunity for all" requires it. The first claim is belief not only by the practical experience of over twenty years of EEO enforcement, but also by his own admission of the effectiveness of numerical race-conscious goals as measurement devices through his acceptance of them for recruitment. The second claim is simply contrary to the Supreme Court decisions on affirmative action. Neither has Mr. Reynolds offered factual support for his announced policy retreat. He has not presented any evidence that current affirmative action policies have operated unfairly against what the Attorney General has termed "the previously advantaged group,"[79] or have resulted in the hiring of unqualified employees. Nor, assuming Mr. Reynolds has knowledge of instances of abuse, has he said why those cases cannot be corrected without undoing the policy entirely. That, of course, was what the Supreme Court did in affording a remedy to Allen Bakke.[80]

B. *The Department Is Undermining the Requirements of the Federal Contract Compliance Program*

In addition to the shift in employment discrimination suits that the Department of Justice itself prosecutes, the Assistant Attorney General apparently is attempting to impose a similar change upon the Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor. He has stated in an interview that the EEO requirements under Executive Order 11246, as amended, which the OFCCP administers and enforces, should be similarly restricted.[81]

The consequences of this change for federal contractors would be drastic. For more than twelve years, government contractors have been re-

76. Testimony of William Bradford Reynolds before the House Subcommittee on Employment Opportunities (Sept. 23, 1981) at 5, 13-16.

77. *Id.*; *see also*, Remarks of William Bradford Reynolds before the Fourth Annual Conference on EEO, "Recent Developments in Federal Regulations and Case Law," (October 20, 1981) at 3 [hereinafter cited as Remarks].

78. *See* Remarks, *supra*, note 77 at 8.

79. Address of the Hon. William French Smith to the American Law Institute, May 22, 1981, at 12.

80. Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978).

81. Masters, *New Civil Rights Chief Lacks Experience, Critics Say*, Legal Times, Oct. 26, 1981, at 6, col. 1.

quired, as a condition of receiving the substantial benefits of federal contracts, to use numerical goals and timetables as a measure of compliance with their contractual obligations not to discriminate. This requirement which is imposed on all federal contractors of a certain size,[82] was developed because years of effort with other, less precise means proved ineffectual. Indeed, the present affirmative action plan requirements, with self-devised goals and timetables, were introduced in 1979 to satisfy the objection that the previous, more general requirement did not give sufficiently clear guidance to contractors as to their obligations.[83]

In opposing current affirmative action requirements, the Assistant Attorney General has placed himself at odds with the Department and specific agency responsible for the federal contract compliance program—the Secretary of Labor, Under Secretary of Labor, Solicitor of Labor, Director of the OFCCP—as well as Equal Employment Opportunity Commission (EEOC) officials with authority to coordinate equal employment policy.

Lacking either a factual brief that the executive order has operated unjustly or legal arguments that the current requirements contravene decisional law, the Assistant Attorney General's statements can only be seen as an attempted usurpation of the policy-making roles of the responsible agencies.

C. *The Department's Unauthorized Retraction of Goals and Timetables for Federal Employment*

Again reaching beyond his authorized role in seeking to impose his views on affirmative action, in September 1981, Mr. Reynolds attempted to rescind the present legal requirement that federal agencies establish recruitment programs designed to eliminate under-representation of minorities and women by use of goals and timetables.[84]

On August 21, 1981, the Acting Chair of the EEOC, J. Clay Smith, Jr., sent a memorandum to all heads of federal agencies regarding development of multi-year affirmative action plans, including goals and timetables, for their agencies. The EEOC was given the authority to oversee federal workforce EEO and affirmative action matters in 1978 by the Civil Service Reform Act of that year. But on September 22, 1981, without having consulted Acting Chair Smith or the officials at the EEOC charged with administering the federal EEO enforcement programs, Reynolds wrote Smith to advise him that the Department of Justice "is unable to conclude at present that there is statutory authority for compelling [the] use [of goals and timetables] in affirmative action planning." A copy of this letter was sent to all heads of federal agencies on the same day that it was sent to Mr. Smith. The result of all this has been that federal agencies are in a state of confusion with regard to their EEO and affirmative action obligations. The Assis-

82. Under the present regulations all service and supply contractors with a contract of $50,000 or more and at least 50 employees are required to develop affirmative action plans that include goals and timetables for jobs in which there is under-utilization of women or minorities.

83. *See* Jones, *The Bugaboo of Employment Quotas*, 1970 WISC. L. REV. 341.

84. EEOC Guidelines setting out the requirements for federal equal opportunity recruitment programs, which are found in an Appendix to 5 C.F.R., Part 720, were issued pursuant to 8 U.S.C. 7201, as amended by Section 310 of the Civil Service Reform Act of 1978, Pub. L. 95-454.

tant Attorney General's meddling is impeding the agencies' ability to carry out the congressional intent declared in the Civil Service Reform Act of 1978, "to provide . . . a Federal workforce reflective of the Nation's diversity."[85]

D. *The Department's Announced Intention to Seek Reversal of the Supreme Court's Decision in Weber*

Assistant Attorney General Reynolds recently has moved further to retreat from current fair employment policy by challenging a 1979 Supreme Court interpretation of the employment discrimination law. He has announced that he plans to seek a reversal of the Supreme Court's ruling in *United Steelworkers v. Weber*, which he confidently labels as "wrongly decided."[86]

In *Weber*, as noted above, the Supreme Court rejected a white male's challenge to an affirmative action program in which half the spaces in a newly-created skilled crafts on-the-job training program were set aside for black employees. The training program was voluntarily established, pursuant to a collective bargaining agreement between the Steelworkers Union and the employer, Kaiser Aluminum Co., in order to correct the legacy of

85. Civil Service Reform Act of 1978, § 3(1). Another example of the Justice Department's attempt to influence the policy making of other agencies concerns its efforts to restrict regulations protecting the rights of handicapped people. Under Executive Order 11250, Justice is responsible for *coordinating* the carrying out of the 1973 statute barring discrimination against "otherwise qualified handicapped individual[s]" in any program or activity receiving federal financial assistance (section 504). This is a responsibility the Department carries also with respect to comparable statutes concerning discrimination in federal programs based on race (Title IX of the Education Amendments of 1972). What this means is that Justice must insure that all federal agencies promulgate regulations to carry out these statutes, and that these agencies' regulations contain consistent and fair enforcement procedures.

In the case of section 504, Justice has been given authority to review the guidelines previously adopted by the Department of Health, Education and Welfare (HEW). The Civil Rights Division has recently circulated to other agencies a draft of revised guidelines which in critical respects would undermine the purpose of section 504. A prime example is the treatment of those HEW guideline provisions which require recipients of federal financial assistance to provide "qualified handicapped persons" with "equal opportunity" and with aids, benefits and services which are "as effective" as those provided to others. The Civil Rights Division draft omits entirely all sections of the HEW guidelines that use the words "equal" or "as effective as." [45 C.F.R. §§ 85.51(b)(1), (ii), (iii), (v), (vii) and (viii) have been deleted]. The Justice proposal further cuts back existing protections by eliminating prohibitions of criteria or methods of administration, or site selections, that "have the effect" of subjecting handicapped persons to discrimination. *Compare* 45 C.F.R. § 85.51(b)(3) and (b)(4) *with* Justice proposal. And if the draft becomes official, segregation of the handicapped will no longer be barred in all programs, but only in those that are "significant"—whatever that may mean. *Compare* 45 C.F.R. § 85.51(b)(2) *and* Justice draft. Another constriction of protection would be achieved by excluding from section 504 coverage programs or activities that "benefit from" federal funding, leaving only the direct recipients of federal aid. 45 C.F.R. § 85.51(b).

Perhaps the most poignant of the changes proposed is the creation of a justification for continued exclusion of handicapped individuals. Heretofore, such a person who was "qualified" for a federally-aided program could not be treated discriminatorily. 45 C.F.R. § 8k.31(3). Now, however, the Department proposes that a person shall not be considered "qualified" for post-secondary or vocational education if the person's participation would cause an "undue burden on a recipient [of federal funds] or other beneficiaries." Thus is the closet door reopened and the intended beneficiaries of section 504 pushed inside, because of expense to the program provider or, simply, the prejudices of other program beneficiaries.

86. Taylor, *Civil Rights Division Head Will Seek Supreme Court Ban on Affirmative Action*, Wall St. J., Dec. 8, 1981, at 4, col. 2.

discrimination which had resulted in severe under-representation of blacks in the skilled trades in the aluminum industry. The plan was negotiated as part of an industry-wide collective bargaining agreement between the Steelworkers and all of the aluminum manufacturing companies. It was designed to end automatically when racial balance was achieved. No whites were displaced as a result of the program; to the contrary, both whites and blacks benefited from the creation of a new training program where none had existed before.

In 1979 the Supreme Court, by a 5-2 vote, upheld this carefully-delineated progam, as a voluntary "affirmative action plan designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."[87] The Court's response to the challenger's argument deals as well with the present views of the Assistant Attorney General:

> It would be ironic indeed if a law [the Civil Rights Act] triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long' . . . constituted the first Legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[88]

There have been instances in which the Supreme Court has overruled its own position on an issue of public importance within a short period after the initial decision, but they are extremely rare.[89] Normally, the values of certainty and continuity in the law lead Justices to respect precedents of recent vintage even when they hold strongly opposing views and changes in the composition of the Court provide an opportunity for reversal. Certainly, private litigants should feel free to press cases urging the Court to reconsider its prior opinions. But the obligations of Justice Department officials, who are bound by the Constitution to take care that the laws are faithfully executed, are different. Absent extraordinary circumstances, a Justice Department policy of quarreling with and challenging Supreme Court decisions with which the Department disagrees would interfere with the faithful execution of the laws and create confusion and chaos.

In the case of *Weber*, there are no extraordinary circumstances. Mr. Reynolds does not claim to have discovered any legal arguments or telling point in the legislative history of the Civil Rights Act of 1964 that the Court overlooked. Rather, he simply does not like the result and thinks the case was wrongly decided. In this instance as in many others discussed in this report, Reynolds has acted without heed to his basic responsibilities under the Constitution.[90]

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87. United Steelworkers v. Weber, 443 U.S. 193, 209 (1979).

88. *Id.* at 204.

89. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), overruling Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940) (The Flag Salute Cases).

90. Earlier in his Justice Department tenure, testifying before the House Subcommittee on Employment Opportunities, Mr. Reynolds was asked whether he intended to follow the *Weber* case and acknowledged his duty to follow it: "I would have to tell you that the *Weber* case is now the law. It would be improper and irresponsible for me to act in a way that is contrary to the law." Testimony of William Bradford Reynolds before the House Subcommittee on Equal Employment Opportunities, Sept. 23, 1981, colloquy between Representative Harold Washington and Mr. Reynolds, Transcript at 59.

CHAPTER 4: VOTING—SPEARHEADING RETRENCHMENT ON BASIC RIGHTS

I. *The Voting Rights Act*[91]

In the almost quarter of a century that the Justice Department has had major statutory responsibility for civil rights enforcement, the Department has not always been in the vanguard of the development of federal equal opportunity policy. Other departments and the President himself often have taken the lead, for example, to assure that the federal government assumed broad responsibility for preventing taxpayer dollars from being allocated to discriminatory institutions.

Yet, except during the tenure of John Mitchell as Richard Nixon's Attorney General, the Department has always striven to develop the law in ways which assure victims of discrimination a real prospect for redress in the courts. When other agencies have resisted (the Interstate Commerce Commission, for example, on the issue of segregation in transportation terminals), Justice often has intervened forcefully to define and assist the rights of minorities.

That has now changed. As noted earlier, it was the Justice Department, not the Department of the Treasury, that took the lead in defying the law to try to restore tax exemptions to racially discriminatory private schools.[92] It is also the Justice Department that is seeking to override the policies of the Department of Labor in order to narrow the equal employment responsibilities of federal contractors that is also challenging EEOC's effort to secure affirmative action in federal employment.[93]

In fact, under the leadership of Attorney General Smith and Assistant Attorney General Reynolds, the Justice Department has become the locus of efforts in the Reagan Administration to narrow and weaken civil rights protections. Nowhere has this become more evident than in the role the Department has taken with respect to the Voting Rights Act of 1965.

When the Reagan Administration took office in January 1981, no civil rights issue loomed larger than extension of the Voting Rights Act, key provisions of which were scheduled to expire in August 1982. Recognizing that factual information would be needed on the current status of voter protections, the Judiciary Committee of the House of Representatives began work early, holding comprehensive hearings beginning in the Spring of 1981. On July 31, 1981, the Committee, by a vote of 23-1, reported a bill to extend the Voting Rights Act with two important strengthening amendments,[94] and an amendment permitting jurisdictions which demonstrate full compliance with the law over a ten-year period to bail out from the special requirements of the Act.[95] On October 5, 1981, after rejecting weakening amendments by wide margins, the House passed the Committee bill by an overwhelming vote of 389-24. The votes on amendments and on final passage reflected strong bipartisan support for the Committee bill from all regions of the nation.

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91. 42 U.S.C. 1973 (1965).

92. *See, supra* text accompanying notes 12-43.

93. *See, supra* text accompanying notes 53-74.

94. The first amendment of the United States Constitution restores an effect standard to section 2 of the Act. The second amendment provides for an extension of the bilingual provisions.

95. H.R. REP. No. 97-227, 97th Cong., 1st Sess. (1981).

All during this period, The Justice Department assiduously refrained from taking any position on the legislation, stating that it was preparing an analysis for the President. On October 2, virtually the eve of the House consideration of the bill, the Attorney General sent the President his memorandum, which profferred five alternatives for Mr. Reagan to consider. The bill reported 23-1 by the Judiciary Committee (and later passed by the House) was not among these options; indeed all five were considerably weaker.[96]

After passage of the House bill, however, the Administration could no longer avoid the issue. At a Cabinet meeting on November 4, there was an extensive debate on the voting rights legislation, with several officials advocating Administration approval of the House-passed bill and Attorney General Smith arguing for weaker alternatives. On November 5, it has been reported,[97] the President decided that he would announce the next day his readiness to sign either a ten-year extension of the Act, a modified version of the House bill or the House bill itself.[98]

But, according to undenied accounts, on learning of the President's decision on Friday morning, November 6, the Attorney General "became furious" and "charged off to the White House demanding to see the President." He saw the President around noon and "reargued his case, contending that Reagan should not flat out endorse the House bill, but instead, should specify a preference for certain amendments, including a weaker bail-out provision." Mr. Smith succeeded in his mission. When he testified before a Senate Judiciary Subcommittee on January 27, 1982, the Attorney General was able to represent the Reagan Administration as excluding the House-passed bill from the options it supported.[99]

Voting is widely regarded as the most basic of civil rights and the Voting Rights Act as the most successful civil rights law ever enacted. The Justice Department has special responsibilities with respect to voting because, in contrast to education, housing, employment and other areas, it is the only federal department that is vested with substantial enforcement duties. By using his role and influence first to delay and then to shape Administration policy in opposition to a strong voting bill with broad bipartisan support, Mr. Smith has indelibly stamped the Justice Department as the place to go for the weakening of civil rights protections.

II. *Non-Enforcement of Voting Rights*[100]

Doubts about the Department's commitment to the protection of voting rights have been reinforced by its performance in several important cases in which the Department was called upon to exercise enforcement duties under

96. Report to the President from Attorney General, Amending the Voting Rights Act, Oct. 2, 1981, at 1-2.

97. L.A. Times, Nov. 8, 1981, at 1.

98. *Id.*

99. Statement of William French Smith before the Senate Subcommittee on the Judiciary Concerning the Voting Rights Act, Jan. 27, 1982.

100. Substantial portions of this section are taken with permission from a report by Frank R. Parker and Barbara Y. Phillips of the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law, entitled *The Justice Department and Voting Rights Act Enforcement: Political Interference and Retreat* (1982).

the Voting Rights Act.[101] As in the education cases discussed above, the Department's record has been marked by abrupt changes in positions that its predecessors had taken in court. In several instances, the impetus for these reversals has been pressure exerted by Republican members of Congress[102] and the Department's actions have been in conflict with the requirements of the law.

A. *City of Jackson, Mississippi Annexation*

On December 3, 1976, the Attorney General lodged an objection under Section 5 of the Act[103] to an annexation by the City of Jackson. The Department concluded that the annexation, which covered a forty square mile area containing 32,490 people, 74% of whom are white, would dilute the voting strength of blacks, a violation of the law. This was the third annexation of a predominantly white area by Jackson since 1960. Jackson is governed by a three-member city council, all elected at-large. The Justice Department determined that the 1976 annexation "continues a trend dating back at least to 1960 of the annexation of areas of primarily white population, which has the effect of counteracting the impact of an otherwise growing black percentage." The impact of these annexations was to "more than offset the growth of the black population;" without them, "the black population in the City of Jackson would be approaching a majority."

This section 5 objection was ignored by the City of Jackson, and—despite repeated requests—the Justice Department failed to file any action to enforce it. Then, a month before the June 2, 1981 municipal election, the Acting Assistant Attorney General (the official to whom Justice Department regulations delegate the Attorney General's section 5 responsibilities) wrote to the City that:

> It is our understanding that the City intends to hold its 1981 elections by including in the electorate the areas annexed in 1976 . . . . [I]f the 1981 elections are conducted in a manner violative of federal law, and if the objection is not resolved and remains outstanding, we will be obligated to take prompt action to enforce the provisions of the Voting Rights Act . . . . [T]he relief we seek may involve an order shortening the terms of the persons elected and requiring that a new election in compliance with federal law be conducted.[104]

On July 23, however, the objection was withdrawn in a letter which evidences major irregularities:

a) The letter notes that the Department's "thorough reevaluation" included "consultation with the Deputy Attorney General." Consultation with the Deputy Attorney General, Edward C. Schmults, is outside the normal procedure followed in these cases.

b) Justice Department regulations require that reconsideration of an objection can only be based on "a substantial change in operative fact or

101. In a number of other cases, however, the Department has straightforwardly taken action under section 5. It has, for example, rejected apportionment plans in New York, Virginia and Georgia as having a discriminatory impact on minorities.

102. *See infra* Chapter 5.

103. Section 5 requires election changes by covered jurisdictions to be pre-cleared by the Department of Justice or the District Court for the District of Columbia.

104. Letter from Acting Assistant Attorney General to the City of Jackson (June 2, 1981).

relevant law."[105] This objection was reconsidered and withdrawn even though there was no change in the facts or the law.

c) The standards applied in withdrawing the objection directly contradict the standards applied and litigated by the Justice Department in *City of Rome v. United States* and affirmed by the Supreme Court in 1980.[106] The withdrawal of the objection was the direct result of political interference by Senator Thad Cochran (R-Miss.) and Representative Trent Lott (R-Miss.) in the Justice Department's enforcement of the Voting Rights Act.[107]

B. *McCain v. Lybrand*[108]

In August 1981, Assistant Attorney General Reynolds approved the filing of an amicus curiae brief supporting black voters' challenge to Edgefield County, South Carolina's implementation of election law changes without the required section 5 pre-clearance. Such implementation before preclearance violates the Voting Rights Act. Then within twenty-four hours, just before the case was scheduled to be argued before a three-judge District Court in South Carolina, Reynolds reversed his position and ordered that the brief—which had already been sent to South Carolina for filing—not be filed.

A spokesman for Senator Strom Thurmond's (R-S.C.) office admitted that the Senator had discussed the case with Justice Department officials, including Reynolds, but denied that he applied "any pressure." Reynolds claimed that he changed his mind on the basis of "new information" which showed that the issues would be fully presented without Department participation. He declined to disclose the source of this new information.[109]

Justice Department participation in a case can be very helpful, sometimes even critical, in Voting Rights Act cases. Here, counsel for the private plaintiffs said that it would have been "enormously helpful for somebody from the Justice Department to affirm their position that the use of at-large voting had never been pre-cleared."[110] The Voting Rights Act itself places primary responsibility for its enforcement on the Attorney General. Since the suit alleged a failure to pre-clear—information which was within the particular knowledge of the Department—the Department's failure to file its own suit, let alone support the private plaintiffs' case, represents a failure to perform its duties under the Act.

C. *Bolden v. City of Mobile*[111]

On May 8, 1981, the Department of Justice filed a motion to intervene on the plaintiffs' side in the retrial of *Bolden v. City of Mobile*, which challenges the constitutionality of at-large elections in Mobile, Alabama. The Justice Department complaint contained the following paragraph:

Black citizens of Mobile have been the victims of a long history of pur-

105. 23 C.F.R. § 51.45 (1981).
106. 446 U.S. 156 (1980).
107. The Clarion Ledger (Jackson), July 22, 1982, p. 1, 18A.
108. 509 F.2d 1049, *cert. denied*, 419 U.S. 1032 (1974).
109. Richmond Times-Dispatch, Sept. 18, 1981, at 1, 14.
110. *Id.* (statement of Laughlin McDonald).
111. 542 F. Supp. 1050 (S.D. Ala. 1982).

> poseful, official racial discrimination designed to segregate black persons from white persons, to deny the vote to black persons, to assure that black persons would not serve on the Mobile governing body and to maintain white supremacy.

This allegation received wide publicity. Subsequently, Republican Senator Jeremiah Denton, whose hometown is Mobile, protested the Justice Department's use of the term "white supremacy," and Attorney General Smith ordered the wording changed in response to Senator Denton's complaint.[112]

D. *Rogers v. Lodge*[113]

This case involves a challenge to at-large, countywide elections for the county commission of Burke County, Georgia. Both the district court and the court of appeals held these elections unconstitutional. In the court of appeals, the Justice Department filed a lengthy amicus curiae brief in support of the plaintiffs in which it argued that discriminatory intent need not be proved to establish a violation of section 2 of the Voting Rights Act. That provision, the Department argued, was intended by Congress to invalidate voting practices with a racially discriminatory effect which perpetuated the effects of prior purposeful disfranchisement of blacks.

When the defendants appealed to the Supreme Court, the Department at the last minute reversed its position and decided against filing an amicus brief. The case is important because it is the first opportunity for the Supreme Court to review or elaborate on the discriminatory purpose test which four members of the Court announced in 1980 in *City of Mobile v. Bolden*.[114]

E. *Blanding v. DuBose*[115]

The Justice Department and private plaintiffs brought this suit in 1980 to enforce a 1976 section 5 objection to an at-large voting plan for election of the Sumter County, S.C. County Commission. The defendants claimed that although the change had been objected to in 1976, it subsequently received the necessary pre-clearance owing to a failure of the Attorney General to object again when the change was resubmitted in 1979. The Department opposed this claim, taking the position that it had done everything legally necessary and that pre-clearance had never been obtained.

In February 1981, the district court ruled for the defendants. Surprisingly, the Justice Department decided not to appeal that decision. The private plaintiffs did appeal, and therefore, under the Supreme Court's rules, the Department was required to file a brief. Pressed now to take a stand, it reiterated the position it had taken before the district court. In January 1982, the Supreme Court summarily and unanimously reversed the district court's judgment, agreeing with the interpretation of the law that the Department had advanced at the outset but which it had sought to abandon by failing to appeal the negative trial court ruling. This sequence of events shows an arguably more subtle retreat from the Department's duty to en-

112. Washington Post, May 16, 1981, at A4.
113. — U.S. —, 102 S. Ct. 3272 (1982).
114. 446 U.S. 55 (1980).
115. 454 U.S. 393 (1982).

force the Voting Rights Act than some of the examples described above, but it is no less serious. The law is equally undermined by a flat refusal to initiate enforcement and by failure to appeal from a decision in which the government's position is erroneously rejected.

CHAPTER 5: UNDUE POLITICAL INFLUENCE

Edward Bates, who served as President Lincoln's Attorney General, articulated a standard for the office to which his successors might aspire. Bates said, "The office I hold is not properly political, but strictly legal; and it is my duty above all other ministers of state to uphold the law and resist all encroachments, from whatever quarter, of mere will and power."

This credo no doubt is easier to establish than to follow. The Attorney General and his staff cannot determine their legal course in a hermetically sealed environment. Especially in cases involving issues of national significance, it is appropriate for the Department of Justice to collect information from a variety of sources and to listen to the views of those who have knowledge and judgment to offer. Since the Department is publicly accountable, it should give a respectful ear to the opinions of citizens and their elected representatives.

But even with wide latitude given for the proper role of "politics" in Justice Department Law enforcement, a review of the record reveals that the Reagan Administration's Justice Department has permitted political considerations to corrupt fair administration of the law. Members of Congress and political advisors to the Administration have boldly and successfully pressured the leaders of the Department to change and weaken positions in civil rights cases. The Attorney General, his Deputy and the Assistant Attorney General for Civil Rights have failed to resist these "encroachments of will and power," and have allowed this influence to circumvent the channels normally relied upon for fair decision-making.

For example, in the North Carolina higher education case, mentioned earlier,[116] it was the intervention of Senator Jesse Helms (R-N.C.) that led to the negotiated settlement of a lawsuit alleging discrimination in the state university system. The negotiations proceeded in the absence of the Civil Rights Division lawyers who had worked on and were familiar with the case and without the knowledge of lawyers representing minorities who were parties to the proceedings. As noted, the government ended up settling the lawsuit in a fashion which violated the Department of Education's own published criteria and without specifying commitments which the state had made in previous negotiations.[117]

In the Seattle school case discussed in Chapter 1[118] political influence was initiated by the Attorney General of the State of Washington and capped by a memo to the Attorney General and two of his lieutenants from Lyn Nofziger, then the president's key political advisor. In April 1981, Washington Attorney General Ken Eikenberry embarked on a series of meetings and correspondence designed to persuade the Justice Department

116. *See, supra* notes 49-51 and accompanying text.
117. *Id.*
118. *See, supra* note 42 and accompanying text.

to reverse in the Supreme Court the position it had successfully argued in the district court and court of appeals. In his correspondence, Mr. Eikenberry did not advance legal arguments, but rather said:

> Our reports have it that in the Supreme Court the United States will once again elect to oppose the State of Washington in this litigation. I believe that such a position would be absolutely contrary to the policies of President Reagan's Administration and certainly contrary to the theme of his campaign for the Presidency. . . .[119]

On August 24, 1981, Mr. Nofziger sent a memo to Justice officials Smith, Schmults and Reynolds and to presidential advisor Edwin Meese. The memo stated:

> I enclosed for your perusal a letter to me of August 4, from Ken Eikenberry, the Attorney General of the State of Washington, and a long-time Reagan worker and supporter.
>
> Not surprisingly he, like 99.9% of the people who have supported Ronald Reagan in the past, is at odds with mandatory school busing, as I think we all are.
>
> Surely, if we are going to change the direction of this country, mandatory school busing is a good place to make changes—as I thought we would do because that was what the President wanted.

Lawyers for the Seattle School Board and civil rights groups did not become aware of any of this correspondence until the Department announced its change of position. Mr. Reynolds, asked by an NBC correspondent whether the White House had sought to exercise political influence in the case, denied it even after being confronted with the Nofziger memo.[120]

Other instances in which Republican members of Congress intervened and apparently played a decisive role in getting the Department to reverse a previous position include:

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119. Letter from Ken Eikenberry to Deputy Attorney General Schmults (Aug. 4, 1981). On the same date Mr. Eikenberry sent a copy of the letter to Lyn Nofziger and Dick Richards, Chairman of the Republican National Committee, with a plea for their intervention.

120. Interview shown on NBC Television, (Oct. 16, 1981). Along with political interference, decision-making at the Department may be tainted by racial attitudes held by some of its high officials. While preconceptions concerning race are rarely articulated and difficult to pin down, some insight is provided by a memorandum to Assistant Attorney General Reynolds by Robert J. D'Agostino, Deputy Assistant Attorney General for Civil Rights, concerning a school and housing desegregation suit filed by the Department in Yonkers, New York in 1980. The Yonkers case contained several counts. In one, the Department, after investigating the methods for assigning students to classes for the emotionally disturbed, alleged that some black students were improperly classified as emotionally disturbed. Mr. D'Agostino wrote, "Why improperly? . . . Blacks, because of their family, cultural and economic background are more disruptive in the classroom on the average. It seems that they would benefit from such programs." Memorandum to William Bradford Reynolds, Assistant Attorney General-Designate, dated July 21, 1981, page 2.

In another count, the Department alleged that local officials had deliberately segregated government-supported housing on a racial basis and requested a remedy that would allow black people opportunities to live in unsegregated areas. D'Agostino reacted, "What is the nature of Zonkers' violation? They were stupid enough or altruistic enough to voluntarily participate in programs to build low-cost and subsidized housing. . . ." July 21, 1981 memorandum to Reynolds, at 3. Requiring officials now to provide units in unsegregated areas would place "burdens" on those areas, he claimed.

On the basis of these comments, D'Agostino called for a thorough review of the Yonkers case, concluding, "I see absolutely no reason to pursue this case in its present form." (July 21, 1981 memoranda 3). Attorneys in the Civil Rights Division protested the D'Agostino memorandum as racially insensitive. *See* Washington Post, Sept. 10, 1981, at A17. None of D'Agostino's superiors, however, has ever publicly indicated than his comments were in any way improper.

a) After talking to Senator Strom Thurmond (R-S.C.) about the case, Assistant Attorney General Reynolds reversed himself and decided not to join in a voting rights enforcement suit in Edgefield County, South Carolina—Strom Thurmond's childhood home.[121]

b) After Republican Senator Thad Cochran and Congressman Trent Lott of Mississippi protested a longstanding Department objection to an annexation of white voters by the City of Jackson the objection was revoked preemptorily. Senator Cochran, brother of a member of the Jackson City Council, acknowledged that he had "asked the high echelon people to take a look at the Jackson problem."[122]

c) When the Justice Department filed a complaint in an important voting rights case alleging a history of official action to maintain "white supremacy" in Mobile, Alabama, Senator Jeremiah Denton protested vigorously. The Attorney General responded by directing the filing of an amended complaint deleting the phrase.[123] Veteran lawyers could not recall another instance when a complaint already filed was changed to accommodate a political protest.

d) The Department weakened its position in a Texas prisons case after an exchange of letters between Republican Gov. William P. Clements, Jr. and Deputy Attorney General Schmults. The Civil Rights Division attorney sent to represent the Department's modified position in court was later reprimanded summarily for not advocating the weakened posture with sufficient vehemence.[124]

e) Responding to pressure from Congressman Trent Lott, who obtained support in his campaign on this issue from a cryptic note by the President, the Department of Justice lobbied strenuously and successfully for a change in the IRS policy against tax exemptions for segregating and discriminating private schools.[125]

A common thread runs through the exercise of pressures on the Justice Department by office holders and other Republican politicians. In each instance enumerated, the primary claim of the politicians was that the Justice Department position should reflect the wishes of those who elected Ronald Reagan.[126] In no case is there evidence that the Justice Department recog-

121. *See supra* Chapter 4.

122. *Id.*

123. *See supra* note 110 and accompanying text.

124. *See*, St. Louis Dispatch, Dec. 7, 1981, at 1.

125. N.Y. Times, Feb. 3, 1982, at A1, 21. *See also supra* note 29 and accompanying text.

126. A prime example of political intervention is the Justice Department's conduct in the case challenging the congressional extension of time for state ratification of the Equal Rights Amendment and claiming that state ratification may be rescinded. While cooler heads ultimately prevailed, to some extent, the conflicting signals that the Department issued on this case served to create immense confusion.

In the trial court, the case presented two quite different sets of questions. There were, of course, the substantive questions raised by the plaintiffs concerning extension and rescission. But separate from these were questions as to whether the case was properly in federal court at all. The Justice Department strongly urged that there was not a proper federal case here, but went on (since, rightly or wrongly, the court might not accept that position) to argue vigorously in support of Congress' action and against the plaintiffs' position on the merits. On December 23, 1981, on the eve of the final opportunity for state legislative ratification, the trial court rejected Justice's views (and the parallel views of the National Organization for Women, which had intervened in the case on the federal government's side), ruling for the plaintiffs on every issue.

On January 4, 1982, Assistant Attorney General Paul McGrath told the press that the Department would appeal the trial court's decision, but declined comment on the position the Department would take. News reports on this announcement prompted intense political pressure on the White House to instruct the Justice Department to shelve plans for appeal. Right-wing organizations—including the Conservative Caucus, Jerry Falwell's Moral Majority, the National Conservative

nized that arguments of voter sentiment are completely inappropriate when majority will is being used to trammel minority rights. In all cases, the Department simply succumbed to the pressure being exerted.

The Department's posture of acquiescence has not been altered even when the political intervention was heavy-handed and arrogant. Perhaps the most graphic example of political over-reaching came in a prison case in Mississippi. In April 1981, a hearing was scheduled before U.S. District Judge William C. Keady, at the request of the Department, to determine whether the State of Mississippi was attempting to circumvent Judge Keady's orders on jail standards at the Mississippi State Penitentiary at Parchman. The Department's attorneys asked the judge to allow federal agents, including the FBI, to visit county jails to check on whether state prisoners were being inadequately housed. Congressman Trent Lott convinced Deputy Attorney General Schmults to ask the court for a three-week delay in the lawsuit. As a result of those discussions, Mr. Schmults sent a letter to the Mississippi State Attorney General. Schmults failed, however, to inform the Civil Rights Division attorney representing the United States in court of his action. The Division lawyer first learned of the Department's change in position when the State's attorneys read the letter aloud in court. According to newspaper accounts, "Judge Keady later agreed to the compromise negotiated through Lott's office, a congressionally inspired deal that allows state officials, rather than federal agents, to inspect the jails."[127]

That did not end the matter. In October 1981, Congressman Lott still was not satisfied by reports he was receiving from Mississippi concerning the

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Political Action Committee and Phyllis Schafly's Eagle Forum—led this opposition, and it was reported that the President called the Attorney General personally on the matter. N.Y. Times, Jan. 13, 1982, at A14.

The next day a press release from the Attorney General's office "clarified" the situation:

> As required by its obligations to defend acts of Congress, the Justice Department will appeal the case to the Supreme Court, taking the position at this time that judicial intervention in this matter is premature.
>
> The Department's position that the case is not ripe for decision is based on the fact that ratification of the proposed Amendment has not as yet occurred and will never occur if three additional states do not ratify the Amendment by the July 1, 1982 deadline. The Department will oppose NOW's effort to expedite the appeal, since the entire matter may be rendered moot in the months ahead.
>
> The appeal is grounded on considerations of ripeness and is consistent with statements by Attorney General William French Smith calling on the courts to exercise judicial restraint. The Department at this time is not taking a position on the merits.

The key to parsing that statement appears to lie in its last sentence: the Department, finding itself between the position it had taken thus far in the case as counsel for the defendant federal official and the political position of the White House in opposition to the ERA, and subjected to clamors not to adhere to the former, but instead to bow to the latter, was looking for a way to avoid committing itself again on the substantive issues.

Indeed, when the Department filed a response to NOW's request that the Court expedite the case in order to remove the cloud the lower court's decision had cast over the continuing ratification efforts just at the critical moment, that response strongly urged that the Court *not* expedite the case. Even the plaintiff states agreed with NOW that expedited review was in the Nation's best interest. Again the suspicion was inevitable that the Department was searching for a way to avoid or to delay as long as possible taking a position on the substantive issues.

As it turned out, the Court has put the case on its calendar, deferred all questions until later stages of the process, and "stayed" the lower court's judgment until the Supreme Court's final determination. Only time will reveal whether the Department continues to succeed in finding ways to avoid the merits of this issue.

127. Clarion Ledger (Jackson), July 22, 1981, at 1A.

Department's position in the pending case. He "fired-off" a letter to Deputy Attorney General Schmults complaining by name of Division lawyers "seeking perversely to compel even more restrictive standards on the local facilities. . . . This is contrary to common sense and to my understanding with you. I expect the situation to be corrected without delay." Congressman Lott continued to vent his fury at this perceived breach in Mr. Schmults' commitment to him. "I want to know," the letter demanded, "with reference to chapter and verse of the civil service statutes, why [the lawyer] has not been fired. There are too many lawyers ready and eager to carry out Ronald Reagan's policies to permit those policies to be subverted by mere civil servants."[128] The Department's responsiveness to this type of political intervention can only encourage bolder and bolder attempts to subvert the legal process.

CONCLUSION

A legal system can be fair and just only if the people who administer it have certain qualities: openmindedness, a willingness to investigate the facts of each case thoroughly, a readiness to enforce laws with which they may disagree, and an ability to recognize their own preconceptions and biases and to seek to set them aside in carrying out the law. These qualities are difficult to define with precision and even more difficult to attain. But one thing has become painfully clear. At the Justice Department in 1982, these basic qualities of fairmindedness and fidelity to law are lacking. Instead, power and prejudice hold sway.

128. Letter from Representative Trent Lott to Deputy Attorney General Edward Schmults (Oct. 21, 1981). While the attorney has not been dismissed, it does not appear that the Department has ever written Mr. Lott to suggest that his actions constituted improper interference with the Department's performance of its legal and professional responsibilities.