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Divider Title: **26**

ACCESS TO JUSTICE/CIVIL JUSTICE REFORM

1. ISSUE STATEMENT

A priority of the Civil Division and the Clinton Justice Department is a broad-based initiative to improve the administration of civil justice in federal and state courts and to increase access to our justice system for all Americans.

In prior Republican administrations, "civil justice reform" was synonymous with business oriented tort reform, focusing on such proposals as limitations on punitive damages or the federalization of product liability laws. However, such initiatives, even when combined with a few plausible procedural reforms, attracted insurmountable opposition from many bar and consumer groups. In contrast, this new initiative is targeted at the reform of court processes and procedures which complicate and delay civil litigation, unnecessarily increase costs, and impede access to the courts for millions of low and middle income litigants. Liability reform, for now, will be considered in the context of other pending legislation, such as health care reform and, possibly products liability reform (see below for separate discussions).

Five broad topics will be the primary focus of the project: (1) Alternate dispute resolution and settlement procedures; (2) Discovery; (3) Case management and trial process; (4) Access to justice; and (5) Court resources.

In order to gain support from the broadest possible cross-section of public and private interests, we have consulted with members of the bench and bar throughout the country, as well as with groups and individuals representing many diverse perspectives on the problems facing our civil justice system. The development of a comprehensive set of proposals aimed at reducing costs and delays, simplifying procedures, and increasing access to justice will require communication with and consensus from many groups that have not previously participated in such an effort. Every possible attempt will be made to solicit ideas to be considered, and to seek the advice and consent and where necessary, compromise, from those individuals and groups who are instrumental in shaping our contemporary civil justice system.

2. STATUS

The project commenced with the selection in the late fall of a small working group representing all of the civil litigating divisions of the Justice Department, as well as the Executive Office of the U.S. Attorneys. Cynthia Lebow, Senior Counsel for Policy in the Civil Division, and Paul Friedman, Deputy Associate Attorney General, serve as the co-chairs of the initiative. The 19 member group has been divided into five subgroups to consider in depth the major topics indicated above. The subgroups have been meeting intensively for the past four months, and have consulted informally with a variety of respected judges, practitioners, and academic experts. Each subgroup has already produced preliminary draft measures that include a combination of proposed legislation, executive action, and model procedures which might be applicable to state civil justice systems.

Once a comprehensive set of draft proposals has been prepared and widely circulated within the Justice Department and the Executive Branch for comment, the leaders of the project will initiate a broad-based outreach program seeking approval for the proposals from every facet of the legal community, including the trial bar, business laywers, civil rights and consumer representatives, as well as leaders of the organized bar and the federal and state judiciary. Efforts will also commence to involve key members of the House and Senate.

3. DEPARTMENT POSITION

This initiative has been discussed and endorsed publicly by the Attorney General, the Associate Attorney General, and the Assistant Attorney General for the Civil Division. As stated by AAG Frank Hunger at a recent American Bar Association symposium on civil justice reform:

> "Instead of spinning our wheels to formulate a package we all know from the very beginning does not stand a chance of passing, I want to build a consensus package that will begin to make the changes we all agree need

to be made to make our judicial system more fair and more accessible. Civil justice reform . . . is simply the right thing to do and the time to do it is now."

4. JUDICIARY COMMITTEE MEMBERS INTEREST

- **Senator Biden** was the principle author of the Civil Justice Reform Act of 1990 ("CJRA"). Evaluation of the performance of the 10 pilot districts mandated by the CJRA to adopt prescribed cost-saving and delay-reducing measures will be completed at the end of 1995.

- **Senator Heflin** chairs the Subcommittee on Courts and Administrative Practice. He is the most knowledgeable Senator with respect to court administration and reform and was the architect of the Federal Courts Study Commission.

- **Senator Grassley** is the Ranking Republican on the Subcommittee on Courts and Administrative Practice.

5. REFERENCE MATERIALS

See attached outline of topics under consideration by the Access to Justice Working Group.

ACCESS TO JUSTICE WORKING GROUP PRELIMINARY AGENDA

I. ALTERNATIVE DISPUTE RESOLUTION/SETTLEMENT PROCEDURES

A. Pre-complaint Notice Procedures

B. Structure of ADR Programs and Procedures

1. Mandatory vs. Voluntary Use of ADR

2. Court-sponsored vs. Private ADR Programs

3. Binding vs. Non-Binding

4. Trial Court vs. Appellate Court Programs

5. Early Use of ADR Techniques

6. Use of Various ADR Processes (e.g. arbitration, mediation, early neutral evaluation, mini-trials, negotiated rulemaking)

C. Justice Department ADR Initiatives

1. Guidance Revision

2. Education and Training

   a. DOJ Attorneys, Supervising Attorneys, Other Professional Staff
   b. Client Agencies
   c. Training on Full Range of Dispute Resolution Techniques as Essential Component of Legal Education

3. Funding for Neutrals (creating an earmarked fund separate from the general litigation fund)

4. Appropriate Use of ADR/Settlement as an Element of Performance Evaluation of DOJ Attorneys, Supervisors and Professional Staff

5. Use of ADR in Community Relations Disputes

6. Involvement of DOJ Employees in Community ADR Programs

7. Settlement Process and Settlement Authority

8. DOJ Use and Advocacy of ADR as a Model for Federal Agencies, the States, Private Parties

D. Application and Tailoring of Appropriate Dispute Resolution Techniques to Specific Types of Disputes (e.g., custody, divorce, claims arising under the proposed health security act, landlord/tenant)

E. Offers of Settlement and Amendments to F.R. Civ. P. 68

F. Relationship of ADR and Settlement Mechanisms to Fee Shifting Statutes

G. Increased Access to Appropriate ADR Services

1. Low-Income and Middle-Income Disputants

2. Culturally, Ethnically, Racially and Linguistically Diverse Populations

H. Qualifications, Training, Evaluation, and Ethics of ADR Providers and Users

I. Evaluation of Efficacy of Various Administrative Processes as Dispute Resolution Mechanisms, Including Interagency Arrangements for Sharing of Neutrals

J. Evaluation of Client Agency Use of Appropriate and Effective ADR (e.g., conciliation process at HUD)

K. Use of Court-annexed and Private ADR in the States

II. DISCOVERY

A. Judicial Management of Discovery

1. Judicial Approval/Oversight of Discovery

2. Sanctions For Discovery Abuse -- Presumptions and Standards

3. The Use of Adjuncts or Others to Manage Discovery

4. Protective Orders

B. Increasing Efficiency and Economy In The Discovery Process

1. Time and Numerical Limitations on Discovery

2. Use of Case Tracking

3. Mandatory Disclosure of Core Information

4. Phased Discovery

5. Use of Technology

6. Redefining "Relevance" in Discovery

C. Re-Examining Discovery Principles

1. Uniformity vs. Flexibility of Discovery Rules

2. National Rules and Local Rules -- How to Reconcile Them

3. A Lawyer's Responsibility to Clients vs. the Courts

D. Funding Discovery Research Projects

E. Internal DOJ Guidance on Discovery Practice

III. CASE MANAGEMENT AND TRIAL PROCESS

A. Expert Evidence Reforms

1. Review the Rules of Evidence on Expert Witnesses to improve them.

2. Discuss with Justice experts the experiences with expert testimony for suggestions on improvements and Rules changes.

B. Differentiated or "Tiered" Case Management

1. Explore the court systems which have tiered case management systems and the systems' usefulness.

2. Explore the methods for establishing tiers in the court systems. Also, the use of technology to implement those systems.

C. Court Supervision of Cases and Lawyers

1. Evaluate the "Rocket Docket" of Eastern Virginia: Interview judges and attorneys, both private and government, who are involved in the "Rocket Docket" to determine its adaptability to other courts.

2. Determine how case management systems can be presented in the most <u>useable</u> form to other courts and to the bars of the various courts.

D. Evaluation and Response to CJRA Recommendations: After evaluating the impact of Civil Justice Reform Act plans in the various courts, choose the best ideas and determine how they may be translated into action in district courts of various sizes.

E. Use and Cost of Technology in Trials: Consult with the users of the most current technology (Arizona and New York City, for example) and determine how to provide such improvements to other courts.

F. Multi-District Litigation: Explore the statutes on multi-district litigation with the goal of expanding the powers of transferee courts to resolve transferred cases. Determine whether special, defined categories of cases can be removed and consolidated in federal court on the basis of minimal diversity.

G. Class Actions: Explore the management of the "mega-case". Determine how lawyers can be taught to expedite class action cases in cooperation with the courts.

IV. ACCESS TO JUSTICE

A. Barriers to Access to Justice

1. Does bias currently operate in the legal system regarding:

   a. Gender
   b. Race
   c. Ethnicity
   d. Language/Illiteracy
   e. Disability
   f. Socio-Economic Status

2. Are current anti-bias laws adequate to address the problems in this area?

3. Are current mechanisms to enforce those laws adequate?

4. Standing: Does the law of standing set appropriate barriers to use of the legal system for resolving disputes?

5. Do the procedures of administrative agencies create barriers to vindication of rights? Does unintended bias operate in the administrative process?

6. Do the procedural requirements of class action litigation create barriers to use of class actions?

B. Methods to Remove Barriers and Expand Access to Justice

1. Increase <u>Pro</u> <u>Bono</u> Representation

   a. Voluntary v. Mandatory
   b. Federal Attorneys' <u>Pro</u> <u>Bono</u> Opportunities

2. Utilize National Service Program

3. Increase Loan Forgiveness for Public Service Practice

4. Evaluate Attorney's/Expert Fees Statutes & Cost Shifting Proposals

5. Expand Education/Outreach to Explain Legal Remedies: Beyond Civics

6. Facilitate Pro Se and In Forma Pauperis Appearances

7. Expand Alternative Dispute Resolution Methods

8. Expand the Role of Non-Lawyers Advocates

9. Legal Services to the Poor: funding, prohibited cases.

10. Legal Services to People of Limited Means

11. Group Legal Services

12. Use of Technology to Enhance Access

13. Other innovations, experiments to provide access to justice.

V. COURT RESOURCES

A. Defining the Role of the Courts

1. Examine the three aspects of current Federal jurisdiction:

    a. Courts as the vehicle for enforcing compliance with Federal criminal and civil laws;

    b. Courts as the vehicle for vindicating rights and ensuring benefits conferred by the Constitution and Federal statutes; and

    c. Courts as the vehicle for resolving disputes that do not involve Federal law.

2. Examine how the adjudicative resources of the courts are being allocated among these functions.

    a. Comprehensive statistical review of the workload of Federal judges: e.g. raw and weighted case statistics, statistics on the functions on which judges spend the most time, and the results of other studies.

    b. Balance between criminal/civil resources -- study of the impact that federalization of crimes and other major criminal developments have had on the availability of resources for civil litigation.

3. Implications of this allocation of resources in terms of the current and future ability of courts to perform their essential functions.

    a. Study of the impact that limitations of civil resources has had on the integrity of the civil justice adjudicative process.

b. Examine the question: How do we avoid rationing civil justice?

B. Jurisdictional and Structural Questions

1. Determine whether changes in jurisdiction could be made to improve the efficiency of the courts:

   a. Examine the jurisdictions of specialized courts (e.g., the Court of Federal Claims) and various boards (e.g., Board of Contract Appeals) to see whether cases currently handled by district courts could be handled more effectively elsewhere.

   b. Review recent proposals concerning modifications of diversity jurisdiction (e.g., plaintiff based diversity, indexing amount in controversy requirement). Consider the impact these proposals have on the allocation of workload between Federal and State resources.

2. Determine whether the structure or organization of the courts should be altered to improve access:

   a. Examine the role played by administrative law judges in producing or preventing litigation.

   b. Examine the role played by specialized courts.

   c. Examine ways to improve the flexibility of judicial resources to address fluctuating workloads (e.g., cross-district/circuit assignments, floating judges, floating magistrates, ways to handle multi-district litigation).

C. Ensuring that Courts Have the Resources to Perform Their Mission

1. Determine the factors and criteria that should be employed in determining appropriate judicial staffing.

2. Determine the proper role of adjuncts (magistrates, staff attorneys, clerks), the potential for creating new types of adjuncts (e.g., appellate magistrates) and the general resources needed by the courts in this area.

3. Examine the role that can be played by technology in assisting judicial employees in accomplishing their work.

4. Examine mechanisms that should be employed to ensure appropriate court funding levels.

D. Providing for the Long-Term Health of the System

1. Funding and conduct of long-term research on civil justice issues -- determining whether a new or existing Department component should have a continuing responsibility to track issues involving civil justice and to propose needed reforms.

2. Reducing unnecessary government litigation -- focusing on ways to prevent cases from ever being filed in court..

   a. Wider use of the "reg-neg" procedures used effectively by such agencies as EPA and the Army Corp of Engineers.

   b. The use of judicial impact and legislative checklists.

   c. Review of Executive Orders which affect the way that the Government conducts litigation.

3. Study ways in which to educate the bar and public as to appropriate and inappropriate uses of Federal civil resources (e.g., civility codes).

Access to Justice/Civil Justice Reform
Addendum: Judiciary Committee Members' Positions/Interests

Senator Grassley has a bill on this issue. Senator Heflin is interested in changing the Federal Rules of Civil Procedure. Senator Kohl is concerned with changes in joint and several liability and fee-shifting to discourage frivolous lawsuits, and caps on damages (especially in the area of medical malpractice). Additionally, Senator Kohl believes that product liability legislation needs to be reformed. Senator Hatch also supports tort reform and product liability reform. Senator Grassley advocates the use of alternative dispute resolution.

Reno Confirm Hearing

CIVIL JUSITCE REFORM

Senator Brown. I appreciate that. I wanted to direct your attention for a moment to the recommendations made by our former Vice President's Civil Justice Task Force. Those involved a number of recommendations that I think were designed, at least hopefully designed, to reduce the delays in the judicial system and encourage pre-litigation settlements and alternative dispute resolutions.

As I think you are aware, an Executive order was signed that required Federal litigators to abide by the applicable principles of the justice reforms, over 50 proposals. I think it would be helpful to us to know what your feelings are about those, particularly alternative dispute resolution. Do you have changes in mind, or do you support the applicability of these reforms to the Justice Department?

Ms. Reno. Obviously I have not had extensive experience in the last 15 years in the area of civil justice and the area of civil justice reform. Prior to that time, I worked in that area and was actively concerned and involved in trying to develop alternative dispute resolution mechanisms, and I think that is an important step forward, and I would like to continue to work with Congress, with people in the Department of Justice, to foster that as much as possible, consistent with providing people access to our courts.

I think we can do so much in terms of case management and in terms of mediation. What I would like to do is focus on this area, if I am confirmed and take office, and focus on it in a real way, because I don't think there is any doubt, Senator, that all of us are concerned about the delay, about some of the costs involved in litigation, and what can be done to minimize it so as to make our courts truly accessible to our people.

Senator Brown. Would it be fair to say that you don't, at least at this point, have any specific proposals in mind to overturning that Executive order?

Ms. Reno. I would like to review the Executive order, but obviously I think it would be precipitous for me to sit here today in terms of--as Senator Hatch has pointed out, I have had an awful lot to learn, and there are still things that I need to understand. And rather than make some premature statement, I would like to study it carefully and work with you in the area.

Senator Brown. I think that is wise, and I can appreciate that. I guess what I was trying to get at is, do you right now have a feeling that the order needs to be overturned? I don't mean to commit you on the issues, but do you come to us with a preconceived notion as to whether the order ought to be retained or overturned?

Ms. Reno. I don't have a preconceived notion. I have an open mind, and I would like to approach it with an open mind and in an informed manner.

CIVIL JUSTICE REFORM

Senator Kohl. All right. I would like to talk with you for a moment about tort reform, product liability. I know that, as you said the other day, you are not fully up to speed on it, but I should imagine you have some opinions on things like the joint and several liability concept, which, as you know, would hold someone who holds 1 percent of an interest in a company liable for 100 percent of the damages if the others cannot pay, things like caps on damages.

Do you have some opinions on those two things?

Ms. Reno. What I would really like to do, because obviously I have come back to address the issue of civil justice reform after 15 years in rather a pressure-cooker atmosphere of the last 3 weeks, and I would really like to make this a priority for the Department of Justice and study it carefully.

Traditionally, I have opposed, prior to my experience in prosecution, I have opposed caps. But I want to look at it, consider it, and make sure that access to our courts is maintained for all people and that we have an opportunity to get into court. But I would like to look at the whole issue of civil justice reform and make as informed a judgment as possible on the issues.

TORT REFORM

Senator Heflin. We have a problem in this country in certain localities dealing with civil litigation. Under various speedy-trial acts and other laws that have been passed, criminal prosecutions get priority in the Federal courts. In many instances, civil cases are put, in effect, on the back burner and are delayed a long time.

This is something that I think needs to be explored, and several of us are working on this. I know your history as being a person who was involved in judicial reform in the State of Florida, where you were one of the staff directors of the Florida Senate, I believe, in the days when a good deal of judicial reform was going on in the States. And really, the States have taken a lead and have reformed from an administrative basis their court systems far more than the Federal courts have.

I hope that you will look into this, in particular in regards to the civil litigation and what can be done, whether or not there can be judges that can be used more frequently from the less crowded areas to go into the crowded areas. Some of this is largely outside the Department of Justice, but, nevertheless, there is sort of a liaison with this. And then the Department of Justice has civil cases that are also being put on the back burner.

I think it is a matter that needs to be looked at as well as the overall situation pertaining to administrative reform of the Federal court system. Will you look into that?

Ms. Reno. I certainly will, and I hope that we could focus the Department on issues of justice reform and help--again, working together--achieve some meaningful reform in this area.

TORT REFORM

Senator Hatch. Great. Now, many Americans are becoming increasingly concerned about our current tort system, and many feel that it is not serving the general public very well and that it serves the interests of no one except trial lawyers. Now, I think that is a little bit of a harsh criticism, but, nevertheless, that is a prevailing viewpoint some people have in this country.

The costly excesses, they say, of this system are paid by Americans in a number of ways: through higher prices, higher insurance premiums, higher taxes, and higher unemployment.

Let me just go on a little bit more, and then couple it all with a question. Last year we had a landmark product liability bill. It was a tort reform bill in the Senate, S. 640. It had significant bipartisan support in the Senate. That bill would provide, among other things, for uniform nationwide standards of liability for sellers of products and uniform standards governing the award of punitive damages in product liability cases. Many feel that we are losing our manufacturing facilities because we have such wide open product liability tort laws that allow so many lawsuits.

Now, to bring it even further, some people feel that part of our problems with health care and the excessive costs in health care are because of medical liability concerns or the ease with which medical liability lawsuits are brought that cause doctors, for fear that they are going to be sued for medical liability, to practice what is called defensive medicine, or to overdo everything at a very great cost and excessive cost to the American public.

What is your feeling about tort reform? And I have just mentioned three areas, but let me just ask for your opinion and what you might do about it.

Ms. Reno. I have heard tort reform used in many different ways in the last three weeks in talking with the various members of the committee, and I like to think of it in terms of civil justice reform. I want to do everything I can to assure all Americans their opportunity to go to court to protect their interest.

But I have also seen a great deal of problems generated by a lot of paper, a lot of procedure, a lot of fuss. The example I gave you of the whole problem of discovery in the criminal context I suspect is multiplied, though it has been a long time these last 15 years since I really became involved in a civil case.

I think we can do so much in terms of continuing to ensure all Americans access to our courts while at the same time, through better case management, through review of our discovery procedures, through other alternative dispute resolution programs, through mediation, that we can do so much to make our courts accessible for people, while at the same time reducing the cost and reducing the delay that is troublesome.

With respect to the products liability issue, I appreciated so very much what you said in your opening statement, that there are going to be a lot of things that I can't be an instant expert on. But obviously the whole issue of products liability is going to have to be an issue that is addressed and addressed in a very careful and thoughtful way. And I hope to develop a structure in the office where we can focus on these issues of civil justice reform in an informed way. And I really look forward to working with all members of the committee because so many of you have expressed interest in this area. There is disagreement. But I think working together we ought to come up with some sensible efforts.

disputes that are endless and costly and in Americans who are disillusioned by one of the most fundamental institutions of our democratic society.

I am dedicated, as Attorney General, to doing everything I can to improve the quality of civil justice in America, and I intend to proceed on three fronts. First, I am determined to foster collaborative partnership efforts with the judiciary, the bar, the Government, and the public.

This morning I met with seven judges, Federal judges, in what is becoming a quarterly conference of the top administration of the Department of Justice and the Executive Committee of the Judicial Conference in the Federal system, in which we will address matters of mutual concern, in which we will address how we can work together, what we can do about budgets, how we can make this process more effective for both the executive and the judicial branch of government. We will have subcommittees on budgeting, subcommittees on criminal justice issues, subcommittees on court security issues, and we invite everyone to be involved.

Secondly, I have gone to the American Bar Association and said I want to form a partnership with you, I want to work with you, I want to engage in good, sound communication. We may not all agree at every step of the way, but we will know, if I have anything to say about it, that both sides will have been heard out as we address these critical problems that concern us all.

We cannot and we will not reform the civil justice system simply by working on our own. This is true for judges, for the organized bar, and for the Justice Department. We must do a far better job of reaching out and embracing the diverse interests that are impacted by the civil justice system.

You've got the same problem as I've got. You have got to get all of America into this room, just as I've got to get all of America represented in the Department of Justice. We have got to get all of America represented on the bench of our nation; we have got to get all of America represented in prosecutor's offices. And we can do it, but we must, if we are to work, make the law real.

I am pleased that the American Bar Association will soon launch its Access to Justice 2000 initiative. Through this effort, and similar efforts underway in California, Massachusetts, and elsewhere, we can do what we must do, grow from the grassroots up a national commitment to providing justice for all.

I'm also encouraged by one of the ideas put forth in the working papers for this summit, the creation of individual State justice commissions, and we talked about a variation on that this morning with the judges. According to your proposal, such a commission would be composed of judges, bar association representatives, other interested lawyers, court administrators, and a balanced group of litigants. The commission would be charged with designing and implementing a civil justice reform plan within 12 to 18 months.

This is the kind of joint collaborative effort we need to succeed at this monumental task. On behalf of the Clinton administration and the Department of Justice, I pledge to work with you, and with everyone else who is interested, to achieve meaningful and lasting reform.

Second, I am committed to preserving the integrity of the American judicial system. This means guaranteeing adequate funding for our courts and for our judges, and also for a system that provides access to legal services.

When I look at judges with caseloads in the hundreds trying to dispense justice, working well into the evenings sometimes, I come away with a profound admiration for the American judiciary. But you cannot, day in and day out, continue to provide real justice for all unless you have caseloads that are manageable.

It also means, however, that if we're going to do this, we must work smarter -- lawyers, judges, litigants, all of us must do more to streamline procedures and cut red tape. The Assistant Attorney General for the Civil Division, Frank Hunger, will be speaking to you later on this afternoon. He will tell you in more detail about the civil justice reform initiatives now underway at the Department of Justice.

A comprehensive access to Justice and civil justice reform initiative is one of the top priorities of the Department and the Clinton administration. Our purpose is not political. I want to get rid of the political rhetoric that has besieged this issue. All of us care about this. All of us are involved. I want to tone down the rhetoric and engage in thoughtful discussion with business interests, with legal interests, with community groups, with community advocates, so that we can arrive at realistic solutions.

The proposals being discussed at this summit hold promise. You have placed your focus well on early settlement, the discovery and trial process, and on case management. As you continue to work, I encourage you to examine how emerging technologies might be used to improve fairness and efficiency of the system.

And I would also urge you to do something that I think is critical. I have now been in office 9 months.

There are so many remarkable advocates, but in so many law schools around this nation these remarkable advocates have been taught to advocate and not to negotiate. I am amazed at how often it's necessary to pull people back in and say let's talk a little bit more, I'm sure we can work through this issue.

I talk to law school deans around the country, and would have thought that more would be emphasizing negotiating courses by themselves, and negotiation within substantive issues of the law. We can do far more, and I've asked the Department of Justice to try to initiate procedures whereby we try to negotiate something sensible up front using the best techniques of negotiation that can be taught.

One of my goals as Attorney General though, as is obvious from my remarks, is to increase the access to the legal system for all Americans. If 80 percent of the poor and the working poor in America do not have access to legal services, something is terribly wrong. And we must also understand that that working poor category, and the category of poor in America, is increasing as the middle class that we came to know 30 years ago has substantially been diminished.

It is imperative that we focus on this access question, because for those 80 percent of the poor and the

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PRODUCTS LIABILITY

1. **ISSUE STATEMENT**

Major products liability legislation is currently pending in both the Senate and the House of Representatives. The bill under most active consideration in the Senate is S. 687, which was introduced by Senator Rockefeller (D.- W.Va.) on March 31, 1993. This bill, which has 9 Democratic and 35 Republican cosponsors, would preempt various features of state product liability law in an effort to create national uniformity in this area. The proposed legislation would, inter alia, provide for a national standard for the award of punitive damages, alter the procedures and burden of proof under which such damages could be awarded, and create various defenses to punitive damage awards (particularly as to pharmaceuticals and other products approved by the Food & Drug Administration). A companion bill, H.R. 1910, introduced by Congressman Rowland (D. Ga.), contains nearly identical provisions and enjoys 144 cosponsors, including 47 Democrats. A side-by-side comparison of S. 687 and H.R. 1910 follows this briefing sheet.

2. **STATUS**

S. 687 was reported out of the Commerce Committee on November 9, 1993, and was discharged from the Judiciary Committee on April 11, 1994. We have been informed that Senator Rockefeller intends to bring this bill to the floor in late June or early July. On May 3, 1994, a Subcommittee of the House Energy and Commerce Committee conducted its third set of hearings on H.R. 1910.

3. **DEPARTMENT POSITION**

The Department has not taken a formal position on these bills. A working group has been formed by the Attorney General, under the general supervision of the Acting Associate Attorney General, to study these bills and make recommendations to the Department. However, the White House has indicated that it is hesitant to have the Administration take a position on any of these bills until the Health Care Bill, which currently contains medical malpractice reforms, is passed. Nevertheless, the DOJ working group on products liability intends to wrap up its work during the next month so as to put the Department in the position to move quickly should the Administration change its mind and wish to take a position on this legislation.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

Senators Grassley and Hatch are among the sponsors of Senator Rockefeller's product liability legislation.

5. REFERENCE MATERIALS

A summary of the provisions of S. 687 is attached.

S. 687

Sponsor: Rockefeller (D-WV)
Title: Product Liability Fairness Act
Introduced: March 31, 1993
Cosponsors: 44 (9D, 35 R)
Committees: Comm. on Commerce, Science & Transportation

Comm. on Judiciary

Status:

November 9, 1993
Reported out, Commerce (16-4)

March 15, 1994
Hearings by Judiciary

April 11, 1994
Judiciary discharged and placed on Senate Legislative Calendar

Key Provisions:

- Preemption
- Establishes standard of care
- Clear and convincing evidence
- Bars punitives in certain circumstances where product was approved or recognized as safe by the FDA or FAA
- Allows defendant to elect separate proceedings for punitive determination
- Lists factors in determining punitive damages
- Establishes statute of limitations and statute of repose for certain good
- Eliminates joint liability for noneconomic damages
- Codifies certain contributory negligence standards
- Offer of judgment and ADR provisions

H.R. 1910

Sponsor: Rowland (D-Ga)
Title: Fairness in Product Liability Act
Introduced: March 28, 1993
Cosponsors: 146 (48D, 98R)
Committees: Comm. on Energy & Commerce

Comm. on the Judiciary

Status:

February 2, 1994
Hearings held by Subcom. of Energy & Commerce

April 21 and May 3, 1994
Hearings held by Subcom. of Energy & Commerce

Key Provisions:

- Preemption
- Establishes standard of care
- Clear and convincing evidence
- Bars punitives in certain circumstances where product was approved or recognized as safe by the FDA
- Allows defendant to elect separate proceedings for punitive determination
- Lists factors in determining punitive damages
- Establishes statute of limitations and statute of repose for certain good
- Eliminates joint liability for noneconomic damages
- Codifies certain contributory negligence standards

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GENERAL AVIATION LIABILITY

1. **ISSUE STATEMENT**

H.R. 3087 and S. 1458 are companion bills to amend the Federal Aviation Act to establish a 15 year statute of repose (amended in the Senate to 18 years) for civil actions against general aviation manufacturers for defective design or manufacture. This legislation was recommended by the President's National Commission to Ensure a Strong Competitive Airline Industry and does not alter state tort laws in any other significant respect. Assistant Attorney General Frank Hunger recommended that the administration support this bill before it recently passed the Senate by a vote of 91-8. However, the White House political operation has been unwilling for the Justice Department to go forward with a public endorsement of the bill out of concern for reaction by the trial bar.

S. 1458 does not alter state laws with respect to joint and several liability, punitive damages, recovery of economic or non-economic damages, or comparative or contributory negligence. It does not limit the jurisdiction of any state or federal court or impose a federal standard of liability in any way. The report issued by the National Airline Commission indicated that the enactment of such a statute of repose would "help regenerate a once-healthy industry and create thousands of jobs."

After reviewing the bill in detail, it has been determined that the proposed amendments to the Federal Aviation Act would not significantly impact state tort law or procedure, thereby avoiding the kind of complicated "federalization" issues raised by more comprehensive product liability bills. Certification of general aviation aircraft, regulation of the maintenance of such planes, and licensing of general aviation pilots are all controlled by federal law and regulation. The statute of repose established by this bill is an appropriate extension of this federal role.

In response to the National Airline Commission's recommendation, President Clinton indicated that the Administration would consider whether to support such legislation as part of a comprehensive review of federal product liability proposals. In correspondence with Rep. Dan Glickman (D-KS), the author of the bill in the House, the President indicated that AAG Frank Hunger had been assigned the task of making a determination as to whether the measure should be supported. AAG Hunger and Senior Counsel for Policy Cindy Lebow have met at length with representatives of the trial bar and the general aviation industry on this matter.

2. STATUS

S. 1458 passed the Senate on March 16, 1994 by a vote of 91-8. Before the bill came to the Senate floor, AAG Hunger attempted to clear a DOJ letter of support through OMB and the White House. Despite recognition that the bill had been recommended by the National Airline Commission, was supported by DOT and DOD, and that it resulted in nominal "tort reform" in a very narrow area of the law, political concern over the reaction of the trial bar prevented final White House approval of the proposed DOJ letter.

H.R. 3087 is now pending before the House Judiciary Committee. A hearing was held before the Economic and Commercial Law Subcommittee, chaired by Cong. Jack Brooks (D-TX) on May 12. Judiciary Committee Chairman Brooks has opposed this bill in the past and has promised the trial lawyers that it will not be reported from the Judiciary Committee. However, Rep. Glickman has obtained over 280 cosponsors and has threatened a discharge petition to bring the measure to the House floor for a vote. Although ATLA continues to state its opposition to this legislation, this measure is far less important to that organization than pending medical malpractice proposals or product liability legislation. It is believed that Chairman Brooks might let the bill out of the House Judiciary Committee in exchange for making a fight on other issues.

In the House, H.R. 3087 was jointly referred to the Public Works and Transportation Committee which, favorably reported the measure by voice vote last week.

The Administration must decide whether or not to support this measure before the issue becomes moot.

3. **DEPARTMENT POSITION**

The Civil Division supports this legislation. Others in the Department agree with the White House that until Health Care Reform is complete and we have developed and cleared a position on products liability legislation generally, it is risky to take a position on this bill. Many of the same arguments that can be made for "limited products liability reform" in the aviation area can also be made for such reform in the pharmaceutical area, and then we are onto a slippery slpe. To date, no public statements have been made.

4. **JUDICIARY COMMITTEE MEMBERS INTEREST**

Although this legislation involves "tort reform", the Senate Commerce Committee had jurisdiction because the measure amends the Federal Aviation Act. Among Judiciary Committee members, Senators Biden, Heflin, Simon and Specter voted against the bill. Senator Metzenbaum authored some pro-consumer amendments on the floor and ultimately voted for the measure.

5. **REFERENCE MATERIALS**

None

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Divider Title: ______________________________

HEALTH SECURITY ACT - MEDICAL MALPRACTICE ASPECTS

1. ISSUE STATEMENT

The Health Security Act, proposed by President Clinton, includes certain reforms to discourage the filing of non-meritorious medical malpractice actions, to provide fair, uniform national rules for malpractice awards, and to promote cost-effective and less litigious means of resolving medical malpractice claims. The medical malpractice provisions of the HSA are intended to pre-empt existing state laws to the extent that such laws are inconsistent with or less restrictive than the proposed reforms. The legislation does not provide for federal question jurisdiction for medical malpractice cases.

All issues touching on health care reform are being coordinated through the White House. The Justice Department had no input in the development of the Administration's proposal, but Associate Attorney General Hubbell defended the measure in testimony before the Health and Environment Subcommittee of the House Energy and Commerce Committee in November, 1993. Cynthia Lebow, Senior Counsel for Policy in the Civil Division, will be delivering similar testimony before the Senate Judiciary Committee on May 24.

Up to now, the White House has discouraged the development of alternatives or amendments to any portion of the Health Security Act. However, it is acknowledged that modifications, both technical and substantive, may be necessary with respect to the medical malpractice provisions. It would be appropriate for the Department to develop a series of amendments, that with White House clearance, could be offered at the time any one of a variety of House or Senate committees claiming jurisdiction mark up the legislation. At this point, the White House does intend for DOJ staff to serve as the lead technical and substantive advisors on this issue, as well as a number of other important matters related to the legal aspects of health care reform.

2. STATUS

To date, hearings have been held on medical malpractice issues by the Health and Environment Subcommittee of the House Energy and Commerce Committee and by the Senate Finance Committee. A hearing on the subject is scheduled before the Senate Judiciary Committee on May 24. The Health Subcommittee of the House Ways and Means Committee adopted an amendment on medical malpractice as part of its markup last month. The Senate Committee on Labor and Education has included medical malpractice provisions in its draft legislation, which may be marked up during the week of May 23. The House Judiciary

Committee is expected to hold a hearing on medical malpractice shortly after the Memorial Day recess. DOJ staff has provided briefings to various committee staff as requested.

3. **DEPARTMENT POSITION**

See attached statement of Acting Associate Attorney General William Bryson, submitted for the record to the Senate Finance Committee.

4. **JUDICIARY COMMITTEE MEMBERS INTEREST**

Senate Judiciary Committee Biden and Senator Heflin have generally opposed efforts to federalize state tort law and procedure. However, both seem to recognize the special case presented by health care reform and the likelihood that some medical malpractice reforms will be included in an overall health care reform package. Senator Hatch and Senator Grassley are outspoken advocates of more restrictive reforms, including a cap on non-economic damages, than proposed by the President.

5. **REFERENCE MATERIALS**

See attached testimony.

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Divider Title: **30**

THE BANKRUPTCY AMENDMENTS ACT OF 1994 -- S. 540

1. ISSUE STATEMENT

On April 21, 1994, the Senate unanimously passed S. 540, which amends numerous provisions of title 11, United States Code ("Bankruptcy Code"). Of particular significance are provisions to create a National Bankruptcy Commission, to streamline reorganization procedures under Chapter 11 for small businesses, and to provide enhanced penalties for bankruptcy fraud. Many of the changes this bill effects are minor, but some, particularly those designed to streamline the reorganization process, substantially affect important interests of our client agencies. We have also warned of constitutional issues surrounding the expanded utilization of bankruptcy appellate panels, which S. 540 authorizes. The Department provided to the Senate Judiciary Committee extensive comments on various proposals as this legislation evolved into its present form. Many of the DOJ comments were incorporated into the final version of the legislation and the Department worked constructively with Senate staff to resolve a number of issues before the bill went to the Senate floor.

2. STATUS

S. 540 will next be considered by the House Judiciary Committee. The Department is reviewing the bill that the Senate passed, and we expect to update our comments to reflect any changes not addressed in our most recent letter to the Senate.

3. DEPARTMENT POSITION

The Department generally supports S. 540 but may seek amendments further amendments in the House. The attached Statement of Administration Policy expresses particular concern about proposed chapter 10 of the Bankruptcy Code for small businesses, about raising the debt limits for chapter 13 eligibility, and about pension plan minimum funding requirements. The Judiciary Committee addressed some of these concerns in the bill that went to the Senate floor, and currently we are reviewing the impact of the changes that the committee made.

4. JUDICIARY COMMITTEE MEMBERS' INTERESTS/POSITIONS

Senator Heflin authored S. 540 and has attempted to pass similar legislation for the past two Congresses. Senator Metzenbaum has been particularly interested in provisions of the bill affecting pension funding and the treatment of retiree benefits in bankruptcy.

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2. STATUS

S. 540 will next be considered by the House Judiciary Committee. The Department is reviewing the bill that the Senate passed, and we expect to update our comments to reflect any changes not addressed in our most recent letter to the Senate.

3. DEPARTMENT POSITION

The Department generally supports S. 540 but may seek amendments further amendments in the House. The attached Statement of Administration Policy expresses particular concern about proposed chapter 10 of the Bankruptcy Code for small businesses, about raising the debt limits for chapter 13 eligibility, and about pension plan minimum funding requirements. The Judiciary Committee addressed some of these concerns in the bill that went to the Senate floor, and currently we are reviewing the impact of the changes that the committee made.

4. JUDICIARY COMMITTEE MEMBERS' INTERESTS/POSITIONS

Senator Heflin authored S. 540 and has attempted to pass similar legislation for the past two Congresses. Senator Metzenbaum has been particularly interested in provisions of the bill affecting pension funding and the treatment of retiree benefits in bankruptcy.

5. REFERENCE MATERIAL

Attached is the Statement of Administration Policy dated April 19, 1994. Copies of S. 540 and the Department's letter to the Senate dated February 28, 1994 are available from the Civil Division.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 19, 1994 (SENT 4/20/94)
(Senate)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

S. 540 - Bankruptcy Amendments Act of 1993
(Heflin (D) Alabama and 29 others)

The Administration supports Senate passage of S. 540, but will seek amendments during further congressional consideration of the bill.

The Administration supports speeding and simplifying the reorganization process for small businesses under Chapter 11 of the Bankruptcy Code, and hopes to work closely with the Congress to achieve this goal. The Administration recommends that this goal be achieved by amending Chapter 11 to create a two-track system that would simplify and facilitate small business reorganizations. The Administration appreciates Senator Heflin's commitment to offer an amendment to achieve this goal. The amendment would replace the provisions of S. 540 that would create a new Chapter 10 of the Bankruptcy Code for small business bankruptcies.

The Administration opposes the provision in S. 540 raising the debt limits for eligibility in Chapter 13. Under current law and procedure, Chapter 13 petitions too often result in the total non-payment of tax claims. Until the requirements for the satisfaction of such claims are made more effective, the Administration does not support increasing the debt limits for Chapter 13 eligibility.

The Administration would support amendments to S. 540 that would assure that pension plan minimum funding requirements are met before a debtor leaves bankruptcy protection.

Pay-As-You-Go Scoring

S. 540 would affect outlays and receipts; therefore, it is subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act (OBRA) of 1990.

OMB's preliminary scoring estimates of this bill are presented in the table below. Final scoring of this legislation may deviate from these estimates. If S. 540 were enacted, final OMB scoring estimates would be published within 5 days of enactment, as required by OBRA. The cumulative effects of all enacted legislation on direct spending and receipts will be reported to Congress at the end of the congressional session, as required by OBRA.

PAY-AS-YOU-GO ESTIMATES
(in millions)

	1994	1995	1996	1997	1998	1994-1998
Outlays	-20	0	0	0	0	-20
Receipts	0	-1	-1	-1	-1	-4
Net Deficit Effect	-20	+1	+1	+1	+1	-16

* * * * *

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Divider Title: **31**

VOTING RIGHTS ACT CASES
(Race-Consciously Designed Electoral Districts)

1. ISSUE STATEMENT

In Shaw v. Reno, 113 S.Ct. 2816 (1993), the Supreme Court applied strict scrutiny to districts whose geographically bizarre shape was viewed as an effort to segregate voters on the basis of race. The creation of black or Hispanic majority districts have been used as measures to remedy racially discriminatory apportionment plans, and by jurisdictions that wish to avoid litigation by voluntarily insuring that their electoral plans assure fair representation of minorities. We have generally supported them as necessary remedial measures, and in fact defended the districts under attack in the Supreme Court in Shaw v. Reno. In addition, when we preclear changes to electoral plans submitted to us under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, we are often faced with such districts. Shaw v. Reno makes challenges to these districts easier, as it requires a sufficient "non-racial justification" for the shape of the district in order to avoid strict scrutiny.

After the Shaw decision, a three-judge court ruled for plaintiffs in a Shaw-based challenge to Louisiana's congressional districts. Hays v. Louisiana, 839 F. Supp. 1188 (W.D. La. 1993). The court held that the state's creation of a second black-majority congressional district was an unconstitutional racial gerrymander. The state has appealed the case to the Supreme Court. Louisiana recently adopted a new redistricting plan that creates a more compact second black-majority district, and has submitted the new plan to us for Section 5 review.

2. STATUS

We have recently moved to participate in district court cases in North Carolina, Georgia, and Texas to help defend majority-minority districts which have been challenged as violating the standards the Court established in Shaw. In all three of those cases, we helped convince the courts to deny plaintiffs' requests for a preliminary injunction to prevent use of the challenged plans in the 1994 elections.

In the remand of the Shaw case, we filed a post-trial amicus brief arguing that North Carolina's congressional districts were constitutional, and the case is under advisement. In the Georgia case, where we were admitted as defendant-intervenors, discovery closes on June 6. In Texas, our motion to convert from amicus to intervenor status was denied, and we have sought reconsideration of that ruling. We are examining the recent Shaw challenge to Florida's congressional districts to determine what action is most appropriate. Also, we have been named as defendants in a similar challenge to a majority-minority state senate district in Florida.

3. DEPARTMENT POSITION

The Department's position is that it may be necessary to draw electoral districts specifically designed to be majority black or Hispanic in order to assure that an electoral plan fairly represents minority voters. Each district must be judged individually, and a bizarre shape should not override the necessity to insure fair representation. Georgia and North Carolina drew these majority black districts in response to Justice Department objections to the number of districts created in which minority voters would be in the majority. We have argued in each that the districts are supported by compelling governmental interests and are narrowly tailored to achieve a constitutional end.

In the Louisiana case, we also argued that the state had a compelling interest in creating two districts in which black voters would have a realistic opportunity to elect candidates of their choice. We filed an amicus brief in the Supreme Court supporting the state's appeal. If, however, the new redistricting plan is precleared under Section 5, the appeal may be resolved. In the event, as expected, there is a challenge to the new plan, we will assess how best to participate in the litigation (i.e., remain as amicus or move to intervene).

The President, referring to our participation in the Georgia, North Carolina and Texas cases, issued a press release (Feb. 22, 1994) which said the actions "reaffirm my Administration's strong commitment to defend the historic gains made under the Voting Rights Act." The Attorney General made a similar statement in her press release the same day. "This Department is committed to protecting minority voting rights gains that were achieved through redistricting after the 1990 Census. Our actions today will help insure that the clock is not turned back and that those gains are not undone."

4. **JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS**

There are no members of the Committee from Georgia, North Carolina, Texas, or Florida. There has been a lot of discussion of the issue of how to respond to Shaw v. Reno from the Congressional Black Caucus, of which Senator Braun is a member.

Contact: Steven H. Rosenbaum 5/94

Voting Rights Act Cases
Addendum: Judiciary Committee Members' Positions/Interests

Expect the traditional liberal/conservative break. Senator Mosely-Braun is a member of the Congressional Black Caucus, and the CBC is very happy that the Department is participating in cases to defend majority minority districts. (The CBC would prefer the Department to intervene in all of these cases, instead of merely filing amicus briefs.) Republican senators on the Committee are likely to be in favor of <u>Shaw</u>, a Supreme Court case that questioned, to some extent, the creation of majority minority districts. Senator Thurmond believes that all states should be treated equally and that targeted localities should not have to obtain clearance from the government prior to changing voting procedures.

STATUS OF SHAW V. RENO CASES: AS OF MAY 24, 1994

ING CASES	AFFECTED DISTRICTS	CAS TUS	DOJ INVOLVEMENT	NEXT DECISIO GE
Shaw v. Hunt (E.D. N.C.) On remand from 6/28/93 Supreme Court ruling creating a new constitutional claim	* Mel Watt (B) 12th District * Eva Clayton (B) 1st District	Trial ended 4/4/94. Post-trial briefs were filed on April 11, 1994. The case is under submission.	DOJ is amicus; DOJ's post-trial brief argues the state plan is constitutional.	Await the Court's decision and decide on appropriate action at that time.
Hays v. Louisiana (W.D. La.) The decision in this case is the first to use the new Shaw standard.	* Cleo Fields (B) 4th District	The 4th District was found unconstitutional on 12/28/93; the state's appeal to the Supreme Court is pending; on 4/21/94 the legislature passed a new plan with two black-majority districts; DOJ received the plan for Section 5 review on 5/2/94.	DOJ is amicus; the SG filed an amicus brief on 4/29/94 in support of the state's appeal.	While the state's appeal is pending, we are expediting our Section 5 review of the new district plan, which retains two black majority population districts.
Vera v. Richards (S.D. Tex.) Filed January 26, 1994	All Nine Minority Districts are being challenged, including: * Eddie B. Johnson (B) 30th District * Craig Washington (B) 18th District * Gene Greene (W) 29th District (Hispanic pop.)	Trial begins on June 28, 1994. State defendants have moved to postpone the trial. Black citizens were granted intervention (NAACP), but LULAC (MALDEF) was denied. LULAC has sought reconsideration.	DOJ is amicus. On 5/5/94, our motion for permissive intervention was denied; on 5/11/94, we moved to intervene as of right and for reconsideration of the denial of permissive intervention.	Awaiting the court's ruling on our motion to intervene; we continue to prepare to participate as a party.
Johnson v. Smith (N.D. Fla.) Filed January 18, 1994	* Corinne Brown (B) 3rd District	Defendant either moved to dismiss or filed to abate the plaintiffs complaint; Black citizens (Lawyer's Committee) have moved to intervene; three black members of congress have moved to intervene.	The Voting Section expects to recommend intervention.	A decision on the Department's participation is expected soon.
Johnson v. Miller (S.D. Ga.) Filed January 13, 1994	* Cynthia McKinney (B) 11th District	Plaintiffs' motion for preliminary relief to enjoin the elections was denied on 4/18/94; a pretrial conference is scheduled for 6/23/94.	DOJ is a party in this case; our motion to intervene was granted in March, 1994.	Conduct discovery and prepare for trial; we believe a July trial date is most likely.
Scott v. U.S. (M.D. Fla.) Filed April 14, 1994 This case involves a state plan.	* James Hargrett (B) 21st Florida State Senate District	The case has just been filed. State defendants moved to dismiss on May 11, 1994.	This district was drawn after DOJ objected in 1992 to the failure of a prior plan to recognize black voter strength in Hillsborough County	The Department's deadline to respond to the complaint is 6/13/94.

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAR 8 1994

The Honorable Orrin G. Hatch
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

This is in reference to your letter of January 19, 1994, regarding a statement, in one of a series of documents you received last May from Mr. Howard Paster, that the Department of Justice consistently has supported remedies that soften the impact of pure majority rule.

That statement is correct, and we have done so vigorously where the facts show that, due to racial bloc voting, and other relevant circumstances, majority-vote election systems resulted in a denial or abridgement of minorities' right to vote. Our objections under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, to the adoption of majority-vote requirements are numerous. Our litigation, too, has targeted majority-vote systems which were found to dilute minorities' right to vote.

In addition, we have consistently granted Section 5 preclearance for limited or cumulative voting systems. These systems use at-large elections but either restrict the number of votes that may be cast (limited voting) or allow more than one vote to be cast for a particular candidate (cumulative voting). We also have agreed to limited voting systems in settlement of some of our lawsuits challenging the use of at-large elections under Section 2 of the Voting Rights Act, 42 U.S.C. 1973, and have suggested consideration of limited or cumulative voting systems as corrective measures to resolve concerns that prompted Section 5 objections to voting changes affecting judicial elections. Most of these actions took place in the years 1987 through 1991.

These are the matters that underlay Mr. Paster's representation, as described in the document to which you referred. Your letter, however, requests documents relating to statements that Ms. Lani Guinier has made, in her writings, regarding remedies that could be pursued in the legislative forum, or by private plaintiffs in appropriate circumstances. These remedies would change the legislative decision-making process. Since we do not maintain that we have pursued such remedies, nor did Mr. Paster represent that we had, it is unclear what you would like us to give to you in response to your request for such documents.

There have been instances where we have precleared voting changes under Section 5, often made as a result of the settlement of private Section 2 lawsuits, relating to three items referenced in your letter: rotation in office, rotation of responsibility among elected commissioners, and discouraging single-member executive offices in favor of power sharing alternatives. However, these are not instances, such as those for which you requested documents, where we have sought such arrangements as remedies.

There also are instances where we have viewed changes in the legislative decision-making process as having the potential to foster racial discrimination in violation of the Voting Rights Act. For example, we championed the application of the Section 5 preclearance process to such changes in our Supreme Court brief in Presley v. Etowah County Commission. But that, too, seems to be outside of the scope of your request.

Accordingly, we are unable to provide to you the documents you seek. If you would like documents relating to actions that we have stated we have taken, or that others have said we have taken, we will be happy to oblige you.

Sincerely,

Sheila Anthony

Sheila F. Anthony
Assistant Attorney General

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

January 19, 1994

Ms. Sheila F. Anthony
Assistant Attorney General
for Legislation
United States Department of Justice
10th and Constitution Avenue
Washington, D.C. 20530

Dear Ms. Anthony:

As Ranking Republican on the Senate Judiciary Committee, I am interested in the enforcement of the Voting Rights Act. In his May 24, 1993 letter to me concerning the nomination of Professor Lani Guinier to be Assistant Attorney General for Civil Rights, Howard Paster, Assistant to the President for Legislative Affairs, attached a series of documents.

In one document, "Analysis of Wall Street Journal Criticism of Professor C. Lani Guinier," the following is stated: "Remedies that soften the impact of pure majority rule have been consistently supported by the Department of Justice in both Democratic and Republican Administrations. During the Reagan and Bush Administrations, the Department of Justice entered Section 5 objections to majority vote requirements in numerous instances . . . . " (page 10).

Please provide me responses to the following requests at your earliest convenience:

1. For the period of January 21, 1981 through January 19, 1993, please provide me with copies of all documents, identified by case and jurisdiction, showing that the Department of Justice sought the following remedies under Section 2 of the Voting Rights Act:

   a. "[S]etting the number of votes needed to pass any legislation [or even certain legislation,] at one higher than the number of white representatives" (L. Guinier, "No Two Seats, The Elusive Quest for Political Equality," 77 Va.L.Rev. 1413, 1506 (1991) (hereinafter, "No Two Seats")).

   b. Cumulative voting in the legislative body, i.e. "over a period of time and a series of legislative proposals, votes on multiple bills would be aggregated or linked. That is, pending bills of importance to minorities would be linked to pending bills of importance to the majority, and each legislator would have an aggregate number of votes to cast on the linked bills although they would not be required to vote on each bill, or vote as a bloc." ("No Two Seats," at 1503, 1503 n. 307).

c. "require[ing] a supermajority vote on issues of importance to the majority . . . ." ("No Two Seats," at 1503).

d. "[requiring] a minority veto on critical minority issues." ("No Two Seats", at 1503).

e. Requirement of a concurrent majority to pass legislation, i.e., "in order to pass, legislation would need the support of a majority of minority representatives, however, defined, as well as a majority of majority representatives." (L. Guinier, "The Triumph of Tokenism: The Voting Rights Act and The Theory of Black Electoral Success," 89 Mich. L. Rev. 1077, 1140, 1140 n. 303 (1991) (hereinafter, "Tokenism")).

f. "rotation in office"; i.e. rotating an office "between . . . two racial groups" ("Tokenism" at 1140, 1140 n. 303).

g. "rotation of responsibility among elected commissioners," ("No Two Seats", at 1504 n. 312), or similar elected officials.

h. "consociational arrangements," i.e. a system reflecting "four essential elements of communal representation: grand coalition of political leaders from all significant population segments; mutual veto or concurrent majority; proportionality; and segmental autonomy." ("Tokenism", at 1140; 1140 n.303.

i. discouraging single-member executive offices "in favor of power sharing alternatives that emphasize collective decision-making." (Second Proms and Second Primaries: The Limits of Majority Rule, The Boston Review 32, 34 (Sept-Oct 1992)).

If there is no such case or jurisdiction under any of these questions, please so state.

2. For the period January 21, 1981 through January 19, 1993, please provide me with copies of all documents, identified by case and jurisdiction, showing that the Department of Justice either sought any of the procedures or devices listed in question 1. (a)-(i) as a remedy under Section 5 of

the Voting Rights Act, or otherwise objected to any plan submitted under Section 5 thereof for failure to utilize under any of the procedures listed in question 1. (a)-(i).

If there is no such case or jurisdiction under any of these questions, please so state.

3. For the period of January 21, 1993 to the present, please provide me with copies of all documents, identified by case and jurisdiction, showing that the Department of Justice sought remedies under Section 2 of the Voting Rights Act listed in question 1 (a)-(i).

If there is no such case or jurisdiction under any of these questions, please so state.

4. For the period January 21, 1993 to the present, please provide me with copies of all documents identified by case and jurisdiction, showing that the Department of Justice either sought any of the procedures or devices listed in question 1 (a)-(i) as a remedy under Section 5 of the Voting Rights Act, or otherwise objected to any plan submitted thereunder for failure to utilize any of the procedures listed in question 1 (a)-(i).

If there is no such case or jurisdiction under any of these questions, please so state.

If you have any questions about this request, please contact my staff director, Mark R. Disler, at 224-7703.

Sincerely,

Orrin Hatch

Orrin G. Hatch
Ranking Minority Member

OGH:mdv

Department of Justice

FOR IMMEDIATE RELEASE:
Tuesday, February 22, 1994

CR
202-616-2765

**DEPARTMENT OF JUSTICE DEFENDS RIGHTS OF MINORITY VOTERS
TAKES ACTION IN NORTH CAROLINA, GEORGIA AND TEXAS**

WASHINGTON, D.C. -- The Department of Justice today moved to defend the rights of minority voters in separate cases in Georgia, North Carolina and Texas, where Congressional districting plans have been challenged.

"This Department is committed to protecting minority voting rights gains that were achieved through redistricting after the 1990 Census," Attorney General Janet Reno stated. "Our actions today will help ensure that the clock is not turned back and that those gains are not undone."

In compliance with the Voting Rights Act, Georgia, North Carolina and Texas each drew additional black or Hispanic majority congressional districts in order to fairly reflect minority voting strength. Under the Bush Administration, the Justice Department approved each of the state's districting plans before they were implemented, as required by Section 5 of the Voting Rights Act. The Department's decisions to defend minority voter opportunities in each state were based on individual assessments of each of the districting plans.

The suits against the districting plans in Georgia and Texas are based on a Supreme Court case, Shaw v. Reno, challenging the constitutionality of North Carolina's Congressional plan. That challenge resulted in a decision in June of 1993 which set forth new districting standards. In Shaw, the Court found that a redistricting plan that segregated voters by race and was "irregular on its face" was subject to strict constitutional scrutiny.

Following the Supreme Court decision in North Carolina, the Department took steps to ensure that the Voting Rights Act was not undermined by misinterpretations of Shaw. Since the decision, the Department has participated in cases raising issues under Shaw in Louisiana, California and Texas. In August, the Department participated as amicus curiae in Hays v. Louisiana, which challenged the creation of two black majority Congressional districts in Louisiana. The Department argued that the state had a compelling interest in drawing the two districts.

The Department's actions today are outlined below:

NORTH CAROLINA

The Department will continue to defend North Carolina's decision to draw two black majority Congressional districts by participating in the case as amicus curiae.

North Carolina created the two districts in 1992 after the Department of Justice objected to the state's first districting plan. That plan had failed to fairly reflect black voter strength by drawing only one black majority district. Following the objection, the Department approved a plan with two black majority districts.

In March 1992, five voters challenged the creation of the black majority 1st and 12th Congressional Districts. Department of Justice officials were initially named as a defendant in the case, but were dismissed by the trial court.

On June 28, 1993, the Supreme Court affirmed the dismissal of Department officials States as defendants and remanded the case back for the plaintiffs to prove that the districts were simply a "racial gerrymander" without sufficient non-racial justification.

The case, now entitled Shaw v. Hunt, is scheduled for trial on March 28. The Department will join the state in opposing a motion to prevent the use of the challenged districting plan in the May 3rd Congressional primary elections.

In its brief, the Department argues that there is substantial evidence that the state's plan is constitutional and is narrowly tailored to meet a compelling state interest.

GEORGIA

The Department will intervene as a defendant on the side of the state of Georgia in order to defend the state's effort to recognize black voting strength. The state drew three majority black districts, one of which is being challenged.

Georgia's Congressional district plan had been precleared by the Department in 1992 after the Department issued two objections to plans submitted with only two black majority districts. The state then drew a third black majority district.

On January 13, 1994, plaintiff's filed Johnson v. Miller, challenging the constitutionality of one of the black majority districts - District 11.

"We are intervening in this case because the state drew this district to resolve concerns raised by the Justice Department," said Acting Assistant Attorney General for Civil Rights James P. Turner.

TEXAS

The Department will participate as amicus curiae to defend the rights of minority voters in Texas in Vera v. Richards, a lawsuit filed on January 26, 1994 challenging the Texas Congressional districting plan.

The Department participated in a status conference called by the Court today and opposed plaintiff's motion seeking a preliminary injunction barring the use of the plan in March 8, 1994, primary elections.

The state has seven Hispanic majority districts and two black majority districts under a plan precleared by the Department in 1991.

"By participating in these cases, the Justice Department will be able to provide the Courts with the benefit of its extensive involvement in redistricting litigation throughout the country," said Turner.

The Department is currently considering its options in a yet another case filed on January 18, 1994, challenging a redistricting plan in the 3rd Congressional district in Florida.

# # #

94-079

The Washington Post

February 23, 1994, Wednesday, Final Edition

SECTION: METRO; PAGE D1

LENGTH: 628 words

HEADLINE: U.S. Review May Delay Alexandria School Vote

SERIES: Occasional

BYLINE: Steve Bates, Washington Post Staff Writer

BODY:

The Justice Department says it needs up to two more months to decide whether Alexandria's School Board election plan is fair to minorities, apparently necessitating a delay of the planned May 3 voting -- possibly by as much as three years.

Yesterday evening, Justice notified city officials that it needs a detailed and voluminous accounting of City Council deliberations that led up to the Dec. 16 decision to divide the city into three districts, each of which would elect three School Board members.

Because of Virginia's history of racial discrimination in election practices, each jurisdiction in the state must submit election plans to Justice for review of compliance with the Voting Rights Act.

Under its own regulations, the federal agency has until late April to decide whether it will allow the May 3 election under the plan approved by the city. City Attorney Philip G. Sunderland said the state Board of Elections won't allow a May election unless federal approval is received by April 8.

Alexandria officials said privately last night that they believe it is unlikely the voting can go forward this spring.

Carl Feusahrens, a key backer of the November 1993 referendum in which city voters approved the idea of School Board elections, said City Council members should "redouble their efforts" to gain Justice approval. "I'm just disappointed that the will of the majority of Alexandrians can be tossed aside like this so easily," he said.

George H. Lambert Jr., a Northern Virginia Urban League official who protested the council's election plan to Justice, said the federal agency had much to consider and should not rush to judgment. "It's important to do it right," he said.

Alexandria has been poised to be among the first Virginia jurisdictions to elect a School Board this spring. Until now, the City Council has appointed School Board members.

Tuesday is the filing deadline for School Board candidates to submit petition signatures to state election officials. If Justice approves the city-proposed election plan or any other plan after that date, the election could be contested in court as one in which potential candidates were not given an adequate opportunity to file, city officials suggested last night.

Under existing state law, if the election is delayed, it cannot occur until May 1997, because the School Board and the City Council must be elected at the same time, according to Sunderland. The Justice deliberations have no bearing on the May 3 City Council election, in which the mayor and six other council members will be elected citywide.

City officials are trying to gain General Assembly approval of a bill that would allow them to hold the School Board election later this year, once Justice has approved a School Board election plan.

Traditionally, the Alexandria City Council has appointed three or four black residents to the nine-member school panel. However, in shifting from the appointment process to election of School Board members, city officials found it difficult, if not impossible, to devise election plans that guarantee that the same number of minorities will be chosen.

After four public hearings, the council voted 6 to 1 for a plan creating three districts, one of which has a voting-age population that is 42 percent minority. Lambert and three other black leaders said the council should have chosen an alternative plan creating a two-member district with a minority population of 60 percent.

The Justice Department wants a detailed chronological description of all discussion by city officials regarding options for the election. It also wants election returns since 1983 for all races involving minority candidates and a map showing residences of council and School Board members.

LANGUAGE: ENGLISH

LOAD-DATE-MDC: February 23, 1994

Clinton Presidential Records
Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a tabbed divider. Given our digitization capabilities, we are sometimes unable to adequately scan such dividers. The title from the original document is indicated below.

Divider Title: **32**

MOTOR VOTER

1. ISSUE STATEMENT
The National Voter Registration Act of 1993 (Motor Voter) was signed into law on May 20, 1993, and will become effective in most states on January 1, 1995. For states which must amend their constitutions to comply, Motor Voter becomes effective either on January 1, 1996, or within 120 days after a constitutional amendment could become effective without a special election. Motor Voter requires states to establish voter registration procedures for federal elections so that eligible citizens may apply to register to vote:

- when applying for a driver's license
- through the mail (mail-in registration)
- at selected state and local public offices (e.g. welfare, unemployment and disability offices)

All states must participate in the program unless they had in effect prior to March 11, 1993, either a law allowing citizens to vote without advance registration or no law respecting voter registration for a federal election. Four states are exempt from compliance under this provision: Wyoming, Wisconsin, North Dakota and Minnesota. The Act provides for a civil right of action to enforce Motor Voter, and civil and criminal penalities. The Attorney General has determined that the Civil Rights Division will enforce the civil provisions and the Criminal Division the criminal provisions.

2. STATUS
Numerous state legislatures are presently considering enabling laws. Some states (New Hampshire and Idaho) have considered attempting to exempt themselves from the national law by passing election-day registration and making their laws retroactive to March 10, 1993. Others (Indiana, Kansas and New Mexico) have adjourned their 1994 legislative sessions without passing enabling legislation. The Federal Election Commission (FEC) issued a NOPR on March 10, 1994, on the format of the mail-in form and on reporting and record keeping requirements (59 FR 11211). This is the only federal rulemaking action required by the Act. The FEC's proposal has drawn strong criticism from the League of Women Voters. In addition, the Civil Rights Division has urged the FEC to include race information on the standard form.

3. DEPARTMENT POSITION
The Department is committed to enforcing the Motor Voter law by ensuring that states pass legislation on time and that there is full compliance with the requirements of the Act. On May 19, 1994, Assistant Attorney General Deval Patrick reiterated this commitment in a letter sent to all fifty states. The Attorney

General issued a similar statement that same day at a press conference.

4. JUDICIARY COMMITTEE MEMBERS INTEREST OR POSITION

The Act passed through the Rules Committee, not the Judiciary Committee. The vote of the full Senate was, with few exceptions, on a party line. Senators Kennedy, Simpson and Feinstein played significant roles (Sen. Feinstein also sits on the Rules Committee).

5. REFERENCE MATERIALS

* Public Law 103-31, Motor Voter;
* Memorandum for the Attorney General dated 7/15/94;
* Memorandum from the Attorney General dated 9/13/94;
* Letter dated 5/19/94, from Deval Patrick to states and statement by the Attorney General that same day.

Public Law 103-31
103d Congress

An Act

To establish national voter registration procedures for Federal elections, and for other purposes.

May 20, 1993
[H.R. 2]

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

National Voter Registration Act of 1993. Inter-governmental relations. 42 USC 1973gg note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "National Voter Registration Act of 1993".

42 USC 1973gg.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—The Congress finds that—

(1) the right of citizens of the United States to vote is a fundamental right;

(2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and

(3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

(b) PURPOSES.—The purposes of this Act are—

(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;

(2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;

(3) to protect the integrity of the electoral process; and

(4) to ensure that accurate and current voter registration rolls are maintained.

SEC. 3. DEFINITIONS. 42 USC 1973gg-1.

As used in this Act—

(1) the term "election" has the meaning stated in section 301(1) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431(1));

(2) the term "Federal office" has the meaning stated in section 301(3) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431(3));

(3) the term "motor vehicle driver's license" includes any personal identification document issued by a State motor vehicle authority;

(A) may not require any information that duplicates information required in the driver's license portion of the form (other than a second signature or other information necessary under subparagraph (C));

(B) may require only the minimum amount of information necessary to—

(i) prevent duplicate voter registrations; and

(ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(C) shall include a statement that—

(i) states each eligibility requirement (including citizenship);

(ii) contains an attestation that the applicant meets each such requirement; and

(iii) requires the signature of the applicant, under penalty of perjury;

(D) shall include, in print that is identical to that used in the attestation portion of the application—

(i) the information required in section 8(a)(5) (A) and (B);

(ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

(iii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes; and

(E) shall be made available (as submitted by the applicant, or in machine readable or other format) to the appropriate State election official as provided by State law.

(d) CHANGE OF ADDRESS.—Any change of address form submitted in accordance with State law for purposes of a State motor vehicle driver's license shall serve as notification of change of address for voter registration with respect to elections for Federal office for the registrant involved unless the registrant states on the form that the change of address is not for voter registration purposes.

(e) TRANSMITTAL DEADLINE.—(1) Subject to paragraph (2), a completed voter registration portion of an application for a State motor vehicle driver's license accepted at a State motor vehicle authority shall be transmitted to the appropriate State election official not later than 10 days after the date of acceptance.

(2) If a registration application is accepted within 5 days before the last day for registration to vote in an election, the application shall be transmitted to the appropriate State election official not later than 5 days after the date of acceptance.

SEC. 6. MAIL REGISTRATION. 42 USC 1973gg-4.

(a) FORM.—(1) Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant to section 9(a)(2) for the registration of voters in elections for Federal office.

(2) In addition to accepting and using the form described in paragraph (1), a State may develop and use a mail voter registration

(iii) Acceptance of completed voter registration application forms for transmittal to the appropriate State election official.

(B) If a voter registration agency designated under paragraph (2)(B) provides services to a person with a disability at the person's home, the agency shall provide the services described in subparagraph (A) at the person's home.

(5) A person who provides service described in paragraph (4) shall not—

(A) seek to influence an applicant's political preference or party registration;

(B) display any such political preference or party allegiance;

(C) make any statement to an applicant or take any action the purpose or effect of which is to discourage the applicant from registering to vote; or

(D) make any statement to an applicant or take any action the purpose or effect of which is to lead the applicant to believe that a decision to register or not to register has any bearing on the availability of services or benefits.

(6) A voter registration agency that is an office that provides service or assistance in addition to conducting voter registration shall—

(A) distribute with each application for such service or assistance, and with each recertification, renewal, or change of address form relating to such service or assistance—

(i) the mail voter registration application form described in section 9(a)(2), including a statement that—

(I) specifies each eligibility requirement (including citizenship);

(II) contains an attestation that the applicant meets each such requirement; and

(III) requires the signature of the applicant, under penalty of perjury; or

(ii) the office's own form if it is equivalent to the form described in section 9(a)(2),

unless the applicant, in writing, declines to register to vote;

(B) provide a form that includes—

(i) the question, "If you are not registered to vote where you live now, would you like to apply to register to vote here today?";

(ii) if the agency provides public assistance, the statement, "Applying to register or declining to register to vote will not affect the amount of assistance that you will be provided by this agency.";

(iii) boxes for the applicant to check to indicate whether the applicant would like to register or declines to register to vote (failure to check either box being deemed to constitute a declination to register for purposes of subparagraph (C)), together with the statement (in close proximity to the boxes and in prominent type), "IF YOU DO NOT CHECK EITHER BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED NOT TO REGISTER TO VOTE AT THIS TIME.";

(iv) the statement, "If you would like help in filling out the voter registration application form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application form in private."; and

(C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of 30 days, or the period provided by State law, before the date of the election; and

(D) in any other case, if the valid voter registration form of the applicant is received by the appropriate State election official not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(2) require the appropriate State election official to send notice to each applicant of the disposition of the application;

(3) provide that the name of a registrant may not be removed from the official list of eligible voters except—

(A) at the request of the registrant;

(B) as provided by State law, by reason of criminal conviction or mental incapacity; or

(C) as provided under paragraph (4);

(4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of—

(A) the death of the registrant; or

(B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d);

(5) inform applicants under sections 5, 6, and 7 of—

(A) voter eligibility requirements; and

(B) penalties provided by law for submission of a false voter registration application; and

(6) ensure that the identity of the voter registration agency through which any particular voter is registered is not disclosed to the public.

(b) CONFIRMATION OF VOTER REGISTRATION.—Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office—

(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.); and

(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote.

(c) VOTER REMOVAL PROGRAMS.—(1) A State may meet the requirement of subsection (a)(4) by establishing a program under which—

(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

(B) if it appears from information provided by the Postal Service that—

(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid pre-addressed return form by which area covered by a polling place to an address in the same area shall, notwithstanding failure to notify the registrar of the change of address prior to the date of an election, be permitted to vote at that polling place upon oral or written affirmation by the registrant of the change of address before an election official at that polling place.

(2)(A) A registrant who has moved from an address in the area covered by one polling place to an address in an area covered by a second polling place within the same registrar's jurisdiction and the same congressional district and who has failed to notify the registrar of the change of address prior to the date of an election, at the option of the registrant—

(i) shall be permitted to correct the voting records and vote at the registrant's former polling place, upon oral or written affirmation by the registrant of the new address before an election official at that polling place; or

(ii)(I) shall be permitted to correct the voting records and vote at a central location within the same registrar's jurisdiction designated by the registrar where a list of eligible voters is maintained, upon written affirmation by the registrant of the new address on a standard form provided by the registrar at the central location; or

(II) shall be permitted to correct the voting records for purposes of voting in future elections at the appropriate polling place for the current address and, if permitted by State law, shall be permitted to vote in the present election, upon confirmation by the registrant of the new address by such means as are required by law.

(B) If State law permits the registrant to vote in the current election upon oral or written affirmation by the registrant of the new address at a polling place described in subparagraph (A)(i) or (A)(ii)(II), voting at the other locations described in subparagraph (A) need not be provided as options.

(3) If the registration records indicate that a registrant has moved from an address in the area covered by a polling place, the registrant shall, upon oral or written affirmation by the registrant before an election official at that polling place that the registrant continues to reside at the address previously made known to the registrar, be permitted to vote at that polling place.

(f) CHANGE OF VOTING ADDRESS WITHIN A JURISDICTION.—In the case of a change of address, for voting purposes, of a registrant to another address within the same registrar's jurisdiction, the registrar shall correct the voting registration list accordingly, and the registrant's name may not be removed from the official list of eligible voters by reason of such a change of address except as provided in subsection (d).

(g) CONVICTION IN FEDERAL COURT.—(1) On the conviction of a person of a felony in a district court of the United States, the United States attorney shall give written notice of the conviction to the chief State election official designated under section 10 of the State of the person's residence.

(2) A notice given pursuant to paragraph (1) shall include—

(A) the name of the offender;

(B) the offender's age and residence address;

(C) the date of entry of the judgment;

(D) a description of the offenses of which the offender was convicted; and area than a municipality, the geographic area governed by that unit of government; or

(3) if voter registration is maintained on a consolidated basis for more than one municipality or other unit of government by an office that performs all of the functions of a voting registrar, the geographic area of the consolidated municipalities or other geographic units.

SEC. 9. FEDERAL COORDINATION AND REGULATIONS. 42 USC 1973gg-7.

(a) IN GENERAL.—The Federal Election Commission—

(1) in consultation with the chief election officers of the States, shall prescribe such regulations as are necessary to carry out paragraphs (2) and (3);

(2) in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office;

(3) not later than June 30 of each odd-numbered year, shall submit to the Congress a report assessing the impact of this Act on the administration of elections for Federal office during the preceding 2-year period and including recommendations for improvements in Federal and State procedures, forms, and other matters affected by this Act; and Reports.

(4) shall provide information to the States with respect to the responsibilities of the States under this Act.

(b) CONTENTS OF MAIL VOTER REGISTRATION FORM.—The mail voter registration form developed under subsection (a)(2)—

(1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(2) shall include a statement that—

(A) specifies each eligibility requirement (including citizenship);

(B) contains an attestation that the applicant meets each such requirement; and

(C) requires the signature of the applicant, under penalty of perjury;

(3) may not include any requirement for notarization or other formal authentication; and

(4) shall include, in print that is identical to that used in the attestation portion of the application—

(i) the information required in section 8(a)(5) (A) and (B);

(ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

(iii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

SEC. 10. DESIGNATION OF CHIEF STATE ELECTION OFFICIAL. 42 USC 1973gg-8.

Each State shall designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under this Act.

States Code), notwithstanding any other law), or imprisoned not more than 5 years, or both.

SEC. 13. EFFECTIVE DATE. 42 USC 1973gg note.

This Act shall take effect—

(1) with respect to a State that on the date of enactment of this Act has a provision in the constitution of the State that would preclude compliance with this Act unless the State maintained separate Federal and State official lists of eligible voters, on the later of—

(A) January 1, 1996; or

(B) the date that is 120 days after the date by which, under the constitution of the State as in effect on the date of enactment of this Act, it would be legally possible to adopt and place into effect any amendments to the constitution of the State that are necessary to permit such compliance with this Act without requiring a special election; and

(2) with respect to any State not described in paragraph (1), on January 1, 1995.

Approved May 20, 1993.

LEGISLATIVE HISTORY—H.R. 2 (S. 460):

HOUSE REPORTS: Nos. 103-9 (Comm. on House Administration) and 103-66 (Comm. of Conference).
SENATE REPORTS: No. 103-6 accompanying S. 460 (Comm. on Rules and Administration).
CONGRESSIONAL RECORD, Vol. 139 (1993):
Feb. 4, considered and passed House.
Mar. 10, 11, 15-17, S. 460 considered in Senate; H.R. 2, amended, passed in lieu.
May 5, House agreed to conference report.
May 6-8, Senate considered and agreed to conference report.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 29 (1993):
May 20, Presidential remarks.

O

Office of the Attorney General
Washington, D.C. 20530

September 13, 1993

MEMORANDUM

TO: James P. Turner
Acting Assistant Attorney General
Civil Rights Division

John C. Keeney
Acting Assistant Attorney General
Criminal Division

FROM: The Attorney General

SUBJECT: Enforcement of the National Voter Registration Act of 1993

Consistent with 28 C.F.R. 0.50(a) and 0.55(a), I assign responsibility for the civil enforcement of the National Voter Registration Act of 1993 to the Civil Rights Division, and responsibility for the criminal enforcement of the National Voter Registration Act of 1993 to the Criminal Division unless racial discrimination is involved, in which case the Civil Rights Division shall be responsible for such criminal enforcement.

Letter from Deval L. Patrick
Assistant Attorney General for Civil Rights

Dear State Official:

As you know, voting is a right of citizenship in this country. Free and easy access to the exercise of this most fundamental right must therefore be a central objective of this or any Administration. Accordingly, the enforcement of the National Voter Registration Act (NVRA) will be one of our highest priorities at the Department of Justice.

The NVRA requires all states to provide voter registration opportunities for federal elections through the driver licensing process, through the mail, and at state agencies, and to incorporate important safeguards into the voter purge process. In most states, the date on which these procedures must be in place is January 1, 1995.

Several state legislatures have passed legislation to conform their procedures with the NVRA. I congratulate those states in this group, and wish them success in administering the new procedures. As more states join this group, I remind those that are subject to the preclearance requirement of Section 5 of the Voting Rights Act that preclearance should be requested as soon as possible for such changes so we can conclude the review process with plenty of time left for implementation.

Other state legislatures, however, have adjourned for the year without adopting legislation that conforms the state's election system with the procedures required by the NVRA. Still others have passed or are considering legislation that attempts to take advantage of exemption characteristics that were written into the NVRA for other states, under other circumstances. We are paying very close attention to these developments.

Although we are authorized under Section 11 of the NVRA to file litigation in federal court when necessary to carry out the Act, it is our view that voter registration procedures work best when they are designed by state officials in a manner that is most easily carried out at the state and local level -- provided those procedures satisfy all of the requirements of the Act. Thus, it is our hope that compliance with the NVRA will be forthcoming from those states that have not yet done so, without the need for court action. In those circumstances where court action is warranted, however, we will proceed swiftly.

In this spirit, we have talked with people in many states to determine the steps that are being taken toward compliance with the NVRA, and we look forward to learning of the efforts of the remaining states. Please keep us apprised of the steps your state will take, or has already taken, to achieve compliance with the NVRA. You may contact Mr. Barry H. Weinberg, Deputy Chief of our Voting Section, (202) 307-3266, if you have questions.

STATUS OF COMPLIANCE BY STATES UNDER THE NATIONAL VOTER REGISTRATION ACT

The National Voter Registration Act requires states and the District of Columbia to adopt legislation that will provide for voter registration through the driver licensing process, through the mail and through various state agencies. It also prohibits states from removing voters from registration lists for not voting. Most states are required to have their new voter registration in place by January 1, 1995.

STATES THAT HAVE NOT YET PASSED LEGISLATION [21]

- California, District of Columbia, Illinois, Louisiana, Michigan, Montana, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina and Texas.
- New Mexico, Indiana -- have adjourned their legislatures without adopting new legislation and do not plan to reconvene until after the January 1 deadline.
- Arkansas, Virginia and Vermont -- may be allowed additional time to comply in order to amend their state constitutions.

STATES THAT HAVE PASSED LEGISLATION [23]

- Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Iowa, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, Oregon, South Dakota, Tennessee, Utah, Washington and West Virginia.

STATES THAT ARE EXEMPT UNDER THE LAW [4]

- Minnesota, North Dakota, Wisconsin and Wyoming -- because they had same-day voter registration or no voter registration laws passed prior to the enactment of the law.

STATES THAT ARE TRYING TO CLAIM EXEMPTION [3]

- Idaho and New Hampshire -- by passing legislation that retroactively adopts same-day voter registration.
- Kansas -- by trying to pass a bill to retroactively eliminate voter registration.

U.S. Department of Justice

JUN 15 1993 Washington, D.C. 20530

MEMORANDUM FOR THE ATTORNEY GENERAL

FROM: James P. Turner
Acting Assistant Attorney General
Civil Rights Division

John C. Keeney
Acting Assistant Attorney General
Criminal Division

SUBJECT: Enforcement of the National Voter Registration Act of 1993

The National Voter Registration Act of 1993 (the motor voter act) was signed into law by the President on May 20, 1993. A copy is attached.

The act, in brief, is effective generally on January 1, 1995, and requires the states to adopt motor voter procedures (section 5), mail voter registration (section 6), and agency-based voter registration (section 7); limits the purging of voters (section 8); gives enforcement authority to the Department of Justice and a limited regulatory role to the Federal Election Commission (sections 9 and 11); and provides criminal penalties for fraud and abuse (section 12). In addition, United States Attorneys are required to notify chief state election officials of federal felony convictions (section 8(g)). The Department's new enforcement responsibilities under the act are discussed below.

Voting Rights Act Preclearance

The act will require most states and counties, including those that are specially covered under the Voting Rights Act, to make many changes in their voter registration practices and procedures. As a result, the Civil Rights Division expects a substantial increase in its workload under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, which requires that before changes in voting standards, practices, and procedures in 911 counties in 16 different states can be implemented, they must receive a federal determination, from either the Attorney General or the U.S. District Court for the District of Columbia, that the voting changes in question have been shown not to have a discriminatory purpose or effect.

As a matter of practice, jurisdictions nearly always seek preclearance by submitting their voting changes for review by the Attorney General (the submissions are received and analyzed by the Civil Rights Division's Voting Section), rather than seeking declaratory judgments from the federal court. Thus, through the application of Section 5, as well as through enforcement of the prohibitions against discrimination in voting contained in Section 2 of the Voting Rights Act, 42 U.S.C. 1973, the Civil Rights Division's Voting Section will be involved in assuring that the implementation of the new motor voter legislation will not result in a denial or abridgement of the right to vote on account of race, color, or membership in a language minority group.

Criminal Enforcement

The criminal provisions of section 12 of the act are designed to discourage the fraudulent use and misuse of the new electoral mechanisms provided by the law to ease voter registration throughout the country. These criminal provisions are similar to election fraud statutes currently supervised by the Criminal Division's Public Integrity Section. 9 U.S.A.M. 2.133(8). Based on its experience in prosecuting election crimes and in overseeing the prosecution of these crimes by United States Attorneys' Offices, the Criminal Division expects some increase in certain types of election fraud as a result of the act's standardization of voter registration procedures, and a corresponding increase in the Public Integrity Section's supervisory responsibilities over election crimes.

Recommendations

Under these circumstances, in keeping with 28 C.F.R. 0.50(a) and 0.55, criminal enforcement under section 12 of the new motor voter law would appear to be the responsibility of the Criminal Division's Public Integrity Section, unless racial discrimination is involved, in which case the Civil Rights Division's Criminal Section would be responsible. Further, it would appear appropriate for the Civil Rights Division to be responsible for the Attorney General's motor voter civil enforcement responsibilities under section 11(a) and, where necessary, to defend the act's constitutionality.[1]

Finally, as they have in the past, the Civil Rights Division and the Criminal Division would work in close cooperation with the Federal Election Commission in situations where their participation would be appropriate; the Commission has the responsibility under

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[1]Under 28 C.F.R. 0.50(a), the Assistant Attorney General, Civil Rights Division, is responsible for the "[e]nforcement of all Federal statutes affecting civil rights, including those pertaining to elections and voting. . . ."

the motor voter law to inform the states of their responsibilities under the act, to prepare biennial reports to Congress on the impact of the act, and to promulgate a mail voter registration application form (section 9(a)).

If you concur, attached is a memorandum to implement this approach. The respective Divisions would then prepare any necessary conforming amendments to their statements of responsibilities contained in Subparts K and J of 28 C.F.R. Part 0.

Attachments

Department of Justice

FOR IMMEDIATE RELEASE
THURSDAY, MAY 19, 1994

CR
(202) 616-2765

ATTORNEY GENERAL RENO ENCOURAGES STATES TO COMPLY WITH VOTER REGISTRATION LAW

WASHINGTON, D.C. -- Marking the one-year anniversary of its signing, Attorney General Janet Reno today urged the states to comply with the National Voter Registration Act (NVRA).

The NVRA, otherwise known as the motor-voter law, requires states to provide voter registration through the driver licensing process, through the mail and through various state agencies. It also prohibits states from removing voters from registration lists for not voting.

"This administration fought for a law which promised to bring new voices to the political process by making it easier for all Americans to exercise their fundamental right to vote," stated Reno. "We must fulfill the promise of the law, by ensuring that all states live up to their responsibilities."

As a result of the NVRA, state legislatures are drafting bills to create plans that conform with the law's requirements. Several state legislatures, however, have not yet adapted their voting systems to meet the requirements of the law.

(MORE)

Addressing those states that have not yet complied, Reno said, "I want to work with the states to ensure full compliance with the law. But for those who don't comply, I fully intend to use the authority of the Department to enforce the law."

Assistant Attorney General for Civil Rights Deval L. Patrick sent a letter today to state election officials reminding them of their responsibility, offering assistance and letting them know of the Department's firm commitment to enforcing the law.

# # #

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Divider Title: **33**

PHILADELPHIA ABSENTEE BALLOT CONTROVERSY

1. **ISSUE STATEMENT**

Since late 1993, there has been a high profile controversy in Philadelphia over a November 2, 1993 special election contest for a state Senate seat (District 2) in Pennsylvania. A federal district court ordered the Philadelphia Board of Elections to unseat the prevailing Democratic candidate, William Stinson, and declare Republican candidate Bruce Marks the winner based on findings of widespread fraud and illegalities in the absentee ballot process in the election. At the time of the election, the outcome of the race determined partisan control of the senate.

Prior to the election, Stinson campaign workers went door-to-door telling people that they could vote from home by absentee ballot for convenience. Pennsylvania law does not allow absentee voting unless the voter expects to be out of the county on election day or is physically unable to go to the polls. The campaign initially targeted nonminority areas, but later, after a poll indicated that Stinson was trailing Marks by four percentage points, the workers focused the absentee ballot campaign in predominantly black and Hispanic neighborhoods in the district. The Stinson supporters solicited signatures on absentee ballot applications (provided to them and later processed by the Democratic members of the board of elections), brought the ballots to voters' homes, obtained their votes, and returned the ballots. State law does not allow this practice (ballots must be sent to and returned by the voter directly).

Following the election, the Philadelphia Inquirer ran a series of articles describing its findings of widespread absentee ballot illegalities. The state Attorney General's office announced a broad investigation of the allegations.

The federal court ruled that the conduct by the Stinson campaign supporters, and the election board members who cooperated with them violated 42 U.S.C. 1971(a)(2)(A), by discriminating against Marks in favor of Stinson, and Section 2 of the Voting Rights Act "by targeting Latino and African-American voters for fraud, intimidation, and deception in order to obtain illegal absentee ballots for Stinson." Additionally, the court found violations of the First Amendment, Equal Protection and Substantive Due Process requirements of the Constitution. The court enjoined any future discriminatory application of election laws to favor one candidate or party, prohibited the dissemination of absentee ballots except by delivery or mail to the voter, required that absentee ballot applications be provided in Spanish and English, and ordered that Marks be seated as the winner. Marks v. Stinson, No. 93-6157 (E.D. Pa. April 26, 1994).

2. **STATUS**

A final judgment in the lawsuit was entered on April 26, 1994. Marks was sworn in on April 28. The appeal of the decision is pending. The Pennsylvania Attorney General has announced misdemeanor indictments against Stinson and two of his aides. According to press accounts, more indictments are expected.

3. **DEPARTMENT ACTION**

Most of the criminal statutes the Department enforces prohibiting vote fraud or voter intimidation by private persons are limited to elections in which there is a federal office on the ballot. The November 1993 special election in Philadelphia did not include a federal contest. In late November, the Voting Section of the Civil Rights Division instructed the FBI to conduct a preliminary investigation of the claims of intimidation of Hispanic voters to determine if there were violations of Section 11(b) of the Voting Rights Act, 42 U.S.C. 1973i(b), a civil provision which prohibits any person from intimidating, threatening or coercing any person for voting or attempting to vote.

The Voting Section continues to monitor developments in the state investigation. We also are monitoring the litigation, but have determined that our participation in the case is not warranted.

The court in Marks found that the absentee ballot applications were not available in Spanish, which would violate the minority language requirements of the Voting Rights Act (Section 203 of the Act, 42 U.S.C. 1973aa-1a). On April 26, 1994, the Voting Section sent a letter to the Philadelphia City Attorney asking for detailed information concerning the city's overall compliance with Section 203. We are evaluating the city's preliminary response to that inquiry.

4. **JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS**

Attorney General Reno received requests by Senators Specter, Congressman Gingrich, and other Republicans to conduct an investigation and to get involved in the litigation. Senator Specter is likely to ask why the Department has not sought to participate in the Marks case or undertaken a criminal investigation.

Contact: Steve Rosenbaum

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Divider Title: ______________________________

AFFIRMATIVE ACTION/ QUOTAS

1. **ISSUE STATEMENT**

Affirmative action is a term often used to describe a range of private and public programs undertaken to remedy discrimination in employment on the basis of race, ethnicity, or gender. In recent years, the debate over what actions should be taken to remedy employment discrimination has often dissolved into an argument over what constitutes a "quota". While the courts have generally upheld efforts by private and public employers and courts to remedy past discrimination by taking race into account in hiring practices, university admissions, etc., they have rejected inflexible requirements to hire certain numbers of women and minorities. The argument over what constitutes a "quota" reached a height during debate on the Civil Rights Act of 1990 (which passed in 1991), which then-President Bush criticized as a "quota bill."

While the Affirmative Action vs. Quotas debate is most often discussed in the context of employment, it is also relevant to educational issues. Recently the Department of Education issued a guidance allowing colleges and universities to employ minority targeted scholarships as a tool to help remedy past discrimination or as a mechanism to create more diversity. The Department's action represents an effort to recognize the legal boundaries of appropriate remedial action in dealing with entrenched discrimination.

2. **STATUS**

There are no particular upcoming events, actions, or decision points, although, by the very nature of the work done in the civil rights division, every remedy for past, proven discrimination sought by the division's 10 litigating sections could be construed as "affirmative action," or even as a "quota."

3. **DEPARTMENT POSITION**

The Department's position is that the civil rights division is responsible for enforcing the federal civil rights laws and certain constitutional provisions. The Supreme Court has, in a series of decisions, carefully delineated when race-conscious remedies may and may not be used by the Department of Justice to redress violations of those laws, and the division will adhere to those decision.

Administration Position

The President is on record against quotas, i.e., those rigid and inflexible floors and ceilings, but is in favor of using race-conscious remedies in cases where the Supreme Court has allowed them -- to remedy past instances of proven discrimination.

4. **JUDICIARY COMMITTEE MEMBERS INTERESTS/ POSITIONS**

The committee members are generally split down partisan lines on this issue, with Senator Hatch most interested in painting race-conscious remedies as quotas and Senator Kennedy most vigilant on the other side.

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Divider Title: 35

<u>IN-SCHOOL SEGREGATION/ TRACKING</u>

1. ISSUE STATEMENT

The problem of in-school segregation is receiving increasing attention as an area where the federal government may be seeking to involve itself. This type of segregation results from the use of ability grouping, testing, special education placement, some magnet programs, and differential discipline policies and practices. It is also called "tracking."

This is a fairly controversial area, because while many defend these practices as valid ways to separate those students who need special attention, others criticize them as biased against African-American students. Even those who give the policies the most benign interpretation are wary about the results which often make for as segregated an education as before <u>Brown v. Board of Education</u>.

2. STATUS

There are several (4 or 5) investigations into the problem of tracking in public schools at this time in the Civil Rights Division. At least one case is likely to be brought to the AAG for approval in the next several weeks.

3. DEPARTMENT POSITION

Deval Patrick is interested in exploring the problem of tracking and deciding whether or not it is something the Division and the Department should pursue. However, a quote by Mr. Patrick in the May 9, 1994 edition of USA Today implies that he is prepared to challenge all tracking under his authority to end school desegregation. Mr. Patrick was quoted as saying that "[w]e are seeing kids -- particularly minority kids -- being placed in remedial and other kinds of programs for the same reasons they were put in separate schools 40 years ago, and that's wrong." This quotation was put in the context of other, more extreme quotations and included in an article with Mr. Patrick's picture and a misleading headline. While the reporter has since apologized for incorrectly expanding Mr. Patrick's comments, others may still perceive the Department as further along in its commitment to tracking cases than it is at this time.

It should be noted that the Department of Education, Office of Civil Rights, would have primary responsibility for this area, although the DOJ Civil Rights Division would have the responsibility to work with DOE to pursue any litigation.

4. JUDICIARY COMMITTEE MEMBER INTEREST/ POSITION

No member of the committee has yet expressed a particular interest in this issue, although the article in USA Today may spark questions from the staff.

5. REFERENCE MATERIALS

Attached is the USA Today story of May 9, 1994.

Contact: Helaine Greenfeld

USA TODAY

DATE: 54
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School 'tracking' to be challenged as biased

By Tony Mauro
USA TODAY

Forty years after the Supreme Court declared segregated schools unconstitutional, the Clinton administration is planning a legal attack on classroom tracking — described by one expert as "the segregating tool of the '90s."

Through tracking, students are separated by abilities and special needs under labels such as speech-impaired, learning-disabled and retarded.

But critics say the methods used to assess students are often biased against blacks — relegating them to programs where challenges and expectations are low.

"We are seeing kids — particularly minority kids — being placed in remedial and other kinds of programs for the same reasons they were put in separate schools 40 years ago, and that's wrong," says Deval Patrick, the Justice Department's new assistant attorney general for civil rights.

Patrick says tracking will be challenged in the context of laws and rulings that outlaw school segregation.

He made his remarks during an interview about the 40th anniversary of the Supreme Court's May 17, 1954, ruling in *Brown vs. Board of Education*.

Today, school desegregation remains an elusive goal. Almost two-thirds of black students and three-fourths of Hispanic students attend schools where fewer than half the students are white.

But even where schools have been desegregated system-wide, tracking often keeps white and black students in separate classrooms.

Hugh Price of the Rockefeller Foundation calls tracking "the segregating tool of the '90s."

In Louisville, where the 1975 merger of mostly black city schools and mostly white county schools is considered a success, "desegregation has never gone beyond the head count," says University of Louisville professor Blaine Hudson.

Blacks make up 30% of students in the system. But classrooms are racially divided due to tracking, and student interracial contact is reduced, Hudson says.

Tracking has been viewed by educators as a positive teaching tool. "The belief has been if you have a homogeneous group, they all learn faster," says Janet Crouse of the National Parent Teachers Association.

By Tony Wesnofske, AP

PATRICK: Justice Department's new assistant attorney general for civil rights will challenge tracking.

But Crouse says it can lead to discrimination, and she favors other methods such as team teaching. She says parents should question tracking practices.

"Classes for the gifted usually mean classes for whites, and special education classes usually mean classes for black males," says federal judge Robert Carter, who argued the Brown case with the late Thurgood Marshall.

"Special class assignments are too often made by personnel who cannot see beyond the black skin, with the result that too many aggressive black youngsters get trapped in dead-end special education classes, and lose all prospects of future academic interest or achievement."

In San Francisco, blacks constitute 20% of all students — but 50% of students assigned to special education, says superintendent Waldemar Rojas.

Blacks are overrepresented in special education programs in 39 states, compared with their percentage in the overall student population, according to a recent analysis by *U.S. News & World Report*.

Even within special education programs, blacks are often placed on the lowest rung.

The magazine found that in overwhelmingly black Perry County, Ala., most special education students are classified as retarded.

In the mainly white Mountain Brook district also in Alabama, most special education students are viewed as learning-disabled.

Contributing: Patricia Edmonds, Margaret L. Usdansky and Robert Davis