U.S. Department of Justice

Civil Rights Division

TELEFACSIMILE COVER SHEET

DATE: 11/20/97

TO: Tom Friedman

PHONE: 456-5587

FAX: 456-7431

FROM: Isabelle Pinzler

DEPARTMENT OF JUSTICE - CIVIL RIGHTS DIVISION
FAX NUMBER: 202-307-2572
PHONE: 202-514-6715

MESSAGE:

NUMBER OF PAGES TRANSMITTED (EXCLUDING THIS SHEET) 3

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11/20/97

Consolidated Title VI Enforcement Effort in DOJ/CRT
Projected Costs

It is projected that 50 additional employees will be required solely for the coordinated Title VI enforcement effort. An increase of this level equates to a 9% net increase over the Division's current authorized position level. A rough estimated cost is approximately $5 million (see below). This does not include substantial additional costs that would be involved if a separate agency was required to be established (e.g.--build-out costs to house 50 employees etc.), or expenses associated with administrative support personnel.

Assumptions Used:

- The breakdown of cost projections was based on a 1 to 7 clerical support ratio to other staff, and 1 to 5 attorney to investigator ratio. This equates to a breakdown of 34 investigators, 9 attorneys and 7 secretaries.
- Projected costs are for full year expenses, and based on modular cost estimates for each of the three respective position types and varying grade levels within each category.
- Payroll costs are based on salaries that include the 2.45% FY 98 pay raise for the full year, and 27% benefits costs.

Cost Estimate:

Position	Grade Level	#	Amount
Attorneys	GS-12	2	$ 227,852
	GS-13	5	626,165
	GS-14	2	276,294
		9	$1,130,311
Investigators	GS-9	11	$ 965,052
	GS-11	12	1,156,620
	GS-12	9	956,574
	GS-13	2	235,186
		34	$3,313,432
Secretary	GS-5	2	133,170
	GS-6	4	278,812
	GS-7	1	73,076
		7	$ 485,058
TOTAL		50	$4,928,801

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

SEP 15 1997

MEMORANDUM FOR ELENA KAGAN
DEPUTY ASSISTANT TO THE PRESIDENT
DOMESTIC POLICY COUNCIL

FROM: Isabelle Katz Pinzler IKP
Acting Assistant Attorney General
Civil Rights Division

RE: Work of the Civil Rights Division

OVERVIEW

The mission of the Civil Rights Division of the Department of Justice is to serve as the chief civil rights enforcement agency of the federal government. The Division has primary responsibility for federal civil rights litigation, and has certain coordination and public education responsibilities as required by law or executive order. The civil rights laws of the United States provide both criminal and civil protections (depending on the law) on the basis of a number of factors, including race, color, religion, sex, national origin, disability, age, familial status, citizenship status, marital status, and source of income, in employment, education, public accommodations, housing, lending, programs receiving federal financial assistance, and in other areas. Specifically, the Attorney General has delegated to the Division primary litigation authority for enforcement of the Civil Rights Act of 1964, the Fair Housing Act, the Equal Credit Opportunity Act, the Americans with Disabilities Act, and a number of criminal and civil statutes. The Division also enforces federal constitutional and statutory rights in institutions covered by the Civil Rights of Institutionalized Persons Act.

The Division has a number of general goals:

1. To reduce significantly police and other official criminal misconduct and to eliminate or reduce substantially reduce violent activity by private citizens (including organized hate groups) against others because of their race, religion, national origin or gender.

2. To prevent and eliminate systemic barriers to full participation of minorities in the electoral process.

3. To enforce the laws prohibiting discrimination in employment, housing opportunities and credit transactions, and educational opportunities.

4. To protect the constitutional and statutory rights of institutionalized persons.

5. To ensure that public services, programs and activities do not discriminate on the basis of disability and to ensure that public accommodations are available to persons with disability.

6. To enforce the law concerning immigration related unfair employment practices.

BUDGET INFORMATION AND SECTION DESCRIPTIONS/WORKLOAD

The Division has a 1997 budget of nearly $62.5 million, and employs approximately 560 persons, including more than 250 attorneys, in 11 sections [1996 representative workload samples are approximate]--

Administrative--runs the Office of Redress Administration (processes claims under the Civil Liberties Act of 1988 for persons of Japanese ancestry interned during World War II) and processes Freedom of Information Act requests, as well as providing administrative support divisionwide

Appellate--handles all appeals of Division cases [~170 matters received, ~125 briefs filed]

Coordination and Review--coordinates enforcement of laws that prohibit discrimination by recipients of federal financial assistance [~1200 complaints received, ~100 agency requests for assistance]

Criminal--enforces criminal civil rights laws that prohibit police misconduct, hate crimes, church burnings, slavery, interference with right to reproductive health services [~10,000 complaints; ~80 new cases filed]

Disability Rights--enforces laws that prohibit discrimination on the basis of disability [~1000 investigations started, ~23 cases filed, ~100,000 requests for technical assistance received]

Education--enforces laws prohibiting discrimination in education [~320 ongoing investigations, ~210 cases pending]

Employment--enforces laws prohibiting discrimination by state and local government employers [~5,000 referrals from EEOC, ~11 new cases filed]

Housing and Civil Enforcement--enforces laws prohibiting discrimination in housing, lending, credit, and public accommodations [~200 investigations conducted, ~60 new cases filed]

Office of Special Counsel for Immigration Related Unfair Employment Practices--enforces laws prohibiting employment discrimination based on national origin and citizenship status [~400 complaints received, ~11 cases filed, ~7,000 calls to the toll free assistance hotline]

Special Litigation--enforces federal laws and constitutional rights of persons confined in certain state and local institutions, civil cases of interference with reproductive rights, civil cases of a pattern or practice of police misconduct [~3000 complaints, ~26 new investigations opened, ~10 new cases filed]

Voting--enforces laws prohibiting discrimination in voting [~19,000 voting changes reviewed for discrimination, ~ 20 new cases filed]

The sections work closely with other associated federal agencies (e.g., Housing Section works with HUD, Employment Section works with the Equal Employment Opportunity Commission, Education Section works with the Department of Education, Coordination and Review works with all agencies that provide Federal financial assistance), to coordinate activities, provide training and receive referrals as set forth by applicable law.

For the past three years, funding for the Division has remained flat, resulting (due to mandatory increases and inflation) in a net decrease of resources for the Division. In order to maintain an optimal vigorous enforcement program for the Division, a budgetary increase of approximately 20% would be required.

Attached is a summary of the highlights of the Division's work under the Clinton Administration.

CIVIL RIGHTS DIVISION ACCOMPLISHMENTS SUMMARY

Since the Administration took office, the Division has made substantial accomplishments in each of the areas of civil rights enforcement. Major accomplishments include:

- **Criminal Prosecution:** The Division remains strongly committed to the vigorous prosecution of criminal violations of the civil rights laws.

  - In Fiscal Year 1996, the Division received 11,721 complaints, reviewed 10,129 complaints and investigated 2, 619. 70 new matters were taken to the Grand Jury, and the Division has had a prosecutorial success rate of 87%. Already in 1997, the Division has received 6,000 complaints alleging criminal interference with civil rights.

  - The Division filed 42 cases involving racial violence charging 66 defendants, the highest number of cases and the second highest number of defendants ever charged in one year.

  - The Criminal Section maintained an overall 89% success rate.

  - The Criminal Section is an integral part of the National Church Arson Task Force (NCATF), which is led by the Assistant Attorney General for Civil Rights, together with the Treasury Assistant Secretary for Enforcement. This Task Force, established to investigate a rash of suspicious fires in houses of worship, also includes representatives from the FBI, the Bureau of Alcohol, Tobacco and Firearms, the United States Attorneys, the Community Relations Service, the Criminal Division, and the U.S. Marshals in the Task Force has deployed over 200 ATF and FBI investigators around the country to investigate these fires. The Task Force is also coordinating closely with state and local law enforcement officials in our prosecution efforts, and in our attempts to prevent fires before they happen.

    - As of July 2, 1997, the NCATF is investigating approximately 449 fires that have occurred at houses of worship since January, 1995.

    - Progress toward resolving these cases is being made. Many of the incidents investigated have been solved, mainly by a combination of federal and local arrests and prosecutions. Since 1996, arrests of 214 suspects have been made in connection with over 158 fires at churches and other houses of worship.

  - The Division has placed a special emphasis on hate crimes where serious injury or death results. For example:

    - In Riverside County, California, Division attorneys are presenting to a federal grand jury allegations of excessive use of force by deputy sheriffs during the televised apprehension of two undocumented aliens

    - Department Attorneys and the USAO in St. Petersburg, Florida are reviewing evidence regarding the October 24, 1996, shooting of an African American teenager by a Florida police office, resulting in several nights of civil disturbance. A state grand jury failed to return charges against the officer.

◂ On February 10, 1997, a jury in Brooklyn, N.Y. convicted both defendants on criminal civil rights charges for the stabbing death of Yankel Rosenbaum during a civil disturbance in the Crown Heights Section of Brooklyn.

◂ In Richland, Mississippi, four members of a neo-Nazi skinhead organization, pled guilty to conspiracy and interfering with the housing rights of an interracial couple by throwing a Molotov cocktail at their trailer home.

◂ Three defendants, one of whom is a racist skinhead and a member of the white supremacist group "South Bay Nazi Youth," were convicted of a civil rights conspiracy after they drove through the streets of Lubbock, Texas, hunting African-American men, luring them to the conspirators' car and shooting the men at close range with a short-barreled shotgun. One victim died, one was seriously wounded in the face and another had a finger blown off.

◂ In Livingston, Texas, six defendants pled guilty to civil rights charges for beating randomly selected African-American men with a rifle and a rodeo belt buckle, and punching them repeatedly as they tried to escape. The defendants had been angered at seeing other black men at a night club in the presence of white women. The adult defendants were given prison sentences ranging from 20 to 43 months.

◂ Five skinheads were sentenced to terms of imprisonment ranging from 16 to 49 months for conspiracy after beating an African-American man while he and his wife, who is white, were in a public park in Iowa.

◂ Two defendants were sentenced to 81 months in prison after being convicted of conspiracy and housing interference in connection with a drive-by shooting into the homes of two African-American women in Alma, Georgia.

◂ In Livermore Falls, Maine, two defendants were sentenced to 70 and 88 months following their guilty pleas to civil rights charges after threatening four Latino victims, chasing them by car away from the store, and firing shots at the victims' fleeing car, wounding one victim in the arm.

▸ **Police Misconduct Initiative**: The Division has developed a comprehensive initiative to address police misconduct.

◂ In 1995, at the Attorney General's direction, the Civil Rights Division launched an initiative on police misconduct. The initiative's goal is to establish and implement a comprehensive approach to combat and prevent law enforcement misconduct, through deterrence, effective training, and prevention. To achieve this goal, we have undertaken efforts to improve coordination between our criminal and civil enforcement efforts, and between the different modes of civil enforcement.

◂ In February, 1997, we filed suit against the City of Pittsburgh and its police department, and contemporaneously filed a consent decree. The decree provided for the training and supervision of police officers.

◂ The Division has filed two suits using the provision of the 1994 Crime Control and Prevention Act. One involves the conduct of law enforcement officers in Iberia Parish, Louisiana. The other involves juvenile justice facilities in Kentucky. We successfully entered a consent decree in the Kentucky suit.

◂ The Division is also working to prevent police misconduct by encouraging law enforcement agencies to develop and implement management practices that optimize integrity within the force.

▸ **Voting Rights**: One of the Division's most important missions is to ensure that all Americans enjoy a full and effective right to vote, free from unlawful discrimination.

◂ The Division is fully and vigorously enforcing the National Voter Registration Act NVRA) -- the so-called "Motor Voter" law. The Division's litigation has successfully defended Congress's constitutional authority to enact the NVRA and has brought states that originally resisted the law -- California, Illinois, Michigan, Mississippi, Pennsylvania, South Carolina, and Virginia -- into compliance. The Division is monitoring other states for full compliance, and has recently challenged New York's NVRA procedures.

◂ The Division has reviewed more than 12,500 submissions under Section 5 of the Voting Rights Act and objected approximately 150 times on the grounds that proposed changes have violated the Act. In 1996, the Attorney General reviewed approximately 4,600 submissions involving 18,000 separate voting changes. In that year, the Division filed 18 new cases.

◂ The Division is committed to its efforts to achieve equal voting opportunities for all Americans, including minorities who live in states that have a history of voting discrimination. We have defended racially fair redistricting plans against claims that they are unconstitutional "racial gerrymanders," and we will continue to do so consistent with the Supreme Court's legal standards.

◂ On March 14, 1997, a federal court in Georgia approved remedial redistricting plans for the Georgia house and senate that we negotiated that preserve minority voting rights under the Supreme Court's standards.

◂ On April 24, 1997, a federal court in Louisiana upheld the constitutionality of a majority-black parish council district drawn to remedy a violation of the VRA.

◂ The Division's vigorous enforcement of the minority language provisions of the Voting Rights Act and Section 5 of the Act resulted in new and expanded protections of Native Americans' right to be provided election information and assistance in their own languages in counties in New Mexico and protections of Chinese Americans' right to be provided Chinese language election materials and assistance in Alameda County, California, and New York City. We have established a Minority Language Task Force to enhance our enforcement of these important protections.

◂ Pursuant to our authority under the Voting Rights Act, the Division has monitored numerous elections around the country in order to ensure that minority citizens are able to cast their ballots, have those ballots counted and are able to receive assistance -- including effective assistance in Native American languages, Chinese, and Spanish -- from the person of their choice while casting their ballots.

▸ **Housing and Public Accommodations Discrimination**: The Division has made attacking housing and lending discrimination a high priority.

◂ Over the past five years, the Department has filed 38 pattern and practice testing cases with evidence generated by the fair housing testing program. All of these cases involve rental situations and often involve agents misrepresenting the availability of rental units based on race or national origin.

◂ The Division conducted 207 housing discrimination investigations in 1996 alone, and resolved 92 cases by either consent decrees or trials.

◂ The Division has filed twelve lending discrimination suits, all of which have settled by Consent Decree. These suits have been widely publicized within the banking industry and have had a positive impact on industry practices. Among them, in August 1994, the Justice Department settled a lawsuit against Chevy Chase Bank for allegedly refusing to issue loans in predominantly African American neighborhoods because of the racial identity of those neighborhoods. The results of this case have been quite positive, with the bank making significantly more loans in African American neighborhoods -- by the end of 1994 they recorded a 536 percent increase in the District of Columbia and a 266 percent increase in Prince George's County, Maryland.

◂ The Division resolved a major lending discrimination suit against the Northern Trust bank in Chicago, Ill., resulting in monetary relief of $700,000 for victims of the discrimination.

◂ In September, 1996 the Division reached a settlement with the Long Beach Mortgage Company, which agreed to pay $3 million to African-American, Hispanic, female and elderly borrowers alleged by the Division to be victims of the company's unlawful pricing practices. The Division charged that the price of home mortgage loans at Long Beach were unlawfully influenced by the race, national origin, sex and age of the borrowers. The company also agreed to spend another $1 million educating consumers on how to shop for the most advantageous loans.

◂ The Division is committed to ending discrimination in insurance practices. We have settled with four of the largest insurance companies in the nation, which together write almost 50% of the nation's homeowners insurance policies.

◂ In March, 1997, we settled our lawsuit against Nationwide Insurance Companies. We had compiled evidence that of intentional discrimination in industry practices. The settlement, the most comprehensive in such a case, required the expending of over $13 million in funding in ten cities for community investment.

◂ We recently settled a major case charging that American Family Insurance Company, the largest provider of homeowners' insurance in Wisconsin, violated the Fair Housing Act, where the company had failed to offer homeowners' insurance in the predominantly African American community in Milwaukee to the same extent and on the same terms that it offered such insurance in the majority white areas of the city and its surrounding suburbs. The consent decree provides for injunctive relief, $5 million in monetary damages to individual victims of discrimination, and over $9 million in low-interest loans for the formerly excluded communities.

◂ Large awards were also obtained in fair housing cases. For example, in a case alleging race discrimination at a large apartment complex in south Florida, a consent decree awarding $1.2 million was approved by the court. In a race case resulting from the Program's fair housing testing program in the Detroit area, a settlement totaling $425,000 was approved by the court. In the 1996 fiscal year, over $15 million in monetary relief was obtained.

◂ The Division recently obtained a record $475,000.00 settlement from its Fair Housing Testing Program against a Detroit area apartment complex that refused to rent to African-Americans and families with children.

◂ The Division resolved a major public accommodations suit against the Denny's restaurant chain. In addition to substantial monetary relief for individual victims of discrimination, the settlement included significant provisions to prevent future discrimination. The Department is presently looking for ways to strengthen and broaden its ability to combat discrimination in public accommodations.

▸ **Employment Discrimination**: The Civil Rights Division is responsible for enforcing Title VII of the Civil Rights Act of 1964 against state and local governments.

◂ During the Clinton Administration, the Division has filed nearly sixty new lawsuits charging both individual discrimination and patterns and practices of employment discrimination. Since 1996, the Division has filed 19 new cases and has settled 22 new or pending cases.

◂ The Division continues to bring suits challenging both cognitive and physical strength and agility tests used by public agencies that have a disparate impact on minorities and women but that do not predict success on the job, including successful lawsuits in New Nassau County and Louisiana State Police examinations.

◂ Presently, the Department is in discovery in suits against tests used by the New York City Board of Education for custodial workers and the South Eastern Pennsylvania Transportation Agency.

◂ The Division has also obtained orders providing injunctive and make-whole relief for over 2,000 victims of discrimination. This is a new record.

◂ The Division is also currently administering the distribution of over $10 million in damages to victims of employment discrimination.

◂ The Division has obtained $7.2 million in back pay and benefits to an estimated 1,000 female victims of a gender-restricted hiring and assignment policy of the Arkansas Department of Corrections.

◂ The Division has been deeply involved in the President's review of affirmative action and in the preparation of a proposal to reform affirmative action in government procurement. Several federal statutes have now been challenged. The Department is committed to the vigorous and effective defense of federal affirmative action programs.

▸ **Citizenship and National Origin Discrimination**: In April 1994, the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) merged with the Civil Rights Division. OSC's mission is to eliminate workplace discrimination based on a worker's citizenship status, national origin, or the employment eligibility verification process.

◂ The Division has investigated 1,691 discrimination charges and initiated 125 independent investigations. During this period, the Division filed 44 complaints and negotiated 158 formal settlements of charges and 26 settlements of independent investigations.

◂ In October 1996, the Division negotiated a settlement agreement with Wal-Mart Stores, Inc. of a complaint which alleged that one of its locations had engaged in a pattern or practice of requiring aliens to produce burdensome and unfair documentation.

◂In May, 1997, the Division filed a complaint against Schmitz Corporation d/b/a/ Little Oak German Restaurant for its refusal to hire a U.S. citizen of Filipino descent because he could not produce an INS-issued document. The restaurant believed the complaining party to be an alien because of his "foreign" appearance.

◂ The Division has stepped up its efforts to deter employment discrimination by assessing civil penalties in each meritorious case.

◂ The Division obtained an important ruling in U.S. v.Guardsmark, which held that all work-authorized individuals are protected under the "document abuse" provisions of the Immigration Act of 1990 (IA'90). In settling this case, the Division successfully negotiated the largest civil penalty ever assessed under the antidiscriminatory workplace provisions of the statute.

◂ As part of its public outreach program, the Division obtained an automated employer hotline (1-800-255-8155, TDD 1-800-362-2735) aimed at combating employer confusion under the Immigration and Nationality Act (INA). The hotline, along with its innovative automatic "fax-back" feature, has been extremely successful and provided up-to-date information to over 7564 callers between July, 1994 and December, 1995.

▸ **Educational Opportunities**: The Division continues to be committed to eliminating the vestiges of segregation in elementary and secondary education as well as in state institutions of higher education.

◂ In the past year, the Division intervened in two private suits, Sinajini v. San Juan County Sch. Dist. and Meyers v. San Juan County Sch. Dist., to challenge allegations that American Indian students in Utah were being denied equal educational opportunities because of their race and limited-English speaking proficiency.

◂ The Division continued its challenges to the formerly separate higher education systems in Mississippi and Alabama. In Alabama, we obtained relief which included for the first time the establishment of endowments for the state's historically Black schools.

◂ The Division continues to further the progress of school desegregation in cases involving over 500 school districts located in the formerly de jure states.

◂ In response to recent court and legislative actions threatening the voluntary use of race by school districts with K-12 grades, the Department is working with the Department of

Education to establish policies and guidelines regarding permissible programs to permit the educational value of preparing students to live in a pluralistic society and is prepared to support narrowly tailored desegregative measures to further that goal.

◂In anticipation of future litigation involving challenges to affirmative action programs in colleges and universities spawned by the 5th Circuit's ruling in Hopwood, the Department has established a post-Hopwood working group which has been involved in litigation in Texas, and is presently considering involvement in higher education cases.

▸ **Coordination and Cooperation with other Federal Agencies**: The Division coordinates the enforcement by Federal agencies of various statutes that prohibit illegal discriminations in programs that receive Federal financial assistance.

◂The Division, in conjunction with the Environment and Natural Resources Division, is discussing and consulting with the EPA on its proposed policy for enforcement of environmental justice and the impact of environmental actions on minority and low income communities as they apply to environmental permitting programs. We are coordinating with the EPA as it develops its policy. The Division is presently examining two private environmental impact cases to determine if the participation of the Department is warranted.

◂ As part of the Administration's efforts to reinvigorate the effective, consistent, and timely enforcement of grant- related civil rights statutes, as required by Executive Order 12250, the Division held individual meetings with over 26 Federal grant-giving agencies. The purposes of these meetings were to identify questions and problems, determine training needs, and share worthwhile practices and procedures utilized by various agencies. As an outgrowth of the meetings, the Division has conducted training sessions for 14 Federal agencies and the State of Tennessee, which has a State law equivalent of Title VI. In addition, an agency advisory group was established to identify current issues and build a consensus for proposed solutions. The group, which is made up of 12 Federal agencies, will meet with the Division every month. This year, the Division completed a comprehensive Title VI legal manual and an investigations procedures manual which includes a "how-to" program compliance section with case studies and investigatory pointers.

◂ The Division developed a strategy for publicizing its responsibilities as a result of entering into a memorandum of understanding (MOU) with the Office of Justice Programs (OJP). The MOU gave the Division responsibility for investigating complaints of services discrimination on the basis of race, color, sex, national origin, and religion filed against law enforcement agencies receiving assistance from the Justice Department. Pursuant to this strategy, the Division developed and had approved for distribution a complaint form and a brochure advising individuals of their rights under grant-related civil rights laws. These materials will be distributed at a grass roots level by various civil rights organizations. In addition, the Division developed a "Question and Answer" brochure advising law enforcement agencies of their responsibilities under grant- related civil rights laws. Distribution is expected to begin soon. Finally, the Division met with numerous law enforcement interest groups advising them of its mission and seeking their advice as to how best to publicize it.

◂ The Division took several steps to increase public awareness of its mission and activities. After an over 10 year hiatus, the Division revived the Civil Rights Forum. This quarterly publication advises Federal agencies, interest groups, and interested individuals about policy developments concerning enforcement of grant-related and other civil rights laws, recent court decisions, and other items of interest. In addition, the Division continued to staff an educational center at various conventions and meetings, answering questions and providing educational material about its activities.

◂ As part of its outreach, the Division distributed the 60-second radio public service announcements it had produced, both in English and Spanish, that described the programs and activities covered by Title VI and explained how and where to file complaints of discrimination.

▸ **Redress for Japanese-American Internees**:

◂ The Division issues monetary redress to American citizens and permanent aliens of Japanese ancestry who were forcibly evacuated, relocated, and interned by the United States Government during World War II. As of the end of FY 1995, the Division authorized redress payments totalling over $1.5 billion in nearly 80,000 cases. Current funding levels provide for payment to 82,250 individuals.

▸ **Increased Fine and Debt Collection**:

◂ The Civil Rights Division collected or had funds disbursed to aggrieved parties for judgments awarding restitution, penalties and fines totaling $25,132,408 in fiscal year 1995. This banner year represents a 50% increase over FY 1994 awards of $12.5 million, and a 407% increase over the previous five year average.

▸ **Appellate**:

◂ In fiscal year 1996, the Department filed 124 briefs and other substantive papers involving civil rights matters in the courts of appeals and the Supreme Court. This year, the Division has already filed 72 briefs of substance regarding such matters as hate crimes, the Fair Housing Act, National Voter Registration Act, and environmental justice. In 1996, the Division had an 81% success rate in the Courts of Appeals on merits cases.

◂ The Division filed briefs as amicus in challenging California voters approved Proposition

209, which amended the state constitution to prohibit state affirmative action based on race or gender. In our briefs, we argued that Proposition 209 is unconstitutional because it places unique and extraordinary burdens on the ability on minorities and women to obtain such legislation through the ordinary political process. The Ninth Circuit Court of Appeals rejected this argument, and the case is expected to be appealed to the Supreme Court.

U.S. Department of Justice

Civil Rights Division

TELEFACSIMILE COVER SHEET

DATE: 11/14/97

TO: Tom Friedman
Domestic Policy Council

PHONE: 456-5587

FAX: 456-7431

FROM: Isabelle Katz Pinzler
DEPARTMENT OF JUSTICE - CIVIL RIGHTS DIVISION
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U.S. Department of Justice
Civil Rights Division

Office of the Assistant Attorney General *Washington, DC 20530*

NOV 14 1997

To: Tom Friedman
DPC

Is this the type of thing you were looking for?

[signature]

A PROPOSAL FOR MORE EFFECTIVE TITLE VI ENFORCEMENT

There is little hope that Title VI will ever be effectively enforced, given the current organization of enforcement resources. In many agencies, enforcement of Title VI is not viewed as a matter of law enforcement but rather as a matter of agency politics. For example, an agency may not want to offend an important congressperson by investigating and threatening fund termination in his or her district. Or a civil rights office may be stopped from investigating because program people who grant funds want those funds to go to certain areas. In addition, most agencies currently devote insufficient resources to the enforcement of Title VI and related external civil rights statutes. Many times, the scarce resources available are devoted instead to internal enforcement, i.e., processing EEO complaints. The current fragmented politicized approach to Title VI enforcement is reminiscent of how Executive Order 11246, concerning Federal contract compliance, was enforced prior to the consolidation of enforcement in the Department of Labor during the Carter Administration. Just as it was necessary to consolidate E.O. 11246 enforcement to make the Executive Order effective, it is necessary to consolidate Title VI enforcement.

An effective Title VI enforcement program is generally viewed as having three components: pre-award reviews, post-award reviews, and complaint investigations. The first item, pre-award reviews, is primarily procedural, i.e., making sure grant documents have assurances of compliance so the Department of Justice (DOJ) can contractually enforce them in appropriate circumstances. In addition, there should be some checking to ensure that grants are not awarded to recipients who are blatantly discriminating. As a practical matter, outside of a few agencies, little checking is done. Even when there is checking, little is done except special conditioning grants to make their drawdown contingent on obeying relevant court orders. The pre-award function belongs with the fund-granting agency, if for no other reason than it is the only one in a position to require assurances and do other checking prior to the award of a grant. If this function were to reside anywhere else, undue delays would result.

In contrast, the other two elements of a Title VI enforcement program, post-award reviews and complaint investigations, are not procedural and need not be performed by the fund-granting agency. For these elements, a disinterested factfinder gathers facts either as a result of self-identified issues (a post-award compliance review) or as the result of a complaint, and then applies the law to the facts found and makes a determination of compliance or noncompliance. Voluntary compliance or enforcement is undertaken for identified noncompliance. This is similar to what the Equal Employment Opportunity Commission (EEOC) does when it receives complaints of employment discrimination by State and local governments and other nonfederal entities.[1]

Title VI investigations, voluntary compliance activities, and administrative enforcement similarly should be consolidated into one entity. In other words, one agency should be given responsibility for accepting and investigating all Title VI complaints, as well as conducting selected post-award compliance reviews. The consolidated agency would investigate complaints, issue Letters of Finding, enter into settlement agreements and, in the event compliance could not be achieved, proceed to an administrative fund termination hearing or refer the case to the appropriate DOJ litigating section for enforcement. Possibly, the Department of Education (and perhaps the Departments of Health and Human Services and Housing and Urban Development, as well) could be exempted from the consolidation because those agencies have relatively effective Title VI enforcement programs. Under this scheme, the consolidated agency would be responsible only for Title VI enforcement against recipients of the remaining 25 agencies.

Ideally, a new independent agency would be created to enforce Title VI (and, we would recommend, Title IX as well). However, it is extremely unlikely that Congress would approve creation of a new civil rights enforcement agency at this time. One alternative would be to place the new function within an already existing entity such as DOJ's Coordination and Review Section (COR).[2] COR already conducts Title VI investigations pursuant to Memoranda of Understanding with the Office of Justice Programs and the Asset Forfeiture Section. In addition, the DOJ Title IX Enforcement Plan designates COR as the entity to conduct Title IX investigations for DOJ components, upon their request. Substantial staff (probably at least 50 new people) would need to be assigned to COR, were it to undertake this function.

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[1] If employment discrimination is alleged against the Federal government, agencies other than just the EEOC are involved because a complainant must first file with the Federal agency that allegedly discriminated. EEOC only takes action if resolution within the agency fails.

[2] However, it must be noted that DOJ is as subject to agency politics as any other fund-granting agency. In addition, until recently DOJ did not have a Title VI administrative enforcement program.

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

SEP 15 1997

MEMORANDUM FOR ELENA KAGAN
DEPUTY ASSISTANT TO THE PRESIDENT
DOMESTIC POLICY COUNCIL

FROM: Isabelle Katz Pinzler IKP
Acting Assistant Attorney General
Civil Rights Division

RE: Work of the Civil Rights Division

OVERVIEW

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6. To enforce the law concerning immigration related unfair employment practices.

BUDGET INFORMATION AND SECTION DESCRIPTIONS/WORKLOAD

The Division has a 1997 budget of nearly $62.5 million, and employs approximately 560 persons, including more than 250 attorneys, in 11 sections [1996 representative workload samples are approximate]--

Administrative--runs the Office of Redress Administration (processes claims under the Civil Liberties Act of 1988 for persons of Japanese ancestry interned during World War II) and processes Freedom of Information Act requests, as well as providing administrative support divisionwide

Appellate--handles all appeals of Division cases [~170 matters received, ~125 briefs filed]

Coordination and Review--coordinates enforcement of laws that prohibit discrimination by recipients of federal financial assistance [~1200 complaints received, ~100 agency requests for assistance]

Criminal--enforces criminal civil rights laws that prohibit police misconduct, hate crimes, church burnings, slavery, interference with right to reproductive health services [~10,000 complaints; ~80 new cases filed]

Disability Rights--enforces laws that prohibit discrimination on the basis of disability [~1000 investigations started, ~23 cases filed, ~100,000 requests for technical assistance received]

Education--enforces laws prohibiting discrimination in education [~320 ongoing investigations, ~210 cases pending]

Employment--enforces laws prohibiting discrimination by state and local government employers [~5,000 referrals from EEOC, ~11 new cases filed]

Housing and Civil Enforcement--enforces laws prohibiting discrimination in housing, lending, credit, and public accommodations [~200 investigations conducted, ~60 new cases filed]

Office of Special Counsel for Immigration Related Unfair Employment Practices--enforces laws prohibiting employment discrimination based on national origin and citizenship status [~400 complaints received, ~11 cases filed, ~7,000 calls to the toll free assistance hotline]

Special Litigation--enforces federal laws and constitutional rights of persons confined in certain state and local institutions, civil cases of interference with reproductive rights, civil cases of a pattern or practice of police misconduct [~3000 complaints, ~26 new investigations opened, ~10 new cases filed]

Voting--enforces laws prohibiting discrimination in voting [~19,000 voting changes reviewed for discrimination, ~ 20 new cases filed]

The sections work closely with other associated federal agencies (e.g., Housing Section works with HUD, Employment Section works with the Equal Employment Opportunity Commission, Education Section works with the Department of Education, Coordination and Review works with all agencies that provide Federal financial assistance), to coordinate activities, provide training and receive referrals as set forth by applicable law.

For the past three years, funding for the Division has remained flat, resulting (due to mandatory increases and inflation) in a net decrease of resources for the Division. In order to maintain an optimal vigorous enforcement program for the Division, a budgetary increase of approximately 20% would be required.

Attached is a summary of the highlights of the Division's work under the Clinton Administration.

CIVIL RIGHTS DIVISION ACCOMPLISHMENTS SUMMARY

Since the Administration took office, the Division has made substantial accomplishments in each of the areas of civil rights enforcement. Major accomplishments include:

- **Criminal Prosecution:** The Division remains strongly committed to the vigorous prosecution of criminal violations of the civil rights laws.

  - In Fiscal Year 1996, the Division received 11,721 complaints, reviewed 10,129 complaints and investigated 2, 619. 70 new matters were taken to the Grand Jury, and the Division has had a prosecutorial success rate of 87%. Already in 1997, the Division has received 6,000 complaints alleging criminal interference with civil rights.

  - The Division filed 42 cases involving racial violence charging 66 defendants, the highest number of cases and the second highest number of defendants ever charged in one year.

  - The Criminal Section maintained an overall 89% success rate.

  - The Criminal Section is an integral part of the National Church Arson Task Force (NCATF), which is led by the Assistant Attorney General for Civil Rights, together with the Treasury Assistant Secretary for Enforcement. This Task Force, established to investigate a rash of suspicious fires in houses of worship, also includes representatives from the FBI, the Bureau of Alcohol, Tobacco and Firearms, the United States Attorneys, the Community Relations Service, the Criminal Division, and the U.S. Marshals in the Task Force has deployed over 200 ATF and FBI investigators around the country to investigate these fires. The Task Force is also coordinating closely with state and local law enforcement officials in our prosecution efforts, and in our attempts to prevent fires before they happen.

    - As of July 2, 1997, the NCATF is investigating approximately 449 fires that have occurred at houses of worship since January, 1995.

    - Progress toward resolving these cases is being made. Many of the incidents investigated have been solved, mainly by a combination of federal and local arrests and prosecutions. Since 1996, arrests of 214 suspects have been made in connection with over 158 fires at churches and other houses of worship.

  - The Division has placed a special emphasis on hate crimes where serious injury or death results. For example:

    - In Riverside County, California, Division attorneys are presenting to a federal grand jury allegations of excessive use of force by deputy sheriffs during the televised apprehension of two undocumented aliens

    - Department Attorneys and the USAO in St. Petersburg, Florida are reviewing evidence regarding the October 24, 1996, shooting of an African American teenager by a Florida police office, resulting in several nights of civil disturbance. A state grand jury failed to return charges against the officer.

◂ On February 10, 1997, a jury in Brooklyn, N.Y. convicted both defendants on criminal civil rights charges for the stabbing death of Yankel Rosenbaum during a civil disturbance in the Crown Heights Section of Brooklyn.

◂ In Richland, Mississippi, four members of a neo-Nazi skinhead organization, pled guilty to conspiracy and interfering with the housing rights of an interracial couple by throwing a Molotov cocktail at their trailer home.

◂ Three defendants, one of whom is a racist skinhead and a member of the white supremacist group "South Bay Nazi Youth," were convicted of a civil rights conspiracy after they drove through the streets of Lubbock, Texas, hunting African-American men, luring them to the conspirators' car and shooting the men at close range with a short-barreled shotgun. One victim died, one was seriously wounded in the face and another had a finger blown off.

◂ In Livingston, Texas, six defendants pled guilty to civil rights charges for beating randomly selected African-American men with a rifle and a rodeo belt buckle, and punching them repeatedly as they tried to escape. The defendants had been angered at seeing other black men at a night club in the presence of white women. The adult defendants were given prison sentences ranging from 20 to 43 months.

◂ Five skinheads were sentenced to terms of imprisonment ranging from 16 to 49 months for conspiracy after beating an African-American man while he and his wife, who is white, were in a public park in Iowa.

◂ Two defendants were sentenced to 81 months in prison after being convicted of conspiracy and housing interference in connection with a drive-by shooting into the homes of two African-American women in Alma, Georgia.

◂ In Livermore Falls, Maine, two defendants were sentenced to 70 and 88 months following their guilty pleas to civil rights charges after threatening four Latino victims, chasing them by car away from the store, and firing shots at the victims' fleeing car, wounding one victim in the arm.

▸ **Police Misconduct Initiative**: The Division has developed a comprehensive initiative to address police misconduct.

◂ In 1995, at the Attorney General's direction, the Civil Rights Division launched an initiative on police misconduct. The initiative's goal is to establish and implement a comprehensive approach to combat and prevent law enforcement misconduct, through deterrence, effective training, and prevention. To achieve this goal, we have undertaken efforts to improve coordination between our criminal and civil enforcement efforts, and between the different modes of civil enforcement.

◂ In February, 1997, we filed suit against the City of Pittsburgh and its police department, and contemporaneously filed a consent decree. The decree provided for the training and supervision of police officers.

◂ The Division has filed two suits using the provision of the 1994 Crime Control and Prevention Act. One involves the conduct of law enforcement officers in Iberia Parish, Louisiana. The other involves juvenile justice facilities in Kentucky. We successfully entered a consent decree in the Kentucky suit.

◂ The Division is also working to prevent police misconduct by encouraging law enforcement agencies to develop and implement management practices that optimize integrity within the force.

▸ **Voting Rights**: One of the Division's most important missions is to ensure that all Americans enjoy a full and effective right to vote, free from unlawful discrimination.

◂ The Division is fully and vigorously enforcing the National Voter Registration Act NVRA) -- the so-called "Motor Voter" law. The Division's litigation has successfully defended Congress's constitutional authority to enact the NVRA and has brought states that originally resisted the law -- California, Illinois, Michigan, Mississippi, Pennsylvania, South Carolina, and Virginia -- into compliance. The Division is monitoring other states for full compliance, and has recently challenged New York's NVRA procedures.

◂ The Division has reviewed more than 12,500 submissions under Section 5 of the Voting Rights Act and objected approximately 150 times on the grounds that proposed changes have violated the Act. In 1996, the Attorney General reviewed approximately 4,600 submissions involving 18,000 separate voting changes. In that year, the Division filed 18 new cases.

◂ The Division is committed to its efforts to achieve equal voting opportunities for all Americans, including minorities who live in states that have a history of voting discrimination. We have defended racially fair redistricting plans against claims that they are unconstitutional "racial gerrymanders," and we will continue to do so consistent with the Supreme Court's legal standards.

◂ On March 14, 1997, a federal court in Georgia approved remedial redistricting plans for the Georgia house and senate that we negotiated that preserve minority voting rights under the Supreme Court's standards.

◂ On April 24, 1997, a federal court in Louisiana upheld the constitutionality of a majority-black parish council district drawn to remedy a violation of the VRA.

◂ The Division's vigorous enforcement of the minority language provisions of the Voting Rights Act and Section 5 of the Act resulted in new and expanded protections of Native Americans' right to be provided election information and assistance in their own languages in counties in New Mexico and protections of Chinese Americans' right to be provided Chinese language election materials and assistance in Alameda County, California, and New York City. We have established a Minority Language Task Force to enhance our enforcement of these important protections.

◂ Pursuant to our authority under the Voting Rights Act, the Division has monitored numerous elections around the country in order to ensure that minority citizens are able to cast their ballots, have those ballots counted and are able to receive assistance -- including effective assistance in Native American languages, Chinese, and Spanish -- from the person of their choice while casting their ballots.

▸ **Housing and Public Accommodations Discrimination**: The Division has made attacking housing and lending discrimination a high priority.

◂ Over the past five years, the Department has filed 38 pattern and practice testing cases with evidence generated by the fair housing testing program. All of these cases involve rental situations and often involve agents misrepresenting the availability of rental units based on race or national origin.

◂ The Division conducted 207 housing discrimination investigations in 1996 alone, and resolved 92 cases by either consent decrees or trials.

◂ The Division has filed twelve lending discrimination suits, all of which have settled by Consent Decree. These suits have been widely publicized within the banking industry and have had a positive impact on industry practices. Among them, in August 1994, the Justice Department settled a lawsuit against Chevy Chase Bank for allegedly refusing to issue loans in predominantly African American neighborhoods because of the racial identity of those neighborhoods. The results of this case have been quite positive, with the bank making significantly more loans in African American neighborhoods -- by the end of 1994 they recorded a 536 percent increase in the District of Columbia and a 266 percent increase in Prince George's County, Maryland.

◂ The Division resolved a major lending discrimination suit against the Northern Trust bank in Chicago, Ill., resulting in monetary relief of $700,000 for victims of the discrimination.

◂ In September, 1996 the Division reached a settlement with the Long Beach Mortgage Company, which agreed to pay $3 million to African-American, Hispanic, female and elderly borrowers alleged by the Division to be victims of the company's unlawful pricing practices. The Division charged that the price of home mortgage loans at Long Beach were unlawfully influenced by the race, national origin, sex and age of the borrowers. The company also agreed to spend another $1 million educating consumers on how to shop for the most advantageous loans.

◂ The Division is committed to ending discrimination in insurance practices. We have settled with four of the largest insurance companies in the nation, which together write almost 50% of the nation's homeowners insurance policies.

◂ In March, 1997, we settled our lawsuit against Nationwide Insurance Companies. We had compiled evidence that of intentional discrimination in industry practices. The settlement, the most comprehensive in such a case, required the expending of over $13 million in funding in ten cities for community investment.

◂ We recently settled a major case charging that American Family Insurance Company, the largest provider of homeowners' insurance in Wisconsin, violated the Fair Housing Act, where the company had failed to offer homeowners' insurance in the predominantly African American community in Milwaukee to the same extent and on the same terms that it offered such insurance in the majority white areas of the city and its surrounding suburbs. The consent decree provides for injunctive relief, $5 million in monetary damages to individual victims of discrimination, and over $9 million in low-interest loans for the formerly excluded communities.

◂ Large awards were also obtained in fair housing cases. For example, in a case alleging race discrimination at a large apartment complex in south Florida, a consent decree awarding $1.2 million was approved by the court. In a race case resulting from the Program's fair housing testing program in the Detroit area, a settlement totaling $425,000 was approved by the court. In the 1996 fiscal year, over $15 million in monetary relief was obtained.

◂ The Division recently obtained a record $475,000.00 settlement from its Fair Housing Testing Program against a Detroit area apartment complex that refused to rent to African-Americans and families with children.

◂ The Division resolved a major public accommodations suit against the Denny's restaurant chain. In addition to substantial monetary relief for individual victims of discrimination, the settlement included significant provisions to prevent future discrimination. The Department is presently looking for ways to strengthen and broaden its ability to combat discrimination in public accommodations.

▸ **Employment Discrimination**: The Civil Rights Division is responsible for enforcing Title VII of the Civil Rights Act of 1964 against state and local governments.

◂ During the Clinton Administration, the Division has filed nearly sixty new lawsuits charging both individual discrimination and patterns and practices of employment discrimination. Since 1996, the Division has filed 19 new cases and has settled 22 new or pending cases.

◂ The Division continues to bring suits challenging both cognitive and physical strength and agility tests used by public agencies that have a disparate impact on minorities and women but that do not predict success on the job, including successful lawsuits in New Nassau County and Louisiana State Police examinations.

◂ Presently, the Department is in discovery in suits against tests used by the New York City Board of Education for custodial workers and the South Eastern Pennsylvania Transportation Agency.

◂ The Division has also obtained orders providing injunctive and make-whole relief for over 2,000 victims of discrimination. This is a new record.

◂ The Division is also currently administering the distribution of over $10 million in damages to victims of employment discrimination.

◂ The Division has obtained $7.2 million in back pay and benefits to an estimated 1,000 female victims of a gender-restricted hiring and assignment policy of the Arkansas Department of Corrections.

◂ The Division has been deeply involved in the President's review of affirmative action and in the preparation of a proposal to reform affirmative action in government procurement. Several federal statutes have now been challenged. The Department is committed to the vigorous and effective defense of federal affirmative action programs.

▸ **Citizenship and National Origin Discrimination**: In April 1994, the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) merged with the Civil Rights Division. OSC's mission is to eliminate workplace discrimination based on a worker's citizenship status, national origin, or the employment eligibility verification process.

◂ The Division has investigated 1,691 discrimination charges and initiated 125 independent investigations. During this period, the Division filed 44 complaints and negotiated 158 formal settlements of charges and 26 settlements of independent investigations.

◂ In October 1996, the Division negotiated a settlement agreement with Wal-Mart Stores, Inc. of a complaint which alleged that one of its locations had engaged in a pattern or practice of requiring aliens to produce burdensome and unfair documentation.

◂In May, 1997, the Division filed a complaint against Schmitz Corporation d/b/a/ Little Oak German Restaurant for its refusal to hire a U.S. citizen of Filipino descent because he could not produce an INS-issued document. The restaurant believed the complaining party to be an alien because of his "foreign" appearance.

◂ The Division has stepped up its efforts to deter employment discrimination by assessing civil penalties in each meritorious case.

◂ The Division obtained an important ruling in U.S. v.Guardsmark, which held that all work-authorized individuals are protected under the "document abuse" provisions of the Immigration Act of 1990 (IA'90). In settling this case, the Division successfully negotiated the largest civil penalty ever assessed under the antidiscriminatory workplace provisions of the statute.

◂ As part of its public outreach program, the Division obtained an automated employer hotline (1-800-255-8155, TDD 1-800-362-2735) aimed at combating employer confusion under the Immigration and Nationality Act (INA). The hotline, along with its innovative automatic "fax-back" feature, has been extremely successful and provided up-to-date information to over 7564 callers between July, 1994 and December, 1995.

▸ **Educational Opportunities**: The Division continues to be committed to eliminating the vestiges of segregation in elementary and secondary education as well as in state institutions of higher education.

◂ In the past year, the Division intervened in two private suits, Sinajini v. San Juan County Sch. Dist. and Meyers v. San Juan County Sch. Dist., to challenge allegations that American Indian students in Utah were being denied equal educational opportunities because of their race and limited-English speaking proficiency.

◂ The Division continued its challenges to the formerly separate higher education systems in Mississippi and Alabama. In Alabama, we obtained relief which included for the first time the establishment of endowments for the state's historically Black schools.

◂ The Division continues to further the progress of school desegregation in cases involving over 500 school districts located in the formerly de jure states.

◂ In response to recent court and legislative actions threatening the voluntary use of race by school districts with K-12 grades, the Department is working with the Department of

Education to establish policies and guidelines regarding permissible programs to permit the educational value of preparing students to live in a pluralistic society and is prepared to support narrowly tailored desegregative measures to further that goal.

◂In anticipation of future litigation involving challenges to affirmative action programs in colleges and universities spawned by the 5th Circuit's ruling in Hopwood, the Department has established a post-Hopwood working group which has been involved in litigation in Texas, and is presently considering involvement in higher education cases.

▸ **Coordination and Cooperation with other Federal Agencies**: The Division coordinates the enforcement by Federal agencies of various statutes that prohibit illegal discriminations in programs that receive Federal financial assistance.

◂The Division, in conjunction with the Environment and Natural Resources Division, is discussing and consulting with the EPA on its proposed policy for enforcement of environmental justice and the impact of environmental actions on minority and low income communities as they apply to environmental permitting programs. We are coordinating with the EPA as it develops its policy. The Division is presently examining two private environmental impact cases to determine if the participation of the Department is warranted.

◂ As part of the Administration's efforts to reinvigorate the effective, consistent, and timely enforcement of grant- related civil rights statutes, as required by Executive Order 12250, the Division held individual meetings with over 26 Federal grant-giving agencies. The purposes of these meetings were to identify questions and problems, determine training needs, and share worthwhile practices and procedures utilized by various agencies. As an outgrowth of the meetings, the Division has conducted training sessions for 14 Federal agencies and the State of Tennessee, which has a State law equivalent of Title VI. In addition, an agency advisory group was established to identify current issues and build a consensus for proposed solutions. The group, which is made up of 12 Federal agencies, will meet with the Division every month. This year, the Division completed a comprehensive Title VI legal manual and an investigations procedures manual which includes a "how-to" program compliance section with case studies and investigatory pointers.

◂ The Division developed a strategy for publicizing its responsibilities as a result of entering into a memorandum of understanding (MOU) with the Office of Justice Programs (OJP). The MOU gave the Division responsibility for investigating complaints of services discrimination on the basis of race, color, sex, national origin, and religion filed against law enforcement agencies receiving assistance from the Justice Department. Pursuant to this strategy, the Division developed and had approved for distribution a complaint form and a brochure advising individuals of their rights under grant-related civil rights laws. These materials will be distributed at a grass roots level by various civil rights organizations. In addition, the Division developed a "Question and Answer" brochure advising law enforcement agencies of their responsibilities under grant- related civil rights laws. Distribution is expected to begin soon. Finally, the Division met with numerous law enforcement interest groups advising them of its mission and seeking their advice as to how best to publicize it.

◂ The Division took several steps to increase public awareness of its mission and activities. After an over 10 year hiatus, the Division revived the Civil Rights Forum. This quarterly publication advises Federal agencies, interest groups, and interested individuals about policy developments concerning enforcement of grant-related and other civil rights laws, recent court decisions, and other items of interest. In addition, the Division continued to staff an educational center at various conventions and meetings, answering questions and providing educational material about its activities.

◂ As part of its outreach, the Division distributed the 60-second radio public service announcements it had produced, both in English and Spanish, that described the programs and activities covered by Title VI and explained how and where to file complaints of discrimination.

▸ **Redress for Japanese-American Internees**:

◂ The Division issues monetary redress to American citizens and permanent aliens of Japanese ancestry who were forcibly evacuated, relocated, and interned by the United States Government during World War II. As of the end of FY 1995, the Division authorized redress payments totalling over $1.5 billion in nearly 80,000 cases. Current funding levels provide for payment to 82,250 individuals.

▸ **Increased Fine and Debt Collection**:

◂ The Civil Rights Division collected or had funds disbursed to aggrieved parties for judgments awarding restitution, penalties and fines totaling $25,132,408 in fiscal year 1995. This banner year represents a 50% increase over FY 1994 awards of $12.5 million, and a 407% increase over the previous five year average.

▸ **Appellate**:

◂ In fiscal year 1996, the Department filed 124 briefs and other substantive papers involving civil rights matters in the courts of appeals and the Supreme Court. This year, the Division has already filed 72 briefs of substance regarding such matters as hate crimes, the Fair Housing Act, National Voter Registration Act, and environmental justice. In 1996, the Division had an 81% success rate in the Courts of Appeals on merits cases.

◂ The Division filed briefs as amicus in challenging California voters approved Proposition

209, which amended the state constitution to prohibit state affirmative action based on race or gender. In our briefs, we argued that Proposition 209 is unconstitutional because it places unique and extraordinary burdens on the ability on minorities and women to obtain such legislation through the ordinary political process. The Ninth Circuit Court of Appeals rejected this argument, and the case is expected to be appealed to the Supreme Court.

A PROPOSAL FOR MORE EFFECTIVE TITLE VI ENFORCEMENT

There is little hope that Title VI will ever be effectively enforced, given the current organization of enforcement resources. In many agencies, enforcement of Title VI is not viewed as a matter of law enforcement but rather as a matter of agency politics. For example, an agency may not want to offend an important congressperson by investigating and threatening fund termination in his or her district. Or a civil rights office may be stopped from investigating because program people who grant funds want those funds to go to certain areas. In addition, most agencies currently devote insufficient resources to the enforcement of Title VI and related external civil rights statutes. Many times, the scarce resources available are devoted instead to internal enforcement, i.e., processing EEO complaints. The current fragmented politicized approach to Title VI enforcement is reminiscent of how Executive Order 11246, concerning Federal contract compliance, was enforced prior to the consolidation of enforcement in the Department of Labor during the Carter Administration. Just as it was necessary to consolidate E.O. 11246 enforcement to make the Executive Order effective, it is necessary to consolidate Title VI enforcement.

An effective Title VI enforcement program is generally viewed as having three components: pre-award reviews, post-award reviews, and complaint investigations. The first item, pre-award reviews, is primarily procedural, i.e., making sure grant documents have assurances of compliance so the Department of Justice (DOJ) can contractually enforce them in appropriate circumstances. In addition, there should be some checking to ensure that grants are not awarded to recipients who are blatantly discriminating. As a practical matter, outside of a few agencies, little checking is done. Even when there is checking, little is done except special conditioning grants to make their drawdown contingent on obeying relevant court orders. The pre-award function belongs with the fund-granting agency, if for no other reason than it is the only one in a position to require assurances and do other checking prior to the award of a grant. If this function were to reside anywhere else, undue delays would result.

In contrast, the other two elements of a Title VI enforcement program, post-award reviews and complaint investigations, are not procedural and need not be performed by the fund-granting agency. For these elements, a disinterested factfinder gathers facts either as a result of self-identified issues (a post-award compliance review) or as the result of a complaint, and then applies the law to the facts found and makes a determination of compliance or noncompliance. Voluntary compliance or enforcement is undertaken for identified noncompliance. This is similar to what the Equal Employment Opportunity Commission (EEOC) does when it receives complaints of employment discrimination by State and local governments and other nonfederal entities.[1]

Title VI investigations, voluntary compliance activities, and administrative enforcement similarly should be consolidated into one entity. In other words, one agency should be given responsibility for accepting and investigating all Title VI complaints, as well as conducting selected post-award compliance reviews. The consolidated agency would investigate complaints, issue Letters of Finding, enter into settlement agreements and, in the event compliance could not be achieved, proceed to an administrative fund termination hearing or refer the case to the appropriate DOJ litigating section for enforcement. Possibly, the Department of Education (and perhaps the Departments of Health and Human Services and Housing and Urban Development, as well) could be exempted from the consolidation because those agencies have relatively effective Title VI enforcement programs. Under this scheme, the consolidated agency would be responsible only for Title VI enforcement against recipients of the remaining 25 agencies.

Ideally, a new independent agency would be created to enforce Title VI (and, we would recommend, Title IX as well). However, it is extremely unlikely that Congress would approve creation of a new civil rights enforcement agency at this time. One alternative would be to place the new function within an already existing entity such as DOJ's Coordination and Review Section (COR).[2] COR already conducts Title VI investigations pursuant to Memoranda of Understanding with the Office of Justice Programs and the Asset Forfeiture Section. In addition, the DOJ Title IX Enforcement Plan designates COR as the entity to conduct Title IX investigations for DOJ components, upon their request. Substantial staff (probably at least 50 new people) would need to be assigned to COR, were it to undertake this function.

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[1] If employment discrimination is alleged against the Federal government, agencies other than just the EEOC are involved because a complainant must first file with the Federal agency that allegedly discriminated. EEOC only takes action if resolution within the agency fails.

[2] However, it must be noted that DOJ is as subject to agency politics as any other fund-granting agency. In addition, until recently DOJ did not have a Title VI administrative enforcement program.

U.S. Department of Justice

Civil Rights Division

TELEFACSIMILE COVER SHEET

DATE: 11/20/97

TO: Tom Friedman

PHONE: 456-5587

FAX: 456-7431

FROM: Isabelle Pinzler

DEPARTMENT OF JUSTICE - CIVIL RIGHTS DIVISION
FAX NUMBER: 202-307-2572
PHONE: 202-514-6715

MESSAGE:

NUMBER OF PAGES TRANSMITTED (EXCLUDING THIS SHEET)

3
(max. 30 pages)

If you do not receive the total number of pages listed, please call the sender listed above.
Thank you.

11/20/97

Consolidated Title VI Enforcement Effort in DOJ/CRT
Projected Costs

It is projected that 50 additional employees will be required solely for the coordinated Title VI enforcement effort. An increase of this level equates to a 9% net increase over the Division's current authorized position level. A rough estimated cost is approximately $5 million (see below). This does not include substantial additional costs that would be involved if a separate agency was required to be established (e.g.--build-out costs to house 50 employees etc.), or expenses associated with administrative support personnel.

Assumptions Used:

- The breakdown of cost projections was based on a 1 to 7 clerical support ratio to other staff, and 1 to 5 attorney to investigator ratio. This equates to a breakdown of 34 investigators, 9 attorneys and 7 secretaries.
- Projected costs are for full year expenses, and based on modular cost estimates for each of the three respective position types and varying grade levels within each category.
- Payroll costs are based on salaries that include the 2.45% FY 98 pay raise for the full year, and 27% benefits costs.

Cost Estimate:

Position	Grade Level	#	Amount
Attorneys	GS-12	2	$ 227,852
	GS-13	5	626,165
	GS-14	2	276,294
		9	$1,130,311
Investigators	GS-9	11	$ 965,052
	GS-11	12	1,156,620
	GS-12	9	956,574
	GS-13	2	235,186
		34	$3,313,432
Secretary	GS-5	2	133,170
	GS-6	4	278,812
	GS-7	1	73,076
		7	$ 485,058
TOTAL		50	$4,928,801

Directorate of Civil Rights
U. S. Department of Labor
200 Constitution Avenue, NW
Room N-4123
Washington, DC 20210
TEL: (202) 219-8927
FAX: (202) 219-5658

FAX TRANSMITTAL SHEET

DATE: 11/21/97

PAGES:

TO: Mary Smith
Domestic Policy Council

FAX NO: 456-7431

FROM: Lynne Pratico

DCR/USDOL

COMMENTS:

November 21, 1997

MEMORANDUM FOR MARY SMITH
Domestic Policy Council

FROM: Lynne Marie Pratico for ANNABELLE T. LOCKHART
Director
Directorate of Civil Rights

SUBJECT: Request for Additional Information

As requested, attached is the additional narrative you requested. If you need anything further, please call Ms. Lynne Pratico, as I will not be back from leave until December 1. She can be reached on 202-219-8927. Thank you for the opportunity to provide input.

Attachment

Department of Labor's Proposal for Enhanced Civil Rights Enforcement of Financially Assisted Programs

Background

The Directorate of Civil Rights (DCR) is responsible for enforcing the varied Federal statutes and regulations, that (1) prohibit discrimination in all DOL programs, (2) prohibit discrimination on the basis of disability by certain public entities and in DOL conducted activities; (3) prohibit discrimination within DOL workplaces.

DOL Jurisdiction

The DOL provides approximately 35 billion dollars in financial assistance to over 900 grant recipients annually. These programs include: The Job Training Partnership Act (JTPA) programs to prepare youth and adults facing serious barriers to employment for participation in the labor force by providing job training and other services that will results in increased employment and earnings, increased education and occupational skills and decreased welfare dependency. They include the Job Corps, State Employment Security Older Worker Program, Migrant and Seasonal Farmworker Program, Disabled Person Program, and Indian and Native American Program and the Unemployment Insurance Program. In addition, $3 billion of new funding is being provided to DOL for the Welfare to Work program.

This proposal envisions support for the following Civil Rights Performance Goals

Coordination - 1 FTE and 90,000

There is a need for a more comprehensive approach to civil rights enforcement. To achieve the president's desire to enhance civil rights enforcement will require OMB to review the civil rights enforcement function on a cross-cutting basis to achieve performance goals. DOJ could work with OMB and the respective agencies to promote a comprehensive civil rights agenda. This would provide the framework and overall reporting relationships to integrate civil rights enforcement within the budget process. To support this coordination effort, DCR would need a staff year to support this effort.

Moving toward a Paperless Office - $158, 000

There is a critical need for the establishment of a state of the art data base which can provide management information reports which can respond to GPRA and DOJ requirements. A review needs to be made of the current information technology infrastructure which supports the civil rights enforcement of federal financial assistance programs to determine what is needed to achieve the desired outcomes of improved case processing and case management. A working group could be established to conduct the survey and make recommendations in this area.. Some economies of scale perhaps could be achieved if agencies explored the possibility of selecting a data base system with would meet the needs of agencies with some modifications adaptable to their specific programs.

We have preliminarily explored the possibilities of upgrading our existing system and estimate that at least 75,000 will be needed to obtain license and data base conversions to a new system. Additionally, 83,000 will be required for computers for the additional staff.

Improved Targeting - $ 100,000

An enhanced management information system could produce reports which would the identify problem areas that should be targeted for review. This system could also identify trends in complaints such that compliance activities could be directed towards those entities most in need of assistance. This would maximize the utilization of staff resources to address the targeted problem areas in a given year and enhance development of workplans and results under GPRA. Another $100,000 is needed to design management information reports to meet this performance goal.

Alternative Dispute Resolution - 11 FTE and $990,000

Alternative dispute resolution has proven to be an effective tool to resolve complaints in both the private and public sectors in recent years. This tool needs to be incorporated into the federal financial assistance complaint process to produce cost avoidance savings. It is proposed that states be encouraged to establish an ADR process in their existing complaint system. Implementation of ADR within these systems will require extensive marketing and outreach by civil rights staff, since many states do not currently have ADR in place. It is further recommended that where ADR programs have not been established, that ADR be offered as an option to those complainants who file complaints with the civil rights office.

7 FTE will be required to market ADR and to assist states in developing and designing ADR programs. In addition, 4 FTE will be needed to provide ADR for those complainants who request ADR in the processing of their complaints with DCR.

Reducing Backlogs

The implementation of ADR in the complaint process at the state level and at the federal level will reduce complaint backlogs and produce cost avoidance savings. Attached is an example of DOL performance goals designed to achieve this outcome. These performance goals reflect both the internal and external civil rights program.

Compliance Activities - 25 FTE and $2,250,000

Compliance Monitoring - 18 FTE and $1,620,000

18 FTE will be required to provide total compliance monitoring coverage on a three year cycle. Withing existing resources only 4 compliance reviews can not be conducted, due to the regulatory nee to process complaints. This will enable staff to conduct 18 reviews per year.

Data Collection - 4 FTE and $360,000

Currently, applicant data is not captured to identify those seeking entry into programs such as JTPA. While recognizing there is a burden associated with requiring states to record such information, there is no other way of knowing who is being turned away and for what reasons. To ensure that discriminatory factors are not being used in the intake process, a pilot program could be instituted. This would require revisions to ETA's management information system, agreement by the pilot state to participate as well as OMB concurrence to collect this data. A compliance monitoring team would be required to test this alternative approach, including the use of testers.

Compliance Assistance - 3 FTE and $270,000

3 FTE will be required to conduct 20 technical assistance visits per year. This represents staff being on the road two week out of every month.

Summary

This request is for a total 37 FTE and $3,588,000. When added to the existing budget for DCR, this represents less than one-half of one percent of the total DOL financial assistance dollars.

the favorite stats dropped on readers in recent years—it was gleaned from a Cato Institute paper by economist Clark Wiseman—the entire garbage output of the U.S. during the next 1,000 years could be put in a 30-square-mile landfill 1,000 feet deep. The country has plenty of space, and modern landfills bear no resemblance to the loathsome municipal dumps you are possibly confusing them with.

How do you tell when recycling makes economic sense? No problem: It makes sense when it happens naturally, without any federal subsidies or interaction with Gaia the earth goddess. The automobile industry has been recycling without Gaia for over 40 years, as evidenced by those compacted cars one sometimes sees by the highway. Aluminum cans are also an easy case because recyclers can make a profit reselling them to beer and soft-drink producers and are therefore delighted to pay your township for the privilege of carting them away. But other products are more problematical, and many recyclers are now finding they are in a lousier business than Al Gore led them to expect.

Their problem—centered on newsprint and some plastics—is that the products they recycle have become embarrassingly uncompetitive with ordinary raw materials. The news from Pittsburgh in mid-June was that no recycler was willing to bid on a city contract under which it would have picked up the curbside assortments for free. A report from Boston was more hilarious: Recyclers already committed to pick up were losing so much money on operations that they dumped the stuff in a local landfill (and confessed). In New York the problem for recyclers a year ago was that the highly profitable newsprint left by the curb was being systematically stolen by "paper rustlers," as they were colorfully labeled in the tabloids. Prices having collapsed, the problem today is that recycled newsprint is not in demand by anybody, not even the staunchly cyclist *Times*.

People in the business have to be rethinking whether recycling isn't already overdone. But the fanatics selling recycling as a secular religion—or maybe not so secular—appear to be pounding away harder than ever. A Nexis search the other day turned up 164 articles in the database mentioning the ominous term "precycling." The word refers to something deemed even more wonderful than buying recycled products: It's *getting by without products*. Planet-sparing suggestion broached by a Montana journalist: Instead of buying your olive oil in disposable bottles, get your own reusable bottle and buy the stuff in bulk. Will the salad fans of America go for this deal? Will EDF make a video out of it? Will it feature Albert Belle? One wonders.

ONLY IN AMERICA (Cont'd)

LOS ANGELES—Her ultimatum having come and gone, the attorney for a vegetarian bus driver who refused to pass out coupons for free hamburgers said ... she intends to sue the Orange County Transportation Authority.

Transit officials fired Bruce Anderson, 38, this past week for refusing to distribute the coupons, which are part of an ad campaign waged jointly by the Carl's Jr. fast-food chain and OCTA ...

Anderson quickly hired civil rights attorney Gloria Allred, who ... accused OCTA of violating Title VII of the U.S. Civil Rights Act—which protects religious beliefs—as well as similar guidelines of the Equal Employment Opportunity Commission ...

The coupons—which Anderson called "heart-attack coupons"—are being given out every Tuesday [in] June ...

— From a news report in the Los Angeles *Times*.

THE EEOC IN RETREAT

A funny thing has happened to the Equal Employment Opportunity Commission in recent months. The EEOC, which has spent years expanding the definition of "discrimination," is now contracting it.

In its expansionary mode, the agency went far beyond what Congress thought it was enacting in the Civil Rights Act of 1964. EEOC decided that the law forbade not merely discriminatory intent but discriminatory results—the "disparate impact" standard. It played a major role in expanding the act's ban on sex discrimination so as to encompass

sexual harassment and, further, to specify that harassment has occurred when workers, male or female, encounter a sex-related "hostile environment." (Around 10% of harassment complaints are now brought by men.) Finally, the agency gained responsibility for coping with the multifarious mysterious contentions about bias built into the Americans With Disabilities Act.

It had to happen, so it happened. The EEOC got overwhelmed. Just during the Nineties, its case backlog has increased by about 130%, to around 100,000 today. Drowning in paperwork, the agency had to regroup.

EEOC Chairman Gilbert Casellas was naturally too cagey to say that he now proposed to operate with a narrower definition of discrimination. What he said was much more politically correct and socially acceptable: that he would make the agency more efficient. It would now mass-produce results. It would emphasize broad-gauged "pattern and practice" cases, involving large numbers of employees. It would summarily dismiss cases that looked tough to win. Its investigators would handle more cases; they are now averaging 123 cases a year, up from 51 in 1990. Under the new regime, the caseload is barely growing, and Casellas is in fact getting good reviews for EEOC's new efficiency.

But ask yourself this question: Is it logically possible to throw out far more complaints and act only on cases that look easy to win—and not implicitly narrow the definition of discrimination? The answer is obvious. Whether the process will bring the law of discrimination all the way back to the original 1964 act is, to be sure, another question.

tra's harassment have left the company, some remain scarred by their experiences. Leaving Astra abruptly has often made finding another job hard. Prospective employers always ask why they left. "It's difficult, because you want to tell them what happened at Astra but you don't know if they'll understand," says Kurz. At one interview, Kurz says, she told the female interviewer some of her story. "You could tell by the look on her face," says Kurz. "She was thinking: 'Scandal, stay away from us.'" Many others say they lie about the reasons they left in order to get a job.

Some claim they still suffer from psychological trauma. Former rep Yvonne Stokes says the combination of extreme stress and sexual harassment got so bad that she started crying one day in front of a doctor she had called on as a sales rep. He referred her to a psychiatrist. Still taking antidepressant drugs, she says: "I just want to be me again. I look back and say: 'How could I have let this company do this to me?' "

Webb claims Astra turned her from a happy-go-lucky and deeply religious young woman into an emotional basket case. She says the toll from 2½ years of harassment was so bad that her hair started to fall out, she was often sick to her stomach, and she started to scratch her back and chest until the skin was raw. Her doctor ordered her to go on disability leave last May, and she is still under psychiatric care.

Nearly a year after going on leave, Webb's perceptions of normal, everyday events are still warped by her Astra experience. A regular in her church choir, Webb says: "There's something wrong when I think the people in my church are hugging me wrong." And at a recent job interview, she says the male interviewer asked her a perfectly innocent question: Was she willing to travel? But Webb says her instinctive reaction was: "He wants to get me into a hotel room." The happiest day of her life, Webb says, came when Astra finally fired her a few months ago. Now preparing a lawsuit, she vows: "If I have to lose every penny I have, I'll do it to show them that what they do isn't right."

With Jane A. Sasseen in New York

GETTING JUSTICE IS NO EASY TASK

For workers who have endured sexual harassment, the Equal Employment Opportunity Commission is supposed to be their champion. That's why the suit against Mitsubishi Motor Manufacturing of America Inc.—potentially the largest EEOC case ever—has brought praise from civil rights groups and uneasiness from business groups.

But for such victims, a search for justice is no simple task. Overcoming fear and embarrassment to confront a lecher is hard. But even those who clear that hurdle don't easily find vindication when the two best avenues for help—law-enforcement agencies and the courts—are fraught with delay. The underfunded EEOC is struggling to stay on top of a heavy caseload. State agencies take up some of the slack but face budget constraints, too. And private lawsuits are costly.

HOLDUPS. Result: When fresh evidence can make or break a case, "justice delayed is justice denied," says Gary E. Phelan, a plaintiffs' attorney in New Haven. To get recourse, workers facing alleged harassment can first turn to their employers or unions for help. If those channels don't pan out, they can sue their employers and co-workers in court or turn to the government to pursue a case on their behalf. Either way, they must first file a complaint at the EEOC or a state antibias agency within 180 days of the alleged discriminatory act.

Even those who want to pursue their own lawsuits must first get a so-called right-to-sue letter from a government agency—a step meant to keep complaints from clogging the courts. The EEOC is required to issue such approvals within 180 days of the charge. In reality, the process averages eight months, even though complainants can ask for a go-ahead earlier. After approval, plaintiffs have 90 days to file in court.

Workers who press their complaints through the EEOC face a backlog of 97,000 cases. In the past five years, the workload has exploded. Sexual-harassment charges alone rose by 150% from 1990, to 15,549 last year—driven in part by publicity over allegations by law professor Anita Hill against Supreme Court appointee Clarence Thomas during his 1991 confirmation hearings. Yet the agency's budget rose by only 26%, to $232.6 million, during that period. New EEOC Chairman Gilbert Casellas is pushing an overhaul of agency procedures and is giving charges of systemic bias priority.

HARD TO WIN. There's always the option of hiring a lawyer to pursue a grievance in court. But they're expensive. Fees vary, but some charge $2,500 to $7,500 to go on retainer, according to Phelan. For many women with harassment complaints, a government-run case is often the only recourse.

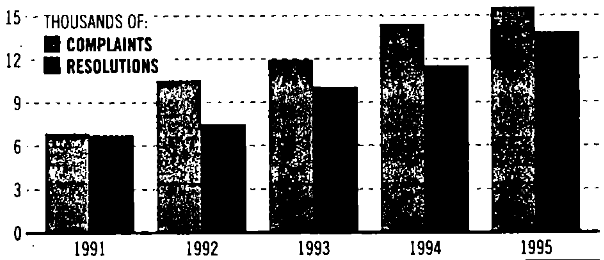
Like all bias complaints, sexual-harassment cases are difficult to win. Under the law, "a stray remark or a cross-eyed look" does not make a case, says Ellen J. Vargyas, EEOC general counsel. And sexual-harassment cases often boil down to the credibility of accuser and accused. If a victim does win, there's a cap on damages. Plaintiffs can recover a maximum of $50,000, including compensatory and punitive damages, from employers with fewer than 100 workers and $300,000 maximum from those with more than 500 workers.

For harassment victims, an EEOC overhaul can't come soon enough. Speedy resolution of such painful cases is the best way to deliver justice—to all parties involved.

By Catherine Yang in Washington

GOING PUBLIC

Employee sexual-harassment complaints filed at the Equal Employment Opportunity Commission are on the rise



MONETARY COMPENSATION MILLIONS OF DOLLARS

1991	1992	1993	1994	1995
$7.1	$12.7	$25.1	$22.5	$24.3

DATA: EEOC

CHART BY ALAN BASEDEN

Newspoints

Deals, trends and people

'ATIONAL NEWS

Jnequal justice for all

EEOC director fighting a rising tide

Gilbert F. Casellas learned the meaning of discrimination at an early age, probably before he could even spell it. As a child in Tampa, Fla., there were certain places he couldn't go because of his brown skin, like the local boys' club or the "whites only" sections of the beach. When he reached adolescence things began to change. Congress passed the Civil Rights Act of 1964, schools began to desegregate and Casellas could now go to the downtown movie theater.

More than 30 years later, however, as chairman of the Equal Employment Opportunity Commission, Casellas is finding out that the more things change, the more they stay the same.

JASON MICCOLO JOHNSON

Gilbert Casellas

As the chief enforcer of anti-discrimination laws, the EEOC must identify and eliminate workplace discrimination, a task easier said than done. Casellas chaired a recent EEOC meeting in Washington, where he revealed that the commission had received 87,600 charges of discrimination in 1995, an increase of about 42% from 1990. This figure includes a backlog of cases. Almost 30,000 were based on race, 88% of which were filed by African Americans. So while Republicans on Capitol Hill fantasize about a color-blind society, the commission knows better: workplace discrimination continues to be epidemic.

"The data refutes the assumption that discrimination has been eliminated," says Casellas. The EEOC has developed a hospital approach to wiping out its growing caseload. Based in theory on emergency-room triage, cases are prioritized in order of importance. But like the average city hospital, the understaffed commission must operate under budgetary constraints. Congress appropriated $235 million for 1996, down $2 million from last year, meaning the EEOC has to revamp its attack strategy. "We made a choice to go after the kind of cases where we'll have the most impact and maximize our resources by addressing the ones that have an impact beyond an individual's satisfaction," says Casellas.

COMPLAINTS FILED WITH THE EEOC

TOTAL Charges	1991	1992	1993	1994	1995*
Race	27,525 43.1%	29,042 40.3%	31,688 36.0%	31,656 34.8%	29,986 34.3%
Sex	17,422 27.3%	21,482 29.8%	23.905 27.2%	25,860 28.4%	26,181 29.9%
National Origin	6,418 10.1%	7,126 9.9%	7,393 8.4%	7,414 8.1%	7,035 8.0%
Religion	1,160 1.8%	1,33[illegible] 1.9%	1,444 1.6%	1,546 1.7%	1,581 1.8%

*Preliminary data

Source: US Equal Employment Opportunity Commission, Washington, 1996

DAWN ABARD

This strategy may only be a band-aid on what could soon become a gouging wound now that Congress is considering legislation to eliminate affirmative action programs. A proposed bill by presidential hopeful Bob Dole and Rep. Charles Canady (R-Fla.), which would outlaw race- and sex-based remedies in hiring, is primarily directed at federal employment. However, Casellas shudders to think of the trickle-down effect that it may have on the private sector companies, which are the major source of complaints. "I think the real question is what will the workplace look like five years from now if that bill is in place. If you talk to advocacy groups, they say the federal government isn't doing enough to recruit, hire and promote minorities in its workforce. Five years from now, if we're not allowed to measure our successes, you've got to conclude that it's going to be worse," Casellas says. And he's concerned that the cuts might validate the kinds of rollbacks that some have sought in the private sector.

Whether or not the bill passes, Casellas observes, "I think we will inevitably be unpopular because whenever you challenge a practice or pattern of discrimination, somebody's going to be unhappy. And sometimes those people who are unhappy are influential and powerful."

—Joyce Jones

EDITED BY
Eric L. Smith

The U.S. Equal Employment Opportunity Commission

U.S. Equal Employment Opportunity Commission National Enforcement Plan

I. Introduction

In a motion unanimously adopted on April 19, 1995, the Commission directed the development, for its approval, of a National Enforcement Plan identifying priority issues and setting out a plan for administrative enforcement and litigation of the laws within its jurisdiction: Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Equal Pay Act (EPA), and the Americans With Disabilities Act (ADA). Also on April 19, 1995, the Chairman directed District Directors and Regional Attorneys in each field office to develop Local Enforcement Plans that will be consistent with the National Plan and that will tailor their priorities to the specific needs of the many different communities served by the Commission.

This motion was adopted at a special meeting convened on April 19, 1995, to consider recommended reforms to enforcement policies that had been established by the Commission over a decade ago. The recommendations had been developed by the Task Force on Charge Processing (Task Force) created by Chairman Gilbert F. Casellas and led by Vice Chairman Paul M. Igasaki which was charged with reviewing and analyzing the private sector charge processing system. More recently, partially as the result of the Commission's increased statutory responsibilities, the number of persons filing charges annually with the EEOC has risen from less than 64,000 in fiscal year 1991 to more than 95,000 in fiscal year 1995, a 49% increase. More funding to support additional staffing and other resources necessary to meet these new challenges has not been forthcoming.

The Task Force recognized that the Commission's effectiveness as a law enforcement agency had been reduced by the overwhelming increase in its inventory of individual charges of discrimination, by the lack of financial resources needed to address the increased workload, and by a failure to strategically utilize its resources to pursue its mission through vigorous investigation, conciliation, and litigation. In the 1980's, a number of enforcement processing and litigation policies based on principles of "full investigation and enforcement" were implemented.

The Task Force concluded that the policies and practices now prevented the agency from using its limited resources strategically to pursue its mission of eradicating workplace discrimination. To address this problem, it recommended the adoption of policies that would permit the agency to make the most prudent use of its resources to accomplish its mission. One of these recommendations was that the Commission develop National and Local Enforcement Plans that prioritize issues of discrimination for Commission action.

Given the comprehensive scope of the National Enforcement Plan, the Commission consulted with a broad range of external and internal stakeholders. Through this process, the Commission sought and received recommendations from dozens of representatives of the employer, employee, labor, and civil rights communities at both the national and local levels. In addition, the then-Acting General Counsel and then-Acting Director of the Office of Program Operations consulted with several District Directors and Regional Attorneys and asked all Regional Attorneys and District Directors to solicit suggestions from a wide range of EEOC staff, including union representatives.

Based upon this extensive consultative process and after its own careful consideration of the issues, the Commission adopts the following National Enforcement Plan (NEP) which will form the cornerstone of the Commission's efforts to achieve its statutory mission of eradicating discrimination from the workplace. The NEP recognizes that the Commission must use its limited resources more strategically to deter workplace discrimination, guide the development of the law, resolve disputes, and promote a work environment in which employment decisions are made on the basis of abilities, not on the basis of prejudice, stereotype and bigotry. The Commission also recognizes that regardless of resource issues, the development of this Plan is consistent with good management and reinventing government.

With this Plan, the Commission articulates the general principles governing the Commission's enforcement efforts, establishes national enforcement priorities, sets general parameters for the development of the Local Enforcement Plans, and delegates significant litigation authority to the Office of General Counsel so that the Commission can most effectively and efficiently accomplish its enforcement objectives.

II. Governing Principles

The National Enforcement Plan incorporates the following principles, which have guided its development and will govern its implementation.

A. The Commission is committed to an enforcement plan that encompasses a three-pronged approach to eliminate discrimination in the workplace: (1) prevention through education and outreach; (2) the voluntary resolution of disputes; and (3) where voluntary resolution fails, strong and fair enforcement.

First, the Commission recognizes that achieving its fundamental mission -- the eradication of employment discrimination -- requires not only enforcement of the law, but also prevention of the problem through public outreach and education. Therefore, within current resource limitations, the National Enforcement Plan encourages that public education, outreach, and technical assistance be conducted at both the national and local level to support and enhance the enforcement activities directed by the NEP.

Second, the Commission is committed to the voluntary resolution of disputes where appropriate and feasible. The Commission recognizes that negotiated agreements that resolve claims of discrimination can directly advance the Commission's enforcement objectives, in addition to benefiting the parties to a particular dispute. The Commission believes that the use of Alternative Dispute Resolution (ADR) significantly furthers the Commission's mission as a law enforcement agency. Accordingly, the Commission strongly encourages its use as an integral part of our enforcement process.

Finally, the Commission is fully committed to firm and fair enforcement, including litigation, where voluntary efforts to achieve compliance fail. The Commission recognizes that an effective litigation program is critical to the furtherance of the Commission's enforcement agenda by enjoining current violations, deterring future violations, and providing remedies to victims of employment discrimination.

B. The Commission recognizes that given budget constraints under which it operates, it cannot be all things to all of its various constituencies. Moreover, the Commission must be candid with the public regarding the decisions that it makes. The adoption of this National Enforcement Plan and the subsequent adoption of Local Enforcement Plans will take critically important steps in this direction.

C. The combination of limited resources and increasing demands on the Commission requires a carefully prioritized and coordinated enforcement strategy. Strategic enforcement will assure the most effective use of the Commission's resources by assuring that available funds are devoted to efforts which have the potential to yield the greatest dividends in achieving equal employment opportunity. As part of this strategic enforcement strategy, the Commission is committed to the strategic and proactive use of its limited enforcement resources through, among other things, systemic investigations and litigation.

D. The Enforcement Plan must assure fair, aggressive and credible enforcement of all of the statutes enforced by the Commission regardless of the basis of discrimination or the issue.

E. Determination of whether a case should be pursued under the National Enforcement Plan will be based both on the issue raised and an assessment that the strength of the case supports the decision to proceed.

F. The Commission's enforcement activities will not be limited exclusively to the enumerated priority areas. With regard to charge processing, the Commission will issue cause findings in all cases in which it determines that it is more likely than not that discrimination has occurred and will proceed to conciliation in such cases. With regard to litigation, the Commission may pursue certain cases in which it has found cause, even though those cases do not fall clearly within an enumerated enforcement priority. At the same time, the Commission will not pursue litigation on every charge which falls within the NEP or LEPs. The Commission recognizes that it will be required to forgo litigating some good cases in order to devote adequate resources to other cases. At every stage of the process, the Commission will assess the available facts to determine whether the strength of the case and the nature of the issue supports the decision to proceed.

G. Enforcement efforts must be directed to the resolution of the Commission's pending inventory, in addition to the approximately 100,000 new cases which are projected to be filed over the next year. The Commission's recently implemented charge prioritization policies have already significantly reduced the Commission's current inventory, and it is anticipated that this trend will continue barring unforeseen circumstances. Both the National and Local Enforcement Plans must provide immediate strategies for continuing to reduce the existing inventory of cases. Such strategies should not ignore each office's need also to provide the resources necessary to support priority cases and address new filings. The backlog of cases is unfair to charging parties and respondents alike, diminishes EEOC's credibility as a law enforcement agency, and consumes valuable resources.

While the charge prioritization policies reflected in the NEP will permit the Commission to dedicate significant resources towards the Commission's goal of achieving a manageable inventory, the Commission recognizes that without a significant increase in resources, this goal will remain elusive.

III. Enforcement Priorities

Based on the above principles, the Commission has identified three major categories of priorities, which include a series of subcategories, that will provide the foundation of the National Enforcement Plan. These priority categories will apply, as appropriate, to investigation, conciliation, and litigation, including both trial and appellate practice, as well as the EEOC's amicus curiae and intervention representation.

The Commission sets forth the following areas as priorities under the National Enforcement Plan. These priorities will apply to each of the statutes enforced by the Commission and to all persons protected by these statutes.

A. Cases involving violations of established anti-discrimination principles, whether on an individual or systemic basis, including Commissioner charge cases raising issues under the NEP, which by their nature systemic basis, including Commissioner charge cases raising issues under the NEP, which by their nature could have a potential significant impact beyond the parties to the particular dispute.

1. Cases involving repeated and/or egregious discrimination, including harassment, or facially discriminatory policies.
2. Challenges to broad-based employment practices affecting many employees or applicants for employment, such as cases alleging patterns of discrimination in hiring, lay-offs, job mobility, including "glass-ceiling" cases, and/or pay, including claims under the Equal Pay Act.

B. Cases having the potential of promoting the development of law supporting the antidiscrimination purposes of the statutes enforced by the Commission.

1. Claims presenting unresolved issues of statutory interpretation under one or more of the statutes enforced by the Commission, as follows:

   a. Claims presenting unresolved questions regarding the allocation of burdens in disparate treatment cases as set forth in St. Mary's Honor Center v. Hicks.

   b. Claims presenting questions regarding the scope of liability under the statutes enforced by the Commission, including issues of employer liability in harassment cases and individual liability.

   c. Claims of national origin discrimination involving language issues, including accent discrimination and restrictive language policies or practices.

   d. Claims clarifying the Title VII duty to reasonably accommodate religious practices.

   e. Claims raising unresolved questions under the Americans with Disabilities Act regarding the meaning of "reasonable accommodation" and the term "qualified individual with a disability," as well as the defenses of "undue hardship" and "direct threat."

   f. Claims presenting questions regarding the interpretation of the prohibition of disparate impact discrimination under the Civil Rights Act of 1991, the Age Discrimination in Employment Act, and the Americans With Disabilities Act.

   g. Claims based on the intersection of two or more prohibited bases of discrimination (e.g., discrimination against women of color, older women, or minority persons with disabilities).

   h. Claims addressing the legality of agreements that mandate binding arbitration of employment discrimination disputes imposed as a condition of initial or continued employment.

   i. Claims presenting unresolved issues regarding the provision of employee benefits, including claims arising under Title I of the Older Workers Benefits Protection Act, and the Americans With Disabilities Act.

   j. Claims of comparable significance identified and approved in the Local Enforcement Plans.

2. Cases involving legal issues where there is a conflict in the federal circuit courts on a Plan priority or in which the Commission is seeking Supreme Court resolution of such issue.

C. Cases involving the integrity or effectiveness of the Commission's enforcement process, particularly the investigation and conciliation of charges.

1. Cases involving allegations of retaliation against persons for participating in Commission proceedings or opposing unlawful employment discrimination, particularly cases where the scope of the statutory protection against retaliation is at issue.

2. Cases presenting challenges to Commission policy declarations, such as guidelines, regulations or policy guidance.

3. Cases protecting Commission access to information, including subpoena enforcement proceedings and proceedings to preserve or prevent the loss or destruction of evidence, except as set forth in paragraph 5 below.

4. Cases involving allegations of a material breach of an agreement to which the Commission was a party settling an earlier proceeding.

5. Cases involving alleged violations of the Commission's recordkeeping and reporting requirements where there is reason to believe that there may be another violation of statutes enforced by the Commission.

With the adoption of these priorities, and pursuant to a Motion unanimously adopted by the Commission on April 19, 1995, the Commission hereby withdraws all Priority Issues Lists that have previously set out priority issues for Commission consideration.

IV. Local Enforcement Plans

Each District Director and Regional Attorney shall develop a Local Enforcement Plan (LEP) and a supporting document detailing its plan to implement the LEP. These documents shall be submitted concurrently to the Commission, the General Counsel and Director of the Office of Program Operations, no later than forty-five (45) days from the date of the adoption of the National Enforcement Plan. In turn, the General Counsel and Director of Office of Program Operations shall review the LEPs and submit their recommendations to the Chairman no later than twenty-one (21) days from the date that the LEPs are submitted by the District Offices. The Commissioners may also submit their comments to the Chairman on the LEPs and the implementation documents, as well as on the recommendations submitted by OGC and OPO, no later than thirty-five (35) days from the date that the LEPs are submitted by the District Offices. Then, the Chairman shall have thirty (30) days to determine whether to approve the LEPs. LEPs are to be consistent with the National Enforcement Plan, but their specific goals and objectives should be tailored to reflect legal and factual issues specific to the communities served by each office, as well as each office's resources. In particular, LEPs shall include the following critical components:

A. An evaluation and strategy to address the provision of Commission services to underserved populations and geographic regions, as well as employment practices of particular importance in the region served by each district office.

B. A description and identification of the local issues which are on the NEP.

C. A description of each office's plan to resolve the pending cases in the office's inventory, including the long-term plans of the district office to use ADR techniques as part of its charge processing activities.

D. In addition, each district office shall develop an implementation document supporting the LEP. This document shall describe the district office's strategy for utilizing its resources and give Headquarters information critical for planning, staffing, and the allocation of resources in the field. This document shall:

1. Prioritize and justify the issues identified in the LEPs as to severity and need for local impact, taking into account industries, constituencies, and geographic areas involved;
2. Identify pending charges/suits or proposed charges/suits which fall within the local priority list and indicating those which would have the greatest impact;
3. Identify which of those current charges/suits can be pursued with available resources, as well as those others that could be pursued if additional resources were available; and
4. Describe how the plan results will be achieved, including time lines. Given that disclosure of the implementation documents would seriously circumvent the Commission's pending and proposed enforcement efforts, each implementation document will be treated by the Commission as confidential.

V. Delegation of Authority to General Counsel

The Commission, by resolution of April 19, 1995, delegated litigation authority in certain cases to the General Counsel until such time as the Commission adopts the National Enforcement Plan. With the goals of increasing strategic enforcement for the General Counsel and field attorneys, freeing the Commission to focus on policy issues, and increasing the efficiency and effectiveness of our litigation program, the Commission now provides such delegation as follows:

First, the Commission delegates to the General Counsel the decision to commence or intervene in litigation in all cases except the following:

A. Cases involving a major expenditure of resources, e.g. cases involving extensive discovery or numerous expert witnesses and many pattern-or-practice or Commissioner's charge cases;

B. Cases which present issues in a developing area of law where the Commission has not adopted a position through regulation, policy guidance, Commission decision, or compliance manuals;

C. Cases which, because of their likelihood for public controversy or otherwise, the General Counsel reasonably believes to be appropriate for submission for Commission consideration; and

D. All recommendations in favor of Commission participation as *amicus curiae* which shall continue to be submitted to the Commission for review and approval.

Second, the Commission ratifies its decision to give the General Counsel the authority to redelegate to regional attorneys the authority to commence litigation. The Commission encourages such redelegation of litigation authority as appropriate.

Finally, the Commission restates and ratifies its April 19, 1995 delegation to the General Counsel of the authority to refer public sector Title VII and ADA cases which fail conciliation to the Department of Justice, as well as the authority to redelegate this authority to Regional Attorneys. Regional Attorneys are encouraged to consult informally with designated "point of contact" attorneys at the Department of

Justice regarding significant legal issues that arise in processing state and local government charges that appear to have litigation potential.

The General Counsel will report to the Commission quarterly on each new case filed pursuant to the delegated authority procedure set out above. The report will briefly describe the issue, basis, and scope of the case, and indicate whether authority to file it had been delegated to the Regional Attorney by the General Counsel. The General Counsel's report shall include an assessment of how the delegation authority has been exercised and whether the Commission's stated goals have been better achieved as a result of the delegation. Such reports shall be presented for discussion at the first regularly scheduled Commission meeting after the Report is prepared. The General Counsel will establish procedures for monitoring the performance of Regional Attorneys and will report to the Commission on such effectiveness once each year.

VI. Settlement and Alternative Dispute Resolution

The Commission's Policy Statement on Alternative Dispute Resolution (ADR), adopted on July 17, 1995, as well as the Commission's policy regarding settlements adopted on April 19, 1995, will apply to the implementation of the National and Local Enforcement Plans.

In the ADR Policy Statement, the Commission confirmed its strong commitment to using voluntary alternative methods for resolving disputes in all of its activities, including all aspects of the enforcement process, where appropriate and feasible. ADR is fully consistent with EEOC's mission as a law enforcement agency and is squarely grounded in the statutes enforced by the Commission. Used properly and in appropriate circumstances, ADR can provide less expensive, less contentious, and faster results in eliminating workplace discrimination.

ADR must be viewed as an integral component of its comprehensive enforcement program. ADR will complement current charge processing systems by facilitating early resolution of disputes where agreement is possible, thereby freeing up resources for identifying, investigating, settling, conciliating or litigating other matters. Improvements in the Commission's enforcement efforts should enhance the Commission's credibility as a law enforcement agency.

The Commission recognizes that negotiated agreements that resolve claims of discrimination can benefit the parties to a dispute as well as directly advance the Commission's enforcement objectives. While encouraging the use of ADR, the Commission recognizes that it must remain vigilant in assuring that ADR, as used by the Commission, does not conflict with or undermine our enforcement objectives.

Within these limitations, and in conjunction with ADR programs which it may itself implement, the Commission reemphasizes the important role of settlement and conciliation as an integral component of its comprehensive enforcement program.

VII. Enforcement Partnership With State and Local Fair Employment Agencies

On May 22, 1995, the Commission resolved to establish a new partnership with the state and local fair employment practices agencies (FEPAs), recognizing our common mission to eliminate and prevent employment discrimination and to provide timely and effective redress for individuals who have been discriminated against. The Commission adopted the EEOC/FEPA Task Force's recommendation that the

Chairman should take actions to forge this partnership by eliminating duplication of effort that might exist with respect to the processing of the charges. As part of this process, the Chairman requested the Director of OPO to consult with field offices and FEPAs to explore the feasibility of joint investigative and enforcement activities.

The FEPA's enforcement efforts must be viewed as an integral component of the Commission's enforcement efforts. To enhance the roles of the FEPAs in the Commission's enforcement efforts, the Chairman suggested that the Director of OPO, in consultation with the FEPAs, review and discuss the recommendations of the Task Forces on Charge Processing and Alternative Dispute Resolution, exploring ways in which the principles and recommendations, particularly those concerning priority charge handling and the measurement of results, may be used to further our joint mission of eradicating and preventing discrimination. Therefore, the District Offices are encouraged to solicit suggestions from the FEPAs in developing and implementing their LEPs in an effort to minimize the duplication of efforts.

VIII. Implementation

While this plan does not, and is not intended to, define the operational implementation of the enforcement priorities, the following considerations should guide implementation steps:

A. The top priority for charge processing (Category A), includes Enforcement Plan cases and, within resource constraints, other cases in which it appears more likely than not that discrimination has occurred.

B. A determination that a charge falls within the Enforcement Plan requires a determination that the issue raised is an Enforcement Plan priority as well as an assessment that the strength and potential impact of the case supports the decision to proceed.

C. Although it will be possible to categorize some charges as Enforcement Plan cases immediately upon receipt of the charge, the categorization of other cases will require further evaluation and investigation. The Commission is committed to devoting the appropriate level of resources to the evaluation and investigation of all cases potentially falling within the priorities enumerated in the NEP or Local Enforcement Plans. Nonetheless, district offices should endeavor to identify Enforcement Plan cases at the earliest possible time following receipt of charge.

D. Offices should develop procedures to assure routine and effective consultation between legal and investigative personnel in all phases of the identification and development of Enforcement Plan cases.

E. Cases falling under the enumerated priorities in the NEP and/or Local Enforcement Plans should be accorded priority in investigation with respect to speed, depth, and other measures of dedication of resources in order to assure that the investigation will support a subsequent and timely enforcement action if appropriate.

F. The Commission recognizes that some cases that fall within the enumerated priorities will require a commitment of substantial resources from the district office and may diminish that office's ability to pursue other cases in litigation.

G. In addition to charges filed by individuals, Commissioner's charges under Title VII and the ADA and directed investigations under the ADEA and EPA provide important enforcement tools under the Enforcement Plans.

H. All district offices with responsibilities under the Enforcement Plans should conduct outreach and educational activities and obtain on a regular basis input from stakeholders and interested groups on the effectiveness of the implementation of the National and Local Enforcement Plans. These offices should also conduct regular assessments of the communities they serve to identify any special needs or employment discrimination issues that may otherwise not be addressed.

I. The Commission recognizes that it may not be able to litigate every case that fails conciliation, including cases which fall within the National and Local Enforcement Plans. Thus, the Commission encourages the General Counsel, District Directors, and Regional Attorneys to work closely with the private bar, which continues to play a critical role in civil rights enforcement.

J. All components of all offices in headquarters and the field will work together cooperatively to efficiently and effectively accomplish the mission of the agency.

IX. Reporting

The General Counsel and the Director of the Office of Program Operations shall report quarterly to the Commission on the effectiveness of their efforts under the Enforcement Plans. These reports will include recommendations for amendments to the National Plan or Local Plans where appropriate for the Commission's consideration and, with respect to the General Counsel, the matters set forth in Section V.

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The U.S. Equal Employment Opportunity Commission

U.S. Equal Employment Opportunity Commission National Enforcement Plan

I. Introduction

In a motion unanimously adopted on April 19, 1995, the Commission directed the development, for its approval, of a National Enforcement Plan identifying priority issues and setting out a plan for administrative enforcement and litigation of the laws within its jurisdiction: Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Equal Pay Act (EPA), and the Americans With Disabilities Act (ADA). Also on April 19, 1995, the Chairman directed District Directors and Regional Attorneys in each field office to develop Local Enforcement Plans that will be consistent with the National Plan and that will tailor their priorities to the specific needs of the many different communities served by the Commission.

This motion was adopted at a special meeting convened on April 19, 1995, to consider recommended reforms to enforcement policies that had been established by the Commission over a decade ago. The recommendations had been developed by the Task Force on Charge Processing (Task Force) created by Chairman Gilbert F. Casellas and led by Vice Chairman Paul M. Igasaki which was charged with reviewing and analyzing the private sector charge processing system. More recently, partially as the result of the Commission's increased statutory responsibilities, the number of persons filing charges annually with the EEOC has risen from less than 64,000 in fiscal year 1991 to more than 95,000 in fiscal year 1995, a 49% increase. More funding to support additional staffing and other resources necessary to meet these new challenges has not been forthcoming.

The Task Force recognized that the Commission's effectiveness as a law enforcement agency had been reduced by the overwhelming increase in its inventory of individual charges of discrimination, by the lack of financial resources needed to address the increased workload, and by a failure to strategically utilize its resources to pursue its mission through vigorous investigation, conciliation, and litigation. In the 1980's, a number of enforcement processing and litigation policies based on principles of "full investigation and enforcement" were implemented.

The Task Force concluded that the policies and practices now prevented the agency from using its limited resources strategically to pursue its mission of eradicating workplace discrimination. To address this problem, it recommended the adoption of policies that would permit the agency to make the most prudent use of its resources to accomplish its mission. One of these recommendations was that the Commission develop National and Local Enforcement Plans that prioritize issues of discrimination for Commission action.

Given the comprehensive scope of the National Enforcement Plan, the Commission consulted with a broad range of external and internal stakeholders. Through this process, the Commission sought and received recommendations from dozens of representatives of the employer, employee, labor, and civil rights communities at both the national and local levels. In addition, the then-Acting General Counsel and then-Acting Director of the Office of Program Operations consulted with several District Directors and Regional Attorneys and asked all Regional Attorneys and District Directors to solicit suggestions from a wide range of EEOC staff, including union representatives.

Based upon this extensive consultative process and after its own careful consideration of the issues, the Commission adopts the following National Enforcement Plan (NEP) which will form the cornerstone of the Commission's efforts to achieve its statutory mission of eradicating discrimination from the workplace. The NEP recognizes that the Commission must use its limited resources more strategically to deter workplace discrimination, guide the development of the law, resolve disputes, and promote a work environment in which employment decisions are made on the basis of abilities, not on the basis of prejudice, stereotype and bigotry. The Commission also recognizes that regardless of resource issues, the development of this Plan is consistent with good management and reinventing government.

With this Plan, the Commission articulates the general principles governing the Commission's enforcement efforts, establishes national enforcement priorities, sets general parameters for the development of the Local Enforcement Plans, and delegates significant litigation authority to the Office of General Counsel so that the Commission can most effectively and efficiently accomplish its enforcement objectives.

II. Governing Principles

The National Enforcement Plan incorporates the following principles, which have guided its development and will govern its implementation.

A. The Commission is committed to an enforcement plan that encompasses a three-pronged approach to eliminate discrimination in the workplace: (1) prevention through education and outreach; (2) the voluntary resolution of disputes; and (3) where voluntary resolution fails, strong and fair enforcement.

First, the Commission recognizes that achieving its fundamental mission -- the eradication of employment discrimination -- requires not only enforcement of the law, but also prevention of the problem through public outreach and education. Therefore, within current resource limitations, the National Enforcement Plan encourages that public education, outreach, and technical assistance be conducted at both the national and local level to support and enhance the enforcement activities directed by the NEP.

Second, the Commission is committed to the voluntary resolution of disputes where appropriate and feasible. The Commission recognizes that negotiated agreements that resolve claims of discrimination can directly advance the Commission's enforcement objectives, in addition to benefiting the parties to a particular dispute. The Commission believes that the use of Alternative Dispute Resolution (ADR) significantly furthers the Commission's mission as a law enforcement agency. Accordingly, the Commission strongly encourages its use as an integral part of our enforcement process.

Finally, the Commission is fully committed to firm and fair enforcement, including litigation, where voluntary efforts to achieve compliance fail. The Commission recognizes that an effective litigation program is critical to the furtherance of the Commission's enforcement agenda by enjoining current violations, deterring future violations, and providing remedies to victims of employment discrimination.

B. The Commission recognizes that given budget constraints under which it operates, it cannot be all things to all of its various constituencies. Moreover, the Commission must be candid with the public regarding the decisions that it makes. The adoption of this National Enforcement Plan and the subsequent adoption of Local Enforcement Plans will take critically important steps in this direction.

C. The combination of limited resources and increasing demands on the Commission requires a carefully prioritized and coordinated enforcement strategy. Strategic enforcement will assure the most effective use of the Commission's resources by assuring that available funds are devoted to efforts which have the potential to yield the greatest dividends in achieving equal employment opportunity. As part of this strategic enforcement strategy, the Commission is committed to the strategic and proactive use of its limited enforcement resources through, among other things, systemic investigations and litigation.

D. The Enforcement Plan must assure fair, aggressive and credible enforcement of all of the statutes enforced by the Commission regardless of the basis of discrimination or the issue.

E. Determination of whether a case should be pursued under the National Enforcement Plan will be based both on the issue raised and an assessment that the strength of the case supports the decision to proceed.

F. The Commission's enforcement activities will not be limited exclusively to the enumerated priority areas. With regard to charge processing, the Commission will issue cause findings in all cases in which it determines that it is more likely than not that discrimination has occurred and will proceed to conciliation in such cases. With regard to litigation, the Commission may pursue certain cases in which it has found cause, even though those cases do not fall clearly within an enumerated enforcement priority. At the same time, the Commission will not pursue litigation on every charge which falls within the NEP or LEPs. The Commission recognizes that it will be required to forgo litigating some good cases in order to devote adequate resources to other cases. At every stage of the process, the Commission will assess the available facts to determine whether the strength of the case and the nature of the issue supports the decision to proceed.

G. Enforcement efforts must be directed to the resolution of the Commission's pending inventory, in addition to the approximately 100,000 new cases which are projected to be filed over the next year. The Commission's recently implemented charge prioritization policies have already significantly reduced the Commission's current inventory, and it is anticipated that this trend will continue barring unforeseen circumstances. Both the National and Local Enforcement Plans must provide immediate strategies for continuing to reduce the existing inventory of cases. Such strategies should not ignore each office's need also to provide the resources necessary to support priority cases and address new filings. The backlog of cases is unfair to charging parties and respondents alike, diminishes EEOC's credibility as a law enforcement agency, and consumes valuable resources.

While the charge prioritization policies reflected in the NEP will permit the Commission to dedicate significant resources towards the Commission's goal of achieving a manageable inventory, the Commission recognizes that without a significant increase in resources, this goal will remain elusive.

III. Enforcement Priorities

Based on the above principles, the Commission has identified three major categories of priorities, which include a series of subcategories, that will provide the foundation of the National Enforcement Plan. These priority categories will apply, as appropriate, to investigation, conciliation, and litigation, including both trial and appellate practice, as well as the EEOC's amicus curiae and intervention representation.

The Commission sets forth the following areas as priorities under the National Enforcement Plan. These priorities will apply to each of the statutes enforced by the Commission and to all persons protected by these statutes.

A. Cases involving violations of established anti-discrimination principles, whether on an individual or systemic basis, including Commissioner charge cases raising issues under the NEP, which by their nature systemic basis, including Commissioner charge cases raising issues under the NEP, which by their nature could have a potential significant impact beyond the parties to the particular dispute.

1. Cases involving repeated and/or egregious discrimination, including harassment, or facially discriminatory policies.

2. Challenges to broad-based employment practices affecting many employees or applicants for employment, such as cases alleging patterns of discrimination in hiring, lay-offs, job mobility, including "glass-ceiling" cases, and/or pay, including claims under the Equal Pay Act.

B. Cases having the potential of promoting the development of law supporting the antidiscrimination purposes of the statutes enforced by the Commission.

1. Claims presenting unresolved issues of statutory interpretation under one or more of the statutes enforced by the Commission, as follows:

   a. Claims presenting unresolved questions regarding the allocation of burdens in disparate treatment cases as set forth in St. Mary's Honor Center v. Hicks.

   b. Claims presenting questions regarding the scope of liability under the statutes enforced by the Commission, including issues of employer liability in harassment cases and individual liability.

   c. Claims of national origin discrimination involving language issues, including accent discrimination and restrictive language policies or practices.

   d. Claims clarifying the Title VII duty to reasonably accommodate religious practices.

   e. Claims raising unresolved questions under the Americans with Disabilities Act regarding the meaning of "reasonable accommodation" and the term "qualified individual with a disability," as well as the defenses of "undue hardship" and "direct threat."

   f. Claims presenting questions regarding the interpretation of the prohibition of disparate impact discrimination under the Civil Rights Act of 1991, the Age Discrimination in Employment Act, and the Americans With Disabilities Act.

   g. Claims based on the intersection of two or more prohibited bases of discrimination (e.g., discrimination against women of color, older women, or minority persons with disabilities).

   h. Claims addressing the legality of agreements that mandate binding arbitration of employment discrimination disputes imposed as a condition of initial or continued employment.

   i. Claims presenting unresolved issues regarding the provision of employee benefits, including claims arising under Title I of the Older Workers Benefits Protection Act, and the Americans With Disabilities Act.

   j. Claims of comparable significance identified and approved in the Local Enforcement Plans.

2. Cases involving legal issues where there is a conflict in the federal circuit courts on a Plan priority or in which the Commission is seeking Supreme Court resolution of such issue.

C. Cases involving the integrity or effectiveness of the Commission's enforcement process, particularly the investigation and conciliation of charges.

1. Cases involving allegations of retaliation against persons for participating in Commission proceedings or opposing unlawful employment discrimination, particularly cases where the scope of the statutory protection against retaliation is at issue.

2. Cases presenting challenges to Commission policy declarations, such as guidelines, regulations or policy guidance.

3. Cases protecting Commission access to information, including subpoena enforcement proceedings and proceedings to preserve or prevent the loss or destruction of evidence, except as set forth in paragraph 5 below.

4. Cases involving allegations of a material breach of an agreement to which the Commission was a party settling an earlier proceeding.

5. Cases involving alleged violations of the Commission's recordkeeping and reporting requirements where there is reason to believe that there may be another violation of statutes enforced by the Commission.

With the adoption of these priorities, and pursuant to a Motion unanimously adopted by the Commission on April 19, 1995, the Commission hereby withdraws all Priority Issues Lists that have previously set out priority issues for Commission consideration.

IV. Local Enforcement Plans

Each District Director and Regional Attorney shall develop a Local Enforcement Plan (LEP) and a supporting document detailing its plan to implement the LEP. These documents shall be submitted concurrently to the Commission, the General Counsel and Director of the Office of Program Operations, no later than forty-five (45) days from the date of the adoption of the National Enforcement Plan. In turn, the General Counsel and Director of Office of Program Operations shall review the LEPs and submit their recommendations to the Chairman no later than twenty-one (21) days from the date that the LEPs are submitted by the District Offices. The Commissioners may also submit their comments to the Chairman on the LEPs and the implementation documents, as well as on the recommendations submitted by OGC and OPO, no later than thirty-five (35) days from the date that the LEPs are submitted by the District Offices. Then, the Chairman shall have thirty (30) days to determine whether to approve the LEPs. LEPs are to be consistent with the National Enforcement Plan, but their specific goals and objectives should be tailored to reflect legal and factual issues specific to the communities served by each office, as well as each office's resources. In particular, LEPs shall include the following critical components:

A. An evaluation and strategy to address the provision of Commission services to underserved populations and geographic regions, as well as employment practices of particular importance in the region served by each district office.

B. A description and identification of the local issues which are on the NEP.

C. A description of each office's plan to resolve the pending cases in the office's inventory, including the long-term plans of the district office to use ADR techniques as part of its charge processing activities.

D. In addition, each district office shall develop an implementation document supporting the LEP. This document shall describe the district office's strategy for utilizing its resources and give Headquarters information critical for planning, staffing, and the allocation of resources in the field. This document shall:

1. Prioritize and justify the issues identified in the LEPs as to severity and need for local impact, taking into account industries, constituencies, and geographic areas involved;
2. Identify pending charges/suits or proposed charges/suits which fall within the local priority list and indicating those which would have the greatest impact;
3. Identify which of those current charges/suits can be pursued with available resources, as well as those others that could be pursued if additional resources were available; and
4. Describe how the plan results will be achieved, including time lines. Given that disclosure of the implementation documents would seriously circumvent the Commission's pending and proposed enforcement efforts, each implementation document will be treated by the Commission as confidential.

V. Delegation of Authority to General Counsel

The Commission, by resolution of April 19, 1995, delegated litigation authority in certain cases to the General Counsel until such time as the Commission adopts the National Enforcement Plan. With the goals of increasing strategic enforcement for the General Counsel and field attorneys, freeing the Commission to focus on policy issues, and increasing the efficiency and effectiveness of our litigation program, the Commission now provides such delegation as follows:

First, the Commission delegates to the General Counsel the decision to commence or intervene in litigation in all cases except the following:

A. Cases involving a major expenditure of resources, e.g. cases involving extensive discovery or numerous expert witnesses and many pattern-or-practice or Commissioner's charge cases;

B. Cases which present issues in a developing area of law where the Commission has not adopted a position through regulation, policy guidance, Commission decision, or compliance manuals;

C. Cases which, because of their likelihood for public controversy or otherwise, the General Counsel reasonably believes to be appropriate for submission for Commission consideration; and

D. All recommendations in favor of Commission participation as *amicus curiae* which shall continue to be submitted to the Commission for review and approval.

Second, the Commission ratifies its decision to give the General Counsel the authority to redelegate to regional attorneys the authority to commence litigation. The Commission encourages such redelegation of litigation authority as appropriate.

Finally, the Commission restates and ratifies its April 19, 1995 delegation to the General Counsel of the authority to refer public sector Title VII and ADA cases which fail conciliation to the Department of Justice, as well as the authority to redelegate this authority to Regional Attorneys. Regional Attorneys are encouraged to consult informally with designated "point of contact" attorneys at the Department of

Justice regarding significant legal issues that arise in processing state and local government charges that appear to have litigation potential.

The General Counsel will report to the Commission quarterly on each new case filed pursuant to the delegated authority procedure set out above. The report will briefly describe the issue, basis, and scope of the case, and indicate whether authority to file it had been delegated to the Regional Attorney by the General Counsel. The General Counsel's report shall include an assessment of how the delegation authority has been exercised and whether the Commission's stated goals have been better achieved as a result of the delegation. Such reports shall be presented for discussion at the first regularly scheduled Commission meeting after the Report is prepared. The General Counsel will establish procedures for monitoring the performance of Regional Attorneys and will report to the Commission on such effectiveness once each year.

VI. Settlement and Alternative Dispute Resolution

The Commission's Policy Statement on Alternative Dispute Resolution (ADR), adopted on July 17, 1995, as well as the Commission's policy regarding settlements adopted on April 19, 1995, will apply to the implementation of the National and Local Enforcement Plans.

In the ADR Policy Statement, the Commission confirmed its strong commitment to using voluntary alternative methods for resolving disputes in all of its activities, including all aspects of the enforcement process, where appropriate and feasible. ADR is fully consistent with EEOC's mission as a law enforcement agency and is squarely grounded in the statutes enforced by the Commission. Used properly and in appropriate circumstances, ADR can provide less expensive, less contentious, and faster results in eliminating workplace discrimination.

ADR must be viewed as an integral component of its comprehensive enforcement program. ADR will complement current charge processing systems by facilitating early resolution of disputes where agreement is possible, thereby freeing up resources for identifying, investigating, settling, conciliating or litigating other matters. Improvements in the Commission's enforcement efforts should enhance the Commission's credibility as a law enforcement agency.

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This page was last modified on January 15, 1997.

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MEMORANDUM

TO: ELENA KAGAN

CC: BRUCE REED

FROM: TOM FREEDMAN, MARY L. SMITH

RE: EEOC REFORM

DATE: JUNE 6, 1997

SUMMARY

Attached is a concise history and description of the workings of the EEOC, a categorization of its problems, including case backlog and limited authority, and potential amerliorating reforms.

I. BACKGROUND

The EEOC was created in 1964 to investigate employment discrimination charges relating to race, color, religion, sex, or national origin. Since that time, the EEOC has become responsible for administering additional laws: (1) the Equal Pay Act of 1963, (2) the Age Discrimination in Employment Act of 1967, (3) the Equal Employment Act of 1972, (4) Section 501 of the Rehabilitation Act of 1973, (5) the Americans With Disabilities Act (ADA) of 1990, and (6) the Civil Rights Act of 1991.

Critics of the Commission assert that the 1964 Civil Rights Bill did not provide the EEOC with sufficient remedies for victims of discrimination because of Southern opposition to the bill. Numerous commentators, including Bill Bradley, Shelby Steele, and Jesse Jackson, have noted the delays and ineffectiveness associated with the Commission, the major administrative enforcement mechanism designed to remedy discrimination in our country. They note that the Commission's failure to promptly and effectively remedy claims of discrimination demoralizes individual victims of prejudice and sabotages national efforts at creating a society based on equal opportunity.

II. PROCESS

("EEOC Process Chart" attached)

- Plaintiff has 180 days to file a charge of discrimination with EEOC.

- EEOC investigates whether there is cause to believe discrimination occurred
  - However, even if EEOC investigation is not completed, 180 days after the charge is filed, a plaintiff can request a "right to sue" letter, which permits the filing of the case in federal court
  - Plaintiff has 90 days to file complaint in federal court after receiving "right to sue" letter

- If the EEOC does investigation, then it either issues a "cause" finding or a "no cause" finding
  - "Cause" finding issued: EEOC encourages the parties to enter into conciliation procedures which either result in a settlement or if no settlement, the plaintiff is given a "right to sue" letter
  - "No cause" finding issued: potential plaintiff is given a "right to sue" letter <u>and the EEOC's determination of "no cause" is entitled to no deference in court</u>

III. STRUCTURE

- EEOC carries out its mission through 50 field offices that receive, investigate, and resolve charges of discrimination in the private sector, and it coordinates these activities in the public sector.

- A 5-member commission heads the EEOC. The President appoints the members, with the consent of the Senate, for rotating 5-year terms. No more than 3 members can be from the same political party. The President designates one member to serve as Chairman and another as Vice Chairman. The current chairman is Gilbert F. Casellas.

IV. CURRENT STATUS

- For 1998, the EEOC has requested a budget of $246 million, an increase of $6 million, or 2.65 over the current level for 1997.

- During 1994, the EEOC issued 36,377 determinations following a full investigation, and 94.7% or 34,451 resulted in "no cause" findings in favor of the defendant. There were only 1,926 determinations of "cause," a mere 5.3% of the total determinations.

- In 1992, the EEOC filed 347 susbstantive lawsuits, 26% involved sex discrimination, 21% involved age discrimination, and 19% concerned race discrimination. The majority, 53% involved unlawful termination, 18% concerned discriminatory hiring.

V. PROBLEMS

- **Backlog.** The backlog of cases or number of charges awaiting investigation. At one time the backlog was over 100,000 cases, but recently Mr. Casellas testified before Congress that this backlog has been reduced to 75,000.

- **Delay.** The increasing time it takes EEOC to investigate and process charges. In 1994, the EEOC stated that the average investigation of a claim took 328 days and that its backlog would take 18.8 months to clear. Attorneys at DOJ report that it is not uncommon to commence cases after 5 years have elapsed since the the incident that prompted the original complaint.

- **Scope.** The limited number of litigation actions and systemic investigations initiated by the EEOC. In 1992, the EEOC filed 347 substantive lawsuits.

- **Impact.** The EEOC spends its time and effort collecting statements, investigating charges, and issuing determinations. But these determinations are without legal impart.

VI. POSSIBLE SOLUTIONS

- **Resources**. More funding for staff to address the backlog

- **Authority.** Give the EEOC "cease and desist" authority, that is, authority to issue injunctions in cases
of egregious violations

- **Authority.** Give judicial deference to an EEOC determination of "cause" or "no cause," permitting only appellate review based on a "substantial evidence" standard of review

- **Authority.** Encourage binding ADR on an accelerated schedule <u>before</u> EEOC does investigation

- **Possible Criminalization.** Stregthen inducements to changing behavior, as the Army has done. Criminalize job discrimination in the strongest cases, where there is profound damage and willful violations of the law with direct economic impact. Professors Moskos and Butler note in their study of the military that "racist behavior ends a person's career. That racial remarks are rarely heard among Army NCOs and officers, even in allwhite groups, reflects how strictly this normis adhered to....criminalizing racial discrimination has, in a manner of speaking, been accomplished de facto in the military."

- **Structure.** Transform the EEOC structure, streamlining its decisionmaking into something more similair to the National Labor Relations Board (NLRB). Key components include: General Counsel appointed by the President and consent of the Senate responsible for overseeing investigation and prosecution of unfair labor practices; regional field officers appointed by the General Counsel; minimal backlog; consider use of Administrative Law Judge (ALJ); and

- **Structure.** Improve quality of EEOC training and staff

VII. POTENTIAL CRITICISMS OF PROPOSALS

- More bureaucracy and ineffective.

- Interferes too much in private employers relationships. Making the EEOC's determinations binding will cause an uproar among businesses.

- Does not solve the problems.

- Denies complainants their day in court.

VIII. SOLUTIONS THE EEOC HAS ADOPTED ALREADY

- In 1996, the EEOC adopted a national enforcement plan that sets priorities for the processing of charges and litigation on the national and local level. Priority is placed on class-action lawsuits, claims that involve allegations of company-wide discrimination, and those that are likely to develop key legal principles. The reforms mark a fundamental change for the agency because it no longer fully investigates every charge it receives. Instead, charges are prioritized so those with little merit are dismissed without a probe while priority cases are investigated.

- The EEOC beefed up its mediation strategy, using many volunteer mediators under the Administrative Dispute Resolution Act.

- The agency is also targeting high-profile cases to bring suit such as the Mitsubishi sexual harassment suit in Illinois.

IX. CRITICISMS OF EXISTING SOLUTIONS

- The priority system creates incentives to dismiss cases and avoid investigations.
- EEOC gets involved in court cases only in big cases after private attorneys have made some progress.

MEMORANDUM

TO: Tom

FROM: Neera

RE: Strengthening the E.E.O.C.

Former Senator Bill Bradley has spoken repeatedly for a stronger E.E.O.C. because he believes that there is no adequate remedy for discrimination today. Basically, he argues that the 1964 Civil Rights Bill was weak on remedies for victims of discrimination because of Southern opposition to the bill. It basically gave the EEOC no teeth as a tradeoff for passage.

Senator Bradley claims that the EEOC's structural weakness has led to the current backlog of roughly 100,000 cases. In response, Senator Bradley has urged the President to give the EEOC cease-and-desist authority, along the lines of the National Labor Relations Board. [San Francisco Examiner, 2/14/97]

According to Senator Bradley:
"The issue [of enforcement] arose during the consideration of the 1964 Civil Rights Act: Do we put an administrative enforcement mechanism in the law to remedy discrimination in employment? The Republicans in the Senate said they would join the Southern Democrats and filibuster the bill if President Johnson gave the soon-to-be-created EEOC an administrative enforcement mechanism, so he dropped it out. Now, if there is an act of discrimination, what you do is file a petition with the EEOC. But there is no way to bring the issue to a conclusion. So, the case languishes indefinitely. There are now 97,000 cases backlogged at the EEOC. Imagine you're a competent mid-level clerk in a company that has promoted Whites, but rarely a Black, or you're the 25th African American who's applied for a job with a police department in a city that is overwhelmingly African American, and not one has ever been accepted and so you decide to bring a case at the EEOC. After five years you get no remedy. So then you go to court for another five years, at the end of which you may or may not get a remedy, which means for people of modest means, you don't have a remedy for discrimination because you can't afford a lawyer for ten years in order to get your promotion from a $ 30,000 to a $ 40,000 a year job.

The EEOC should have the same power that the National Labor Relations Board has, which is cease and desist authority, the ability to bring a case to a conclusion and say, yes, there was discrimination and this is a remedy, or say, no, there was no discrimination, this is frivolous. With a more streamlined procedure for resolving charges of discrimination, companies would pay less to lawyers defending them against frivolous cases and individuals who have a legitimate claim would get a more timely resolution to the problem of discrimination. But once given real power the EEOC has to resist ridiculous interventions that allow Americans who don't want to fight discrimination an excuse to discredit the whole EEOC effort. Self-indulgence at the EEOC breeds disrespect for what should be a mechanism of our national self-respect."[Senator Bill Bradley, Vital Speeches, 2/1/96]

MEMORANDUM

TO: Tom

FROM: Neera

RE: Strengthening the E.E.O.C.

Former Senator Bill Bradley has spoken repeatedly for a stronger E.E.O.C. because he believes that there is no adequate remedy for discrimination today. Basically, he argues that the 1964 Civil Rights Bill was weak on remedies for victims of discrimination because of Southern opposition to the bill. It basically gave the EEOC no teeth as a tradeoff for passage.

Senator Bradley claims that the EEOC's structural weakness has led to the current backlog of roughly 100,000 cases. In response, Senator Bradley has urged the President to give the EEOC cease-and-desist authority, along the lines of the National Labor Relations Board. [San Francisco Examiner, 2/14/97]

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MEMORANDUM

TO: MARY SMITH

FROM: RAVEN MONTGOMERY

RE: PROPOSALS/IDEAS FOR THE EEOC

DATE: JUNE 9, 1997

Fortune July 22, 1996

-case backlog increased by a about 130%, to around 100,000 today
-now proposes to operate with a narrower definition of discrimination
-would emphasize broad-gauged "pattern and practices" cases, involving large numbers of employees
-would summarily dismiss cases that looked too difficult to win
-investigators would handle more cases
-all these ideas were proposed by Chairmen Gilbert Casellas

Black Enterprise June 1996

-commission received 87,600 charges of discrimination in '95, an increase of about 42% from 1990
-estimate includes a backlog of cases
-approximately 30,000 were based on race, 88% filed by blacks
-cases were prioritized in order of importance
-Congress appropriated $235 million for '96, down $2 million from the previous year

Nation's Business June 1995

-Have a nationwide mediation program in '96
-agency plans to identify cases where mediation seems appropriate and where it might help both sides quickly resolve a charge
-plans to select one out of every 20 or 30 such charges for mediation
-it will not be used in cases where it is believed a company has shown a pattern of discrimination against workers or job applicants, and it also will not be used in cases where a charging party's complaint is found without merit
-both sides will have the right to withdraw from negotiations at any time
-any resolution will be put in writing and its terms will be enforced by the agency
-mediation might reduce the legal costs and higher back pay if some cases are addressed earlier
-Houston is a city where mediation has be tried

Congressional Quarterly January 29, 1994

-under HR 2721, the EEOC would be given primary responsibility for processing claims of job discrimination

-now charged with helping to enforce laws against discrimination brought by its employees

- according to proposed law the commission appoints an administrative law judge

-all investigations would be carried out by the commission

-bill authorizes no additional money

-would also allow commission to withhold the salaries of federal employees who do not comply with orders

FW October 26, 1993

-systematic litigation could help in decreasing the overwhelming number of cases

Working Women April 1995

-want lawmakers to use a mix of voluntary arbitration, the courts and their own legislative powers to efficiently protect people's civil rights

I. EEOC

A. Problems

* There is a 75,000 case backlog.

* It is routine for cases to take 5 years to be investigated and referred to DOJ.

* EEOC is understaffed.

* EEOC cannot legally do cease and desist orders.

* EEOC is a commission and has trouble coordinating policy.

B. Solutions

* Increase EEOC budget, it has requested $246 million.

* Give it power to do cease and desist orders, like NLRB.

* Let it do industry wide appraisals and suggest solutions.

C. Other

* The history of the EEOC is that it was passed, but was weak on remedies because of Southern opposition to the bill.

* There have been some programs recommending more wide-ranging reform in the Anti-Discrimination bureaucracy. We should pursue this.

II. UNDERGROUND RAILROAD

A. Opportunity

The underground railroad, one of the most dramatic events in American civil rights history, has been recognized as deserving further commemoration. A 1990 bill directed the National Park Service to complete a study of how it should be organized for celebration and educational purposes.

Legislation has been introduced to link the sites nationwide under the auspices of the NPS.

B. Status

* The bill was introduced by Stokes and Portman last month.

* NPS notes the "absence of further funding" in limiting what it can do.

* NPS has invited HRC to an event in March, 1998 marking the contributions of Booker T. Washington and Frederick Douglass.

Ohio State Law Journal

1996

57 Ohio St. L.J. 1

LENGTH: 36311 words

ARTICLE: The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law

EEOC reform

Michael Selmi*

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* Visiting Associate Professor of Law, George Washington University; Associate Professor of Law, University of North Carolina at Chapel Hill. Harvard Law School, J.D. 1987; Stanford University, A.B. 1983. I want to thank John Conley, Marion Crain, Charles Craver, Theodore Eisenberg, Molly McUsic, David Reiser, Charles Shanor, Jonathan Walker, and the participants at Faculty Workshops at the University of North Carolina and George Washington University Law Schools for their comments on earlier versions of this Article. I am also grateful to Stephen Melamut, Linda Patterson, Beth Posner, and Jennifer Rellick for their excellent research assistance. The research for this Article was supported by a University Research Grant from the University of North Carolina.

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TEXT:
[*1]

I. Introduction

The Equal Employment Opportunity Commission (EEOC) has long been at the center of employment discrimination law so much so that since the passage of the Civil Rights Act of 1964, the vast majority of employment discrimination claims have been initially processed by that agency. n1 Another indication of how solidly entrenched the EEOC has become is that its existence [*2] has gone virtually unquestioned over the last thirty years. This is true even though from its inception the agency has been criticized for being ineffective and has likewise been plagued by a tremendous backlog of discrimination complaints. n2

Paul Miller

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n1 All claims filed pursuant to Title VII of the Civil Rights Act of 1964 must be processed initially by the EEOC, as is also true for claims filed under the Age Discrimination in Employment Act and the Americans With Disabilities Act. See 42 U.S.C. section 2000e-5 (1988); 29 U.S.C. section 626(d) (1994) (Age Discrimination in Employment Act); 42 U.S.C. section 12117(a) (1988 & Supp. V 1993) (Americans with Disabilities Act). The only exceptions are for claims filed pursuant to 42 U.S.C. section 1981 (1988 & Supp. V 1993), which applies to race and national origin discrimination, and under the Equal Pay Act, 29

U.S.C. section 206(d) (1988), neither of which requires that claims be processed by the EEOC. Most section 1981 claims filed in federal court include a Title VII allegation, which means that the underlying claim was processed by the EEOC. See Theodore Eisenberg & Stewart Schwab, Comment: The Importance of Section 1981, 73 Cornell L. Rev. 596, 603 (1988) (noting that 84% of race claims filed in the 3 federal districts in the study's data set between 1980-81 included a Title VII allegation). In addition, Equal Pay Act claims comprise an insignificant amount of discrimination claims. As a result, approximately 85% of employment discrimination cases are initially processed by the EEOC. See also John J. Donohue III & Peter Siegelman, Law and Macroeconomics: Employment Litigation over the Business Cycle, 66 S. Cal. L. Rev. 709, 735 n.46 (1993).

n2 As far back as 1966, just two years after its creation, the EEOC was derided as a "poor, enfeebled thing." Michael I. Sovern, Legal Restraints on Racial Discrimination in Employment 205 (1966). See Richard K. Berg, Title VII: A Three-Years' View, 44 Notre Dame Lawyer 311, 315 (1969) ("From the start of its operations . . . [the EEOC] was burdened with a complaint load far in excess of that which had been anticipated and provided for."). More recently, several scholars have questioned the utility of Title VII, the principle law prohibiting employment discrimination, although they have paid little attention to the role the EEOC has played in developing antidiscrimination law. See Farrell Bloch, Antidiscrimination Law and Minority Employment (1994) (questioning impact of antidiscrimination laws on African-Americans and other minorities in the aggregate); Richard Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws (1992) (advocating elimination of Title VII).

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This Article will address the question that has gone unasked for too long: why are employment discrimination claims subject to an agency procedure? More specifically, what purpose, or value, does the EEOC serve? After all, in many ways employment discrimination complaints resemble tort actions or wrongful discharge claims, both of which are generally filed directly in court without having to be processed initially by an agency. Given these analogous claims, the question becomes whether there is something about employment discrimination claims that requires they be processed by an agency, or whether private attorneys would be able to offer an enforcement scheme that would deter discrimination and remedy violations as effectively as the agency. To be sure, one of the original purposes of the EEOC was to encourage resolution of discrimination claims through conciliation procedures rather than litigation, and moving exclusively to private enforcement would obscure that goal. Yet, the purpose of resolving claims through conciliation has long since been lost. As will be shown below, strikingly few claims are actually resolved through agency conciliation. n3

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n3 As noted infra part II.B., only approximately 15% of the claims filed with the EEOC are settled favorably for plaintiffs through the administrative process, and the vast majority of claims are effectively dismissed by the agency.

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Against this background, I will explore the value of the EEOC to determine whether the agency serves any useful or necessary purpose in the enforcement of our employment discrimination laws. In order to assess the value of the EEOC, I will conduct an empirical analysis of the agency's work and compare that work to the parallel enforcement provided through cases filed by private attorneys. As an evaluative measure of the agency's efficacy, I will suggest that the EEOC ought to provide some value that is different from what [*3] could be provided by private attorneys since there are obvious costs to having a public agency process claims. n4

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n4 In the context of the EEOC, these costs are not only financial but include the time delays the agency adds to the process, and as will be shown, the agency structure imposes substantial costs on many cases and claimants who fail to comply with the agency procedures.

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My analysis will reveal that the EEOC serves two primary functions--it screens a large number of nonmeritorious claims, and it settles and files claims that might otherwise be pursued by the private bar. n5 Additionally, the EEOC tends to concentrate on cases that typically involve lost wages of less than ten thousand dollars, and it is possible that the private bar would be less likely than the agency to bring such small cases because these cases may not be sufficiently lucrative to attract profit-motivated attorneys. n6 If these are the primary functions and virtues of the EEOC, it will be shown that they come with significant costs. For example, the present administrative framework results in the dismissal of hundreds of claims each year because plaintiffs fail to comply fully with the administrative procedures. n7 This problem takes on even greater significance because the cases that are dismissed from federal court tend to be cases having private attorney representation, they are also likely to be, on average, among the strongest of discrimination cases, which may provide a compelling institutional reason to protect them. n8 Without the agency procedure, many of these cases would either be settled favorably for the plaintiffs or be litigated to judgment.

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n5 See infra part II.B.

n6 See infra Tables 4-6. I will generally use the terms lowvalue and low-damage cases interchangeably. As a conceptual matter, how to describe these cases is made difficult by changes in the law brought by the Civil Rights Act of 1991, which provided plaintiffs for the first time with an ability to seek compensatory and punitive damages for intentional discrimination claims. Prior to the 1991 Act, plaintiffs were limited to equitable relief, which generally meant lost wages, or back pay, and whatever job relief the plaintiff sought. See 42 U.S.C. section 2000e-5(g)(1) (1988 & Supp. V 1993) (setting forth Title VII remedies); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (discussing Title VII relief).

n7 See infra text accompanying notes 36-39.

n8 The argument that these claims are among the strongest assumes only that attorneys are acting rationally in choosing which cases to pursue. For a discussion of how lawyers decide to undertake employment discrimination representation see infra part III.A.1.

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The recent passage of the Civil Rights Act of 1991 has made the EEOC ripe for reassessment because the 1991 Act has implemented several changes to employment discrimination law that should make employment discrimination cases more attractive to private attorneys. n9 In particular, the 1991 Act makes [*4] limited compensatory and punitive damages, up to $ 300,000 depending on the size of the employer, available to the victims of intentional discrimination and also allows plaintiffs the opportunity for a jury trial on claims of intentional discrimination. n10 The damage provisions should make employment discrimination cases more lucrative and therefore more attractive to attorneys, while the jury trial provision will likewise increase the expected value of cases because plaintiffs tend to have a much higher success rate with juries than they do with cases that are tried before judges. n11 At the same time, some of the changes enacted by the 1991 Act have sharply increased the volume of claims that are filed with the agency, which greatly exacerbated the agency's pre-existing problems and has further hindered their enforcement efforts.

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n9 Although the Civil Rights Act of 1991 was passed in November 1991, it has only recently had an effect in the courts since the Supreme Court held that most of the 1991 Act's provisions were not to be applied retroactively. See Landgraf v. USI Film Prods., 114 S. Ct. 1483 (1994); Rivers v. Roadway Express, Inc., 114 S. Ct. 1510 (1994). Because there is a lengthy delay in processing claims through the EEOC, claims filed under the new statute are only now beginning to reach the courts.

n10 See 42 U.S.C. section 1981a (1988 & Supp. V 1993) (providing for damages with limits of between $ 50,000 and $ 300,000 depending on the size of the employer). Prior to the passage of the 1991 Act, plaintiffs could not recover damages but were limited to equitable relief. See supra text accompanying note 6. The jury trial provision is found at 42 U.S.C. section 1981a(c) (1988 & Supp. V 1993).

n11 Prior to the passage of the 1991 Act, all Title VII claims were tried to a judge, while claims filed under the Age Discrimination in Employment Act, the Equal Pay Act, and section 1981 were tried to a jury. The varying success rates between judge and jury trials are discussed infra text accompanying notes 150-54.

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This Article will proceed as follows. Part II will discuss the structure of the EEOC and its corresponding administrative procedures. In Part III, this Article turns to an empirical analysis of the nature of the agency's work both in terms of the cases the EEOC processes and those it chooses to settle or litigate. The results and success of the EEOC will then be compared to the enforcement of cases instituted by private attorneys. Part IV of this Article focuses on the likely effects of switching to a market system and compares how different parties--plaintiffs, defendants, and courts--might fare under the two systems. Finally, Part V explores proposals for revising or eliminating the EEOC, and concludes that the agency should either be eliminated or substantially reformed so that it concentrates on cases that private attorneys are unlikely to pursue. [*5]

II. The Structure of the EEOC

A. The Procedural Structure

The history of the EEOC has been well-documented elsewhere n12 and will be discussed only briefly here, primarily as it relates to the creation and operation of its unusual structure. The EEOC was created in 1964 as part of the legislation now commonly known as Title VII. n13 Perhaps the most revealing aspect of the agency's creation is that its original structure was forged out of a political compromise that resulted in significantly limiting the agency's enforcement powers. In order to secure passage of the Civil Rights Act of 1964, it was necessary for Congress to ensure that the EEOC would not be too powerful in relation to the interests of employers. As a result, the EEOC initially was not authorized to file suit in federal court but could only seek to conciliate meritorious claims. n14 The compromising nature of the EEOC's formation has substantially restricted its enforcement mission insofar as it has never been clear what the goal of the EEOC ought to be--whether, for example, it was to remedy discrimination, to alleviate the potential burden on the federal courts from employment claims, or to protect employers from undue interference. n15

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n12 For a detailed history of the creation of the EEOC, see Alfred W. Blumrosen, Modern Law: The Law Transmission System and Equal Employment Opportunity 40-92 (1993); Richard K. Berg, Equal Employment Opportunity Under the Civil Rights Act of 1964, 31 Brook. L. Rev. 62, 62-68 (1964); Herbert Hill, The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law, 2 Indus. Rel. L.J. 1 passim (1977); Minna J. Kotkin, Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy, 41 Hastings L.J. 1301, 1314-17 (1990). For a discussion of state and local precursors to Title VII, see Arthur Earl Bonfield, The Origin and Development of American Fair Employment Legislation, 52 Iowa L. Rev. 1043 passim (1967).

n13 See 42 U.S.C. section 2000e-4 (1988) (creating the EEOC).

n14 See Blumrosen, supra note 12, at 48 (explaining that to overcome the filibuster, proponents of the 1991 Act agreed to limit the powers of the EEOC). At its formation, proponents of the bill sought to create an agency that would resemble the National Labor Relations Board so that the agency's determinations on the merits would be binding subject to limited judicial review and the agency would likewise be permitted to seek judicial enforcement of its orders. Id.

n15 At its inception, there was strong evidence that the EEOC's structure was intended, at least in part, to limit its effectiveness. See Hugh Davis Graham, The Civil Rights Era 129-52 (1990).

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Nevertheless, once the agency's impotence became clear, Title VII was amended to provide the EEOC with the power to sue in federal court on behalf [*6] of the victims of discrimination, and also to bring claims on its own behalf without the necessity of having a particular plaintiff. n16 This legislative change brought primary enforcement responsibility to the EEOC, even though private attorneys have always played a simultaneous, and generally more important, enforcement role. n17 Indeed, the 1972 Amendments specifically preserved a private right of action for claimants, one that cannot be extinguished by the EEOC without the plaintiff's consent. n18 In subsequent years, the EEOC also assumed responsibility for enforcement of claims under the Age Discrimination in Employment Act (ADEA) and most recently under the Americans With Disabilities Act (ADA). n19

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n16 See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, sections 1-3, 86 Stat. 103. This latter power is encompassed by what are known as Commission charges, where the Commission issues a charge on its own authority following an investigation. See 42 U.S.C. section 2000e-5(b) (1988). Interestingly, it was the minority view at the time that enforcement of Title VII should be effected through the federal courts rather than through the agency. See H.R. Rep. No. 238, 92d Cong., 1st Sess., at 2167 (1971) (minority views). Employers likewise opposed increasing the powers of the agency, preferring instead to rely on judicial enforcement of the statute. Id. at 2175.

n17 Private attorneys typically file 95% of the cases that end up in federal court and they have also been involved in far more of the pivotal employment discrimination cases. See infra text accompanying notes 83 and 92.

n18 See 42 U.S.C. section 2000e-5(f)(1) (1988) (describing procedures for filing a court claim); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-99 (1973) (discussing prerequisites to filing a claim).

n19 See 29 U.S.C. section 626 (1994) (ADEA); 42 U.S.C. section 12117 (1988 & Supp. V 1993) (ADA).

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Accordingly, Title VII, ADEA and ADA claims are all processed through the following administrative scheme, which will be described in some detail in order to reveal both its limited utility and the difficulty a plaintiff may face in negotiating the process. To seek relief on most federal claims of employment discrimination, an individual must initially file a charge of discrimination with the EEOC. n20 There is no filing fee, and to facilitate the process the EEOC uses a standard form that a claimant completes often with the agency's assistance. n21 Importantly, this initial charge, which is typically filed without the assistance of [*7] a private attorney, shapes the contours of any subsequent court action, and there has been a substantial amount of litigation over the relevance and proper interpretation of the original charge. n22

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n20 This is true for all claims other than those filed pursuant to section 1981 and the Equal Pay Act. See supra text accompanying note 1. As a definitional matter, I will refer to filings with the agency as charges or claims so as to distinguish them from cases, which I will use to denote lawsuits. It should also be noted that the process for federal employees to file a charge is somewhat different in that they initially file claims with their particular agency. Throughout this Article, I will concentrate on the procedures for nonfederal employees.

n21 The form includes boxes to check to describe the applicable kind of discrimination, i.e., race, sex, or age discrimination, and there is room for a brief description of the individual's complaint.

n22 Courts have consistently held that plaintiffs may only pursue those claims that fall within the scope of the original complaint or which are likely to grow out of an investigation of that complaint. See Jenkins v. Blue Cross Mut. Hosp., Inc., 538 F.2d 164 (7th Cir.) (en banc) (allowing claims that are "like or related to" original charge), cert. denied, 429 U.S. 986 (1976); Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970) (allowing claims that can be "reasonably expected to grow out of EEOC investigation"). As one example of how an individual can be frustrated by the EEOC form, if an African-American woman alleges discrimination based on her race but does not also check the box marked "sex" she will likely be precluded from pursuing a sex discrimination claim even if the investigation points to sex rather than race discrimination, or a combination of the two, as the underlying basis for her treatment. See, e.g., Leigh v. Bureau of State Lottery, 876 F.2d 104 (6th Cir. 1989) (dismissing sex discrimination claim because plaintiff had only raised race discrimination claim in EEOC charge). Nor does the EEOC form recognize a combination gender and race claim. See, e.g., Kimberle Williams Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. Chi. Legal F. 139. Although there are procedures to amend a charge of discrimination much like Rule 15 of the Federal Rules of Civil Procedure, there is no procedure to amend a charge of discrimination after a lawsuit is commenced. The problem regarding the scope of the complaint will therefore arise if discovery during the federal litigation produces evidence to establish a claim that was not pled in the original charge.

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Charges of discrimination must be filed within specific, and relatively short, time deadlines. As a general matter, an individual has 180 days from the date of discrimination to file a charge, though that time is extended to 300 days in states that have their own Fair Employment agencies. n23 Since the majority of states have such agencies, most plaintiffs have 300 days to file a claim, but a peculiar twist to the procedure requires that the state have 60 days to investigate a claim, which means that a plaintiff must generally file a charge within 240 days, or 8 months, of the date of the incident. n24 Eight months is an [*8] unusually short statute of limitations. The original justification for such a short deadline was a desire to ensure that discrimination complaints were promptly resolved. n25 Yet, the reality is that discrimination claims are not resolved any more quickly than other claims. Because the EEOC has an enormous backlog of claims, it takes on average one year to complete an investigation, and many cases remain at the EEOC for two or more years. n26

timing

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1 yr. to investigate

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n23 42 U.S.C. section 2000e-5(e)(1) (1988 & Supp. V 1993).

n24 See EEOC v. Commercial Office Prods. Co., 486 U.S. 107 (1980) (work-sharing agreements can render claims filed between 240 and 300 days timely); Mohasco v. Silver, 447 U.S. 807 (1980) (charge must be filed 60 days prior to 300th day to ensure state has sufficient time to process charge). The state can, and often does, waive this investigation period, which then stretches the limitations period to 300 days. As a result, not only are these time frames confusing, but they have led to the creation of a rather strange process: the individual files her complaint with the EEOC and checks the box to indicate that she also wants to have the charge filed with the appropriate state agency. That charge, however, is never actually filed. Instead, the agency waives its processing of the charge and the EEOC takes note of that waiver and considers the charge on its own accord. Nevertheless, by checking the appropriate box the plaintiff has secured an additional 60 days on the statute of limitations clock.

n25 See Mohasco, 447 U.S. at 823 (time frames intended to encourage prompt processing of claims).

n26 In its most recent report, the EEOC stated that the average investigation of a claim takes 328 days and that its current backlog would take 18.8 months to clear. See EEOC Office of Program Operations, Ann. Rep. 11-12 (1994); see also Clyde Summers, Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals, 141 U. Pa. L. Rev. 457, 480-81 (1992) (discussing length of investigation). There might be an additional benefit to the short time frame to the extent the complaint memorializes the alleged discriminatory incident, but too often the charges are so brief that they provide no specific information regarding the nature of the charge other than its broad categorical basis.

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These delays plainly conflict with the express purpose of the statute and also mean that, as a practical matter, many charges will receive no agency action. The reason for this is the time restrictions the statute imposes for the EEOC's investigation. According to the statute, the EEOC has 180 days from the filing of the complaint to investigate a claim, though it is not necessary that an investigation be completed within that time period. n27 Instead, after 180 days elapses the plaintiff has a statutory right to request a "Notice of Right to Sue" and the EEOC must issue the Notice. n28 Once a plaintiff obtains her right-to-sue notice, she can file her claim in federal or state court regardless of whether the EEOC has completed its investigation. In short, a right-to-sue notice functions as a plaintiff's jurisdictional ticket into federal or state court. This procedure illustrates the limited utility of the EEOC: although a plaintiff must file a claim with the agency, it is entirely possible that the EEOC will serve no function other than to issue a mandatory right-tosue notice, which is akin to requiring a driver to apply for a bridge token in advance. Moreover, based on data provided by the EEOC, it appears the agency now serves the sole function of issuing a right-to-sue notice for approximately twenty-five percent of the claims [*9] that are filed. n29

must issue

? all it does is give the

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n27 42 U.S.C. section 2000e-5(e)(1) (1988 & Supp V 1993). An investigation is intended to obtain information to determine whether the individual's claim has merit, and may include written questions, collection of documents, and gathering of information from witnesses in the form of affidavits.

n28 See 29 C.F.R. section 1601.28 (1993) (claimant can request a Notice of Right to Sue after 180 days).

n29 See infra text accompanying note 46.

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if could

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If the EEOC does investigate a claim, it will ultimately render a determination on the merits as to whether sufficient evidence exists to conclude that the plaintiff was discriminated against. n30 If the EEOC issues a cause finding, the agency invites the parties to enter into conciliation procedures with an intent to resolve the claim. The defendant, however, ~~is under no~~ obligation to conciliate, and where conciliation is unsuccessful, the EEOC may subsequently elect to file suit on behalf of the individual claimant. n31 If the EEOC files suit, the defendant is entitled to a de novo hearing in federal court. n32 On the other hand, if the EEOC finds that a charge cannot be substantiated, it issues a "no-cause" determination, which is a letter to the plaintiff explaining that the EEOC has determined that there is no reasonable cause to believe that discrimination occurred. At the same time that the agency issues its no-cause finding, the EEOC will also issue a rightto-sue notice informing the individual that she now has ninety days to file a federal court action. n33 A no-cause finding, therefore, has no binding authority and cannot prevent a plaintiff from proceeding de novo in federal court. n34 Instead, the no-cause finding simply determines that the EEOC will not pursue the case. n35

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n30 In the language of the EEOC, these determinations are called "cause findings" or "no-cause findings."

n31 42 U.S.C. section 2000e-5(f)(1) (1988). In the past, when conciliation failed, the Commissioners of the EEOC were required to approve litigation, which added further delays to the process and which resulted in many decisions not to pursue litigation in cases after the staff had found reasonable cause. For example, in 1992, the Commission approved suits in 70% of the cases in which suit was recommended by the staff, while in 1994 the percentage declined to 40.4%. See EEOC Office of Program Operations, supra note 26, at 40. The EEOC has recently altered its policy to provide more autonomy to the field offices to commence litigation. See Daily Lab. Rep., Apr. 21, 1995, at A1 (describing EEOC's proposed policy changes).

n32 As will be discussed below, the EEOC renders a cause finding in only approximately 3% of the charges that are filed and successfully conciliates only about one-third of those cases. See infra Table 1.

n33 42 U.S.C. section 2000e-5(f)(1) (1988).

n34 See Chandler v. Roudebush, 425 U.S. 840, 844 (1976) ("It is well established that section 706 . . . accords private sector employees the right to de novo consideration of their Title VII claims."); Alexander v.

Gardner-Denver Co., 415 U.S. 36, 44 (1974) (noting that "the Commission cannot adjudicate claims or impose administrative sanctions"); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-99 (1973) (reasonable cause finding is not a prerequisite to federal suit).

n35 Rather than issuing a no-cause finding, many EEOC offices inform the plaintiff, or her counsel, of its intent to do so and afford the plaintiff an opportunity to request a right-tosue notice instead. This has the effect of eliminating any possible prejudice that may arise from the EEOC finding, and may also say something about the EEOC's confidence in its own procedures.

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[*10]

As should be evident, these procedures amount to a rather strange and vacuous process--one where thousands of claims are filed at no financial cost to the plaintiff, few are truly investigated, fewer still resolved, and none of which is binding on any of the parties. Ironically, despite their apparent vacuity, these administrative procedures have led to a tremendous amount of litigation with issues ranging from the particular time-frames for filing a claim to the scope of the charge, to the weight to be accorded a cause or nocause determination, to the time a right-to-sue notice has been received. n36 The amount of litigation over these procedures is likely unparalleled in federal administrative law. During 1993 alone, an electronic search identified a total of 107 cases involving motions to dismiss for failure to comply with EEOC procedures. n37 Given that reported cases comprise only a fraction of the cases actually decided by courts in any year, n38 these decisions likely represent only a [*11] small number of the cases in which procedural issues were litigated, and they do not include the cases that were never filed in court because of procedural defects in the original filing of the charge. Furthermore, of the cases identified, defendants prevailed on approximately seventy percent of their motions to dismiss. n39

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n36 Many of these cases have ultimately been resolved by the Supreme Court. See, e.g., Irwin v. Veterans Admin., 498 U.S. 89, 92-93 (1990) (receipt by attorney begins statute of limitations clock); EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 125 (1988) (state filing need not be timely to benefit from state deferral requirement); Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 150 (1984) (filing of right-to-sue letter without complaint does not constitute timely filing); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) (holding that Title VII filing period is not jurisdictional); Delaware State College v. Ricks, 449 U.S. 250, 257-59 (1980) (defining time to file a claim in tenure case); see also Jerome M. Culp, A New Employment Policy for the 1980s: Learning From the Victories and Defeats of Twenty Years of Title VII, 37 Rutgers L. Rev. 895, 905 (1985) (noting that between 1979-84, the Supreme Court heard 41 employment discrimination cases, 24 of which involved procedural issues including 5 relating to issues on the statutes of limitations). In the last several years the balance of the Court's employment discrimination docket has begun to shift to evidentiary or substantive matters. See McKennon v. Nashville Banner Pub. Co., 115 S. Ct. 879, 886 (1995) (afteracquired evidence rule): Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370-71 (1993) (defining the requirements of sexual harassment cases); St. Mary's Honor Ctr. v. Hicks, 113

S. Ct. 2742, 2747 (1993) (burden of proof).

n37 The search was conducted on WESTLAW for district and appellate court cases involving motions relating to procedural matters. To ensure completeness, two different searches were run, the cases were then compiled by eliminating duplicates and a research assistant checked all the cases to identify the issues involved. Search of WESTLAW, Allfeds library (Feb. 24, 1995 & March 11, 1995).

n38 It has recently been estimated that only about 20% of employment discrimination cases are published, where published was defined as available through an electronic research service. See Peter Siegelman & John J. Donohue, III, Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases, 24 Law & Soc'y Rev. 1133, 1141 (1990) ("Excluding all cases without published opinions thus eliminates 4 in 5 of all cases filed."). In their study, Siegelman and Donohue also found that published opinions were not representative of the entire universe of employment discrimination cases; instead, published cases tended to involve higher stakes and to be more complicated than unpublished decisions. Id. at 1155-56. These findings make it difficult to extrapolate from the published opinions to determine how much litigation was actually generated over the EEOC procedures.

n39 This figure does not include mixed case results where, for example, the defendant prevailed on some but not all of the claims. There were approximately 14 such cases that have been excluded from the calculations. Defendants also seemed to fare somewhat better on appeal than in district court. For the district court cases, defendants prevailed in 68% of the 76 cases, while they prevailed in 13 of 16 appellate decisions, or in 81.2% of the cases. See supra note 37.

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The preceding discussion highlights two important issues. First, the EEOC's procedures appear to be socially wasteful, especially when it is understood that they are not binding on any party. Second, these procedures lead to a large amount of litigation that would be unnecessary in many instances if claims were not initially processed by the agency. n40 Nevertheless, despite these deficiencies, the institutional structure may be worth preserving if there is a net gain from the agency's work, which is the focus of the next section.

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n40 Certainly eliminating the agency would not alleviate all of the litigation regarding procedural issues. For example, there would still be litigation over statute of limitations issues, but it seems likely that the volume of litigation would be substantially reduced, particularly if discrimination plaintiffs were afforded a longer statute of limitations than the current 300 day limitation.

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B. Assessing the Work of the EEOC

In this section, the function and value of the EEOC will be evaluated through an extensive review of the agency's work. This review will rely primarily on data provided by the EEOC in its annual reports, as well as an independent statistical analysis of some of those data as described in detail below. n41 Identifying the value and function of the EEOC through its specific [*12] work will facilitate evaluating whether the agency procedure is necessary to ensure adequate enforcement of the employment discrimination laws.

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n41 Due to the manner in which the EEOC provides information, the data discussed in this section may not always be consistent by years. The EEOC publishes its statistics in three different annual reports, some of which are not issued annually. There is a general annual report, which includes the most comprehensive information relating to the nature of the charges that are filed. The most recent report, at the time this Article was written, however is for 1991-92. See EEOC Ann. Rep. (1991 & 1992). The Programs Branch also issues an annual report, which provides information relating to the processing of charges. The most recent report is for fiscal year 1994. See EEOC Office of Program Operations, supra note 26, at 11-12. Finally, the General Counsel's office issues an annual report detailing the agency's litigation activity. The most recent report for this office is fiscal year 1993. See EEOC Office of Gen. Counsel, Ann. Rep. (1993).

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1. Administrative Processing

As is well known, the volume of charges filed with the EEOC is substantial and increasing. During fiscal year 1994, the EEOC received 91,189 charges, which represented a 53.4% increase over its 1990 receipts, with much of the increase attributable to the recently enacted ADA. n42 While these charges were typically not resolved during the year they were filed, the EEOC also provides data on its annual charge resolutions. As Table 1 illustrates, during 1994, the EEOC resolved 71,563 charges. The EEOC defines resolution broadly to include termination of charges either by a determination on the merits or an administrative withdrawal of the case initiated by the plaintiff. n43 The two largest classifications of resolutions are no-cause findings, which were issued for 34,451 charges, and administrative resolutions, which account for another 26,012 claims. Administrative resolutions are those resolutions which result in the closing of a case but with no finding issued or relief granted. n44 Administrative resolutions represented 36% of the total charges resolved by the EEOC during 1994. n45 Significantly, the vast majority of these cases were closed when the plaintiff requested a right-to-sue notice from the agency: such requests accounted for 82.5%, or 21,460, of the administrative resolutions. n46 [*13]

[SEE TABLE IN ORIGINAL]

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n42 EEOC Office of Program Operations, supra note 26, at 1. The employment provisions of the ADA became effective during July 1992 for many employers, and by 1994 the ADA accounted for 20.7% of all of the charges filed with the EEOC.

n43 Id. at 11-12.

n44 Id. at 21.

n45 Id. at 32.

n46 Id. at 12. The bulk of the remaining administrative closures are the result of losing contact with plaintiffs who move without informing the EEOC of a new address or phone number. Importantly, the number of requests for right-to-sue notices represented a sharp increase from the previous year. The 1994 totals were a 26.8% increase from the prior year. Id. Because this increase occurred shortly after the changes made by the Civil Rights Act of 1991 became effective, it seems reasonable to assume that the increase is due to those changes.

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The remaining claims are those that were resolved favorably to plaintiffs, which total 11,092 or 15.5% of the total resolutions. The largest percentage of these cases, 9,174, were settled without a formal determination on the merits. Notably, this pattern of charge resolution has been consistent over the last few years. n47

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n47 See id. at 12. Indeed, the percentage of claims resolved favorably for plaintiffs was virtually identical in 1992. See EEOC Office of Program Operations, Ann. Rep. 16 (1992). The totals reported by the EEOC include unsuccessful conciliations, though it is unclear why the EEOC defines unsuccessful conciliations as a favorable resolution for the plaintiff, since such a resolution provides the plaintiff with nothing other than a cause finding. Nevertheless, because there are so few cause findings the number of unsuccessful conciliations is relatively small, 1,319 during 1994, and if removed from the 1994 totals would reduce the overall percentage of claims resolved favorably to plaintiffs to 13.7% of resolutions.

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Perhaps the most interesting, and in some ways remarkable, information regarding the work of the EEOC is found in the cause findings issued by the agency. As discussed earlier, a cause finding is a determination on the merits regarding the underlying claim. n48 During 1994, the EEOC issued 36,377 cause determinations following a full investigation, and 94.7% (34,451) resulted in no-cause findings in favor of the defendants. n49 Accordingly, there were only 1,926 determinations of cause, a mere 5.3% of the total determinations. n50 Since 1990 this figure has been consistent with the highest percentage of cause findings occurring in 1990 at 7.2% of the total, while the lowest was in 1992 [*14] with 3.8% of the total. n51

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n48 See supra text accompanying notes 30-31.

n49 EEOC Office of Program Operations, supra note 26, at 12. Even if settlements the EEOC obtains without a formal merits determination were treated as cause findings, the percentage of cause findings would still be only 24.3%.

n50 Id. at 12.

n51 Id. One has to go all the way back to the 1970s to find a significantly higher percentage. See Blumrosen, supra note 12, at 163-66. The EEOC has recently reported similar results for its processing of ADA claims where it found cause on 822 of approximately 50,000 cases, less than 2% of the charges. See Daily Lab. Rep., July 27, 1995, at A8.

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Equally revealing, an unusually small percentage of the cause findings were favorably resolved--only 31.5% (607) of those findings issued in 1994 met with successful conciliation. n52 This percentage is surprising for at least two reasons. First, the percentage is markedly lower than the general settlement rate for cases that are filed in federal court, which tends to approximate 65%. n53 Second, since so few cases receive a cause determination, one would expect that these cases would be among the very strongest cases and therefore especially amenable to settlement. n54

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n52 See Blumrosen, supra note 12, at 12. Again, this percentage has been consistent since 1991--31.4% in 1991, 33.9% in 1992 and 29.9% in 1993.

n53 See, e.g., Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements, 46 Stan. L. Rev. 1339, 1340 (1994) (noting that approximately twothirds of cases in federal court settle); Joel Seligman, Commentary: The Merits Do Matter, 108 Harv. L. Rev. 438, 445 (1994) (indicating that approximately 60% of private securities litigation settles). The EEOC's settlement rate is thus about one-half of the general rate.

n54 For an explanation of why these cases should be relatively easy to settle see infra part III.A.2. Of course, these cases may not be the strongest of cases. Instead, there is also a class of cases that settle early without a complete investigation that may be the strongest of cases.

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The reason the settlement rates have been so low is likely attributable to two policies that were instituted by the EEOC in the 1980s during Chairman Clarence Thomas' tenure. To ensure greater control over the agency's litigation docket, Chairman Thomas required that the full Commission approve all litigation so that a cause finding issued by the staff amounted to little more than a recommendation for litigation. n55 Additionally, the Commission also began to settle cases only for the full amount of relief. n56 Taken together, these policies created clear disincentives for defendants to settle claims prior to the commencement of litigation, which is reflected in the low percentage of [*15] successful conciliations. n57

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n55 See supra note 31.

n56 See EEOC Comm'rs' Memo. of Enforcement Pol'y, Sept. 11, 1984, reprinted in Staff of House Comm. on Educ. & Lab., 99th Cong., 2d Sess., Report on the

Investigation of Civil Rights Enforcement by the EEOC. This policy was part of the Commission's emphasis on individual cases, and its commitment to providing full relief to all identified victims of discrimination. See Neal Devins, Reagan Redux: Civil Rights Under Bush, 68 Notre Dame L. Rev. 955, 965-67 (1993) (explaining policies implemented during the Reagan and Bush Administrations).

n57 It is not uncommon for defendants to require plaintiffs to commence litigation before they settle cases. A recent study involving medical malpractice claims concluded that "the hospital generally treats the filing of a lawsuit as a hurdle that patients must overcome to receive a settlement." Henry S. Farber & Michelle J. White, A Comparison of Formal and Informal Dispute Resolution in Medical Malpractice, 23 J. Legal Stud. 777, 795 (1994).

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With respect to the substance of the settlements obtained during the administrative process, the EEOC provides only limited information beyond the average benefits obtained, which in 1994 amounted to $ 10,948. n58 In addition to this average, the EEOC also reports the amounts recovered under specific statutes. For disabilities claims the EEOC recovered an average award of $ 20,957, while its age discrimination resolutions netted an average of $ 15,547. n59

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n58 EEOC Office of Program Operations, supra note 26, at 3.

n59 Id. at 12. 1994 represented the first year that a significant number of claims were resolved under the ADA.

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2. EEOC Litigation

The EEOC provides more detailed information regarding its litigation activity, although it provides the data primarily in narrative form. In reviewing the EEOC's litigation activity, there are two different parameters to analyze--the cases the EEOC files, and those it resolves. To obtain a better indication of the EEOC's case resolutions, we created a data set from the information provided in the 1992 and 1988 General Counsel's reports. This data set has allowed us to conduct a statistical analysis of the nature and success of the agency's litigation activity. Based on the EEOC's information, the data set includes variables for the nature of the case, the number of beneficiaries, the resolution of the case, and the amount of money, if any, the EEOC recovered. n60 The statistical information also enabled us to analyze separately cases brought on behalf of individuals and those cases in which the EEOC [*16] obtains classwide relief. n61

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n60 Specifically, the following variables were coded: (1) kind of claim, e.g., race, gender, etc.; (2) whether or not the case was identified as a class action by the EEOC; (3) the number of beneficiaries; (4) the results of the case; (5) the amounts of money recovered, if any. This information was inputted for both the 1992 and 1988 reports but it subsequently turned out that the

1988 information was too incomplete to provide the basis for a useful statistical analysis. For example, the 1988 report suggests that the EEOC did not lose a single case during the year, and there were many entries that were too incomplete to allow any form of analysis, often times because the monetary amounts or the number of beneficiaries was omitted from the information that the EEOC provided. This is not to suggest that the 1988 report was purposefully misleading in any way, only that given the nature of the reported data it was difficult to complete a statistical analysis for that year.

n61 As detailed infra text accompanying notes 78-80, it was not possible to rely on the EEOC's determinations of the scope of the cases since they define as class actions any case in which it seeks classwide relief regardless of whether it obtains such relief.

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Sex
age
race

Initially, we turn to the cases filed by the EEOC. In Fiscal Year 1992, the EEOC filed 347 substantive lawsuits, which involved a total of 456 allegations of discrimination. n62 Sex discrimination allegations accounted for the largest category of claims, comprising 26.1% (119) of all allegations, followed by age discrimination claims with 21.1% (96) of all allegations, and race discrimination claims accounting for 19.1% (87) of the allegations. n63 As to the nature of the allegations, the largest percentage of claims related to individuals who claimed they had been unlawfully terminated, which accounted for 53.4% of all claims. n64 Only 17.8% of the EEOC cases involved claims for discriminatory hiring. n65 Consistent with the EEOC's history and current litigation trends, a relatively small percentage of the cases were filed as class allegations--47 of the cases which constituted 13.5% of the claims. n66

firing
hiring

Class

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n62 EEOC Office of Gen. Counsel, Ann. Rep. 43 (1992). The EEOC defines substantive suits so as to exclude those cases brought to enforce statutory recordkeeping requirements or subpoenas.

n63 Id. The EEOC provides specific numbers only as to allegations as opposed to the number of suits. Reporting the numbers in this fashion could present a skewed picture if, for example, a particular category of claims involves an unusually high number of allegations. However, based on the statistics relating to different statutes, it appears that relying on the number of allegations provides a reasonably accurate measure as 24.2% of the EEOC's cases were filed under the ADEA, which closely approximates the percentage of allegations that included age discrimination claims. It should also be noted that 1992 represented the lowest level of litigation activity for the EEOC since 1990. The differences, however, were not large. For example, in 1993 the EEOC filed 398 substantive suits and the proportion of race, gender, and age cases were roughly the same as in 1992. EEOC Office of Gen. Counsel, supra note 41, at 38-39.

n64 EEOC Office of Gen. Counsel, supra note 62, at 41.

n65 Id. at 43.

n66 Id. This figure is based on the EEOC's definition of class claims.

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The pattern of litigation claims brought by the EEOC has a number of noteworthy features. Substantively, the EEOC's litigation activity is broadly consistent with the general pattern for all employment discrimination cases, including those cases brought by the private bar. John Donohue and Peter Siegelman have documented trends in employment discrimination litigation that largely mirror the EEOC's activity. In particular, they have demonstrated that discharge and individual cases predominate in federal litigation over hiring cases and class actions. n67 Moreover, with one notable exception, the EEOC's [*17] litigation is consistent with the percentage of charges that are filed with the agency. For example, during 1992 twenty-one percent of the EEOC's cases involved age discrimination claims while in the two previous years age discrimination complaints accounted for approximately twenty-seven percent of the claims filed with the agency. n68 However, when compared to the percentage of charges filed, the EEOC's litigation docket is unrepresentative when it comes to race discrimination cases. Although race discrimination represents the largest category of charges filed, constituting approximately forty percent of all charges, they result in the fewest lawsuits, only nineteen percent of the cases. n69 This does not necessarily mean that the EEOC is underserving race discrimination claims; instead, it may mean that race claims settle more frequently than other kinds of claims or that more race claims are withdrawn from the agency, either of which might explain the relatively low percentage of suits. Unfortunately, the EEOC does not provide information describing the nature of the cases it settles through conciliation procedures. n70 Finally, the EEOC appears to bring more age discrimination cases, perhaps at a level that is twice as high, than the private bar does. n71

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n67 See John J. Donohue III & Peter Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 Stan. L. Rev. 983, 1015-21 (1991). In their study of federal court cases filed between 1978 and 1989, the authors documented that for employment discrimination the largest class of cases involved discharge cases and that class actions were on the decline to the point that in 1989 there were only 51 class action suits filed nationwide.

n68 During 1991, there were 17,449 age discrimination complaints, representing 27.8% of the total charges, and during 1992 there were 19,350 complaints filed, representing 27.5% of the total. See EEOC Office of Program Operations, supra note 26, at 29. During 1992, gender claims accounted for 29.8% of all charges and 26.1% of the case allegations filed.

n69 See EEOC Ann. Rep., supra note 41, at 28-31. In 1992, race discrimination charges accounted for 43.1% of all charges, while the percentage for 1991 was 43.4%. Id.

n70 See id.

n71 Between 1972 and 1987, 10.3% of all employment discrimination cases filed in federal court were filed under the ADEA. See Donohue & Siegelman, supra note 1, at 715; see also David L. Rose, Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement, 42 Vand. L. Rev. 1121, 1159 (1989) (noting that the EEOC "has been bringing more age discrimination suits than Title VII suits since 1979"). The EEOC's emphasis on age discrimination cases is somewhat unusual in that age discrimination plaintiffs tend to have significantly higher incomes than other discrimination plaintiffs. See George Rutherglen, From Race to Age: The Expanding Scope of Employment Discrimination Law, 24 J. Legal Stud. 491, 493 (1995) (documenting that age discrimination plaintiffs had incomes that were nearly twice as high as nonage discrimination plaintiffs). The higher incomes of age discrimination plaintiffs would suggest that they are probably in the best position to vindicate their rights without governmental assistance, and yet they seem to receive the highest attention from the EEOC.

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[*18]

Turning to the EEOC's resolution of cases, during 1992 the EEOC resolved 459 cases that had been filed in federal court. n72 As indicated in Table 2, 378 of these cases were settled while 81 were resolved through some form of litigation. Excluding the three default judgments, these figures produce a settlement rate of 82.9%.

[SEE TABLE IN ORIGINAL]

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n72 See EEOC Office of Gen. Counsel, supra note 62, at 43; see also supra text accompanying note 60 (discussing the data that was used).

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Table 3 indicates that in cases that were tried to judgment, the EEOC prevailed in 27 of the 48 trials for a success rate of 56.3%. The EEOC was most successful in litigating sex discrimination cases where it prevailed in 73% of its trials, while the success rate for age discrimination cases was 56.2% and for race discrimination cases was 53.3%. n73

[SEE TABLE IN ORIGINAL]

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n73 As discussed infra part II.C., these success rates compare favorably with those obtained by private attorneys. See infra text accompanying note 86.

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[*19]

Tables 4 and 5 report the amounts recovered by the EEOC in the cases for which the EEOC provided such information. Table 4 presents the amounts for non-class action cases, which are here defined as cases involving ten or fewer beneficiaries, n74 and includes only those cases in which the EEOC identified the number of beneficiaries and also provided the amount recovered in the case. n75 For the cases settled by the EEOC, the median per person recovery was $ 8,332, with a mean of $ 18,174. n76 Though the variance in awards was high with a standard deviation of $ 29,338, 75% of the cases were settled for less than $ 20,000.

[SEE TABLE IN ORIGINAL]

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n74 For an explanation of this classification see infra text accompanying notes 78-80.

n75 There were 22 cases for which the EEOC obtained no monetary relief but for which it was not possible to determine whether the agency had sought any such relief. Accordingly, these cases have not been included in the per person totals. See supra text accompanying note 62.

n76 In general, when reviewing data on litigation amounts the median provides a more accurate estimate of results since means can be readily distorted by inordinately large or small recoveries. See Stephen Daniels & Joanne Martin, Myth and Reality in Punitive Damages, 75 Minn. L. Rev. 1, 39 (1990) ("mean jury awards generally are misleadingly high"); Samuel R. Gross & Kent D. Syverud, Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial, 90 Mich. L. Rev. 319, 384 (1991) (noting that in trial outcome data the means are easily distorted where the dispersion is large). Indeed, with the EEOC data from 1992 the age discrimination trial amounts were strongly influenced by a $ 407,000 recovery obtained by one plaintiff.

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Table 4 also lists the various amounts received for race, gender, and age discrimination claims. While race and gender plaintiffs obtained roughly similar settlements with median awards of $ 7,625 and $ 7,000 respectively, age discrimination cases garnered approximately 40% higher awards, with a median award of $ 11,181. [*20]

[SEE TABLE IN ORIGINAL]

In terms of trial outcomes, Table 5 indicates that individuals represented by the EEOC were successful in 21 individual cases, and the awards in the aggregate were considerably higher in these cases than for settlements--a median award of $ 15,000 per person with an average award of $ 43,656. It appears, however, that these figures are strongly influenced by age discrimination awards, where limited damages were available at trial. n77 In contrast, race discrimination claims had a median award of only $ 7,775 and for sex discrimination claims the median award was $ 9,240. Interestingly, those plaintiffs pursuing race discrimination claims to trial obtained no better monetary awards than those who settled their claims prior to trial. In addition, there were three claims for which the EEOC prevailed on the merits but obtained no monetary relief.

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n77 Age discrimination plaintiffs could obtain liquidated damages in the form of twice their backpay award for willful violations of the statute. These damages were not available for other statutory claims.

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Because the settlements for class actions can vary from what would be expected in a non-class action case, those claims were analyzed separately. However, reliance on the EEOC's definition of a class action was not possible since the agency defines class actions broadly to include all cases in which class relief was sought. n78 As indicated by the data, a large number of cases classified by the EEOC as class actions involve only one or two actual beneficiaries, n79 and the EEOC does not indicate in its reports whether it obtained classwide relief in all of these cases. Therefore, to measure the value of classwide [*21] recovery, class actions are here defined based on the number of beneficiaries involved in the cases, with cases involving ten or more beneficiaries defined as class actions. n80 As provided in Table 6, per person class action recoveries were considerably lower than non-class action recoveries, with a median recovery of only $ 3,158.

[SEE TABLE IN ORIGINAL]

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n78 See EEOC Office of Gen. Counsel, supra note 62, at 48 ("In fiscal year 1992, the Office of General Counsel defined 'class case' as a lawsuit that (a) specifically asserts claims on behalf of a 'class of persons,' or (b) challenges a discrete employment practice or policy applicable to a class or classes of employees.").

n79 We identified 27 cases that had only one or two beneficiaries but which the EEOC had defined as a class action. For many years the EEOC has been criticized for failing to bring class action lawsuits. See, e.g., Rose, supra note 71, at 1159 ("The Commission brought no testing or other adverse impact suits from 1983 to January 1989, and only one such proposed suit had been approved in 1988.") (footnote omitted).

n80 This seems to be a relatively conservative estimate as a case with only 10 members would probably not qualify as a class action. The EEOC, however, is not bound by the procedural rules governing class actions. See General Tel. Co. v. EEOC, 446 U.S. 318, 319 (1980) (holding that EEOC may seek classwide relief without need for class certification).

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Here again, the awards for age discrimination suits were significantly affected by a single case, in this instance a settlement that resulted in an award of thirty-five million dollars for thirty-two beneficiaries. Excluding this settlement from the totals results in an average recovery for age discrimination cases of $ 24,826 with a median recovery of $ 5,243. n81

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n81 The EEOC litigated only one class action during Fiscal Year 1992, so the data in Table 6 includes only settlements. In the litigated case, the EEOC recovered $ 494,175 for 39 beneficiaries in a race discrimination case. EEOC Office of Gen. Counsel, supra note 62, at 43.

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This review of the EEOC's data suggests that the agency receives approximately ninety thousand claims a year but only about fifteen percent of those claims obtain relief as a result of the EEOC's actions during the process. It also appears that the EEOC fails to prioritize its cases, although it may de-emphasize race cases, concentrates on individual rather than class action litigation, and litigates very few cases annually. n82 As a result, the primary [*22] function of the EEOC appears to be to process a large number of cases that the agency determines have no merit. In order to assess the value of the EEOC, the next question is how the EEOC compares to the private bar in its enforcement and litigation activities.

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n82 Professors Donohue and Siegelman previously documented that the United States, which included litigation brought by the Justice Department against public employers, is responsible for about 5% of the litigation involving employment discrimination claims. See Donohue & Siegelman, supra note 67, at 995 (noting that the United States was a plaintiff in only 5.3% of the 7,277 cases filed in 1989).

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C. The EEOC Compared to the Private Bar

As noted earlier, the value of the EEOC, at least as the legal representative of victims of discrimination, is largely measured in comparison to the activity of the private bar. Each year private attorneys file between eight thousand and ten thousand employment discrimination cases in federal court and the government plays no role in the vast majority of these cases. n83 Given the existence of parallel private enforcement, one might expect the EEOC to do something either different from or better than the private bar. Otherwise, if private enforcement would produce roughly the same results, and do so without the cumbersome agency procedures, then the agency may be adding no significant value to the enforcement process. Comparing the results obtained through the two enforcement systems produces mixed results--in some ways the EEOC outperforms the private bar and in other ways its performance compares unfavorably to the results obtained by private attorneys.

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n83 In 1992, there were a total of 10,771 employment discrimination cases filed. See Administrative Office of the U.S. Courts, Ann. Rep. Table C-2A (1992).

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One area in which the EEOC might be considered to outperform the private bar pertains to its settlement rate for those cases it decides to litigate. As

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noted earlier, the EEOC settled approximately eighty-three percent of the cases filed in federal court while settlements for the private bar appear to range somewhere between sixty to sixty-five percent of the cases filed in federal court, depending on which study is relied on for comparison purposes. n84 Of [*23] course, this conclusion relies on the EEOC's settlement rate for court cases. The settlement rate for charges on which the EEOC issues cause findings is considerably lower, with a successful conciliation rate of approximately thirty-five percent. n85 Additionally, one area in which the EEOC clearly fared better than the private bar is in its success rate at trial. n86

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n84 The 65% figure assumes that employment discrimination cases are settled in approximately the same rates as other types of cases. See supra note 53. Perhaps the best indicator that discrimination cases are roughly similar to other cases is the information compiled by the Administrative Office of the United States Courts that provides detailed information on the disposition of federal court cases. Here we find that employment discrimination cases reach trial at a slightly higher rate than most other tort cases--8.8% of employment discrimination cases in 1992 compared to 6% of diversity insurance cases--but otherwise are resolved in similar patterns. See Administrative Office of the U.S. Courts, supra note 83, at Table C-4. Other studies have reported settlement rates for employment discrimination cases that range from 35% to 80% depending on the category of cases that are studied. See Rutherglen, supra note 71, at 513 (finding settlement rate for age discrimination cases ranging from 58% to 47%); Peter Siegelman & John J. Donohue, III, The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis, 24 J. Legal Stud. 427, 450 (1995) (reporting settlement rate of 61.3% and 84.6% depending on the time the case was filed); Siegelman & Donohue, supra note 38, at 1155 (finding a 68% settlement rate among unpublished employment discrimination cases and a 35% settlement rate for published cases).

n85 See supra text accompanying note 32.

n86 See Theodore Eisenberg, Litigation Models and Trial Outcomes in Civil Rights & Prisoner Cases, 77 Geo. L.J. 1567, 1588 (1989) (finding a 22.2% success rate for employment discrimination cases nationwide). Eisenberg found that the United States government had a success rate of 44.1% during the time period he studied. Id. at 1600. See also Paul Burstein & Kathleen Monaghan, Equal Employment Opportunity and the Mobilization of Law, 20 Law & Soc'y Rev. 355, 375 (1986) ("Having a federal agency as party to a case is associated with an 18% higher chance of victory.").

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Although the EEOC has a higher success rate, it obtains less monetary relief for its claimants than the private bar. Here, some caution is necessary because it is difficult to obtain exact comparisons for the EEOC's data. For example, most previous studies involving the amounts recovered by plaintiffs in employment discrimination cases have included cases involving section 1981 claims in which damages were available, and most of the studies do not specifically indicate what percentage of the cases included such claims. n87 Nevertheless, all of the prior studies document that private parties obtain significantly higher results than the EEOC obtains, and focusing on trial outcomes, provides some useful comparisons. Perhaps the most accurate comparison is found in the data compiled by the American Bar Foundation and reviewed by Donohue and Siegelman. This data indicates that between 1972 and 1987, the average recovery in an employment discrimination suit was twenty thousand dollars. n88 Other estimates are consistent with this finding. n89 [*24] If one takes these figures as rough estimates, unadjusted for inflation, it appears that the EEOC obtains significantly less monetary relief than do private attorneys, and indeed the differentials are sufficiently high to compensate for a private attorney's fees. In other words, assuming a plaintiff would pay her attorney's fees from the judgment, a plaintiff would still be better off monetarily by retaining a private attorney than by proceeding with the EEOC. n90

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n87 Section 1981 claims, however, generally comprise only a small number of discrimination claims. See Donohue & Siegelman, supra note 67, at 997 (noting that only 9 cases filed between 1982 and 1987 raised only a section 1981 claim, while another 147 included a section 1981 claim either alone or in conjunction with another statute).

n88 See Donohue & Siegelman, supra note 1, at 760-61. In contrast, based on the information we were able to analyze from the EEOC's 1988 Annual Report the agency's average recovery during 1988 was $ 10,620. EEOC Ann. Rep. (1988).

n89 Eisenberg reported his findings in percentiles, indicating that the recovery at the 40th percentile was $ 14,000 and at the 60th percentile was $ 31,000. See Eisenberg, supra note 86, at 1580. Reviewing trial outcomes from California state courts, Samuel R. Gross and Kent D. Syverud found that 92% of the employment discrimination verdicts exceeded $ 10,000. See Gross & Syverud, supra note 76, at 338. Finally, a review of cases from the Northern District of Illinois indicated that awards in published employment discrimination cases averaged $ 47,907, while the average in unpublished cases was $ 12,375. See Siegelman & Donohue, supra note 38, at 1152.

n90 However, as discussed in more detail below, prevailing plaintiffs are typically entitled to recover their attorneys' fees from the defendants. See 42 U.S.C. section 2000e-5(k) (1988 & Supp. V 1993). Therefore, the differential to compensate for attorneys' fees is primarily relevant for those individuals who may not know that the defendant would pay the attorneys' fees.

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All of this focus on the monetary aspects of the cases may not provide a fair measure of the value of the EEOC if, for example, the EEOC was particularly instrumental in shaping the law through its litigation activity. n91 One way to measure this effect is to look to Supreme Court cases, where the law is shaped most profoundly, to determine whether the EEOC was a party in important and formative cases. Here we find that, outside of cases involving its own procedures, the EEOC has rarely been a party in the Supreme Court in an employment discrimination case. In fact, the EEOC has not been a party in any of the recent major cases pertaining to employment discrimination decided by the Supreme Court. n92

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n91 It is conceivable that the EEOC might also be able to extract workplace changes through settlements that private attorneys were unable to obtain, particularly given that a private attorney's financial incentives may lead the attorney to forego certain nonmonetary recovery whereas the EEOC may have no similar incentive. However, no data is readily available to measure this potential difference. Nevertheless, given that so few of the EEOC's cases are truly class actions--which is when structural change is most likely to be produced--it appears unlikely that its settlements are leading to fundamental changes in the workplace in a manner that is significantly different from what the private bar is able to achieve.

n92 See McKennon v. Nashville Banner Pub. Co., 115 S. Ct. 879 (1995); Landgraf v. USI Film Prods., Inc., 114 S. Ct. 1483 (1994); Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993); Hazen Paper Co. v. Biggens, 113 S. Ct. 1701 (1993); St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993); International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). The EEOC has filed an amicus brief in many of these cases but filing an amicus brief, although valuable, is considerably different than being a party to the case. Along these same lines, Jonathan Leonard has recently observed: "In recent years, a number of record breaking ($ 100 million or more) settlements have been reached in cases charging racial and sex discrimination. In many if not all, of these cases, the EEOC had received complaints and performed preliminary investigations. In none of these cases did the EEOC attain the settlements ultimately achieved by private attorneys." Jonathan S. Leonard, Use of Enforcement Techniques in Eliminating Glass Ceiling Barriers, Rep. for U.S. Dep't of Lab., Glass Ceiling Comm'n, at 70 (1994). The fact that the EEOC has not been actively involved in the development of the law should not be particularly surprising insofar as during most of this time the EEOC was under the direction of a Republican administration that often expressed hostility towards employment discrimination litigation. For a discussion of the civil rights policies during the Reagan Administration see Norman Amaker, Civil Rights and the Reagan Administration (1988); Graham, supra note 15, at 129-52.

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D. A Summary of the Comparison

One can surmise from the review of the EEOC's procedures and its activities the following conclusions. First, the EEOC resolves only a small number of cases in favor of plaintiffs. This can be interpreted in at least one of two ways. It may be that the EEOC is accurately assessing the merits of the cases, in which case a tremendous number of meritless charges are filed each year. Assuming this is an accurate explanation, it is doubtful that so many charges would be filed if the system were not costless to plaintiffs or if those individuals sought legal counsel before filing a claim. On the other hand, if the EEOC is dismissing too many meritorious cases, then a different problem arises--one that directly affects the welfare of the plaintiff class. In either case, the agency structure may not be the most suitable means for advancing meritorious cases.

Second, a large number of cases are dismissed in federal court as a result of failing to comply with the administrative procedures. n93 Most of these cases, when filed in federal court, involve private attorneys, n94 and as discussed in Part III of this Article, if one assumes that attorneys are operating accurately as a filter for strong cases, then these cases may have had considerable promise and were likely to be among the strongest of discrimination claims.

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n93 See supra text accompanying notes 36-39.

n94 One study indicated that 89% of employment-related constitutional tort cases involved counsel. See Stewart J. Schwab & Theodore Eisenberg, Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant, 73 Cornell L. Rev. 719, 747 (1988); see also James N. Dertouzos et al., The Legal and Economic Consequences of Wrongful Termination 37 (1988) (finding that California wrongful discharge plaintiffs were all represented by attorneys working on a contingency fee).

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Finally, the EEOC concentrates its enforcement efforts on relatively small cases--typically recovering through litigation less than ten thousand dollars per [*26] plaintiff. Given this concentration, the question becomes whether these cases are worth the price of the administrative structure, and whether the EEOC is the only means for resolving such low-value cases. As discussed in more detail below, the changes in the law brought by the Civil Rights Act of 1991 should now encourage private attorneys to bring small but strong cases when they may have previously shunned such cases. n95 Whether that would ultimately be the case, and what effect it may have on the judiciary in terms of deterring discrimination, is addressed below.

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n95 See infra part III.A.1.

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III. Can We Rely on Private Attorneys to Enforce the Law?

Part II of this Article identified the kind of work the EEOC performs and the purposes it serves. This part will explore whether private attorneys might provide an enforcement strategy superior to that which the EEOC currently offers. By engaging in this comparative analysis, I will not try to determine whether an enforcement system predicated on private attorneys would be ideal but only whether it would be superior to the existing process. n96 Making that assessment will require identifying the effects the different structure would have on the three relevant parties: plaintiffs, defendants, and courts, while also differentiating among the various kinds of claims the system would emphasize, for example, between low or high-damage claims, and individual or class actions. n97 In addition to the three parties mentioned above, the effect the system would have on the public is of obvious concern. Yet, the public's interests ought to be represented through the concerns of the three previously named parties since the public's interests are largely reflected in our national policy [*27] against employment discrimination and in having an efficient enforcement scheme to carry out the law's objective. Accordingly, the public would be concerned if too few victims of discrimination obtained remedies for the wrongs committed against them, if the system led to overdeterrence among employers, or if it excessively burdened the courts. Deciding which of these areas merits the greatest concern, or how best to mediate the various interests, ultimately involves a policy decision that is beyond the scope of this Article. Therefore, this part of the Article will concentrate on elucidating the likely effects of switching to a purely private enforcement scheme.

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n96 Cf. Neil Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics & Public Policy 49 (1994) (emphasizing the need to study institutional choice from a comparative perspective); Einer R. Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review, 101 Yale L.J. 31, 110 (1991) ("A more accurate measure of the desirability of any legal process, . . . is whether the mix of results it produces is better than the mix of results we could get with alternative processes or laws.").

n97 This section will concentrate on individual cases since as already noted class actions do not currently comprise a meaningful portion of the employment discrimination cases that are filed. However, liberating the EEOC from its focus on individual cases would allow it to concentrate on class action litigation, which is certainly a stronger means of working toward true labor market changes than seeking change through individual cases. See Burstein & Monaghan, supra note 86, at 367 ("Resolving complaints of discrimination one by one is so costly and inefficient that it is not likely to lead to much change in the labor market."); David A. Strauss, The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards, 79 Geo. L.J. 1619 (1991) (arguing for greater emphasis on class action litigation).

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A. The Case for Private Attorneys

In determining whether private attorneys would assume the work of the EEOC, it is necessary to explore the kinds of cases for which private attorneys are likely to offer representation. From the outset it should be noted that there has been a long-standing concern that attorneys are either unwilling or at a minimum hesitant, to pursue employment discrimination claims. n98 As will be emphasized below, the changes made by the Civil Rights Act of 1991 ought to provide new incentives for attorneys to take more discrimination cases, which will be important to consider when evaluating attorneys' past practices. However, not only has there been a concern with whether attorneys would take cases, but a number of commentators have argued that employment discrimination claims are significantly underreported, n99 and if this is true, it [*28] would be important to ensure that moving toward a system that depended entirely on private attorneys would not lead to any greater underreporting. n100

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n98 This was one of the original purposes behind the creation of a governmental agency and a strong motivation behind the 1972 amendments to the 1964 Act. See S. Rep. No. 415, 92d Cong., 1st Sess., 17 (1971) (describing employment discrimination as "modern day David and Goliath" confrontation); Robert Belton, A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964, 31 Vand. L. Rev. 905, 951 (1978) (noting that discrimination cases were originally thought to be unattractive to the private bar).

n99 For example, Kristin Bumiller has estimated that about half of the individuals with discrimination claims failed to pursue them. See Kristin Bumiller, The Civil Rights Society 26 (1988). Other estimates have been even lower. See Richard E. Miller & Austin Sarat, Grievances, Claims, and Disputes: Assessing the Adversary Culture, 15 Law & Soc'y Rev. 525, 545 (1984) (estimating that 7 in 10 discrimination grievants made no claim for redress). There can be little question that employment discrimination claims are underreported at some level, but the data relied on for the above estimates are all based on the self-reporting of claims with no independent attention given to the potential merits of those claims. Therefore, it is difficult to know what percentage of the unreported claims would have resulted in some relief to the plaintiffs. This analysis also suggests that there is some tension between the fact of underreporting and the paucity of claims that obtain relief, unless we assume that the claims that are not reported are for some reason likely to be stronger than the reported claims. Within the economic model of litigation, which assumes that individuals engage in some cost-benefit analysis prior to filing a claim, this is extremely unlikely. Additionally, with some exceptions, it does not appear that discrimination claims are reported substantially less than other types of claims, as it appears that most claims are underreported. See Herbert M. Kritzer et al., To Confront or Not to Confront: Measuring Claiming Rates in Discrimination Grievances, 25 Law & Soc'y Rev. 875, 881 (1991) (reporting that the rate of complaint for employment discrimination was 63% which was lower than other areas but higher than most studies have indicated); Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System--And Why Not?, 140 U. Pa. L. Rev. 1147, 118386 (1992) (reviewing studies and finding low-claiming rate across-the-board).

n100 This is the focus of infra part III.A.3. Importantly, none of the studies documenting the underreporting of claims has concluded that individuals failed to pursue their claims primarily as a result of their inability to hire an attorney.

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To identify whether attorneys are likely to pursue employment discrimination claims, one can begin with the standard economic model of litigation. That model, without any refinement, predicts that plaintiffs will bring suit whenever their expected returns from litigation exceed their expected costs. n101 In the employment context, the returns to a plaintiff can be a job or reinstatement to a previously held job, back pay and both punitive and compensatory damages. n102 For all claims filed pursuant to Title VII and under the ADA, those damages cannot exceed $ 300,000 and depend on the size of the employer. n103 For age discrimination claims, the plaintiff may recover [*29] liquidated damages for willful violations in an amount that is twice the level of backpay, n104 and for claims brought under section 1981 the damages are unlimited. n105 There may also be nonmonetary gains that would motivate individuals to pursue claims even when the monetary returns would not otherwise justify litigation. These gains may include issues such as restoring one's reputation, particularly in cases in which the plaintiff has been fired. n106

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n101 Extensive literature exists modelling the process by which plaintiffs decide to pursue cases and the effect various fee arrangements have on litigation decisions. See, e.g., Richard A. Posner, Economic Analysis of Law section 21.5 (4th ed. 1992); Robert D. Cooter & Daniel L. Rubinfeld, Economic Analysis of Legal Disputes & Their Resolution, 27 J. Econ. Lit. 1067 (1989); Earl Johnson Jr., Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions, 15 Law & Soc'y Rev. 567 (1981); Janice Madden & Jennifer Wissink, Achieving Title VII Objective at Minimum Social Costs: Optimal Remedies and Awards, 37 Rutgers L. Rev. 997 (1985); Thomas J. Miceli & Kathleen Segerson, Contingent Fees for Lawyers: The Impact on Litigation and Accident Prevention, 20 J. Legal Stud. 381 (1991); A. Mitchell Polinsky & Daniel L. Rubinfeld, The Welfare Implications of Costly Litigation for the Level of Liability, 17 J. Legal Stud. 151 (1988); Murray L. Schwartz & Daniel J.B. Mitchell, An Economic Analysis of the Contingent Fee in Personal-Injury Litigation, 22 Stan. L. Rev. 1125 (1970).

n102 Until recently, Title VII plaintiffs were entitled only to make-whole relief, which generally included lost wages and job relief. See supra note 6.

n103 Under the Civil Rights Act of 1991, the maximum damage awards are as follows: for employers with 14-100 employees, $ 50,000; 101-200 employees, $ 100,000; 201-500 employees, $ 200,000; and more than 500 employees, $ 300,000. 42 U.S.C. section 1981(b) (1988 & Supp. V 1993) (setting forth damages for Title VII); 42 U.S.C. section 12117(a) (1988 & Supp V. 1993) (applying Title VII remedies to ADA).

n104 See 29 U.S.C. section 626(b) (1994) (age discrimination remedies); Hazen Paper Co. v. Biggens, 113 S. Ct. 1701 (1993) (discussing available remedies).

n105 42 U.S.C. section 1981 (1988 & Supp. V. 1993).

n106 Many plaintiffs undoubtedly file claims on which they have little prospect of recovery, and many of these claims are probably filed out of anger or spite. While one might argue about the prevalence of these motives in decisions to file suit, it is perhaps most useful here to note that such claims are likely to be more numerous under the existing institutional structure, which attaches no costs to filing a claim, than under a system involving private attorneys since even where the plaintiff may not be acting rationally, one would expect an attorney to act to further her own financial interests.

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At this point, rather than focusing on the plaintiff's incentives to file claims, the decision-making process employed by attorneys will be focused upon because it is their decision to take cases that is of primary interest as a substitute for the EEOC. n107 Stated in its most basic form, attorneys who are acting rationally ought to pursue those cases that present profitable opportunities. In the employment context, defining profitable opportunities will typically depend on the probability and benefits of prevailing measured against the costs of litigation, including the opportunity costs of taking a particular case. Importantly, although damages are relevant to this calculation, they do not control an attorney's decision in employment discrimination litigation because a prevailing plaintiff routinely recovers her attorney's fees from the losing defendant. n108 Damages may surely be relevant to the extent the attorney is hired on a contingency fee basis and also to the extent that the level of damages is relevant to extracting settlements from defendants. n109 Therefore, assuming that an attorney will fund the litigation and also that she will obtain a percentage of the plaintiff's award, the following equation depicts an attorney's incentive structure based on the above analysis: [*30]

[SEE FORMULA IN ORIGINAL]

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n107 Part III.A.3 infra will discuss whether there might be some reason that certain plaintiffs who currently file claims would not seek representation from a private attorney.

n108 42 U.S.C. section 2000e-5(k) (1988 & Supp. V 1993). In contrast, a defendant can only recover her fees if the plaintiff's case is deemed frivolous. See Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

n109 This issue is discussed in more detail infra part III.A.1.

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In this equation, p represents the probability of prevailing, with p1 representing the probability that damages (x) will be assessed in addition to the backpay. n110 W is the weekly wage and D represents the duration of unemployment; thus, wD is the typical backpay calculation for lost wages. n111 Furthermore, Cp represents the costs of litigation. For an attorney working on a contingency fee, this formula will capture the prevailing incentive structure since the attorney would recover a percentage of the damages. n112

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n110 In many instances, the probabilities for prevailing and for recovering damages may be identical but they need not be. The probability one will receive a punitive damage award can be quite distinct from the probability of prevailing on the underlying claim, especially where the damage award may turn on the desirability of the plaintiff or defendant rather than the particular merits of the case. Additionally, a more refined analysis would look to the probability of settling rather than prevailing since attorneys may take cases that offer a strong probability of settling even where the underlying merits are not so strong. Some of these cases may be what are typically called nuisance suits, where plaintiffs file claims out of the hope of extracting a settlement solely due to the cost of a defense. See Luchian Ayre Bebchuck, Suing Solely to Extract A Settlement Offer, 17 J. Legal Stud. 437 (1988). In other instances, these may represent either low damage cases or highly risky but high damage cases.

n111 A prevailing plaintiff is generally entitled to backpay. See Ford Motor Co. v. EEOC, 458 U.S. 219, 220 (1982) (detailing backpay calculations); Albemarle Paper Co. v. Moody, 422 U.S. 405, 409 (1975) (establishing basis for backpay).

n112 From the available evidence, which is limited, it appears that employment discrimination cases are generally based on a contingency fee--if by contingency we include the ability to recover fees from the defendants. For example, in their review of California state cases, Gross and Syverud found that in 73% of the employment cases the plaintiff was represented on a contingency fee basis. See Gross & Syverud, supra note 76, at 374 n.134. Another study found that all of the plaintiffs in the wrongful discharge cases that were studied had attorneys working on a contingency fee basis. See Dertouzos et al., supra note 94, at 37. Though not directly involving employment discrimination cases, other studies have likewise found that individual plaintiffs are typically represented on a contingency fee basis. See Herbert M. Kritzer, The Justice Broker: Lawyers and Ordinary Litigation 88 (1990) (finding 59% of individuals represented on a contingency basis).

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When an attorney expects to recover her fees from the defendant, however, the equation that best represents the attorney's decision-making process would be the following:

[SEE FORMULA IN ORIGINAL]

Here, p represents the probability of prevailing, F represents the fee, and p(F) represents the expected fee. With the prospect of representation as the issue of [*31] interest, the best measure of representation is the expected fee recovery rather than the expected damage recovery. n113 As the equation illustrates, the ability to obtain fees from the defendant suggests that the most attractive case for an attorney may have little to do with damages. An attorney may instead seek out cases with a high probability of success but which are sufficiently complex to require a large number of hours.

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n113 See Donohue & Siegelman, supra note 71, at 721 n.16; John C. Coffee, Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669, 700-01 (1986). The fee is simply the hourly rate multiplied by the hours worked. At one time it was relatively common for attorneys to obtain fee enhancements in employment discrimination litigation from courts as an encouragement for public interest litigation, but the Supreme Court recently held that such enhancements were impermissible under the statute that provides fees to prevailing civil rights plaintiffs. See City of Burlington v. Dague, 505 U.S. 557 (1992).

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What this brief analysis demonstrates is that attorneys have clear incentives to pursue strong employment discrimination cases, that is, at least those cases that have a high probability of prevailing either at trial or through settlement. n114 Moreover, so far there is nothing to suggest that the incentive [*32] structure is flawed for discrimination cases. n115 Indeed, one might expect that, all things being equal, many plaintiff's attorneys would prefer to bring employment discrimination claims as a political move toward eliminating discrimination. n116

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n114 Although there may be room for skepticism regarding the ability of attorneys to select meritorious cases, most studies support the notion that attorneys perform this function reasonably well. For example, a recent study of malpractice cases found that attorneys quite accurately distinguished in their case selection between good and weak cases on the merits. See Farber & White, supra note 57, at 780. Reviewing a number of studies, Michael Saks has likewise concluded that there are few false positives among the cases that are actually filed. See Saks, supra note 99, at 1196; see also Kevin M. Clermont & John D. Currivan, Improving on the Contingent Fee, 63 Cornell L. Rev. 529, 561-62 (1978) (arguing that cases settle so frequently because attorneys are able to assess the value of the case). In contrast, others have questioned the ability of attorneys to distinguish meritorious from nonmeritorious cases. See, e.g., Janet Cooper Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, 43 Stan. L. Rev. 497, 513 (1991) (suggesting that securities litigators often engage in opportunistic filings in order to extract settlements that result in large attorney's fees); Robert A. Kagan, Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry, 19 Law & Soc. Inquiry 1, 48 (1994) (arguing that plaintiffs' lawyers serve as poor gatekeepers because of the number of cases disposed of on motions). Alexander's study, however, seems limited in that it was primarily based on a sample of nine cases filed by one law firm. Alexander, supra, at 520-22; see also Seligman, supra note 53 (critiquing Alexander's study). Regardless of how well attorneys filter out nonmeritorious cases, it is clear that the legal system relies on them to do so for the vast majority of litigation in this country. Thus, the primary question is whether there is something distinct about employment discrimination that requires an agency to do the filtering as opposed to private attorneys.

n115 However, the incentives may be insufficient if there are few strong cases. For reasons to be discussed later in this Article, employment discrimination cases have historically fared poorly when tried before a judge. See infra text accompanying notes 151-54.

n116 See Kritzer, supra note 112, at Table 5-1 (finding that sympathy for a client's predicament was the most important factor to an attorney in deciding to take a case).

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However, a number of questions remain to be answered. First, there is a question whether private attorneys can be expected to take low-value claims so as to assume what appears to comprise the bulk of the EEOC's caseload. Second, one must address the question of why attorneys do not take more cases today; why, for example, more attorneys do not remove cases from the administrative process by requesting a right-to-sue notice from the EEOC. n117 Finally, there is a subsidiary question regarding whether claimants would be less likely to seek out an attorney than they would be to file an administrative claim, and if so, what the implications of that greater reluctance might be. These issues will be discussed in turn.

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n117 See supra text accompanying notes 27-29.

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1. Low-Value Cases

As was shown earlier, a significant portion of the EEOC caseload is concerned with low-damage cases n118 and therefore, any consideration of a private enforcement scheme must take into account whether private attorneys could be expected to assume responsibility for these smaller cases. Alternatively, one might determine that these cases should not be a systemic priority given the limited resources that exist to combat discrimination. If this were the situation, then one would be far less concerned about whether attorneys are likely to take these cases. Therefore, the relative importance of these cases will be addressed at the outset because it directly relates to the importance of attorney representation for low-value cases.

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n118 See supra Tables 4-6.

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Ordinarily one might think that small damage cases ought not to be an enforcement priority and that discouraging such cases would not produce a particular social loss in a system of constrained resources. As long as litigation costs drive decisions, or expected monetary outcomes determine decisions to litigate, the reality is that many low damage claims simply will not be [*33] brought. n119 However, when discrimination forms the underlying basis for the claim, and the system permits individual claims, there is a far greater need to ensure an available judicial forum even for small cases. One reason for this is to guard against the hazard that might arise if employers believed they were effectively free to discriminate as long as the damages remained below a certain level. Surely a policy should not be created that tells employers it is permissible to engage in discriminatory acts as long as the damages do not exceed ten thousand dollars, or worse, a policy that tells employers it is permissible to discriminate against low-wage employees. Here our national policy against discrimination commands that the prohibition of discrimination extends all the way down to even the smallest cases. n120 Moreover, to the extent that low-damage claims are correlated with low-wage jobs, these cases may be concentrated among low-income individuals. n121 Given that members of minority groups and women are also disproportionately found among low-income groups, these cases may disproportionately involve race, gender or national origin claims--precisely the kind of cases that the system should target. n122 Any enforcement system for discrimination claims that systematically [*34] turns away from these causes of action would have to be deemed fatally flawed. Therefore, at some level, low-value claims need to be preserved, and the discussion now turns to the question of whether one can expect private attorneys to pursue low-value cases if the EEOC were no longer available to respond to such claims.

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n119 See Richard E. Miller & Austin Sarat, Grievances, Claims, and Disputes: Assessing the Adversary Culture, 15 Law & Soc'y Rev. 525, 535 n.7 (1981) (noting that cases of less than $ 1,000 are systematically screened out); Polinsky & Rubinfeld, supra note 101, at 157-58; Thomas D. Rowe, Jr., Predicting the Effects of Attorney Fee Shifting, 47 Law & Contemp. Probs. 139, 149 n.47 (1984) (noting that as a society we generally do not want to encourage small claims).

n120 Michael Piore has recently emphasized the distinct importance of discrimination cases by noting, "It is striking that we never talk about selling rights to employment discrimination or sexual harassment." Michael J. Piore, Beyond Individualism 179 (1995).

n121 This correlation may be less clear than it might otherwise appear because low-damage cases may be the result of either a low-wage job or a short duration of unemployment. Apart from the damage remedies made available by the Civil Rights Act of 1991, the primary component of a discrimination award is for lost wages which is a function of the amount of the wages and the time that one was unemployed. Thus, an individual who quickly obtains new employment at a comparable wage would also tend to pursue a small damage claim.

n122 In his recent work, Martin Carnoy documents the concentration of African-Americans and Latinos in what he characterizes as low-wage and high-wage jobs, relying on recent census data. According to Carnoy, in 1990, 46.4% of black males were employed in traditional low-wage jobs, while only 30.5% of white males held such jobs. The percentage of black males in high-wage jobs was 18%, whereas the percentage for white males was 39.5%. Latinos were found in even greater numbers among low-wage job holders--53.8% of Latino men, and 38.9% of Latina women. For African-American women, 38.9% held low-wage jobs (white females 29.1%) and 20.4% held high-wage jobs. Martin Carnoy, Faded Dreams: The Politics and Economics of Race in America 95-97 (1994). For additional discussions of the persistent wage differentials see William A. Darity, Jr. & Samuel L. Myers, Jr., The Black Underclass (1994); Reynolds Farley, The Common Destiny of Blacks and Whites: Observations About the Social and Economic Status of the Races, in Race in America 197, 206-07 (Herbert Hill & James E. Jones, Jr. eds., 1993).

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It has already been shown that the existing structure provides sufficient incentives to private attorneys to pursue employment discrimination cases without exclusive attention to the size of the damages at issue. This was, indeed, one of the guiding principles behind the fee-shifting statute that allows prevailing plaintiffs to recover fees from the defendant. n123 Accordingly, the most attractive case for a plaintiffs' attorney may be a very strong but complicated case--one in which there is a high probability of success but that will take a significant amount of time to prepare. n124 Yet, by focusing on fees that are expected after trial one easily loses sight of the reality that so few cases are actually tried. n125 Rather than being determined after trial, the issue of fees will typically arise during settlement negotiations, and whenever fees are determined as an element of the settlement process the case resembles a traditional contingency fee arrangement. The reason for this is that in settling a particular claim a defendant is primarily concerned with the aggregate amount of the agreement and is generally much less concerned with the distribution of the settlement between the plaintiff and attorney.

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n123 See Harold J. Krent, Explaining One-Way Fee Shifting, 79 Va. L. Rev. 2039, 2050 (1993) (noting that fee shifting increases the attractiveness of cases with low monetary damages); see also Schwab & Eisenberg, supra note 94, at 747 (explaining that fee shifting has protected low-damage constitutional torts). Krent also suggests, however, that feeshifting may make settlement more difficult because it adds another interest into the settlement mix and may place the attorney at odds with her client in certain circumstances. Krent, supra, at 2081-82.

n124 This claim may be stated too strongly because it is easy to see that as soon as one alters the strong presumption on the merits, a cautious attorney may want to avoid unduly complicated cases in favor of greater diversification within her case portfolio. See infra text accompanying notes 143-45.

n125 In employment discrimination cases, only between 8 and 10% of the cases are actually tried. See supra note 84.

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With the focus on settlement, determining whether attorneys would pursue low-damage claims raises two questions: first, whether small or large damage cases are more amenable to settlement; and second, whether one can expect a [*35] fee that is proportionate to the damages that are at stake. At first glance, this latter issue may seem rather obvious if one assumes that fees are a function of the underlying award. But this assumption is only true under an actual contingency fee agreement, and even then an attorney might compensate for the lower award by increasing the percentage of her share for settling small damage claims. n126 In contrast, when an attorney calculates her fees on an hourly basis with the expectation of reimbursement from the defendant either through settlement or after trial, her fee will be dependent on the time she expends on a case rather than on the underlying award. Accordingly, low-damage cases will not necessarily lead to proportionately small fees. n127

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n126 For example, an attorney might offer an arrangement that provided that she received a one-third percentage for cases in excess of $ 50,000 but a 40% share in cases below that amount. This strategy might be feasible, and palatable, if equitable relief, such as a job, was of primary concern to the plaintiff.

n127 One recent study found that on average fees in employment discrimination cases that went to trial averaged more than 50% of the damages obtained by the plaintiff. See Siegelman & Donohue, supra note 38, at 1151 Table 3.4 (average damages were $ 47,907 with an average fee recovery of $ 29,765); see also Rutherglen, supra note 71, at 514 (finding that in age discrimination cases fees were on average double the amount of the recovery).

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This does not answer the question whether cases involving low or high damages are easier to settle. There is now abundant literature on the relationship between damages and settlement prospects, and to the extent there is any consensus on the issue, it is that a number of factors, including the monetary stakes, are relevant to assessing a case's facility for settlement. n128 For example, in some instances, a large corporation may be prone to settle small cases quickly, although as a repeat player in litigation a large corporation may also decide for strategic reasons to bargain in excess of what the expected value of the judgment would dictate in order to deter future litigants. n129 Small defendants may be more likely to act irrationally at the prospect of being sued [*36] if for no other reason than they may be unaccustomed to litigation. Their inexperience and the resulting indignation at being sued may lead them to incur litigation expenses that exceed the damages that are at stake in a case. At the same time, small defendants may have fewer litigation resources, which may result in oversettling cases for fear of the potential costs of losing a case. n130

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n128 For a thorough discussion of the various arguments as to whether large or small cases are more likely to go to trial see Gross & Syverud, supra note 76, at 351-56. Although Judge Posner concludes that higher stakes cases are more likely to be litigated, he also notes that the conditions of the parties and the merits of the cases can significantly increase the risk of litigation. See Posner, supra note 101, at 57.

n129 As the authors of one study recently explained: "In the context of litigation, it is widely believed that repeat players are more likely to reject efficient settlements in any given dispute because of an overriding interest in the development of the governing positive law or in fostering a reputation for stubbornness that could prove valuable in future disputes." George Loewenstein et al., Self-Serving Assessments of Fairness and Partial Bargaining, 22 J. Legal Stud. 135, 156 (1993). For the classic discussion regarding the role repeat players have in litigation see Marc Galanter, Why the Haves Come Out Ahead: Spe4culations on the Limits of Legal Change, 9 Law & Soc'y Rev. 95 (1974).

n130 This may be of less concern in Title VII cases since the damages are capped proportionate to the size of the employer. See supra note 103. As a result, an employer would at least have some upper-limit by which to measure its ultimate exposure.

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Nevertheless, it is often thought that increasing the costs of litigation will also increase the prospects for settlement. n131 However, this presumption fails fully to capture the potential influence costs may have on dispute resolution. Instead of a linear relationship between costs and settlement, what has been found is that increasing costs can have any number of effects on the outcome of the case, including the substantial prospect that only a case involving high stakes is likely to proceed to trial given the often high costs of litigation. n132 For this very reason, some have argued that small cases ought to be the easiest kind of case to settle. n133 Yet, this conclusion is likewise too rigid to withstand extended analysis because it depends on two critical assumptions. The first assumption is that a defendant's litigation behavior is driven primarily by its litigation costs, but as has already been shown, this will not always be the case. n134 Second, it assumes that there are fixed costs to trying a case that make certain cases economically inefficient to try. But, if the costs of litigation are proportionate to the monetary stakes at issue, low damage cases should not [*37] enjoy any settlement advantage because they will be proportionately less expensive to try. n135

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n131 See, e.g., Stephen McG. Bundy, The Policy in Favor of Settlement in an Adversary System, 44 Hastings L.J. 1, 14 (1992) ("A settlement gap is more likely when litigation costs are high and less likely when they are low.").

n132 See Posner, supra note 101, at 557; Linda R. Stanley & Don C. Coursey, Empirical Evidence on the Selection Hypothesis and the Decision to Litigate or Settle, 19 J. Legal Stud. 145, 164 (1990) (concluding that increasing costs of litigation can have varying effects). Others have suggested that greater stakes will lead defendants to litigate cases they are more likely to win, thus skewing data on litigation outcomes. See George L. Priest, Measuring Legal Change, 3 J. Law, Econ. & Org. 193, 207 (1987).

n133 See, e.g., Dertouzos et al., supra note 94, at 40-41 ("Because going to trial imposes high fixed costs independent of the case size or complexity, both parties will wish to settle small cases out of court."); Robert H. Gertner, Asymmetric Information, Uncertainty, and Selection Bias in Litigation, 1993 U. Chi. L. Sch. Roundtable 75, 90 (arguing that low damage cases, with a high probability of liability, ought to be the easiest to settle).

n134 It seems clear that settlement is less likely when nonmonetary issues factor prominently into the litigation. See Bundy, supra note 131, at 14. Such factors may be disproportionately present in employment discrimination cases given the reputational effects that may attach to a finding of discrimination and the further prospect of additional lawsuits from fellow employees.

n135 See Dertouzas et al., supra note 94, at 38 (noting that "defense fees are higher when stakes are higher"). As Dertouzas notes there are fixed costs to trying a case with the primary question being what those costs are. One recent estimate hypothesized that a case with an average trial time of 9 days cannot be tried to a jury for under $ 10,000. See Gross & Syverud, supra note 76, at 336-37 & n.53. Many individual employment discrimination cases, however, can be tried in substantially less than nine days.

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Therefore, the above analysis indicates that it is difficult to reach any definitive conclusion regarding the probability of settling cases based solely on their monetary stakes, other than perhaps to suggest that at least some low-damage cases should be easier to resolve given the fixed costs of litigation. Another difficulty in determining whether attorneys will prefer large to small cases is that with the availability of damages it is now difficult to know what kind of case can be properly classified as a low-value case. Prior to the Civil Rights Act of 1991, it was relatively easy to assess the value of a case because the cases typically involved only lost wages. n136 The changes in the law, however, have made it more difficult to focus solely on the lost wages at issue; damages will now depend primarily on the size of the employer and the nature of the defendant's act. Assuming that there is a relation between the quality of the defendant's practice and the punitive damages assessed by a jury, even cases that involve small lost wages but that stem from practices that are worthy of punitive damages should offer profitable opportunities to attorneys. n137 With this in mind, cases that are unlikely to be profitable, and therefore less likely to obtain representation, will be those low lost wages cases that stem from isolated practices that a jury deems unworthy of significant damages. But in a world of limited resources in which not every case can be filed, it seems that those would be precisely the kind of cases that ought to be treated as a low priority. In any event, because attorneys tend to proportion their effort to the amount of fees at stake, n138 to the extent that low-damage cases result in lower fees, attorneys should be able to compensate for the lower fees by adjusting their caseload accordingly, including by increasing the volume of smaller [*38] cases. n139

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n136 See supra note 6.

n137 To date, there has been very little litigation over the standard a plaintiff must meet to qualify for an award of punitive damages under Title VII.

n138 See Kritzer, supra note 112, at 88 (finding a "strong relationship between stakes and attorney effort"). Earl Johnson has succinctly explained the basis for the relationship as follows: "In most cases, fee-for-service lawyers have economic motives to overinvest, and contingentfee lawyers have motives to underinvest." Earl Johnson, Jr., Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions, 15 Law & Soc'y Rev. 567, 598 (1981).

n139 This suggestion is related to the notion that an attorney's caseload resembles an investment portfolio. See infra text accompanying notes 143-45.

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At least two other factors suggest that attorneys ought to be willing to accept employment discrimination cases that may involve low damages. First, most claims brought in state and federal court involve relatively modest monetary amounts. n140 Even for attorneys who would prefer larger cases, the opportunity costs to taking low-damage cases may not be high since most of the cases from which an attorney might choose will be low-damage cases. And among lowdamage cases one would expect employment discrimination cases to have an edge due to the prospect of receiving fees from defendants in these cases. A second reason attorneys may be willing to accept low-damage claims is that these claims tend to fare better in terms of the proportional amount recovered than larger cases n141 and also have higher success rates than larger claims. n142 In combination, these factors should strongly influence the attractiveness of even lowdamage claims.

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n140 Reviewing data primarily from 1978, Herbert Kritzer found: "Most state cases are quite small, involving less than $ 5,000 . . . In federal court the cases are larger, as one would expect given the jurisdictional minimums in those courts: the median case involves $ 15,000, and 19% of the caseload involves more than $ 50,000." Kritzer, supra note 112, at 31 (footnote omitted). This finding has been consistent among studies of the value of court cases. See, e.g., David Trubek et al., The Costs of Ordinary Litigation, 31 UCLA L. Rev. 72, 87-89 (1983) (finding that most cases were for modest amounts).

n141 See Saks, supra note 99, at 1218 (finding that there tends to be a higher percentage of recovery at the lower-end of the compensation scale). Saks' finding suggests that defendants may quickly find that their litigation costs exceed the value of the case, which would support the theory that low damage cases are the easiest to settle.