

## REAGAN CIVIL RIGHTS: THE FIRST TWENTY MONTHS\*

### Washington Council of Lawyers\*\*

*Editor's Note:* Following the Reagan Administration's first year in office, interested observers continued to monitor the enforcement activities of the Civil Rights Division of the Department of Justice. Among those observers was the Washington Council of Lawyers. Similar to the Leadership Conference on Civil Rights, the Washington Council of Lawyers reported in 1983 on the Division's performance in the areas of equal educational opportunity and the protection of voting rights. Based on its independent investigation, the organization reached conclusions quite similar to those arrived at by the Leadership Conference. In addition, and of particular interest here because it advances the discussion of government civil rights activity contained in the preceding testimony of Jack Greenberg and the Leadership Conference report, the Washington Council of Lawyers evaluated the Division's enforcement activities in cases of housing discrimination; its coordination of laws designed to prevent discrimination in federally funded programs; and its prosecution of criminal violations of various federal civil rights statutes. The relevant chapters containing this evaluation are excerpted below.

#### I. INTRODUCTION AND SUMMARY\*\*\*

Soon after becoming Attorney General, William French Smith promised minority and women's groups that the Justice Department would continue to enforce vigorously the federal civil rights laws. Although he warned that the Administration would change the focus of past civil rights policies, it would, he said, develop creative new approaches to resolve the problems of discrimination.<sup>1</sup>

Despite these assurances, civil rights advocates remained concerned. To head the Civil Rights Division, the Attorney General selected William Bradford Reynolds, a private practitioner from Washington, D.C. who readily admitted that he had no background or expertise in the field. Subsequent appointments throughout the Department and its Civil Rights Division failed to include anyone with a civil rights background, nor were any members of a racial minority appointed to positions of authority. The public statements made by Administration spokesmen concerning civil rights matters were few and far between, but those that issued contained onimous warnings about the new President's commitment to enforcing federal civil rights law.

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\* This report was completed during the first quarter of 1983 by the Washington Council of Lawyers Civil Rights Task Force and is reprinted with their permission

\*\* The Washington Council of Lawyers is a voluntary, bipartisan group of attorneys founded in 1971 to promote public service and public interest activities within the legal community.

\*\*\* Chapter 1 at pp. 1-6 in original.

1. Attorney General William French Smith. Remarks before the American Law Institute 9-10 (May 22, 1981).

This report was undertaken to evaluate that effort. Twenty months into the Reagan Administration, a review of the Civil Rights Division's activities confirms that the Attorney General's early promise to vigorously enforce the law has not been fulfilled.

The Civil Rights Division has long been the centerpiece of federal civil rights commitment. It is the barometer by which all federal agencies' activities can be measured. Indeed, the Division is officially charged with coordinating and reviewing all the civil rights policies and regulations of most federal departments. This report concludes that the Administration has retreated from well-established, bipartisan civil rights policies that were developed during both Democratic and Republican administrations. At the same time, the Reagan Administration has failed to develop—and implement—cohesive and consistent civil rights policies, despite its promise to devise creative and innovative solutions to age-old problems. As a result, the Division's line attorneys have been relegated to the position of a contemporary army entering sophisticated combat with antiquated weaponry and technology.

#### *Fair Housing Laws Enforcement*

New litigation activity under the Reagan Administration has come to a virtual standstill in this area. Compared to an average of nineteen new cases per year in 1978-80, and over thirty-two new cases per year in the Republican years 1969 to 1976, only two new cases have been filed since President Reagan took office. The Division has abandoned entirely filing suits against discriminatory zoning ordinances. Its attorneys have not been permitted to urge courts to review the "effects" of housing policy as well as the motivation for it, although the "effects" test is the prevailing law of the land, primarily as a result of the Division's own efforts during previous administrations.

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#### *Rights of Institutionalized and Handicapped Persons*

The Justice Department's leadership has publicly denounced judicial involvement in such lawsuits, although the Civil Rights Division has, for more than ten years, actively prosecuted more than a hundred such cases. Assistant Attorney General Reynolds has precluded the use of one of the most successful remedies in these cases, the appointment of special masters to oversee court decrees. The Division has filed but three new cases, has been permitted to initiate only a handful of pre-suit investigations, and has been ordered to limit and revise arguments already made in pending cases. Existing regulations protecting handicapped people have been partially suspended. A soon to be released proposal to revise regulations concerning the rights of handicapped persons indicates that the Administration plans to push for significantly reduced protections.

#### *Equal Employment Opportunity*

The Division has flatly repudiated the well-established requirement that affirmative action may be necessary to remedy certain types of employment discrimination, announcing that under no circumstances would it im-

pose such relief regardless of the particular case. Mr. Reynolds has announced his intentions to seek reversal of the Supreme Court decisions establishing the propriety of affirmative action orders. Division attorneys have been ordered to cease making well-established arguments, and cases have been settled upon employers' promises that their "pool of applicants" will include women and minorities, without regard to their actual hiring practices.

### *Criminal Civil Rights Prosecutions*

Not surprisingly, the Administration's best efforts have come in the prosecution of the federal civil rights laws that provide for criminal penalties (e.g., misconduct by police or correctional officers). Statistics indicate that the number of criminal prosecutions since January, 1981 is equal to or greater than the number of cases brought during the Ford and Carter eras in comparable time periods. But, although the level of racially motivated violence appears to be on the increase, the Division's capacity for prosecuting these cases does not show a proportionate increase.

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This report demonstrates that there is a disturbing pattern of limiting and rejecting the civil rights of minorities, women and the handicapped. The Civil Rights Division, long seen as the bastion of civil rights advocacy within the federal bureaucracy, has become, in the Reagan Administration, the naysayer, the too-frequent adversary of minority group interests, the disruptor of continuity. It seemingly has gone out of its way to alienate minority groups by its actions and by its rhetoric, even in circumstances where differences have been minimal or readily resolvable.

The prevailing view of Reagan's top civil rights officials is that America is today a color-blind society that has repudiated its history of bigotry and accepted those citizens who, in the past, were its victims. In those rare instances where discrimination occurs, they believe, the discriminators will voluntarily and in good faith correct their errors, so courts need not ever resort to busing, affirmative action or special masters. However, the historical and current evidence suggests that this is not the case. The unjustified roll-back of bipartisan civil rights policies threatens thirty years of slow but steady progress.

## II. THE GENERAL LITIGATION SECTION: FAIR HOUSING AND EQUAL EDUCATIONAL OPPORTUNITY\*

The largest, and perhaps most influential, of the Civil Rights Division's litigating sections is General Litigation. Its thirty-seven lawyers have the major responsibility for litigating discriminating cases in the areas of housing, education and credit. It assumed its present form in 1978, when the former Housing and Credit Section merged with the existing Education Section.

It is this Section that is the public focus of the Reagan Administration's efforts to alter the enforcement of civil rights laws. Aside from the well-documented cases in which the Division has changed sides or withdrawn

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\* Chapter 2 at pp. 7-23 in original.

during the course of the litigation, there are also instances where less visible investigations have been stalled or never initiated. Most importantly, the record reflects that the Division's largest and most prolific Section has initiated no new school desegregation cases and only two minor housing cases during the twenty months of the Reagan Administration. In the remainder of this Chapter, we will discuss more fully the Section's activities in its two principal areas, housing and education.

### *Fair Housing*

#### I. *Introduction: The Continuing Problem of Housing Discrimination*

The Fair Housing Act of 1968 declared it a national policy "to provide, within constitutional limitations, for fair housing throughout the United States."<sup>2</sup> Despite this promise of national commitment, the reality of racial discrimination in housing persists. For example, a 1979 study by the U.S. Department of Housing and Urban Development (HUD) found that the probability of a black homeseeker encountering at least one instance of discrimination in his search for housing is 75% in the rental market and 48% in the sales market.<sup>3</sup>

The prevalent forms of housing discrimination are increasingly less overt and more difficult to uncover. Minorities are subjected to higher sales or rental prices, larger down payments, longer waiting periods, and higher interest rates.<sup>4</sup> They may be subtly induced to search for housing only in minority neighborhoods, a practice known as "steering"<sup>5</sup> or simply denied access to listings of available housing.<sup>6</sup> Housing opportunities for minorities are further restricted by the discriminatory effects of exclusionary land use controls imposed by local governments, such as zoning for minimum lot size, exclusion of multi-family dwellings, and limitations on the number of bedrooms per housing unit.<sup>7</sup>

This continued racial discrimination in housing has serious consequences. Experts have estimated that housing discrimination is a major cause of the increasingly segregated living patterns which dominate our urban areas today.<sup>8</sup> Largely as a result of discrimination, not simply differences in income, blacks are almost twice as likely as the general population

2. 42 U.S.C. § 3601 (1976).

3. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, OFFICE OF POLICY DEVELOPMENT AND RESEARCH, MEASURING RACIAL DISCRIMINATION IN AMERICAN HOUSING MARKETS: THE HOUSING MARKET PRACTICES SURVEY ES-2 (1979). A similar HUD study of discrimination against Mexican-Americans in the Dallas rental housing market determined that light-skinned Mexican-Americans were subject to a 65% chance of discrimination while dark-skinned Mexican-Americans had a 96% chance of experiencing discrimination in seeking rental housing. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, OFFICE OF POLICY DEVELOPMENT AND RESEARCH, DISCRIMINATION AGAINST CHICANOS IN THE DALLAS RENTAL HOUSING MARKET PRACTICES SURVEY (1979). See also Lamb, *Housing Discrimination and Segregation in America: Problematical Dimensions and the Federal Legal Response*, 30 CATH.-U. L. REV. 363, 374-79 (1981) [hereinafter cited as Lamb]; Heckt, *Apartment Hunting in Black and White*, N. Y. Times (May 11, 1978), p. A23.

4. See H.R. REP. NO. 96-865, 96th Cong., 2d Sess. 5 (1980).

5. U.S. COMM'N ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN SUBURBIA 18 (1974).

6. *Id.* at 18-19.

7. See Branfman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 YALE L.J. 483 (1973).

8. See e.g., Muth, *Residential Segregation and Discrimination*, in 1 PATTERNS OF RACIAL DIS-

to live in substandard housing, and receive an average of 30% less value for their housing dollar.<sup>9</sup> Segregated and inferior housing for minorities helps produce segregated and inferior education, employment, and municipal services in an increasingly vicious cycle.<sup>10</sup> Despite the promise of fair housing legislation, segregation and discrimination in housing remain unsolved.

## II. *Fair Housing Laws and the Role of the Justice Department*

The principal weapon in the fight against housing discrimination, and the primary enforcement tool of the Justice Department, is Title VIII of the 1968 Civil Rights Act, also known as the Fair Housing Act of 1968.<sup>11</sup> The Act prohibits discrimination with respect to a wide range of practices, including not only refusals to sell or rent, but also discrimination in financing, brokerage services, advertising, the terms, conditions, and privileges of sale, and the provision of related services and facilities.<sup>12</sup> Public as well as private discrimination is banned, and Title VIII also bars exclusionary land use controls that discriminate on racial grounds.<sup>13</sup>

The Justice Department is the only federal agency empowered to bring enforcement actions under Title VIII.<sup>14</sup> An action for injunctive relief may be brought whenever there is "reasonable cause to believe" that a person is engaged in "a pattern or practice" of discrimination or such discrimination "raises an issue of general public importance."<sup>15</sup> The Department may exercise its authority on the basis of information provided by aggrieved individuals or on the basis of its own independent investigations. Because of its exclusive federal Title VIII enforcement responsibility, the role of the Justice Department is critical to achieving fair housing.

## III. *Civil Rights Division Fair Housing Efforts Prior to the Reagan Administration*

The Civil Rights Division initiated significant efforts in housing discrimination at the time Title VIII was enacted. In 1968, the division investigated more than 200 allegations of housing discrimination and began developing investigative and litigative techniques for the enforcement of the

CRIMINATION 107, 112-13 (G. von Furstenberg, B. Harrison & A. Horowitz eds. 1974) [hereinafter cited as PATTERNS]; Lamb, *supra* note 2 at 376-78.

9. See, e.g., Lamb, *supra* note 2 at 388-89; Quigley, *Racial Discrimination in the Housing Consumption of Black Households*, in PATTERNS, *supra* note 8 at 121, 122-25, 133.

10. See, e.g., Lamb, *supra* note 2 at 390-95; U.S. COMM'N ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN SUBURBIA 9-15 (1974).

11. 42 U.S.C. §§ 3601-3631 (1976). Several other laws and constitutional provisions prohibit discrimination related to housing and have been utilized by the Justice Department, such as the Equal Credit Opportunity Act, 15 U.S.C. § 1691, but most federal fair housing activity has been focused on Title VIII. See U.S. COMMISSION ON CIVIL RIGHTS, THE FEDERAL FAIR HOUSING ENFORCEMENT EFFORT 57-60 (1970) [hereinafter cited as 1979 CRC REPORT].

12. 42 U.S.C. §§ 3604-3606.

13. See 42 U.S.C. §§ 3604-3606 (1976); see, e.g., United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 442 U.S. 1042 (1975); Morales v. Haines, 486 F.2d 880 (7th Cir. 1973).

14. HUD has the statutory responsibility to receive and investigate complaints of housing discrimination, but has the power only to conciliate disputes, not to bring enforcement actions. See generally H.R. REP. NO. 865, 96th Cong., 2d Sess. (1980); REPORT OF THE COMPTROLLER GENERAL, STRONGER FEDERAL ENFORCEMENT NEEDED TO UPHOLD FAIR HOUSING LAWS (1978). Private actions may be brought under Title VIII as well.

15. 42 U.S.C. § 3613 (1976).

new statute. In October 1969, the Division established a separate housing section.<sup>16</sup>

In 1977, the Housing Section became the Housing and Credit Section to reflect the Civil Rights Division's new responsibilities under the Equal Credit Opportunity Act.<sup>17</sup> An Enforcement Unit within the Section was established, devoted exclusively to monitoring compliance with court orders and consent decrees in housing cases.<sup>18</sup> During the Carter Administration, the Housing and Credit Section was merged with the Education Section to form the General Litigation Section, a structure which remains in existence today, in an effort to combat the dual problems caused by discrimination in housing and education.

Under both Republican and Democratic administrations, the Civil Rights Division has played an important role in fighting housing discrimination. Between 1969 and mid-1978, the Civil Rights Division brought more than 300 cases against over 800 defendants, averaging approximately thirty-two cases per year.<sup>19</sup> In addition, thirty-six enforcement proceedings (*e.g.*, for civil contempt or supplemental relief) were filed.<sup>20</sup> Even this quantity of litigation has been characterized, by the United States Commission on Civil Rights as "somewhat disappointing" in light of the magnitude of the housing discrimination problem.<sup>21</sup>

However, both the Commission and fair housing advocates have praised the "high quality" of the Division's housing discrimination efforts prior to the Reagan Administration, both in its pre-suit investigations and in its actual litigation.<sup>22</sup> The results speak for themselves. Of the more than 300 cases brought as of mid-1978, the Division had suffered only two losses on the merits.<sup>23</sup> Comprehensive relief has been obtained in a number of cases, including the requirement of affirmative steps to correct the effects of past discrimination. Consent decrees frequently have been entered which establish systems of processing housing applicants to ensure against the intrusion of racial and other prohibited considerations.<sup>24</sup> It is important to note that the Division has long had a policy of focusing on complex cases likely to have a great impact on a large number of cases elsewhere in the country. This may account for the Civil Rights Commission's complaint

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16. U.S. COMM'N ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 160 (1971) [hereinafter 1971 CRC REPORT].

17. 1979 CRC REPORT, *supra* note 11 at 60.

18. *Id.* at 62.

19. *Fair Housing Amendments Act of 1979: Hearings on H.R. 2540 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*. 96th Cong., 1st Sess. 3 (1979) (statement of Drew S. Days, III, Assistant Attorney General, Civil Rights Division, Department of Justice).

20. *Id.* See also 1979 CRC REPORT, *supra* at 70-71, 73.

21. 1979 CRC REPORT, *supra* note 11 at 71. The Commission cited several factors which limited the litigation effort: the small size of the housing section, the strict internal standards for filing suit, and the section's multilevel internal review process. *Id.* at 72-73. These factors, coupled with the Division's decision to concentrate on more complex cases with more wide-ranging impact in such areas as exclusionary zoning, resulted in a decrease in the average number of cases filed in the 1978-80 period to 19. See ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES (1979) at 114; ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES (1980) at 129.

22. 1979 CRC REPORT, *supra* note 11 at 70.

23. *Id.* at 57.

24. *Id.* at 71.

about the Division's relatively small number of cases filed. Yet the return on this investment has been significant.

Perhaps the most notable achievement of the Division has been its contribution to the development of a body of case law which has enhanced the effectiveness of Title VIII. For instance, *United States v. City of Black Jack*<sup>25</sup> was one of the first appellate court decisions to apply to housing cases the "effects" test or "*prima facie*" concept recognized in employment discrimination cases. The court adopted the Justice Department's position that conduct by a defendant (in that case passage of a zoning ordinance prohibiting the construction of any new multiple-family dwellings) which has a discriminatory effect establishes a *prima facie* case of discrimination and shifts the burden of proof to the defendant to justify the ordinance's racially discriminatory impact. Virtually every other federal appellate court has followed *City of Black Jack* and has held that the *prima facie* case concept is proper under Title VIII.<sup>26</sup> The "effects" test was utilized by the Division itself in *United States v. City of Parma*<sup>27</sup> as one basis for obtaining a significant court order against the exclusionary actions of an Ohio suburb. The relief included the creation of a fair housing committee within city government and a requirement that the city seek additional subsidized housing for low- and moderate-income families.

Other important principles established in Division housing cases include:

- (1) A duty by defendants found liable in discrimination cases to take affirmative steps to correct the effects of their past discrimination;<sup>28</sup>
- (2) The right of the United States to sue several defendants operating in the same geographic area as part of a group pattern or practice even where no defendant had individually engaged in a pattern and practice and even though the defendants had not acted in concert;<sup>29</sup>
- (3) The vicarious liability of principals for discriminatory acts of their agents;<sup>30</sup> and
- (4) The liability of newspapers for printing discriminatory advertisements.<sup>31</sup>

The Division also has a history of various non-litigation activities promoting fair housing. For example, the Division wrote to more than seventeen of the nation's largest title insurance companies advising them to cease insuring property titles that contained racially restrictive covenants.<sup>32</sup> It also has trained employees of federal financial regulatory agencies to uncover evidence of racial discrimination during their examination of regulated in-

25. 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

26. *See, e.g.*, *Robinson v. Twelve Lofts Realty, Inc.*, 610 F.2d 1032, 1038 (2d Cir. 1979); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146-48 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1287-90 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

27. 494 F. Supp. 1049 (N.D. Ohio 1980), *aff'd in part*, 661 F.2d 562 (6th Cir. 1981).

28. *United States v. West Peachtree Tenth Corp.*, 437 F.2d 221 (5th Cir. 1971).

29. *United States v. Bob Lawrence Realty Co.*, 474 F.2d 115 (5th Cir. 1972), *cert. denied*, 414 U.S. 826 (1973).

30. *United States v. Reddock, P.H.E.O.H. Rptr.* ¶ 13,569 (S.D. Ala. 1972), *aff'd*, 467 F.2d 897 (5th Cir. 1972).

31. *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1971), *cert. denied*, 409 U.S. 934 (1972).

32. 1971 CRC REPORT, *supra* note 16 at 61.

stitutions, an effort which resulted in dramatic increases in the identification of discrimination-connected irregularities in the savings and loan industry.<sup>33</sup> Division attorneys have also established regular contact with local fair housing agencies and groups to assist in the gathering of information which may lead to enforcement actions. They traditionally have been active in public education by speaking to interested groups throughout the county.<sup>34</sup>

The performance of the Civil Rights Division in the housing discrimination area has been characterized as "impressive."<sup>35</sup> The Division's success in building a legal foundation for successful attacks on housing discrimination has earned it bipartisan praise for making a "significant contribution" to fair housing.<sup>36</sup>

#### IV. *The Civil Rights Division under the Reagan Administration*

Both fair housing advocates and career Justice Department attorneys are in agreement that fair housing enforcement by the Civil Rights Division under the Reagan Administration has deteriorated dramatically. This change is more evident in three areas: new litigation activity, shifts in policy, and conduct of previously-filed litigation.

##### A. *New Litigation Activity*

New fair housing litigation activity under the Reagan Administration has come to a virtual standstill. Compared to an annual average of nineteen new cases in 1978-80 and over thirty-two new cases in the predominantly Republican years of 1969-1978, only two new fair housing cases have been brought by the Division since 1980. And no cases whatsoever were filed until February, 1982, more than a year after President Reagan took office.<sup>37</sup>

Moreover, the two cases finally brought by the Section represent a significant departure from its previous strategy to concentrate on complex "test" cases. Both cases involve "distinctly minor suits against individual property management companies,"<sup>38</sup> which were already being sued by local housing groups in virtually identical suits.<sup>39</sup> Indeed, the Civil Rights Division suits themselves resulted not from investigations by the Division, but from information provided to it by these local groups shortly before the current Administration took office.<sup>40</sup> The paucity of new cases and the changed focus of those that do exist furnish strong evidence that the present Administration has retreated from almost fifteen years of vigorous commitment to the goal of fair housing.

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33. *Id.* at 69.

34. *Id.* at 64.

35. *Id.* at 57.

36. *Id.* at 71.

37. Washington Post, Feb. 13, 1982; Washington Post, Apr. 3, 1982, at A15 (letter from Martin E. Sloane, Executive Director of the National Committee against Discrimination in Housing) [hereinafter cited as Sloane Letter].

38. Sloane Letter, *supra* note 37.

39. Compare Fair Housing Center v. Hartman and Tyner, Inc., No. 81-73272 (E.D. Mich. September 8, 1981) with United States v. Hartman and Tyner, Inc., No. 82-71066 (E.D. Mich. March 25, 1982); compare also Education/Instruction v. Commonwealth Ave. Assocs., C.A. No. 81-208-MA (D. Mass. Jan. 29, 1981) with United States v. Commonwealth Ave. Assocs., C.A. No. 82-302-MA (D. Mass. Feb. 4, 1982).

40. Sloane Letter, *supra* note 37.

The Division has claimed that the amicus curiae brief it filed in the Supreme Court in a housing case, *Havens Realty Corp. v. Coleman*,<sup>41</sup> in which the Court affirmed the standing of "testers" to sue under Title VIII, evidences its continued support for fair housing. But the facts behind the filing of the brief belie that claim. In fact, the brief was filed *not* at the initiative of the Division, but "only at the insistence" of HUD and despite the opposition of the Assistant Attorney General William Bradford Reynolds.<sup>42</sup> And, although Mr. Reynolds has frequently claimed in public that many new housing cases are "under investigation," present and former Division attorneys have reported that this may mean nothing more than the opening of a new file when a citizen's complaint is received. Again, statistics speak for themselves—the Division has virtually abandoned new fair housing litigation since the Reagan Administration took office.

### B. Policy Changes

According to present and former Division attorneys, including the former Chief of the General Litigation Section, Robert Reinstein, the decline in new Division litigation activity is due largely to shifts in Division policy. For example, despite previous Division practice and judicial precedent supporting Title VIII as a remedy against exclusionary zoning and similar practices which have significant discriminatory effects, Assistant Attorney General Reynolds has announced that the Division will no longer institute such actions.<sup>43</sup> Fair housing advocates criticize this policy shift as a retreat that is simply unwarranted by applicable case law and one that will insulate discriminatory actions by local governments from legal redress.

Perhaps even more important, the Division has also abandoned the "effects" test which the Division itself helped to establish. The courts have recognized that Congress' intent in enacting laws against discrimination in employment, housing, and other areas was to combat the "consequences" of discrimination, "not simply the motivation;" as the courts have explained, even discrimination not caused by blatant prejudice "can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."<sup>44</sup> In addition, both courts and civil rights advocates have emphasized the importance of the "effects" concept in proving discrimination; as the court succinctly observed in the *City of Black Jack* case, "clever men may easily conceal their motivations" in discrimination cases.<sup>45</sup> Yet the Division's leaders have apparently forgotten that "sophisticated as well as simple-minded modes of discrimination" are illegal.<sup>46</sup> Top Division officials have criticized the "effects" test,<sup>47</sup> and Division attorneys have been told that no new cases employing that concept will be initiated.

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41. 455 U.S. 363 (1982).

42. *Id.*

43. National Law Journal, Nov. 9, 1981, at 3.

44. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (employment); *City of Black Jack*, 508 F.2d at 1185. See also *Sisters of Providence v. City of Evanston*, 335 F. Supp. 396, 404 (N.D. Ill. 1971); see *supra* text at 70-71.

45. *City of Black Jack*, 508 F.2d at 1185.

46. *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

47. See, e.g., Memoranda from Robert J. D'Agostino to William Bradford Reynolds (July 21, 1981), reprinted in 127 CONG. REC. H6183.

These policy changes are akin to sending a contemporary army into combat with antiquated weaponry and technology. Unable to argue the prevailing law of the land, Section attorneys are simply prohibited from engaging in sophisticated litigation. The leadership of the Division has yet to offer them a viable alternative theory, and the result is stagnation.

### C. *Conduct of Pending Litigation*

These policy shifts have also affected the Division's conduct of pending cases. For example, in a case against the City of Yonkers, challenging segregation in education and housing in New York, the Division has already amended its complaint to eliminate its request that Yonkers remedy affirmatively its previous housing discrimination, despite the fact that the Division itself has helped to establish the principle that such relief may be required. Instead, the amended complaint simply asks that Yonkers do no more than cease its previous efforts to oppose the construction of new or rehabilitated subsidized housing. Yonkers has subsequently rejected a consent decree to this effect, and its watered-down counterproposal is currently being reviewed by Mr. Reynolds. In today's housing market, where little or no such construction is taking place, such "relief" is virtually meaningless.

In addition, Division attorneys report that they have been instructed not to attempt to utilize the "effects" test in any pending litigation, and that references to discriminatory effect are often deleted from briefs and pleadings by the Division superiors. For example, the Division recently told the court in *United States v. City of Birmingham*<sup>48</sup> that its case was based on discriminatory intent and that it was not employing the "effects" test, despite its recognition that the federal courts of appeal have upheld this approach.<sup>49</sup>

This shift in position contributed last year to the first defeat the Division has ever sustained in a Title VIII case against a municipality. In October 1981, a federal district court ruled against the Division in a suit filed prior to the Reagan election to end discriminatory housing practices in Manchester, Connecticut. *See, Angell v. Zinsser*.<sup>50</sup> According to former Section Chief Robert Reinstein, Division attorneys organized their legal and trial tactics around the well recognized "effects" test concept, but were then ordered not to employ that theory by the Reagan appointees who inherited the case.<sup>51</sup> Not surprisingly, Mr. Reynolds has decided not to appeal the adverse decision in *Angell*.<sup>52</sup>

### V. *Conclusion of Fair Housing*

Until 1981, both Republican and Democratic administrations had

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48. No. 80-70991 (E.D. Mich. 1980).

49. National Law Journal, Aug. 9, 1982, at 12. *See also* N.Y. Times, Dec. 20, 1981, at 4E (discussing the *Yonkers* litigation).

50. No. 79-229 (D. Conn. Oct. 14, 1981).

51. This shift was presaged by the D'Agostino memoranda, which criticized the "effects" test and suggested a "complete rethinking of our position in the housing cases including *Manchester*." 127 CONG. REC. at H6184. In the *Parma* litigation, in which the Division had employed the "effects" test at trial, the Division's brief and argument on appeal ignored that aspect of the case. The Sixth Circuit nevertheless affirmed the lower court's opinion in that respect and endorsed the "effects" test.

52. National Law Journal, Nov. 9, 1981, at 3, 14.

joined in the battle against housing discrimination. Under the Reagan Administration, however, the Civil Rights Division has refused to use the very legal doctrines which the Division itself has helped establish, and instead has virtually abandoned the fight. Notably, the Administration, which is devoid of previously-recognized expertise in civil rights, has criticized and rejected well-established legal precepts. To date, however, it has proposed no credible alternatives to the theories it has discarded. Whatever its intent, the effect of this policy can only be to exacerbate discrimination in housing across the country.

### III. FEDERAL ENFORCEMENT SECTION—DISCRIMINATION IN EMPLOYMENT\*

#### A. *Background and History of the Federal Enforcement Section*

The present Federal Enforcement Section of the Civil Rights Division was formed in 1979. It is the successor to the Division's Employment Section which since 1969 had responsibility for the Division's equal employment opportunity activities.<sup>53</sup>

The primary legal prohibition against employment discrimination is Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000(e). Until 1972 the Employment Section was the only federal office empowered to bring suit to enforce Title VII, because the Equal Employment Opportunity Commission (EEOC) could seek only to conciliate complaints.<sup>54</sup> The 1972 amendments to Title VII, however, transferred to the EEOC concurrent authority to bring suit against private employers. Since 1974, when the EEOC's authority to sue became exclusive, the Division's jurisdiction has been limited primarily to systematic patterns and practices of employment discrimination by state and local governments, recipients of federal financial assistance, and federal government contractors.<sup>55</sup> These functions were performed in 1974-79 by the Employment Section and the litigation component of the Federal Programs Section. In 1979, these offices were merged into the newly-created Federal Enforcement Section.

Over the years, the Division has built an admirable reputation as an opponent of employment discrimination. In particular, the Section has received high marks from civil rights groups and others for helping to achieve its "primary objective" of "making good equal employment opportunity law."<sup>56</sup> During both Republican and Democratic administrations, the Division has contributed significantly to the development of Title VII case law, both in the area of liability and remedy. For example, the Division obtained two of the earliest appellate decisions holding that Title VII prohibits not only overt, purposeful discrimination, but also bans racially neutral practices that perpetuate the effects of past discrimination.<sup>57</sup> Similarly, the Divi-

\* Chapter 5 at pp. 103-14 in original.

53. U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 118 (1971); 1979 ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES 111.

54. U.S. COMM'N ON CIVIL RIGHTS, TO ELIMINATE EMPLOYMENT DISCRIMINATION: A SEQUEL 245-47 (1977) [hereinafter cited as 1977 CRC REPORT].

55. *Id.* at 247-52.

56. *Id.* at 275; *see also id.* at 263, 276.

57. *Id.* at 276 n.76. *See, Local 189, United Papermakers v. United States*, 415 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *United States v. Local 36, Sheet Metal Workers*, 416

sion has been active in other cases concerning the discriminatory use of tests and other selection procedures.<sup>58</sup>

Equally important, the Division has helped to shape appropriate remedies for violations of the employment discrimination laws. As the Division itself noted, its arguments in *United States v. Local 53, Asbestos Workers*<sup>59</sup> "first established the principle that affirmative steps must be taken to correct the effects [of] past discriminatory employment practices."<sup>60</sup> The Division has similarly stated that "the landmark decisions sustaining the use of numerical goals and timetables as a remedy for past discrimination were either in cases brought by the Civil Rights Division . . . or in which the Division participated as amicus."<sup>61</sup> Cases involving such remedies as backpay and retroactive seniority have also been litigated successfully by the Division,<sup>62</sup> during both Republican and Democratic Administrations.

### B. *The Federal Enforcement Section under the Reagan Administration*

In view of the historical objective of the Division to develop favorable equal employment opportunity case law, the efforts of the Civil Rights Division in the employment discrimination area under President Reagan can best be assessed by reviewing its performance in that area. Such a review demonstrates that under the Reagan Administration, the Division has departed significantly from its own practices and from the case law requirements that the Division itself helped to establish.

Specifically, the Division has completely reversed its previous position concerning the appropriate relief in Title VII cases. Although the Division itself helped to establish the principle that affirmative actions, such as numerical goals and timetables, may be necessary in *some* cases to remedy employment discrimination, the Division has now stated that it will not advocate such remedies in *any* cases, even where an employer has engaged in a pattern or practice of discrimination.<sup>63</sup> Assistant Attorney General Reynolds has announced that he will seek a test case to overturn the Supreme Court's decision upholding affirmative action plans in *United Steelworkers v. Weber*.<sup>64</sup>

#### 1. *Rejection of Affirmative Action in All Circumstances*

Mr. Reynolds has stated that affirmative action remedies will be re-

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F.2d 123 (8th Cir. 1969). These decisions were followed by the Supreme Court's similar holding in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in which the Division participated as amicus curiae.

58. See, e.g., *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977), cert. denied, 434 U.S. 875 (1977); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972).

59. 406 F.2d 1047 (5th Cir. 1969).

60. 1977 CRC REPORT, *supra* note 63 at 277 n.76 (quoting a memoranda of the Chief of the Employment Section).

61. *Id.* See also, e.g., *United States v. Local 86, Ironmakers*, 443 F.2d 544 (9th Cir. 1971).

62. See, 1977 CRC REPORT, *supra* note 63 at 277 n.76.

63. Testimony of William Bradford Reynolds before the House Subcommittee on Employment Opportunities 5 (Sept. 23, 1981) [hereinafter cited as 1981 House Testimony]; William Bradford Reynolds. Remarks before 35th National Conference on Labor 2-3 (June 11, 1982).

64. William Bradford Reynolds. Remarks before the Tenth Annual Conference of Executive Enterprises, Inc. 4 (Jan. 22, 1982) [hereinafter cited as Tenth Annual Conference]; Wall St. J., Dec. 8, 1981. *Weber*, 443 U.S. 1971 (1979).

placed by injunctions that prohibit discrimination, by increased emphasis on the recruitment of women and minorities, and by backpay and seniority awards to identified victims of discrimination. According to the Assistant Attorney General, Title VII should provide remedies only for those individuals who can be identified as victims of discrimination, and not for other members of their class. The ideological basis for the rejection of affirmative action in Title VII cases is the concept, often invoked by Attorney General Smith and Mr. Reynolds, that the Constitution is "color blind" and countenances no discrimination, not even to remedy past discriminatory practices.

This view is, of course, contrary to the Supreme Court's decision in the *Weber* case, and is tantamount to an announcement that the Civil Rights Division will not enforce the law of the land, so Mr. Reynolds was virtually required to declare his intentions to seek reversal of *Weber*. Significantly, Mr. Reynolds claims no novel legal theory or newly discovered legislative history on which to argue his test case. Rather, it is based on his philosophical disagreement with the Court's decision. The Administration can accommodate this view because, as Mr. Reynolds has stated, it believes that "racial and other stereotyping is declining and most people now accept the legal and moral imperative to treat people equally. . . ." <sup>65</sup> In other words, as with school desegregation, the Administration has simply decided that employment discrimination is no longer a serious problem.

This virtual repudiation of bipartisan federal law is a dramatic shift. For over twenty years, affirmative action has been a part of the federal government's strategy for combating discrimination. Since President Kennedy signed Executive Order 19025, the laws of Congress and the orders of the Executive have continued to encourage employers to take deliberate affirmative steps to bring about equal employment opportunity. <sup>66</sup> Indeed, in enacting Title VII, Congress gave the courts express authorization to use "affirmative action . . . or any other equitable relief as the court deems appropriate." <sup>67</sup>

The courts have utilized this authority, often at the request of the Division itself, to combat proven discrimination through affirmative action plans including goals and timetables, where necessary to remedy entrenched discrimination. <sup>68</sup> This has not resulted from a failure to achieve "statistical parity;" instead, courts have frequently concluded that only affirmative relief could successfully end discriminatory practices by recalcitrant employers. <sup>69</sup> As one court explained in upholding the use of goals and timetables at

65. William Bradford Reynolds. Remarks before the Conference on Equal Employment Opportunity in the Public Sector 3 (Feb. 1, 1982).

66. See, 26 Fed. Reg. 1977, 1959-63 Comp. 448; 30 Fed. Reg. 12319 (Sept. 24, 1965), as amended by Exec. Order No. 11375, 32 Fed. Reg. 1430 (Oct. 13, 1967), 3 C.F.R. 406; 42 U.S.C. § 2000(e) (1970), as amended by Equal Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. See also, *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159, 168-71 (3d Cir. 1971), cert. denied, 404 U.S. 854 (1971).

67. 42 U.S.C. § 2000(e)-5(g). See, *Contractors Ass'n of E. Pennsylvania*, 442 F.2d 159, 173 n.47.

68. E.g., *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972); *Carter v. Gallagher*, 452 F.2d 327 (8th Cir. 1971), cert. denied, 406 U.S. 950 (1972). Virtually all of the federal courts of appeal have approved such remedies. See, U.S. COMM'N ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN THE 1980'S: DISMANTLING THE PROCESS OF DISCRIMINATION 22 n.60 (1981) [hereinafter cited as 1981 CRC REPORT].

69. E.g., *NAACP v. Allen*, 493 F.2d 614, 620-31 (5th Cir. 1974) (explaining that "quota relief

the urging of the Division itself, "Congress did not intend to freeze an entire generation of . . . employees into discriminatory patterns that existed before" Title VII; affirmative relief is necessary so that "the effects of past discrimination in job assignments could be overcome."<sup>70</sup> And, as the United States Commission on Civil Rights emphasized last year, affirmative action remains necessary to achieve meaningful success in combating the continuing problem of employment discrimination, Mr. Reynolds' personal views notwithstanding.<sup>71</sup>

Under these circumstances, the Division's shift in position has important practical consequences. Instead of requesting affirmative hiring and promotion relief, the Division has announced that it will now seek to rely—almost exclusively—on recruitment programs to combat discrimination,<sup>72</sup> as exemplified by the consent decree in *United States v. Vermont*.<sup>73</sup> So long as an employer's pool of applicants includes women and minorities, according to this policy, sufficient affirmative remedial action has been taken without regard to the number that are actually hired. In the view of some Section attorneys, the consent decrees provide woefully inadequate reporting and monitoring provisions, and they are concerned that these agreements are, in reality, not enforceable.

Such an exclusive focus on recruitment practices is ineffective, impractical, and contrary to established case law. It is ineffective because it ignores discrimination in promotions, where the "applicant" pool is pre-determined by the pre-existing work force, and because it allows an employer to continue to discriminate in actual hiring decisions so long as the pool of applications from women and minorities is sufficient, even if no one is hired. It is impractical because effective monitoring of compliance would require the Division to review detailed information on recruitment activities at a time when the Division's staff, and its inclination to monitor, is being reduced.<sup>74</sup> And it is contrary to established case law because it ignores the frequent holdings of the federal courts that affirmative remedies are permissible and indeed required in certain cases.<sup>75</sup> As Justice Blackmun explained in the *Bakke* case, there is often "no other way" to "get beyond racism" than to "take account of race" in seeking to remedy entrenched patterns of discrimination.<sup>76</sup>

Mr. Reynolds has also advised the EEOC that his interpretation of the law will impact the affirmative action plans of federal agencies as well. In a letter to the EEOC he advised that the Department "is unable to conclude at

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was essential to make meaningful progress" since "no Negroes were hired" until "affirmative relief was ordered"); *Vulcan Society v. Civil Serv. Comm.*, 490 F.2d 378, 398 (2d Cir. 1973) (holding that "no other method" besides affirmative remedy "was available for affording appropriate relief").

70. *Contractors Ass'n of Eastern Pennsylvania*, 442 F.2d at 173.

71. See, 1981 CRC REPORT.

72. See, Tenth Annual Conference, *supra* note 64 at 12; 1981 House Testimony *supra* note 71 at 11; William Bradford Reynolds. Remarks before the Delaware Bar Association (Feb. 22, 1982).

73. No. 81-380 (D. Vt. 1981). Similar settlements have been or will be entered into in cases against state police forces in New Hampshire, Rhode Island, Massachusetts, Connecticut and Virginia.

74. See, U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT BUDGET: FISCAL YEAR 1983 29-31 (June 1982).

75. See, *Rejection of Affirmative Action in all Circumstances*, *supra* text.

76. *Bakke v. Board of Regents*, 438 U.S. 265, 307 (1978) (Blackmun, J., separate opinion).

present that there is statutory authority for compelling [the] use [of goals and timetables] in affirmative action planning."<sup>77</sup> A copy of the letter went to the head of each federal agency. The potential result is that the federal government, one of the most aggressive employers of women and minorities, may begin to limit its own hiring obligations.

The Division's policies can also be expected to have a chilling effect on meaningful affirmative action efforts in private litigation not involving the Civil Rights Division. This policy shift sends a clear message to employers: not only will the federal government no longer seek affirmative action as a remedy, the Justice Department now suggests, but it may also sue an employer who voluntarily institutes an affirmative action plan in order to test the *Weber* decision. There is a clear, official signal that the federal government has retreated from the battle against employment discrimination and a suggestion that employers may now do the same.

In many employment discrimination cases, of course, affirmative hiring remedies are neither necessary nor appropriate. But for the Division to abandon them entirely, and not evaluate each situation on its individual merits, weakens its ability to negotiate, discourages voluntary affirmative action efforts and forecloses the possibility of meaningful relief in some cases. This retreat is further evidence to women and minorities that the Civil Rights Division is no longer its ally.

## 2. *Discriminatory Job-Testing*

The Division's retreat from the requirements of applicable case law and its own historical positions in employment discrimination litigation has not been limited to the area of affirmative action. In *Connecticut v. Teal*,<sup>78</sup> the Department of Justice joined the defendant, the State of Connecticut, in contending that a plaintiff should not be able to make out a *prima facie* case of employment discrimination by proving that a job test used by an employer operates to discriminate against minorities where, independent of the use of the allegedly discriminatory test, the employer has hired significant numbers of other minority employees.<sup>79</sup> This position was taken although the Division itself, under both Republican and Democratic Administrations, has supported and helped establish the well-recognized principle that the use of tests which discriminate against minorities constitutes a violation of Title VII.

Interestingly, the Department's argument in *Teal* contradicts not only its past positions, but also the position it has most recently taken concerning affirmative action. In the affirmative action area, as discussed above, the Division has argued that Title VII should be interpreted to provide remedies only for *individual* victims of employment discrimination, and that remedies directed at increasing the number of minority employees in an employer's work force are not justified. In *Teal*, however, as the Supreme Court specifically noted, the State of Connecticut and the Justice Department took the position that Title VII effectively granted an employer a "license to discrimi-

77. Letter from William Bradford Reynolds to J. Clay Smith, Acting Chair of EEOC (Sept. 22, 1981).

78. 102 S. Ct. 2525 (1982).

79. *Id.* at 2534-35.

nate" against an "individual employee" on the grounds of race or sex "merely because [the employer] favorably treats other members of the employees' group."<sup>80</sup> The only consistent principle which explains the Division's conflicting stance in these two areas is a simple one—when in doubt, favor the employer.

The Supreme Court's opinion in *Teal* draws attention to another interesting aspect of the Department's change in position, as reflected in its participation in that case. The Court specifically noted that the Government's brief in *Teal* was submitted by the Department of Justice, which "shares responsibility for federal enforcement of Title VII" with the Equal Employment Opportunity Commission. But the EEOC, the court observed, "declined to join" the Department's brief.<sup>81</sup>

The Supreme Court rejected the position advocated by the Department in *Teal*. The Court held that in accordance with the long-standing decision in *Griggs v. Duke Power Co.*,<sup>82</sup> a test which operates to discriminate against minorities and which cannot be shown to be "job-related" violates Title VII, regardless of whether the employer has "favorably treated" other members of the minority group.<sup>83</sup> The Justice Department's arguments to the contrary, the Court noted, would have created a "special haven for discriminatory tests," in violation of Title VII.<sup>84</sup> The unequivocal rejection by the Supreme Court of the Division's position in *Teal* provides further evidence that the Division has abandoned vigorous enforcement of Title VII.

#### IV. COORDINATION AND REVIEW SECTION—DISCRIMINATION IN FEDERALLY FUNDED PROGRAMS\*

##### A. *Introduction—History and Background of the Coordination and Review Section*

The most important nonlitigation function of the Civil Rights Division is performed by the Coordination and Review Section. The Section was created during the Carter Administration, as the Sex Discrimination Task Force, to review federal statutes and regulations for sex bias. After an internal reorganization, the Task Force became the Office of Coordination and Review, which was assigned responsibility for government-wide coordination of Title VI enforcement by the Attorney General. The Office was elevated to the status of a Section in 1980 and now, under Executive Order 12250 (Nov. 2, 1980), it is responsible for the government-wide coordination of all federal government activities to prevent discrimination in federal programs or programs benefiting from federal assistance on the basis of race, national origin, sex, or handicap.<sup>85</sup> The Section is not responsible for age or political discrimination, nor does it engage in litigation.

Under Executive Order 12250, the Justice Department is responsible for coordinating the implementation and enforcement of three laws designed to

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80. *Id.* at 2535.

81. *Id.* at 2533 n.11.

82. 410 U.S. 424 (1971).

83. *Teal*, 102 S. Ct. at 2533-35.

84. *Id.* at 2533.

\* Chapter 6 at pp. 115-29 in original.

85. *See* Exec. Order No. 12250, 45 Fed. Reg. 72,995 (1980).

prevent discrimination in federally assisted programs: (1) Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d), which bans discrimination on the basis of race, color, and national origin; (2) Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, prohibiting sex discrimination in educational programs; and (3) section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which prohibits discrimination on the basis of handicap in federally conducted and assisted programs. In its coordination role, the Section has both the authority and responsibility to ensure that all federal agencies enforce their non-discrimination mandates under these statutes, publish implementing regulations consistent with uniform minimum standards promulgated by the Section, and allocate adequate resources to meet this task.

The Section, then, is intended to be the federal government's primary civil rights coordinator—the manifestation of the Division's symbolic role of advocate for minorities and handicapped persons with federal agencies. Significantly, the Section's activities for the first twenty months of the Reagan Administration indicate a virtual abdication of this role. To date, its actions have consisted of the piecemeal reviewing and approving, or requiring changes in, the regulations proposed by other federal agencies, and the drafting of one set of regulations, which have not yet even been published for comment.

#### B. *Failure to Publish Minimum Guidelines*

As indicated above, the 1980 Executive Order 12250 intended to eliminate inconsistent federal civil rights rules by requiring the Civil Rights Division to promulgate minimum standards for all agencies to adopt. This, it was believed, would promote fair and uniform regulation and relieve some of the complex burdens federal agencies faced in attempting to comply with the sophisticated civil rights laws. President Reagan has not rescinded or modified that Order, and it remains in full force.

Nevertheless, in its first twenty months the Section has failed even to publish proposed minimum guidelines. Federal agencies continue to submit for prior review their own internally developed regulations, and the Section's personnel continue to sift through them on a case-by-case basis. This omission has been caused, in some measure, by an insufficient allocation of resources to the Section.<sup>86</sup> This staff shortage, according to the United States Commission on Civil Rights, also impedes the Section's ability to review thoroughly the proposed regulations it does receive, and prevents meaningful monitoring and evaluation activities to determine if agencies are actually following their own rules.<sup>87</sup>

#### C. *Draft Regulations for Enforcement of Discrimination Laws\**

The Section's primary regulatory activity during its first twenty months,

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86. UNITED STATES COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT BUDGET: FISCAL YEAR 1983 38-39 (June 1982).

87. *Id.* at 39.

\* As noted in the preceding section, no regulations have actually been proposed or adopted; therefore it is necessary to review in detail draft documents still within the Division. These drafts are fungible and often change on a daily basis. This discussion centers on a draft that was

aside from reviewing individual agency proposals, has been to draft about one-half of the required minimum standards, although not one has even been proposed for adoption. One portion of these drafts involves the procedural mechanisms that agencies must follow in promulgating and determining violations of their rules.

### 1. *Monitoring Compliance*

At the insistence of the Office of Management and Budget (OMB), the initial draft of the coordinating regulations for the procedures that federal agencies must follow in monitoring their grants was intended to reduce the regulatory burden upon the recipients of federal financial assistance. The Division sought to accomplish this goal in three important ways.

First, the new draft regulations simply redefine, in a more narrow fashion, the term "recipient." In past Administrations that term properly included indirect federal financial assistance that "benefited" the agency, which therefore was prohibited from discriminating by federal law. The draft specifies that instead the financial assistance must flow *directly* to an agency or institution in order for the anti-discrimination laws to apply. This significantly reduces the coverage of federal laws.

Second, the draft regulations would limit the ability of federal agencies to require recipients to provide them with detailed information concerning civil rights compliance. Current practice permits agencies to collect such data on a routine basis. The proposal would permit survey information only after complaints had been received about a particular recipient, or when there were some special circumstances to justify the need for the material.

Third, the draft regulations limit the agencies' ability to conduct compliance reviews. At present, each agency determines when and how to monitor its recipients. The Division's draft suggests that reviews be conducted only upon the largest recipients. OMB has urged that monitoring, like data collection, be conducted only when an agency can justify its need.

The thrust of these changes is clear. Under the guise of removing "undue" regulatory burdens, the Administration is relaxing enforcement of the civil rights laws. In the overall scheme of things, enforcement of those laws is simply not a priority matter.

### 3. *Rights of Handicapped Persons*

The only substantive regulation currently in draft form concerns the provisions for enforcing prohibitions against discrimination on the basis of handicap. According to some Section personnel, these regulations were selected first because the Administration believed that handicapped persons were fewer or less well-organized than women and racial minorities, thus making easier the task of cutting back the level of civil rights protections currently available. Once these changes were adopted and in place, they would provide a model and a precedent for similar changes in sex and race regulations.

If this was indeed the theory behind the Division's drafting priorities,

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circulated to other agencies for comment in early 1982. As will be indicated where appropriate, some of its terms and concepts have since been modified.

the strength of advocacy groups for the handicapped was seriously underestimated. Copies of the original draft rules were obtained by the interest groups.<sup>88</sup> Their protests have led to subsequent revisions, and no rulemaking proposals have yet been published. It is uncertain at present when the rules will be published, or what their final form might be. But it is instructive to review the original draft in greater detail, because the changes proposed in protecting handicapped people will very likely be transported to race and sex discrimination as well.

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of handicap by federal executive agencies and by programs or activities that receive federal financial assistance.<sup>89</sup> This statute is the major piece of civil rights legislation for disabled people, and demonstrated Congress' strong commitment to ending discrimination based upon handicap.

The Department of Health, Education and Welfare (HEW) was initially designated as the lead agency for coordination of consistent, government-wide enforcement of section 504, under Executive Order 11914.<sup>90</sup> After extensive nationwide pressure from disability groups, HEW published guidelines for implementing section 504 on January 13, 1978.<sup>91</sup> These guidelines set forth enforcement procedures, standards for determining which persons are handicapped, and general guidelines for determining what practices are discriminatory. Each federal agency that provides federal financial assistance is required to use the HEW guidelines as a model for its own regulations implementing section 504 and a number of federal agencies have published proposed or final regulations intended to implement section 504.

Responsibility for coordinating the implementation and enforcement of section 504 was, as noted above, transferred to the Department of Justice in 1980 by Executive Order 12250. Under this Order, the Department must assure that all federal agencies which provide financial assistance have regulations and enforcement procedures which are consistent with the Department's coordination guidelines. The existing HEW guidelines will continue in force until they have been revoked or modified by the Department. Draft coordination guidelines, dated January 27, 1982, were distributed from comment to federal agencies which provide federal financial assistance, but no official rules have yet been promulgated.

The version of the regulations prepared in January 1982 demonstrates that the Division is attempting to substantially erode existing protections for the civil rights of disabled individuals. Although there have been several revisions of various sections, this draft remains the most "official" version pending distribution of any modifications. Current section 504 regulations protect disabled people against discrimination in employment, education, physical accessibility, and many programs and services. The proposed Department draft weakens many of these protections, and will create uncertain and piecemeal enforcement in others. In particular, the draft regulations would produce drastic changes in four areas: general equal opportunity

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88. See *Washington Post*, March 4, 1982 at A27.

89. 29 U.S.C. § 794 (1981).

90. Exec. Order No. 11914, 41 Fed. Reg. 17,871 (1976).

91. 45 C.F.R. §§ 84.-84.61 (1982).

standards, "program specific" coverage, elementary and secondary education, and post-secondary education.

#### a. General Equal Opportunity Standards

Existing section 504 guidelines and regulations require recipients of federal financial assistance to provide qualified handicapped persons with an "equal opportunity" to participate in, and to benefit from, federally assisted programs. They also require recipients to provide handicapped individuals with aids, benefits and services which are "as effective as" those provided to others.<sup>92</sup> The Division's draft guideline inexplicably eliminates any reference to equality of opportunity or effectiveness of aids, benefits or services. Later revisions now appear to include this protection, but no definitive conclusions have been reached.

Section 504 is a civil rights statute, prohibiting discrimination against disabled individuals. Without the requirement of an equal opportunity standard in each agency's section 504 regulations, recipients will be under no legal obligation to achieve one of the Act's primary goals: to provide meaningful access and equality of opportunity to disabled persons. The Division's proposed regulations would significantly abrogate this goal.

#### b. "Program Specific" Coverage

Compliance with section 504 is now required by any "program or activity that receives *or benefits from* . . . [federal] financial assistance."<sup>93</sup> This generally means that if a recipient receives federal financial assistance for one component of its activities, it may not discriminate against handicapped individuals in any of its other programs, since the activities of the entire organization usually benefit from assistance to one subpart.

The Department draft eliminates the phrase "or benefits from" throughout the guidelines. This change drastically reduces section 504's coverage. It could result in fractured enforcement efforts. Non-discrimination will be required in some components of a recipient's program but not in others. A handicapped student would face the real possibility of being unable to complete academic work for a degree, if he or she were restricted to only those departments, courses of study, or even classes, which receive direct financial assistance. This pin-point approach would create an administrative nightmare for both the recipient and the enforcing agency. "Program specific" enforcement will similarly create grave enforcement difficulties when federal assistance is channeled through block grants that dilute the federal dollars or make them more difficult to identify.

The Division's proposals directly contradict the purpose and intent of section 504, as well as applicable judicial precedent interpreting its provisions. Congress intended section 504 to be a comprehensive remedial tool to eliminate discrimination based on handicap.<sup>94</sup> It is [a] familiar canon of statutory construction that remedial legislation should be construed broadly

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92. *Id.* at § 84.4(b)(iii).

93. *Id.* at § 84.2 (emphasis added).

94. NAACP v. Wilmington Medical Center, Inc., 453 F. Supp. 280 (D. Del. 1978), *aff'd* 657 F.2d 1322 (3d Cir. 1981).

to effectuate its purpose.<sup>95</sup> The federal courts have already ruled that recipient institutions which benefit from federal financial assistance cannot discriminate against handicapped persons in any program or activity under section 504.<sup>96</sup> The Division's proposed change in coverage of this important civil rights statute reflects another significant cutback in civil rights enforcement.

### c. Elementary and Secondary Education

In its proposed guidelines, the Department completely eliminates minimum standards for equal opportunity for handicapped students in public elementary and secondary education programs. The draft omits all current requirements that handicapped children be provided an appropriate public education, or that require schools to make accommodations for the unique needs of such children in education programs.<sup>97</sup> It also eliminates the right to be educated in the "regular educational environment" where possible.<sup>98</sup> Later revisions have referred to an "opportunity" to participate in appropriate educational programs, but that is a far cry from the present "right" to so participate.

These protections are basic to equal educational opportunity, and appear in the existing guidelines and section 504 regulations. Failure to provide an individualized education to handicapped children, with their special needs, would be tantamount to depriving such children of an equal opportunity to education. The Department of Justice has a responsibility under Executive Order 12250 to promulgate comprehensive guidelines that will clarify the obligations of federally assisted programs to provide equal educational opportunity. The courts have frequently held that section 504 requires school districts which receive federal funds to consider individually the needs of handicapped students within their jurisdiction.<sup>99</sup> Affirmative guidance on the minimum requirements for access to education is also necessary because a substantial proportion of federal aid, from diverse federal agencies, goes to benefit educational programs. These departments need uniform principles of minimum accessibility for school programs to be set out in the coordination guidelines.

### d. Post-secondary Education

The Department's draft provides that post-secondary education students would not be considered "qualified" and thus entitled to the benefits

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95. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

96. *See, e.g., Wright v. Columbia Univ.*, 520 F. Supp. 789 (E.D. Pa. 1981); *Poole v. South Plainfield Bd. of Educ.*, 490 F. Supp. 948, 951 (D. N.J. 1980) ("[I]t seems absurd to ban discrimination in a discrete area of a school system that receives federal funds while permitting it throughout the rest of the system"). In this respect, section 504 differs from Title VI [42 U.S.C. § 2000(d)] and Title IX [20 U.S.C. §§ 1681-1686], which the Supreme Court has interpreted as imposing a program-specific limitation on bans against discrimination on the basis of race, national origin, and sex. *See also North Haven Bd. of Educ. v. Bell*, 102 S. Ct. 1912 (1982). This difference may be explained by the respective legislative histories of these statutes. *Compare North Haven*, 102 S. Ct. at 1918 (Title IX) with *Poole*, 490 F. Supp. at 951 (section 504).

97. *But see* 45 C.F.R. § 84.33.

98. *But see* 45 C.F.R. § 84.34(a).

99. *See, e.g., Georgia Ass'n of Retarded Citizens v. McDaniel*, 511 F. Supp. 1263 (N.D. Ga. 1981); *Hairston v. Dorsick*, 423 F. Supp. 180 (S.D.W. Va. 1976).

of section 504 if the student's participation in the program would cause an "undue burden" on the school or on other students. Under this provision, a school could argue, for example, that disabled persons with speech impairments create an "undue burden" on other students in a program because their speech is slow or difficult to understand, even though they meet all the academic and technical standards required for participation in the program. Excluding disabled persons because of a perceived "undue burden" is exactly the type of discrimination that section 504 was intended to eliminate. As the Supreme Court itself has recognized, while section 504 may not require substantial changes in a program to accommodate disabled persons, the statute flatly prohibits discrimination against any handicapped persons "who is able to meet all of a program's requirements in spite of his handicap."<sup>100</sup> There is simply no legal support for the Division's attempt to inject a vague and potentially dangerous "undue burden" standard into the enforcement of section 504.

The thrust of the changes proposed in the section 504 draft regulations seems designed to reduce the unreasonable administrative and financial "burdens" the Administration believes the existing regulations place upon the schools, businesses and local governments that receive federal funds. But the changes proposed do not appear to balance reasonably the competing needs of protecting individual rights and eliminating excessive regulation. The draft prepared by the federal entity charged with enforcing the handicap anti-discrimination laws reflects a near abrogation of its legal responsibilities. It is an ominous preview for the revision of similar sex and race regulations that is likely to come before the next presidential election.

#### D. Suspension of Mass Transit Regulations

The bulk of the Coordination and Review Section's activities involve the review of regulations submitted by other federal agencies for the purpose of determining their compliance with the government-wide minimum standards. In the case of section 504 protections for handicapped persons, this means the old HEW regulations, which remain in effect until the Division actually promulgates new ones.

Despite this obligation, the Section has, on several occasions, approved agency regulations that more closely reflect the draft proposals not yet adopted than the existing regulations. In fact, the mass transportation regulations of the HEW guidelines have been suspended for more than a year, so that minimum standards no longer exist in that area.

##### 1. *The Department of Transportation Rules*

On July 20, 1981, the Department of Transportation (DOT) issued a final interim rule, without notice or public comment, revoking requirements that federally-assisted transportation systems make certain types of access available to handicapped patrons. There was little doubt that the rule was in direct contravention of the existing section 504 guidelines, but rather than refusing to approve it the Justice Department summarily suspended the ap-

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100. *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979). See also 45 C.F.R. § 84.3(k)(3).

plicable guidelines—*three weeks after* DOT had already published its rule.<sup>101</sup> The notice stated that the rule suspension was necessary to “ensure that the DOT’s rule is not inconsistent with the coordination guidelines issued by the Department of Justice. . . .”<sup>102</sup>

## 2. *Civil Aeronautics Board (CAB) Rules*

In June, 1982 the CAB published its final rules with regard to nondiscrimination on the basis of handicap, designed to assure that handicapped individuals have access to air transportation services.<sup>103</sup> A major concern of handicapped persons was the limited accessibility of most aircraft, such as narrow aisles and small seats, and they requested the CAB to require, consistent with HEW guidelines, that airlines make limited structural modifications to accommodate them.

The CAB, however, relying on Justice’s suspension of the mass transportation regulations nearly a year earlier, noted that it was “free to adopt” its own standards and rejected the need for any modification.<sup>104</sup> Presumably, Justice had, pursuant to Executive Order 12250, reviewed and approved the regulations prior to their publication.

It is of no little significance that an entire portion of the extant regulations were simply suspended more than a year ago. No interim rules have been promulgated, and the final rules, as noted above, have not been published in a proposed form for public review and comment. Under Mr. Reynolds’ direction, the Division has simply ignored its responsibilities to coordinate implementation of federal laws and regulations.

## V. THE CRIMINAL SECTION—CRIMINAL VIOLATION OF CIVIL RIGHTS STATUTES\*

The Criminal Section of the Civil Rights Division has authority to prosecute violations of a variety of federal civil rights statutes that provide for criminal sanctions. By far the largest number of cases involve misconduct by law enforcement officers (e.g. police, correctional officers, and INS officers) and include instances of brutality, harrassment, witness intimidation, and perjury, among others. These cases are brought primarily under 18 U.S.C. §§ 241 and 242.

Among the non-law enforcement prosecutions concluded by the Section are cases dealing with racially motivated acts of violence, including Ku Klux Klan activity, brought primarily under 18 U.S.C. § 245(b)(2); racially motivated interference with housing rights, brought under 42 U.S.C. § 3631; and involuntary servitude, brought under 42 U.S.C. §§1581 and 1583. In addition, the Justice Department has the authority to enforce a variety of little used criminal statutes, including 18 U.S.C. § 2191, which prohibits cruelty to seamen and was invoked recently for the first time in eighty years.

According to Assistant Attorney General Reynolds, the number of criminal prosecutions brought by the Justice Department under the Civil

101. 46 Fed. Reg. 40,687 (1981).

102. *Id.*

103. 47 Fed. Reg. 25,936 (1982).

104. *Id.* at 25,940.

\* Chapter VII at pp. 130-38 in original.

Rights Acts is equal to or greater than the numbers brought by the Department under the Carter and Ford Administrations during comparable periods of time. In his February 22, 1982 address to the Delaware Bar Association, Mr. Reynolds cited, as the first example of the civil rights enforcement efforts of the Reagan Administration, the record of the Criminal Section. He stated that between January 29, 1981, and February 22, 1982, the Section had "filed 43 new cases charging criminal violations of the civil rights laws and had conducted trials in 11 other cases that were previously under indictment."<sup>105</sup> According to Reynolds, "this level of activity exceeds the 'track record' of prior administrations."<sup>106</sup>

Interviews with the Chief of the Criminal Section and others confirm these figures. During the first half of the 1982 fiscal year, the Department sought indictment in fifty-seven new cases.<sup>107</sup> During the entire 1981 fiscal year, which included nearly four months under the Carter Administration, the Department sought indictments in sixty-two cases. During the 1980 fiscal year, which was the last full fiscal year under the Carter Administration, the Department sought indictments in seventy-seven cases. In fiscal year 1979 the number was sixty-nine, in fiscal year 1978, it was fifty-two. The last fiscal year when grand jury presentations reached a rate comparable to the present rate was the 1976 fiscal year, when the Department sought indictments in 120 cases.

Traditionally, the most controversial and unpopular Criminal Section prosecutions are those brought against law enforcement officials. Yet these cases generally have been approved by Assistant Attorney General Reynolds. For example, in the last year the Section has brought cases against five INS officers at Ft. Chafee, Arkansas, who were charged with beating Cuban refugees. It has prosecuted a member of the Border Patrol for sexually molesting Mexican immigrants. It prosecuted the police chief in Tyler, Texas, for "setting up" defendants on drug charges, and it has prosecuted a New Orleans homicide detective for brutality after a defendant died during interrogation.

The chief instance where Section attorneys were not permitted to take an action they had recommended occurred during the trial of the Fort Chafee—INS officials case. The Section attorney handling the case wanted to file a motion to limit impeachment of Cuban refugees testifying in the case by not permitting the use of their Cuban convictions—either because they were "status" offenses or because the Cuban judicial system under

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105. William Bradford Reynolds, Assistant Attorney General, Civil Rights Division. Remarks before the Delaware Bar Association, "Civil Rights Enforcement in the Reagan Administration: The First Year in Review." 6 (Feb. 22, 1982) [hereinafter cited as Reynolds' Remarks]. The significance of the January 29, 1981 date is somewhat obscure and was, perhaps, an error since the Reagan Administration took office on January 20, 1981 rather than January 29. In fact, between January 29, 1981 and February 4, 1982, 40 new cases had been filed; the remaining three cases cited by Reynolds were filed between January 20 and January 29, 1981.

106. *Id.* at 6 (emphasis in the original).

107. Interview with Daniel F. Rinzal, Chief of the Criminal Section (Apr. 5, 1982). These figures are for the period October 1, 1981 through March 31, 1982. If indictments continue at the same rate for the remainder of the fiscal year, the Section can expect to seek approximately 114 indictments during the fiscal year ending September 1982. Except where noted and as more fully discussed below, all of these statistics include criminal civil cases brought by the various United States Attorneys offices or jointly prosecuted by a U.S. Attorney's office and the Criminal Section, as well as those prosecuted by the Criminal Section alone.

which they were convicted lacked the due process necessary to ensure valid convictions. This position conflicted with that taken by the Department's Criminal Division, and Mr. Reynolds deferred to it on the issue. In the final analysis, however, it made little difference because the judge refused to allow the admission of the evidence in question.

It appears that there has also been general encouragement by the Department of prosecution of incidents of racial violence committed by private individuals—particularly those involving suspected Ku Klux Klan activity or involuntary servitude. Associate Attorney General Rudolph Giuliani has met with lawyers from the Section to ask how the Department can assist in bringing involuntary servitude cases and to suggest new approaches to the issues that arise. It must be noted, however, that the Section has been prosecuting involuntary servitude cases for the last decade, and that it was during the Carter Administration that an "involuntary servitude coordinator" was appointed in the Section. During the past year these cases have received substantially more publicity than in prior years and are, therefore, more visible. In fact, there has not been any substantial increase in the number of such cases actually prosecuted.

During the Carter Administration a new strategy was devised in an attempt to remedy problems of widescale police abuse. Rather than relying on individual prosecutions *after* violations were committed, the Civil Rights Division attempted to initiate affirmative court actions in cities where problems were endemic, in hopes that city officials would take corrective measures. In 1979 the Criminal Section brought suit against the Philadelphia Police Department charging the existence of a pervasive pattern of police abuse that resulted in the denial of basic constitutional rights to all persons in Philadelphia. The suit also charged police department and city officials with facilitating the abusive practices by policies and procedures that hindered investigations of complaints and protected officers accused of wrongdoing from disciplinary actions. The district court dismissed the action without reaching the merits, holding that there was no express or implied statutory authority for the Attorney General to bring such a suit. There is no indication that the current Administration intends to test its authority in other courts or to seek specific legislative authority for such actions. Indeed, resort to federal courts in this situation would seem to run directly counter to the Administration's "states' rights" policy.

The Administration has not yet had to confront two issues that could test its commitment to vigorous enforcement. The first is the so-called "dual prosecution" situation, where law enforcement officers are accused of acts that may violate both federal civil rights laws and state criminal law. In previous Administrations the policy was to grant priority to the state prosecution unless there was some "compelling federal interest" in proceeding in a particular case. If the state declined to prosecute or prosecuted ineffectively, or if the officers were acquitted, the Civil Rights Division was then authorized to proceed. In view of the Administrations's "states rights" philosophy, however, it remains to be seen whether such cases, particularly those with high visibility, will continue to be prosecuted at the federal level.

The second issue, somewhat related to the "dual prosecution" problem, involves conflicts between Civil Rights Division attorneys and local United States Attorneys. United States Attorneys are political appointees, whose

views are, presumably consonant with the Administration's. Their decisions about which civil rights cases to prosecute in their locales may well be at fundamental odds with the views of the career lawyers in the Division. How those differences are resolved will be a telling factor in the Administration's ultimate record.

Despite speculation about what might happen in the future, statistically it does appear that the Justice Department is doing more civil rights enforcement in criminal cases than it did in the past. Statistics can, of course, be misleading and this Administration, not unlike others, may be manipulating numbers to make them say what the Administration wishes them to say. Attempts have apparently been made to re-characterize cases brought under the Carter Administration to make it appear that relatively fewer civil rights prosecutions were initiated during that time. On the other hand, many of the cases brought by United States Attorneys' offices which the current Administration includes in its total may include one or more counts under the civil rights statutes that are not necessarily true "civil rights" cases. Prosecutions of witness intimidation, for example, may have more to do with issues of criminal justice administration than with civil rights. To some extent, therefore, official statistics may be unreliable and it may be futile to try to compare statistics from one year to another. Nevertheless, there is general agreement among those individuals we interviewed that the Justice Department has initiated at least as many and perhaps more criminal rights prosecutions under the Reagan Administration than under previous administrations, and that, to date, there has been no overt attempt to interfere inappropriately with the work of the Criminal Section. There are several explanations for this result. Preliminarily, it must be remembered that, unlike any other section in the division, Criminal is *reactive*, not proactive. It responds to complaints, and depends upon the FBI to investigate the underlying allegations. Thus, as complaints increase and FBI field work in civil rights matters improves, the Section's level of activity is likely to achieve a corresponding increase. According to interviews with present and former Section officials, the current increase is attributable more to a combination of improved FBI work, random chance, and an increase in racial violence than to any initiative in the Section.

But there are also other reasons of policy behind the Criminal Section's relatively high level of activity. On a theoretical level, this Administration believes that widespread racism is a thing of the past. As a result, isolated intentional acts of discrimination are viewed as aberrations that deserve to be punished. As Assistant Attorney General Reynolds expressed it in his speech to the Delaware Bar Association:

Our national consciousness has been raised, and the profound injustice of discrimination on the basis of immutable and irrelevant personal characteristics, such as color, is broadly recognized and condemned. As a consequence, racial and other stereotyping is declining, and most people now accept the legal and moral imperative to treat individuals equally, regardless of race, color[,] sex or national origin. Obviously, and sadly, there are exceptions, and enforcement action is still required. But it is most important, in my view, to appreciate that *such circumstances are the exception and no longer the rule.*<sup>108</sup>

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108. Reynolds Remarks, *supra* note 105, at 5 (emphasis added).

Because the criminal cases present instances of purposeful, willful discriminatory actions, clearly motivated by racial considerations, they are, under Mr. Reynolds' view of modern race relations, clear examples of the exceptions, rather than the rule. In addition, the cases frequently involve acts of violence that no reasonable, morally upright person would publicly countenance.<sup>109</sup> Under the Administration's view, eradicating this kind of intentionally malicious and repugnant behavior will eliminate the problem of discrimination.

As a practical matter, these cases generally involve isolated actions by single individuals or small groups, and thus do not threaten any influential constituencies. If the Section were to attempt, for example, to bring peonage prosecutions against large landowners, or to try to prosecute police unions or to bring another affirmative *Philadelphia*-type suit, support for its activities could likely evaporate.

Finally, the remedies sought in these cases are fully consistent with this Administration's philosophical view of the judiciary's role. They are "one-shot" prosecutions of alleged wrongdoers who are convicted and punished, or acquitted. They do not involve the courts or the Justice Department in the long-term supervision of the criminal justice system or any other institutions which, the current Division leadership believes, should be free from federal intrusion.

Given these circumstances, it is no surprise that Assistant Attorney General Reynolds has chosen to highlight the Criminal Section as the centerpiece of his civil rights activities. A recent report by the United States Commission on Civil Rights, however, provides a disturbing warning. The Commission reported in June, 1982 that the Section faces "growing problems in existing areas of its jurisdiction," including "increased Ku Klux Klan activity," and "widespread violations it believes certain groups are suffering," which it has not had the resources to investigate.<sup>110</sup> Nevertheless, the Justice Department's proposed fiscal year 1983 budget would cut the staff and other resources available to the Criminal Section, preventing it from making "a major effort against these violations in fiscal year 1983."<sup>111</sup>

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109. At a meeting shortly after Reynolds came to the Justice Department, he and Deputy Attorney General Schmultz were shown videotaped evidence that was to be used in a case charging police officers with brutal mistreatment of an accused during questioning. According to others present, both Reynolds and Schmultz appeared disturbed by the police behavior depicted.

110. UNITED STATES COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT BUDGET: FISCAL YEAR 1983 30 and 36 n.88 (June, 1982). These widespread problems include harassment and discrimination against Hispanics in the Southwest and Far West and migrant workers subject to illegal peonage.

111. *Id.* at 36-37.