

**FEDERAL
ENFORCE-
MENT OF
EQUAL
EMPLOY-
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REQUIRE-
MENTS**

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U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and the Congress.

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United States Commission on Civil Rights

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1. Introduction

Background

Federal Government efforts to combat discrimination in employment date back to the 1930s, when a nondiscrimination provision was included in the Unemployment Relief Act of 1933.¹ Since then the Federal Government has adopted extensive equal employment requirements. These include the Equal Pay Act of 1963,² which prohibits sex-based discrimination in compensation; Title VII of the Civil Rights Act of 1964,³ which prohibits employment discrimination based on color, religion, sex, or national origin in classification, hiring, discharge, compensation, or any other terms, conditions, or privileges of employment; the Age Discrimination in Employment Act of 1967,⁴ which prohibits discrimination against older persons (over age 40) with respect to employment practices; and the Rehabilitation Act of 1973,⁵ section 501 of which requires

Federal agencies to take affirmative action in the hiring, placement, and advancement of handicapped employees,⁶ and section 503 of which requires Federal contractors to take affirmative action to hire and promote qualified handicapped workers.⁷

In addition, Executive Order 11246⁸ prohibits discrimination in employment by Federal contractors because of race, sex, religion, color, or national origin, and requires them to take affirmative action in hiring, promotion, pay, and training to ensure nondiscrimination for women and minority men. Executive Order 12067,⁹ implementing Reorganization Plan No. 1 of 1978,¹⁰ assigned the Equal Employment Opportunity Commission (EEOC) responsibility for providing leadership and coordination to all Federal agencies with equal employment opportunity responsibilities.¹¹ Today, virtually every aspect of the workplace from testing, hiring,

¹ Act of Mar. 31, 1933, ch. 17, §1, 48 Stat. 22 (repealed 1968), as cited in U.S. Commission on Civil Rights, *Twenty Years After Brown* (1977), p. 65, n.9. The Civil Rights Acts of 1866 (Act of Apr. 9, 1866, ch. 31, 14 Stat. 27) and 1871 (Act of Apr. 20, 1871, ch. 22, 17 Stat. 13) contained "limited" protections against employment discrimination based on race. Kohl, *Equal Employment Opportunity in America: An Historical Past and Emerging Trends*, 36 Lab. L.J. 836 (1985). "Narrow" Supreme Court interpretations, however, "essentially nullified" those statutes. Paul Burstein, *Discrimination, Jobs, and Politics* (Univ. of Chicago, 1985), p. 16. See also U.S. Commission on Civil Rights, *Civil Rights: A National, Not a Special Interest* (1981), pp. 6-12.

² 29 U.S.C. §206(d) (1982).

³ 42 U.S.C. §§2000e-2000e-17 (1982).

⁴ 29 U.S.C. §§621-634 (1982).

⁵ Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.).

⁶ 29 U.S.C. §791 (1982).

⁷ 29 U.S.C. §793(a) (1982).

⁸ Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65 Comp.), reprinted in, 42 U.S.C. §2000e app. at 28-31 (1982).

⁹ Exec. Order No. 12,067, 3 C.F.R. 206 (1979), reprinted in 42 U.S.C. §2000e app. at 32-33 (1982).

¹⁰ Reorganization Plan No. 1 of 1978, 3 C.F.R. 321 (1979), reprinted in, 42 U.S.C. §2000e-4 app. at 39-42 (1982).

¹¹ Other laws that include prohibitions against job discrimination are Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d to 2000d-4 (1982), which bars discrimination on the basis of race, color, or national origin in any program receiving Federal financial assistance; Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681-1686 (1982), which prohibits sex discrimination in federally assisted education programs; section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (1982), which prohibits discrimination on the basis of handicap in all federally assisted and federally conducted programs; and the Age Discrimination Act of 1975, 42 U.S.C. §§6101-6107 (1982), which bars discrimination because of age in programs receiving Federal financial aid. Title VI covers employment practices in federally assisted programs where a primary objective of the assistance is to provide employment, and also to the extent necessary to assure

promotion, transfer, referral, maternity leave, compensation, fringe benefits, scheduling of work, physical facilities, layoffs, behavior that may constitute sexual harassment, and even grooming is subject to Federal civil rights requirements.¹²

These requirements are enforced through various means.¹³ For example, agencies receive and investigate employment discrimination complaints. They initiate reviews to determine whether employers and institutions are complying with equal employment requirements. When the agencies find violations, they negotiate agreements to correct them, monitor compliance with the agreements, and initiate enforcement proceedings if negotiations fail. Enforcement may involve litigation to obtain court-ordered remedies or administrative proceedings to terminate Federal contracts. In addition, agencies provide technical assistance to employers and the public to promote voluntary compliance with equal employment opportunity requirements and thus reduce the need for enforcement action. Finally, Federal agencies must coordinate their equal employment enforcement activities to avoid unnecessary inconsistency or duplication.

Spending for equal employment enforcement in the public and private sectors constitutes the largest share of the Federal civil rights enforcement budget. For example, in fiscal year (FY) 1985, it accounted for approximately two-thirds of total spending for principal Federal civil rights activities, with a similar proportion projected for FY 86 and FY 87.¹⁴

Since its inception, the U.S. Commission on Civil Rights, in addition to its studies concerning employment discrimination, has issued periodic reports on the Federal Government's efforts to enforce equal employment and other civil rights requirements.¹⁵ These reports have identified a number of severe

problems. A 1975 Commission study concluded, for example, that:

The Federal effort to end [employment] discrimination has not been equal to the task. It has been seriously hampered by lack of overall leadership and direction, deficiencies in existing laws, and the assignment of authority to a number of agencies which have issued inconsistent policies, and developed independent and uncoordinated compliance programs.¹⁶

The result was a "loss of public faith in the objectivity and efficiency of the program," with many employers complaining they were "being harassed by Federal bureaucrats" and many minorities and women persuaded that the Federal equal employment enforcement effort was "totally unreliable."¹⁷ The Commission's 1977 study found that this situation had not "markedly changed."¹⁸

Although changes have taken place in equal employment enforcement policy and organization since 1977, the Commission has not published a detailed evaluation in this area since then. Staff have continued, however, to monitor and assess selected aspects of enforcement such as budget and regulatory developments.¹⁹

The Enforcement Climate

While the Commission has been assessing such matters, public debate over Federal equal employment enforcement policy has intensified. The most controversial issue concerns the use of numerical goals and quotas as a remedy for job discrimination or statistical underrepresentation of women or minorities in the workplace. In brief, one school of thought holds that the use of numerical standards for hiring and promotion constitutes reverse discrimination. It is argued that such a policy, in effect, confers jobs upon women or minority males who were not,

nondiscrimination in the provision of services to intended program beneficiaries. Title IX, section 504, and the Age Discrimination Act cover employment practices in federally assisted programs without such limits.

¹² See generally Barbara Schlei and Paul Grossman, *Employment Discrimination Law*, 2d ed. (Washington, D.C.: Bureau of National Affairs, 1983) (hereafter cited as *Schlei and Grossman*).

¹³ U.S. Commission on Civil Rights, *Federal Civil Rights Commitments: An Assessment of Enforcement Resources and Performance* (1983), pp. 3-5 (hereafter cited as *1983 Commission Report*).

¹⁴ U.S. Executive Office of the President, Office of Management and Budget (OMB), *Special Analyses, Budget of the United States Government, FY 1987* (1986), table J-5, p. J-11. For FY 79 equal employment enforcement spending accounted for almost three-fourths of civil rights spending. U.S. Executive Office of President, OMB, *Special Analyses: Budget of the United States Government, FY 1981* (1980), table J-1, p. 292.

¹⁵ U.S. Commission on Civil Rights: *Federal Civil Rights Enforcement Effort* (1971); *The Federal Civil Rights Enforcement Effort: One Year Later* (1971); *The Federal Civil Rights Enforcement Effort—A Reassessment* (1973); *The Federal Civil Rights Enforcement Effort—1974*, vol. V, *To Eliminate Employment Discrimination* (1975) (hereafter cited as *Vol. V*); and *The Federal Civil Rights Enforcement Effort—1977, To Eliminate Employment Discrimination: A Sequel* (1977) (hereafter cited as *Sequel*). See also Richard P. Nathan, *Jobs and Civil Rights* (Washington, D.C.: prepared for the Commission on Civil Rights at the Brookings Institution, 1969).

¹⁶ *Vol. V*, p. 617.

¹⁷ *Ibid.*, p. 618.

¹⁸ *Sequel*, p. 332.

¹⁹ See, e.g., *1983 Commission Report*, which assessed the performance of various civil rights enforcement agencies, primarily in light of budget developments.

themselves, victimized by past discrimination and denies white males, who also had no part in any previous discrimination, an equal chance to compete for those positions. It is maintained that this preferential treatment policy is illegal and never was intended by the framers of our "colorblind" Constitution or equal employment laws.²⁰ In addition, this policy, it is argued, can lead to the employment of less-qualified minority males or women who are then stigmatized or subjected to self-doubt by virtue of their selection.²¹ Further, it is said that goals and timetables lend themselves to abuse in that they may be used to create a "ceiling" on the hiring of women and minorities, rather than a "floor" so that when the requisite number has been hired, an employer may proceed to discriminate with impunity with respect to the balance of the employees, under cover of a racially proportioned work force.²²

On the other hand, it has been argued that employer promises of nondiscrimination are not enough to undo societal discrimination and that numerical hiring and promotion standards are a reasonable means by which to make job opportunities available to those denied them in the past. According to this point of view, again in very brief outline, "good faith" efforts by employers to hire more minority males and women are appropriate, consistent with the law, and ultimately effective in assuring equal employment opportunity. This viewpoint questions whether any alternative will work as well to overcome the effects of past discrimination,

and it sees as hypocritical the contention that a Constitution that, for so long, countenanced one form of racial prejudice—discrimination against blacks and in favor of whites—prohibits another positive form of racial consideration to repair the damage. It contends that minorities benefiting from affirmative action "do not see their attainments as tainted or undeserved," given their past racial subordination as a group and the "wide range of nonmeritocratic factors" that influence employment opportunities.²³

Employers also have expressed differing views. Some support the use of goals and timetables as "good business" and, now, a routine part of personnel management.²⁴ Others argue that current Federal requirements concerning employment goals and quotas should be significantly revised.²⁵

Use of statistics in proving discrimination, as well as in designing remedies, also has aroused opposition. It has been argued, for example, that the Federal Government, which collects employment data nationwide by race, sex, and national origin, has placed an excessive emphasis on statistics in proving discrimination. According to this view, an underrepresentation of minorities or women in particular jobs, compared with their percentage of the population or relevant work force, may stem from a variety of factors other than discrimination, such as a lack of necessary skills, and therefore should not automatically trigger civil rights remedies.²⁶ A different concern related to statistics involves the alleged high

²⁰ For elaboration of these arguments, see, e.g., Nathan Perlmutter, national director, Anti-Defamation League of B'nai B'rith, and Albert Shanker, president, American Federation of Teachers, testimony in U.S. Commission on Civil Rights, *Selected Affirmative Action Topics in Employment and Business Set-asides*, Consultation-Hearing of the U.S. Commission on Civil Rights, Nov. 6-7, 1985, vol. I (1985), pp. 193-201 and 206-08, respectively (hereafter cited as *1985 Hearing-Consultation*); Herman Belz, *Affirmative Action From Kennedy to Reagan: Redefining American Equality* (Washington, D.C.: Washington Legal Foundation, 1984); Walter Berns, "Affirmative Action vs. the Declaration of Independence," in U.S. Commission on Civil Rights, *New Perspectives* (Summer 1984), pp. 21, 27-28; (hereafter cited as *New Perspectives*); and Sowell, *Weber and Bakke and the Presuppositions of 'Affirmative Action'*, 26 Wayne L.R. 1304-06 (1980). See also Peter Boromeo, consultant, National Italian American Foundation; Francis Femminella, board member, Italian American Civil Rights League, and Alfred Rotandaro, executive director, National Italian American Foundation, interview, Mar. 14, 1985; and Leonard Walentynowicz, former executive director, Polish American Congress, interview, Dec. 27, 1984. See also Glenn C. Loury, "Goals Are Quotas," *Washington Post*, Mar. 11, 1986, p. A-12, in which the author argues there is no distinction in practice between theoretically flexible employment goals and actual quotas.

²¹ See, e.g., Larry M. Lavinsky, "Affirmative Action: Evaluation of the Past and Strategies for a Better Future," *1985 Hearing-Consultation*, pp. 326-27, and Glenn C. Loury, "Beyond Civil Rights," *New Republic*, Oct. 7, 1985, p. 25.

²² See generally Schlei and Grossman.

²³ Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 Harv. L. Rev. 1327, 1383 (1986).

²⁴ Anne B. Fisher, "Businessmen Like to Go by the Numbers," *Fortune*, Sept. 16, 1985, pp. 26-30. See also "Labor Letter," *Wall Street Journal*, Sept. 3, 1985, p. 1, and William McEwen, National Association of Manufacturers, testimony, *Affirmative Action*, joint oversight hearings on affirmative action before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary and the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 99th Cong., 1st Sess. (1986), pp. 214-15.

²⁵ See, e.g., Associated General Contractors, "Contractors Praise Administration Initiative in Affirmative Action Requirements," news release, Aug. 16, 1985; Daniel Seligman, "Waiting for a Stroke," *Fortune*, Apr. 15, 1985, p. 157; and Vincent J. Apruzzese, U.S. Chamber of Commerce, testimony, *Affirmative Action and Federal Contract Compliance*, Hearing Before the Civil and Constitutional Rights Subcommittee of the House Judiciary Committee, 99th Cong., 1st Sess., on affirmative action and Federal contract compliance (1986), pp. 156-70.

monetary cost and excessive paperwork for employers, particularly Federal contractors, of meeting equal employment recordkeeping and reporting compliance requirements.²⁷

Others hold, however, that without statistics it would be impossible to monitor or remedy possible job discrimination.²⁸ Disapproving the use of statistics in establishing adverse impact of an employment practice also would undermine Supreme Court decisions, it is argued.²⁹

Apart from these issues, various groups of Americans increasingly have questioned whether their equal employment concerns are being adequately addressed by the Federal government. Stereotyping based on age,³⁰ disability,³¹ or ethnicity³² that can lead to denial of equal employment opportunities is

one major concern. Employment policies and practices that interfere with religious beliefs are another.³³

The Reagan administration took office in 1981 amidst these concerns. In his first months in office, the President said his administration was "dedicated to equality,"³⁴ and that ". . . [W]e will not retreat on the nation's commitment to equal treatment of all citizens."³⁵ He also announced, however, that "Some things are not as useful and may even be distorted in practice, such as affirmative action programs becoming quota systems."³⁶ Soon thereafter, the Department of Justice announced a reversal of its traditional support for the use of numerically based goals and timetables or quotas as a remedy for past discrimination.³⁷ The Labor Department issued

²⁶ See, e.g., William J. Bennett and Terry Eastland, *Counting by Race: Equality from the Founding Fathers to Bakke and Weber* (New York: Basic Books, 1979) and Walter E. Williams, "Discrimination and Public Policy," in *1985 Consultation-Hearing*, pp. 9-19.

²⁷ Brenda McChrister Brooks, director, Human Resources and Equal Opportunity, National Association of Manufacturers, letter to James W. Cisco, OFCCP, May 24, 1982; *Committee Analysis of Executive Order 11246 (The Affirmative Action Program)*, prepared by the Senate Committee on Labor and Human Resources, 97th Cong., 2d Sess. (1982), pp. 47-48.

²⁸ For such arguments, see generally Joaquin Avila, "Statement of the Mexican American Legal Defense and Education Fund"; Barbara R. Bergmann, "The Common Sense of Affirmative Action"; Judy Goldsmith, "Testimony of the National Organization for Women"; and David H. Swinton, "Underutilization, Discrimination, and Equal Employment Opportunity," in *1985 Consultation-Hearing*, pp. 22-26, 23-32, 227-34, and 54-64, respectively; Citizens Commission on Civil Rights, *Affirmative Action to Open the Doors of Job Opportunity* (1984); Robert Drinan, "Affirmative Action Under Attack," *Human Rights*, Fall 1984, pp. 14-17; Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, 17 Harv. C.R. & C.L.L. Rev. 503 (1982); Barry Goldstein, "The Historical Case for Goals and Timetables," in *New Perspectives*, pp. 20, 22-6; National Urban League, *Affirmative Action 1981: Debate, Litigate, Legislate—Eliminate?* (1981); and Potomac Institute, *A Decade of New Opportunity: Affirmative Action in the 1970s* (1984). For arguments that there is a distinction between goals and quotas, see Derek Bok, "Goals Aren't Quotas," *Washington Post*, Feb. 25, 1986, p. A-15, and Hyman Bookbinder, Washington representative, American Jewish Committee, interview, Nov. 20, 1984.

²⁹ William L. Robinson, executive director, Lawyers' Committee for Civil Rights Under Law, testimony, *Oversight Hearing on the Equal Employment Opportunity Commission's Enforcement Policies*, Hearing Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 99th Cong., 1st Sess. (1985), pp. 175-80.

³⁰ U.S. House of Representatives, Select Committee on Aging, *Age Discrimination in Employment: A Growing Problem in America* (1982), p. 12; Burton Fretz, executive director, National Senior Citizens Law Center, interview, Nov. 6, 1984; Steven Zaleznick, legal counsel; Christopher Mackaronis, senior coordinator, advocacy programs, worker equity department; and David Certner, legislative representative, American Association of Retired Persons, interview, May 27, 1985.

³¹ See generally U.S. Commission on Civil Rights, *Civil Rights Issues of Handicapped Americans: Public Policy Implications*, consultation in Washington, D.C. (1980) and *Accommodating the Spectrum of Individual Abilities* (1983); and Bernard Posner, executive director; June Wakeford, deputy director; Richard Sheppard, director, State relations; Paul Hippolatus, employment advisor; and Ruth Ellen Ross, employment advisor, President's Committee on Employment of the Handicapped, interview, June 11, 1985.

³² See generally U.S. Commission on Civil Rights, *Civil Rights Issues of Euro-Ethnic Americans in the United States: Opportunities and Challenges*, consultation in Chicago, Ill. (1979), pp. 373-508, and Institute of Urban Life, *The Representation of Poles, Italians, Latins and Blacks in the Executive Suites of Chicago's Largest Corporations* (1972).

For a recent review of the economic status of these groups and the conclusion that these groups "have experienced [widespread] prejudice and discrimination. . . in the past," see U.S. Commission on Civil Rights, *The Economic Status of Americans of Southern and Eastern European Ancestry* (1986), p. 48.

³³ See, e.g., U.S. Commission on Civil Rights, *Religious Discrimination: A Neglected Issue*, consultation in Washington, D.C. (1979), and *Religion in the Constitution: A Delicate Balance* (1983). The latter noted that "problems of religious discrimination in employment generally arise in two situations. Opportunities can be denied on the basis of prejudicial stereotypes about members of certain religions. Such discrimination is akin to blatant and intentional race or sex discrimination and is just as invidious. More frequently, problems of religious discrimination in employment occur when neutral work rules conflict with the religious needs of an employee who is an adherent of a minority faith. The most common example of this is when an employer with Saturday business hours requires employees to work that day and has an employee whose religion forbids working on Saturday." (p. 2).

³⁴ News conference, Jan. 29, 1981, as quoted in *Public Papers of the Presidents, Ronald Reagan, 1981* (U.S. Government Printing Office: 1982), p. 58 (hereafter cited as *1981 Presidential Papers*).

³⁵ Remarks in Denver, Colo., at Annual Convention of the National Association for the Advancement of Colored People, June 29, 1981, as quoted in *ibid.*, p. 574.

³⁶ Jan. 29, 1981, news conference, *1981 Presidential Papers*, p. 58.

³⁷ See generally William French Smith, Attorney General of the United States, address before the American Law Institute, May

proposals to reduce existing affirmative action requirements for Federal contractors.³⁸ These steps led to heated criticism that the Justice Department's reversal constituted a major retreat in or even abandonment of the Federal equal employment enforcement effort.³⁹ Civil rights groups and some Members of Congress also opposed the Labor Department's proposals on the grounds that they would significantly weaken important compliance requirements.⁴⁰

Others complained, however, that the administration had not done enough to correct basic problems in Federal equal employment enforcement. According to one early assessment, for example, the Department of Justice "was a major disappointment" during the first year of the Reagan administration because it failed to provide adequate leadership toward eliminating "preferential" affirmative action requirements from Federal laws and Execu-

tive orders and also did little to alter Federal policy so that only proof of intent to discriminate, rather than of discriminatory effect of employment practices, would become the basis for finding violations.⁴¹ The Labor Department's proposed "modest" changes in its affirmative action regulations did not address the "real problems" with the contract compliance program, and the Office of Federal Contract Compliance Programs (OFCCP), it complained, continued to view itself as a "punitive agency."⁴²

The administration, in turn, has defended its record, claiming significant management improvements and increased enforcement activity compared to previous years.⁴³ It also has argued that its position on affirmative action is consistent with public opinion and a more correct interpretation of the law.⁴⁴ The current commitment of the Executive branch to strong enforcement of equal employ-

22, 1981, and William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, DOJ: testimony, *Oversight Hearings on Equal Employment Opportunity and Affirmative Action*, Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 97th Cong., 1st Sess., part 1 (1982), pp. 134-39, and "The Focus of Equal Employment Opportunity Programs Under the Reagan Administration," remarks before Fourth Annual Conference on Equal Employment Opportunity, cosponsored by Federal Bar Association Council on Labor Relations, Committee on Equal Employment Opportunity, and BNA Education Systems, Washington, D.C., Oct. 20, 1981.

³⁸ 46 Fed. Reg. 42,968 (1981) and 47 Fed. Reg. 17,770 (1982).

³⁹ John Feild, "Affirmative Action, A Fresh Look at the Record Twenty Two Years After the Beginning," Washington, D.C.: Center for National Policy Review, 1983, pp. 82-38; Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 Harv. C.R. & C.L.L. Rev. 310, 313-19 (1984); Washington Council of Lawyers, *Reagan Civil Rights: The First Twenty Months* (undated), pp. 103-14.

⁴⁰ See, e.g., National Council of La Raza, *Civil Rights in Crisis: The Reagan Administration's Reforms* (1984), pp. 29-30, 39-40; *Staff Report on the Department of Labor's Proposed Final Affirmative Action Regulations*, Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 98th Cong., 1st Sess. (1983).

⁴¹ Richard N. Holwill, ed., *A Mandate for Leadership Report: The First Year* (Washington, D.C.: Heritage Foundation, 1982), pp. 155, 165. Another observer said the Justice Department's traditional "indifference" to the equal employment concerns of white ethnic groups, particularly with regard to employment quotas, continued despite "rhetoric" to the contrary. Leonard F. Walentynowicz, attorney and former executive director, Polish American Congress, interview, Dec. 27, 1984.

⁴² Ibid., pp. 169-70. See also Jeremy Rabkin, "Reagan's Secret Quotas," *New Republic*, Aug. 5, 1985, pp. 13-18.

⁴³ OMB, for example, reported a significant increase in the total dollar benefits to victims of discrimination resulting from EEOC legal enforcement between FY 80 and 83 and a more than doubling of the number of compliance reviews completed by OFCCP during that same period. U.S. Executive Office of the President, OMB, *Special Analyses: Budget of the United States Government, FY 1985* (1984), tables J-5, p. J-12, and J-6, p. J-15.

Further, the Justice Department maintains it brought more employment cases than it did under the Carter administration during a like period. William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, Department of Justice, interview in *Washington Times*, Apr. 26, 1984, p. 3C.

⁴⁴ William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, Department of Justice, interview published in *New Perspectives*, pp. 34-38, and speech before the National Civil Rights Committee of the Anti-Defamation League of B'nai B'rith, Washington, D.C., June 9, 1983. See also, Chester E. Finn, Jr., "'Affirmative Action' Under Reagan," *Commentary*, April 1982, pp. 17-28, in which the author criticized the growth, despite reportedly little public support, of Federal civil rights policies featuring "race consciousness, set asides, and quotas." Public opinion polls indicate that the majority of Americans support "affirmative action" generally but not if affirmative action is defined as "preferential treatment" or "quotas." See, e.g., Louis Harris, "Americans Favor Affirmative Action Programs," *The Harris Survey*, Jan. 28, 1982, and "Substantial Majority of Americans Oppose Preferential Treatment for Women and Minorities," *The Gallup Report*, August 1984. A 1985 poll by the *New York Times* found that 46 percent of respondents opposed any preference in hiring or promotion where there had been racial discrimination in the past, while 42 percent supported such a preference. The same poll also found, however, that 48 percent of respondents supported such an employment preference for women where there had been discrimination, with 40 percent opposed. *New York Times/CBS News Poll*, May-June 1985. Another 1985 poll, conducted by Lawrence Johnson and Associates and Metro Research Services, found that 77 percent of black leaders support "preferential treatment" of minorities in jobs and colleges while the same proportion—77 percent—of other blacks polled oppose such treatment. Linda Lichter, "Who Speaks For Black America?" *Public Opinion*, August-September 1985, p. 41. One analyst concluded that opinion polling on this issue indicates that although "relatively few people object to special training programs, Head Start efforts, targeted financial aid or extra consideration for minority applicants. . . the public has repeatedly and consistently opposed the use of quotas, numerical goals and preferential treatment for women and minorities." William Schneider, "Public Against Social Issues

ment laws, and the means by which to carry out that commitment, have become the focus of a national public policy debate.

Purpose and Scope

The purpose of this study is to provide information on the extent and nature of continuity and change, as well as areas of strength or progress and weakness or deficiency, in Federal equal employment enforcement. By so doing, the Commission hopes this study will assist the Executive branch in reviewing the effectiveness of these policies and programs, assist Congress in its continuing oversight and funding roles with regard to this enforcement effort, and contribute to greater understanding of the role of the Federal Government in combating employment discrimination. This report reviews both the philosophy and actual operations of EEOC, OFCCP, and the Civil Rights Division (Employment Litigation Section) of the Department of Justice during the Reagan administration. It describes and assesses, to the extent possible, the nature, priorities, and results of selected equal employment enforcement activities at these agencies

Activism," *National Journal*, Nov. 2, 1985, p. 2503. For a discussion of factors, such as the way questions are worded, that can lead to disparities in the findings of different polls, see Everett Carl Ladd, "Polls Apart: A Primer on Wayward Surveys," *Wall Street Journal*, Aug. 16, 1984, and "Special Report: A Guide to Polls," by the editors of *Opinion Outlook* (Washington, D.C., National Journal, 1980).

⁴⁵ In addition to the sources of different views cited in notes 20, 21, 22, 25, 26, and 27, see generally, e.g., U.S. Commission on Civil Rights, *Consultations on the Affirmative Action Statement of the U.S. Commission on Civil Rights*, vols. I and II, *Papers Presented and Proceedings*, Feb. 10 and Nov. 10-11, 1981, Washington, D.C., and testimony at congressional hearings, such as in *Oversight of the Activities of the Office of Federal Contract Compliance Programs of the Department of Labor*, Hearings Before the Senate Committee on Labor and Human Resources, 97th Cong., 1st Sess., parts 1 and 2 (1982), and *Oversight Hearings on Equal Employment Opportunity and Affirmative Action*, Hearings Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 97th Cong., 1st Sess., parts 1 and 2 (1982).

⁴⁶ See "Statement of the United States Commission on Civil Rights Concerning the Detroit Police Department's Racial Promotion Quota," Jan. 17, 1984, in U.S. Commission on Civil Rights, *Toward an Understanding of Stotts* (1985), p. 55, in which a majority of the Commission supported the "principle of nondiscrimination" but opposed "preferential treatment based on race, color, gender, national origin, or religion in favor of nonvictims of discrimination at the expense of innocent individuals." As noted further in this report, the Supreme Court continues to address this issue.

⁴⁷ To ascertain public views of Federal enforcement of equal employment requirements since 1981, staff reviewed public opinion polls, reports, statements, correspondence, congressional

and the extent to which these activities reflect continuity and change in programs and policy since 1981. The specific activities reviewed include policy, employment discrimination complaint processing, compliance reviews, litigation, technical assistance, management, and coordination. Information concerning agency data and views on the nature and scope of employment discrimination is also presented.

It should be noted that this study does not reargue affirmative action issues on which there is a huge body of literature⁴⁵ and which the Commission has addressed elsewhere.⁴⁶ Further, it is not possible in this one report to discuss in detail the various administrative mechanisms and many complex issues involved in Federal equal employment enforcement. Sources for such detail are provided, however.

Methodology and Analysis

To obtain information, project staff conducted a literature review⁴⁷ and examined agency documents and data.⁴⁸ Staff also carried out a range of

testimony, speeches, articles published in periodicals (including law reviews), and other written material by various organizations involved in the civil rights debate. Such material was sought from groups with differing points of view. To obtain White House, congressional, and other agency views of administration equal employment enforcement activities, staff reviewed presidential speeches, congressional hearing transcripts, General Accounting Office (GAO) reports, and budget documents, notably OMB's special civil rights analyses for fiscal years 1981-87.

⁴⁸ To obtain information on agency priorities, program and policy changes, and performance, staff reviewed agency budget documents, such as appropriation requests and justifications, testimony, speeches, annual reports, periodic performance reports and data, compliance manuals, regulations, interpretations, directives, briefs, and other such material.

interviews⁴⁹ and limited field work.⁵⁰ Copies of chapters of this report in draft were submitted to the three agencies for review, and their comments were considered and, in many instances, incorporated in final revisions. The Commission appreciates the full cooperation provided by these agencies during preparation of this study.

The study assesses the effectiveness of enforcement activities, in part, by comparing performance data over time.⁵¹ The performance data examined in this report help to determine whether enforcement activity has been reduced or "rolled back" in recent years. Data on the amount of litigation at EEOC and the Civil Rights Division and the number of compliance reviews conducted by OFCCP are examples of such indicators. As noted, the present administration has cited such data in comparing its effectiveness with that of the previous administration.

There are, of course, limitations to the value of such numbers. For example, increasing numbers over time are not necessarily "good," nor are declining numbers necessarily always "bad." Fewer staff at enforcement agencies do not automatically mean less activity. By the same token, increased numbers do not inevitably signify more or better enforcement. For example, an agency may report more compliance reviews but find fewer violations than before. The data could suggest that violations have diminished, but could also indicate inadequate thoroughness of the reviews. Moreover, the reviews

might have been targeted towards industries with relatively high levels of employment of women and minority males when industries with lower such levels might more appropriately have been reviewed.

Numbers also may be of little value in assessing the quality or character of agency activities. For example, the appropriateness of policies that increase or reduce the Federal enforcement role and compliance requirements, including remedies, is a matter of legal or policy, rather than statistical, interpretation. An agency's litigation program should be judged not only in terms of the volume of cases filed, but also on the extent to which those cases involve landmark decisions with wide ramifications, as opposed to routine or "easy" cases that may not address important unresolved legal issues. Further, acts of omission, such as a failure to issue needed regulations or to file a brief in an important case, could have significant, if not quantifiable, effects. They could, for example, create perceptions by employers and others about the credibility of the enforcement program that may undermine its effectiveness.

Thus, in addition to the quantitative analysis,⁵² Commission staff have evaluated the Federal equal employment effort in the context of a number of benchmarks or factors. As will be seen throughout this report, these benchmarks or points of reference include past evaluations by the Commission⁵³ and

⁴⁹ Key Reagan administration officials were interviewed to obtain further information concerning current agency priorities, goals, major policy and program changes and their rationales, enforcement philosophy, adequacy of resources, reported achievements, and major problems. These persons included the current Deputy Under Secretary of Labor for Employment Standards, Susan B. Meisinger, and her immediate predecessor, Robert Collyer; the most recent OFCCP Director, Joseph Cooper, and his immediate predecessor, Ellen Shong Bergman; the EEOC Chairman, Clarence Thomas; and the Assistant Attorney General for Civil Rights, William Bradford Reynolds III. Eleanor Holmes Norton, EEOC Chair, and Drew S. Days III, Assistant Attorney General for Civil Rights during the Carter administration, also were interviewed. Additionally, senior career staff at these agencies' headquarters were interviewed to obtain more detailed information on agency policy and performance. Representatives of some civil rights and employer groups also were interviewed to supplement the review of literature presenting public perspectives on recent Federal equal employment enforcement.

⁵⁰ Staff visited several OFCCP area offices where they reviewed closed case files and interviewed regional and area office directors and other staff about their activities. Information concerning EEOC field operations was obtained from GAO and other sources.

⁵¹ In some cases, recent annual performance data, such as for FY

85, are compared with similar data for FY 80, for example; and in others, data for the 4-year period 1981-84 are compared with the period 1977-80 to identify patterns and trends. It should be noted that Federal equal employment requirements do not specify benchmarks against which performance can be compared, nor does there appear to be consensus among enforcement officials or other interested observers on numerical indices that might stand as clear proof of enforcement progress or decline. The agencies themselves set their annual performance goals, although these goals may be influenced by the Congress and, at times, by the courts and, more systematically, by OMB budget decisions. (One purpose of the interviews with agency officials was to determine agency bases for setting goals and priorities, whether those bases have changed considerably since 1980, and the rationales for any such changes.)

⁵² For further discussion of problems involving statistical techniques in public policy analysis, see generally Thomas J. Cook and Frank P. Scioli, Jr., *Methodologies for Analyzing Public Policies* (Lexington, Mass.: Lexington Books, 1975).

⁵³ The Commission was reconstituted and reestablished in November 1983 for a 6-year term. The reconstituted Commission neither automatically accepts nor rejects past Commission positions. The past Commission findings cited in this report, along with those of other research agencies and organizations, provide an important context, however, in which to review the operations

others; the history of equal employment legislation, Executive orders, and reorganization plans; court decisions and the theories of discrimination, such as disparate treatment⁵⁴ and adverse impact,⁵⁵ that have developed from those decisions; the views of interested groups, such as civil rights and employer

of the agencies examined in this study. For GAO standards with regard to evidence that affords a "reasonable" basis for judgments, objectivity, and conciseness, among others, concerning analysis of public programs, see GAO, *Standards for Audit of Governmental Organizations, Programs, Activities and Functions* (1981).

⁵⁴ See, e.g., *Teamsters v. United States*, 431 U.S. 324, 335-36 n.15, where the Supreme Court defined disparate treatment as a situation in which "The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." Segregated facilities are an example of disparate treatment. *Schlei and Grossman* at 13.

⁵⁵ Employment policies or practices are unlawful if they have an adverse impact not justified by business necessity. An example is a general intelligence test as a prerequisite for hiring that disquali-

organizations; the agencies' workloads (such as the number of discrimination complaints they receive each year); the resources available to these agencies;⁵⁶ and the agencies' own goals, plans, and regulations.

fies substantially more blacks than whites and that cannot be shown to be job related in the sense that it accurately predicts successful job performance. *Schlei and Grossman* at 1. See also *Griggs v. Duke Power Company*, 401 U.S. 424 (1971).

⁵⁶ In assessing the adequacy of resources for Federal equal employment enforcement, the Commission believes that staffing or spending levels do not necessarily constitute a valid indication of commitment or performance effectiveness. The Commission also recognizes that control of Federal spending is a vital national objective. Identification of specific areas where inadequate resources impair effective equal employment enforcement efforts is, however, a continuing task of the Commission and of this particular project. Accordingly, staff examined all operations at the three agencies to identify any such effect.

2. Equal Employment Opportunity Commission

Summary

For over 10 years following its establishment in 1964, the Equal Employment Opportunity Commission (EEOC) steadily received greater power and major funding increases. It failed, however, to prevent the growth of a huge complaint backlog and suffered from management problems. The period 1977-81 was marked by significant policy developments and a major reduction in the backlog. Agency priorities since 1981 have been improvement in the quality and effectiveness of programs, review of major policies, and final elimination of the complaint backlog.

With regard to management and administration, EEOC has enjoyed relatively stable and harmonious leadership in recent years. The agency has sought greater staff productivity and efficiency through increased staff training and accountability, and has taken steps to improve the quality of complaint processing, litigation, and handling of Federal employee discrimination cases. It also has reformed its financial management system. Such steps to improve program operations often have addressed past concerns by the Commission on Civil Rights, the General Accounting Office (GAO), and civil rights groups, among others. Resource constraints, however, are affecting EEOC's ability to carry out more effectively its diverse responsibilities in the face of an increased workload. The substantial additional resources requested for EEOC in fiscal year 1988 appear necessary to help alleviate these problems.

In the area of policy, EEOC has addressed the major comparable worth issue. EEOC policy concerning the use of remedial numerical goals and timetables has been inconsistent, but the agency to date has generally adhered to previous policy in such areas as the use of statistics in finding possible discrimination, voluntary affirmative action, national origin discrimination, and sexual harassment. EEOC has moved to strengthen its overall enforcement credibility and effectiveness through full investigations, full relief, increased litigation, and a streamlined subpoena process. This important shift is designed to induce more effective employer conciliation and responds to complaints by some that the agency had become a claims adjustment, rather than law enforcement, agency. EEOC's regulatory program generally has languished, in part because of disagreements with the Office of Management and Budget (OMB). It is doubtful that reforms widely perceived as needed in such areas as the Federal sector complaint process and the Uniform Guidelines on Employee Selection Procedures will take place soon.

EEOC eliminated its old complaint backlog and is resolving more complaints on their merits, rather than through administrative closure, a positive development. "No-cause" findings have increased dramatically, generating some criticism, but the agency's new appeals system may enhance the validity of such findings. EEOC is addressing the problem of the declining quality of staff work at the complaint

intake level since those positions were downgraded following a job classification review by the U.S. Office of Personnel Management. Other reforms in charge processing, such as reduced reliance on the rapid charge system, are aimed at improving the quality of EEOC and State and local program handling of all charges, but growing inventories still confront complainants in both the private and Federal sectors. Further, the systemic (pattern and practice) charge program has been revamped and hopefully will now advance significantly.

EEOC litigation activity declined dramatically between FY 82 and 84 but has since increased, along with related monetary relief, to record levels. EEOC *amicus* filings also declined substantially before increasing in FY 86. Major class action cases have been resolved and new ones filed. The adequacy of EEOC monitoring of case settlements remains questionable.

EEOC's coordination role under Executive Order 12067 has been far less significant than was intended. Disputes with the Justice Department over affirmative action and other Title VII enforcement issues and difficulties with the Labor Department over policy communications and coordination are reminiscent of past conflict and inconsistencies in Federal equal employment enforcement. Several new technical assistance programs that expand EEOC's presence and disseminate information concerning equal employment requirements are notable outreach initiatives.

This chapter reviews these and other issues and developments in management and administration, policy, complaint processing, litigation, coordination, and technical assistance, following brief descriptions of EEOC's origin and responsibilities, organization, past performance, and priorities since 1981.

Origin and Responsibilities

EEOC was established by Title VII of the Civil Rights Act of 1964 to enforce the law's prohibitions against discrimination in employment based on race, color, religion, sex, or national origin.¹ The bipartisan agency became operational on July 2, 1965. EEOC's jurisdiction initially covered almost all nongovernment employers of 25 or more employees and unions, employment agencies, and sponsors of apprenticeships or other job training programs.² EEOC was empowered to appoint staff, establish regional offices, subpoena records, and prescribe rules and regulations for carrying out its duties.³ Its functions included regulation, complaint (charge) investigation, conciliation, and participation in litigation as a friend of the court.⁴ It could not enforce its decisions without assistance from the Department of Justice (DOJ) or the private bar, and thus its role essentially was limited to seeking compliance with Title VII through persuasion and negotiation between the complainant and the respondent.

In 1972, EEOC received from Congress important new enforcement powers and expanded jurisdiction. Its new authority included the power to file lawsuits against private employers, employment agencies, and unions when conciliation efforts failed and also authority (transferred from DOJ) to file "pattern and practice" (or systemic) suits against private employers.⁵ The 1972 amendments to Title VII also extended EEOC jurisdiction to all educational institutions and State and local governments, and broadened Title VII coverage to include employers of 15 or more employees and unions with 15 or more members.⁶

As a result of several major transfers of authority in 1978 and 1979 (under President Carter's Reorganization Plan No. 1 of 1978),⁷ EEOC was established as the lead Federal agency in coordinating all Federal equal employment policies and procedures.⁸

Under the reorganization, enforcement responsibili-

¹ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 258 (1964) (codified as amended at 42 U.S.C. §2000e-4(a) (1982)).

² *Id.* at 78 Stat. 253-58 (1964) (codified as amended at 42 U.S.C. §§2000e, 2000e-1, 2000e-2, 2000e-3 (1982)).

³ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 258, 262, 265 (codified as amended at 42 U.S.C. §§2000e-4, 2000e-9, 2000e-12 (1982)).

⁴ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 259, 265 (codified as amended at 42 U.S.C. §§2000e-4, 2000e-5, 2000e-12 (1982)).

⁵ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-

261, 86 Stat. 103, 105, 107 (codified as amended at 42 U.S.C. §§2000e-5(f)(1), 2000e-6(a) and (c) (1982)). Pattern and practice suits attack pervasive discrimination on an industry-wide or company-wide basis.

⁶ *Id.* at 86 Stat. 103, 104 (codified as amended at 42 U.S.C. §§2000e(b)(e), 2000e-1 (1982)).

⁷ Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1979), reprinted in 42 U.S.C. §2000e-4 app. at 311-12 (1982) (hereafter cited as Reorg. Plan No. 1).

⁸ Exec. Order No. 12,067, 3 C.F.R. 206 (1979), reprinted in 42 U.S.C. §2000e app. at 668-69 (Supp. V 1981).

ty for the Age Discrimination in Employment Act (ADEA)⁹ and the Equal Pay Act (EPA)¹⁰ was transferred to EEOC from the Wage and Hour Division of the Department of Labor.¹¹ The reorganization also transferred to EEOC from the Civil Service Commission responsibility for enforcing equal employment opportunity requirements in the Federal sector under section 501 of the Rehabilitation Act of 1973¹² and section 717 of Title VII.¹³

Today, EEOC enforces equal employment laws covering all women, white as well as minority men, older workers, and handicapped employees in the work force.¹⁴ It receives and investigates discrimination charges, resolving them through conciliation and, if necessary, court action. It may also initiate investigations without a specific charge being filed. EEOC reviews proposed EEO rules, regulations, and policy directives of all Federal agencies.¹⁵ It also furnishes technical assistance to those subject to Title VII to encourage compliance with equal employment requirements¹⁶ and prescribes record-keeping and reporting requirements for those employers.¹⁷

Organization

EEOC is headed by five Commissioners, not more than three of whom may be of the same political

party. The Commissioners are appointed by the President, by and with the consent of the Senate, for a term of 5 years. The President designates one member to serve as Chairman and one member to serve as Vice Chairman. The Chairman is responsible for the day-to-day administration of the Commission.¹⁸ The General Counsel also is appointed by the President, subject to Senate confirmation, for a term of 4 years.¹⁹ Current headquarters offices and their functions are identified in chart 2.1.

EEOC has a field structure of 23 district offices, 16 area offices, and 9 local offices that receive, investigate, and resolve employment discrimination charges.²⁰ The district offices process individual and pattern or practice charges and also litigate cases. The district offices also monitor and coordinate the contractual, work-sharing relationship between EEOC and State and local agencies.²¹ Approximately one-half of the district offices have responsibility (i.e., conducting hearings in complaint cases) over Federal agency equal employment efforts.²² Area offices receive charges but do not have systemic charge or legal units: they process individual charges through the "rapid charge" system. They do not litigate or process charges considered relatively

⁹ 29 U.S.C. §§621-634 (1982).

¹⁰ 29 U.S.C. §206(d) (1982).

¹¹ 29 U.S.C. §201 *et seq.* (1982).

¹² Section 501 requires each Federal agency to submit an affirmative action plan for the hiring, placement, and advancement of handicapped persons within that agency. The plan is to describe how the "special needs" of handicapped employees are being met. 29 U.S.C. §791(b) (1982).

¹³ Section 717, part of the 1972 amendments to Title VII, prohibits discrimination by Federal agencies on the basis of race, color, sex, religion, or national origin. It also requires Federal agencies to maintain equal opportunity programs and gives EEOC overall responsibility for Federal procedures used in processing internal discrimination complaints. EEOC has appellate jurisdiction to review final decisions of agencies on complaints. 42 U.S.C. 2000e-16 (1982).

¹⁴ U.S. Equal Employment Opportunity Commission (EEOC), Survey Division.

¹⁵ Title VII requires EEOC to defer for 60 days action on complaints where there is a comparable State or local employment discrimination law. 42 U.S.C. §2000e-5(c) (1982). EEOC enters into written agreements with State and local fair employment practices agencies providing compensation for their services in processing complaints. 42 U.S.C. §2000e-8(b) (1982).

¹⁶ 42 U.S.C. §2000e-4(g)(3) (1982).

¹⁷ Title VII requires employers, employment agencies, and labor organizations to maintain such records as are necessary for EEOC to determine whether unlawful discriminatory employment practices have been committed. 42 U.S.C. §2000e-8(c) (1982). Under this authority, EEOC has promulgated a comprehensive set of regulations detailing what data must be maintained, what data

must be regularly provided to EEOC, and the form in which the data must be provided. 20 C.F.R. §§1602.1-55 (1986). Certain reports require employers to submit information regarding the composition of their work force by race, ethnicity, and sex. EEOC compiles this information in summary reports and shares these reports with State and local agencies, at no cost, upon request. 42 U.S.C. 2000e-8(d) (1982).

¹⁸ 42 U.S.C. §2000e-4(a) (1982).

¹⁹ 42 U.S.C. §2000e-4(b) (1982).

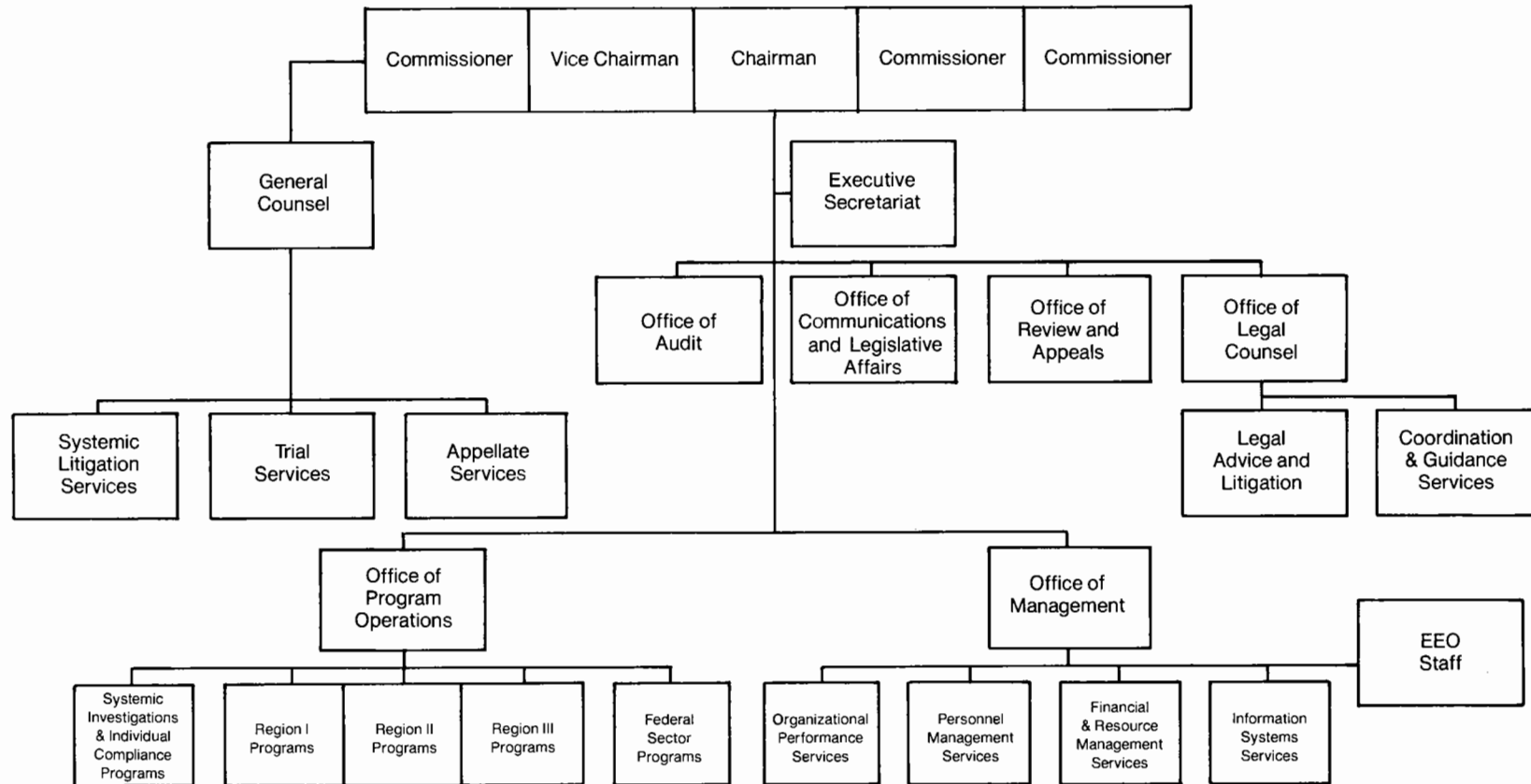
²⁰ For example, these offices secure as much information as possible, frame the charge, and inform the charging party of the investigative procedures to be used. After securing the required information, the field office may conduct an onsite visit or hold a factfinding conference. At the conclusion of an investigation, a determination is made. If the field office issues a cause decision, the Commission invites the parties to meet to determine if the dispute can be resolved through conciliation. The agency may elect to file a lawsuit against the respondent based on the charge if no settlement is achieved. EEOC, *1987 Budget Submitted to the Congress of the United States* (1986), pp. 17-18 (hereafter cited as *1987 Budget Request*). If a no-cause determination is issued, the charging party can appeal that determination under a new proposed rule. 52 Fed. Reg. 11503 (1987). If no appeal is sought, EEOC's involvement ends.

²¹ *Ibid.* The district office has the primary responsibility for the deferral relationship, for example, negotiating and monitoring work-sharing agreements and authorizing contract payments under the overall guidance of the Office of Program Operations. *Ibid.*, p. 20.

²² *Ibid.*, p. 17.

CHART 2.1

Equal Employment Opportunity Commission



District, Area* and Local** Offices								
Region I Programs			Region II Programs			Region III Programs		
Atlanta	Birmingham	Philadelphia	Chicago	Indianapolis	Milwaukee	Dallas	Los Angeles	San Francisco
Baltimore	Jackson*	Newark*	Cleveland	Louisville*	Minneapolis**	El Paso**	San Diego**	Fresno**
Norfolk*	Charlotte	Pittsburgh*	Cincinnati	Memphis	New Orleans	Oklahoma City*	Phoenix	Oakland**
Richmond*	Greensboro**	New York	Detroit	Little Rock*	St. Louis	Denver	Albuquerque*	San Jose**
Washington*	Greenville**	Boston*		Nashville*	Kansas City*	Houston	San Antonio	Seattle
	Raleigh*	Buffalo**						
	Miami							
	Tampa*							

CHART 2.1 (continued)

- The Office of the General Counsel conducts litigation in Federal court for the Commission under Title VII, ADEA, and EPA.
- The Office of Legal Counsel serves as the principal advisor to the Commission, Chairman, and staff on nonenforcement legal matters; provides staff support to the Commissioners in the performance of their interagency coordination functions; and provides guidance through the drafting of regulations, compliance manual sections, and Commissioner decisions.
- The Office of Program Operations serves as the principal advisor on equal employment opportunity administrative enforcement and Federal work force affirmative action matters and manages the Commission's programs in these areas.
- The Office of Management plans and provides key management support services to Commission offices, maintains management controls throughout the agency, and monitors organizational performance.
- The Office of Review and Appeals administers the review and appeals processes for Federal Government employee complainants.
- The Office of Audit conducts independent investigations and audits of agency programs and operations concerning alleged fraud, waste, and mismanagement.
- The Office of Communications and Legislative Affairs serves as the Commission's primary communications link with the news media, Congress, the general public, and constituency organizations. The office coordinates the agency's public affairs activities.

Source: U.S. Equal Employment Opportunity Commission: *18th Annual Report, 1983* (1984), pp. 2-4, and Order 110, "Organization, Mission and Functions," Oct. 17, 1982, as amended Aug. 1, 1985; Deborah Graham and Mike Freeman, Office of Communications and Legislative Affairs, EEOC (Suggested Corrections in EEOC Chapter, Commission Report on Federal Equal Employment Enforcement) (undated).

complex or appropriate for extended charge processing.²³

Past Performance

EEOC has had a troubled history since its creation over 20 years ago. A backlog of discrimination charges quickly developed.²⁴ Turnover in its top leadership also plagued the agency.²⁵ Ineffective processing of charges,²⁶ inadequate resources,²⁷ and lack of enforcement powers²⁸ were other basic problems.

Despite the significant strengthening of EEOC's enforcement authority in 1972 and substantial increases in resources, EEOC's shortcomings persisted. Its complaint backlog continued to grow, management problems were bared, and serious deficiencies existed in virtually every other area of responsibility.²⁹ One civil rights group saw a "badly

mismanaged" agency "in which near chaotic conditions harmed both charging parties and respondents."³⁰ Another concluded that "[t]he bureaucratic inertia of the agency over the past ten years has created mass disillusionment and a severe undermining of the agency's credibility."³¹ EEOC's Vice Chairman in 1977 agreed that the agency was "a tree caught up in an avalanche: rootless, out of control, directed by outside forces."³²

Between 1977 and 1980, major changes were instituted at EEOC. A new "rapid charge" system for processing new complaints was implemented,³³ and many staff were assigned to reduce the backlog of charges.³⁴ These and other changes expedited case handling, increased negotiated settlements, and substantially reduced the backlog.³⁵

²³ 1987 Budget Request, pp. 17-18. Rapid charge and extended charge processing by district offices are discussed later in this chapter.

²⁴ Complainants filed 8,854 complaints (or charges) during EEOC's first year, over four times the amount predicted. EEOC, *Annual Report* (1967), p. 14. Lehr, *EEOC Case Handling Procedures: Problems and Solutions*, 34 Ala. L. Rev. 242 (1983) citing (hereafter cited as Lehr, *EEOC Case Handling Procedures*). By July 1966, EEOC had resolved 1,659 of the charges recommended for investigation, leaving 2,114 "mired" in various stages of the internal agency process. *Ibid.* By the end of the next 10 years, the number of charges filed annually increased almost ninefold. EEOC, *Tenth Annual Report* (1976), p. 33 (hereafter cited as *Tenth Annual Report*).

²⁵ For example, 10 persons served as EEOC Chairman or Acting Chairman during the agency's first decade. U.S. General Accounting Office (GAO), *The Equal Employment Opportunity Commission Has Made Limited Progress in Eliminating Employment Discrimination* (1976), p. 60 (hereafter cited as 1976 GAO Report).

²⁶ For example, charges were not being resolved in a timely manner, most charges were closed administratively without any enforcement action, and there was inadequate screening of complaints that were "spurious and lacking in merit." *Ibid.*, pp. 7-14, 21. The Civil Rights Commission also noted problems, including low skill levels of staff who received charges and inadequate investigative files for the purpose of litigation. U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, vol. V., *To Eliminate Employment Discrimination* (1975), pp. 513-17 (hereafter cited as *Vol. V*).

²⁷ In fiscal year (FY) 1968, EEOC had 389 authorized positions. By FY 73 it had 1,909 authorized positions; by FY 76, 2,584. *Tenth Annual Report*, p. 32. Its appropriation increased from \$6.7 million to \$63.7 million during that period. *Ibid.*, p. 31, and EEOC, *Beginning the Second Decade, 11th Annual Report-FY 1976*, p. 31 (hereafter cited as *11th Annual Report*). The Civil Rights Commission found, however, that EEOC had been staffed "far below" its authorized level. Failure in the Office of the General Counsel to fill positions promptly had delayed filing of lawsuits and led to a low overall number of suits. *Vol. V*, p. 643.

²⁸ With its role initially limited to conference, conciliation, and persuasion, EEOC was a "poor, enfeebled thing. . . [with] the

power to conciliate but not to compel." Michael I. Sovern, *Legal Restraints on Racial Discrimination in Employment* (N.Y.: Twentieth Century Fund, 1966), p. 205. See also Sape and Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 Geo. Wash. L.R. 824 (1972).

²⁹ In addition to *Vol. V*, pp. 469-646, and 1976 GAO Report, see generally GAO: *Violations of the Anti-Deficiency Act and Other Financial Management Problems at the Equal Employment Opportunity Commission* (1976), and *System for Processing Individual Equal Employment Opportunity Discrimination Complaints: Improvements Needed* (1977) (hereafter cited as 1977 GAO Report). See also generally *Staff Report on Oversight Investigation of Federal Enforcement of Equal Employment Opportunity Laws*, prepared for the Subcommittee on Equal Opportunities of the House Committee on Education and Labor, 94 Cong., 2d Sess. (1976) (hereafter cited as 1976 Cong. Staff Report).

³⁰ Lawyers' Committee for Civil Rights Under Law, statement, *Oversight on Federal Enforcement of Equal Employment Opportunity Laws*, Hearings Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 95th Cong., 2d Sess. (1978), p. 460 (hereafter cited as 1978 House Oversight Hearings).

³¹ Women Employed, *Equal Employment Opportunity, A Matter of Enforcement* (July 1977), p. 2.

³² Leach, *Title VII of the Civil Rights Act and the EEOC: An Agency in the Midst of Change*, 29 Mercer L.R. 664 (1977).

³³ Under this approach, the parties to a charge are invited to a factfinding conference to discuss informally their positions and explore possible informal settlement of the charge. The objective is to facilitate quick settlement on a no-fault basis at the earliest stage of the process. EEOC, news release, "Equal Employment Opportunity Commission New Charge Processing Approach," Apr. 16, 1984 (hereafter cited as EEOC "New Charge Processing Approach").

³⁴ EEOC, *14th Annual Report, 1979* (1981), p. 6 (hereafter cited as *14th Annual Report*).

³⁵ By the end of FY 79, there had been an overall reduction in backlogged charges of 43.4 percent. *Ibid.* By the end of FY 82, only 7 percent of the original inventory, or a backlog inventory of approximately 7,700 charges, remained. EEOC, *17th Annual Report, 1982* (1983), pp. 3-4 (hereafter cited as *17th Annual Report*).

Significant policy developments also occurred during this period. For example, EEOC issued new guidelines³⁶ on affirmative action,³⁷ on discrimination based on national origin,³⁸ and on sexual harassment.³⁹ In addition, the Uniform Guidelines on Employee Selection Procedures were issued.⁴⁰ Further, as noted, EEOC assumed additional enforcement responsibilities under ADEA, EPA, and section 501 as a result of the 1978 reorganization.⁴¹

In 1981 the General Accounting Office (GAO) concluded that EEOC had made "many significant improvements in its procedures and practices since 1976 that increase its ability to attack employment discrimination."⁴² Replacing clerical staff with professional staff to screen incoming complaints and expanding EEOC's relationship with State and local FEP agencies were cited as examples.⁴³ The Office of Personnel Management (OPM) also found improved case management procedures and increased productivity at EEOC.⁴⁴ Both agencies raised

³⁶ EEOC decisions on charges, guidelines, and manuals providing guidance in interpreting compliance requirements, although not binding on courts, are often given substantial weight in court opinions. *Vol. V*, p. 506. For example, the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) gave great weight to EEOC's testing and employee selection guidelines.

³⁷ These guidelines describe the legal principles that govern voluntary affirmative action under Title VII. According to the guidelines, voluntary affirmative action may be taken by an employer without "awaiting litigation or formal government action." 44 Fed. Reg. 4,422 (1979) (codified at 29 C.F.R. §1608.01 (1986)). The guidelines provide the "guidance and protection necessary to protect appropriate voluntary actions taken to overcome the effects of past or present practices, policies or other barriers to equal employment opportunity." *14th Annual Report*, pp. 16-17.

³⁸ These guidelines identify employment practices or policies, such as height or weight requirements, fluency in English requirements, and foreign training or education disqualifications, that may discriminate on the basis of national origin. 45 Fed. Reg. 85,635 (1980) (codified at 29 C.F.R. §1606 (1986)).

³⁹ These guidelines specify that physical or verbal harassment on the basis of sex may be unlawful and that employers are responsible for the acts of their supervisory employees or agents, regardless of whether the acts were authorized or forbidden by the employer and regardless of whether the employer knows or should have known of the acts. Fed. Reg. 74,677 (1980) (codified at 29 C.F.R. §1604.11 (1986)).

⁴⁰ The uniform guidelines provide generally that if a test or other employee selection process tends to affect women or minority men disproportionately, it must be validated, with evidence shown that the test is a convincing predictor of job performance. The test also must demonstrate that there are no other less discriminatory tests which are also valid predictors. The evidence required for validation must consist of empirical data indicating a significant correlation between the test and important elements of work behavior. 29 C.F.R. §1607.1-16 (1986). The guidelines were adopted in 1978 by EEOC, the Civil Service Commission, DOJ, the Department of Labor (Office of Federal Contract Compliance Programs), and Department of Treasury (Office of Revenue

concerns, however. For example, OPM perceived "a need for the Commission to . . . discourage managers from pressuring for premature disposition of cases in order to meet a production goal."⁴⁵ GAO concluded that the positive results of the rapid charge system were "misleading" and that the process had "overemphasized obtaining settlement agreements with the result that EEOC has obtained negotiated settlements for some charges on [sic] which GAO believes there was no reasonable cause to believe the charges were true."⁴⁶

Agency Priorities Under the Reagan Administration

EEOC Chairman Clarence Thomas, who took office in May 1982, believes that "employment discrimination continues to limit opportunity in our

Sharing) after more than 5 years of negotiation and discussion. For a discussion of the development of the guidelines, see U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1977, To Eliminate Employment Discrimination: A Sequel* (1977), pp. 323-28 (hereafter cited as *Sequel*).

⁴¹ Reorg. Plan No. 1.

⁴² GAO, *Further Improvements Needed in EEOC Enforcement Activities* (1981), p. 5 (hereafter cited as *1981 GAO Enforcement Report*).

⁴³ *Ibid.*, p. 7.

⁴⁴ See generally U.S. Office of Personnel Management (OPM), *Management Initiatives and EEOC's Improved Productivity* (1981), by Lewis W. Taylor and L.S. Tao (hereafter cited as *1981 OPM Report*).

⁴⁵ *Ibid.*, pp. 9-10. Another commentator said that: "the orientation of the agency toward early and prompt settlement. . . has impaired the agency's credibility. . . . When the EEOC has evidence that the charge lacks merit. . . [it] should encourage the charging party to withdraw the charge, dismiss the charge, or issue a summary no-cause determination and right-to-sue notice." Lehr, *EEOC Case Handling Procedures*, at 259. Still another observer concluded the rapid charge approach meant the "EEOC in reality functions as a claims adjustment bureau and does not operate as an enforcement agency." Hill, *The Equal Employment Opportunity Commission: Twenty Years Later*, 4 J. of Intergroup Rel. 53-54 (1983) (hereafter cited as Hill, *EEOC 20 Years Later*).

⁴⁶ *1981 GAO Enforcement Report*, p. i. GAO also found a need for EEOC to file suit on a more timely basis to expedite relief and to monitor more aggressively conciliation agreements and consent decrees, and it concluded that the agency's systemic program was "basically just getting off the ground." *Ibid.*, pp. 22, 36, and 38. Civil rights groups also expressed concerns about the rapid charge system. One said, "The limited investigation" reflected a "narrow reading" of EEOC's role as an investigatory agency. Barry L. Goldstein, NAACP Legal Defense and Education Fund, testimony, *1978 House Oversight Hearings*, p. 388. See also Richardson Seymour, Lawyers' Committee for Civil Rights Under Law, testimony at same hearings, pp. 499-500.

society, with a pervasive, devastating impact on minority and female expectations.”⁴⁷ He also maintains, however, that civil rights laws cannot correct “root problems of poor education and training.”⁴⁸ In addition, the Chairman has contended that “[i]n the 1970’s the EEOC was concerned with expanding and using its enforcement authority, not with using its authority in an efficient and effective manner” and that the agency needs a “thorough, methodical examination of policies and practices which have been initiated in the past.”⁴⁹ With regard to possible new policy development, the Chairman said soon after he took office that he would not aggressively try to discover new “vistas” of law.⁵⁰

EEOC’s top priority in recent years has been to improve management of the agency: management reforms were of particular immediacy in 1981 and 1982 in light of additional GAO studies that reported serious problems at EEOC in financial management.⁵¹ GAO also cited problems at that time in other management areas.⁵² The Chairman has complained of an “overriding lack of strong management accountability” throughout the Commission and, more specifically, of inadequate emphasis on the quality of work, of the managerial capabilities of supervisors, and of the responsiveness of staff to policy direction as problems requiring major atten-

tion.⁵³ A second early priority was elimination of the remaining backlog of charges.⁵⁴

The following pages discuss EEOC activities in the areas of management and administration, policy, charge processing, litigation, coordination, and technical assistance during the Reagan administration. As will be seen, a number of program and policy initiatives respond to past criticisms of the agency.

Management and Administration

Leadership Stability

EEOC has continued to benefit from relatively stable leadership. Since May 1982 only one person, Clarence Thomas, has served as Chair (although between late January 1981 and June 1982 there were two Acting Chairpersons). Mr. Thomas has been confirmed to serve another term to end in July 1991, making him potentially the longest serving Chair ever at EEOC. His predecessor, Eleanor Holmes Norton, served from June 1977 to February 1981.⁵⁵ By contrast, 11 persons served as Chair or Acting Chair during the 12-year period from 1965 to 1977.⁵⁶

In addition to the stable direction this continuity has afforded the agency, the relatively high level of

accounting records and reports; “inaccurately reported” receivables, payables, and advances; and “weak” internal controls due to “improper segregation of duties, insufficient training and supervision of key accounting and budget personnel, and inadequate internal audit coverage of financial operations.”

⁵² See GAO, *Equal Employment Opportunity Commission Needs to Improve Its Administrative Activities* (1981) (hereafter cited as *1981 GAO Report on Administration*), which expressed concern over underutilization of certain equipment, such as word processors, overstaffing of legal units, and inadequate property controls at EEOC district offices. See also GAO, *Inquiry into Alleged Operating and Management Problems in EEOC’s Office of Review and Appeals* (1982) (hereafter cited as *1982 GAO Report on Office of Review and Appeals*), which identified problems concerning, for example, productivity, records management, and morale.

⁵³ Testimony, *Oversight of the Equal Employment Opportunity Commission*, Hearing Before the Senate Committee on Labor and Human Resources, 97th Cong., 2d Sess. (1982), p. 29 (hereafter cited as *Thomas 1982 Testimony*).

⁵⁴ Ibid. “Backlog” refers to charges filed prior to February 1979. Ibid.

⁵⁵ EEOC, “Backgrounder: The Equal Employment Opportunity Commission” (undated).

⁵⁶ Hill, *EEOC 20 Years Later*, at 56. The situation has not been the same, however, with regard to the position of the General Counsel. Ten persons served as General Counsel or Acting General Counsel between 1965 and 1977, and eight have served in those positions since then (three since 1981). Johnny J. Butler was Acting General Counsel between June 1984 and March 1987. Charles Shanor became General Counsel on April 1, 1987.

⁴⁷ Speech before National Urban League, New Orleans, La., Aug. 2, 1983, p. 2.

⁴⁸ “We have to begin to look at preparation, . . . education, . . . [and] training programs before we can push for access. I am all for pushing for access 100 percent. All those doors have to stay open and I intend to see that they stay open, but you have to have preparation.” Interview in *Higher Education Daily*, July 16, 1982, p. 4. See also speeches by the Chairman at Third Annual Metropolitan Washington Board of Trade EEO Conference, Washington, D.C., Oct. 21, 1982, and the Wharton School of Business, Univ. of Pennsylvania, Jan. 18, 1983 (hereafter cited as Thomas Univ. of Pa. Speech).

⁴⁹ Speech before Associated Industries of Missouri, St. Louis, Mo., Nov. 5, 1982, pp. 10, 19.

⁵⁰ Interview in *Higher Education Daily*, p. 4. Former EEOC Chair Norton predicted that the 1980s would constitute “essentially a followup” to the “ground-breaking” employment discrimination issues of the last 20 years. “[T]here are fewer mountains to climb” for Title VII civil rights advocates while for employers, their equal employment obligations under the laws generally are clear, in her view. Eleanor Holmes Norton, Chair, EEOC (1977-81), comments at Bureau of National Affairs and Industrial Relations Research Association Conference on EEO and the Reagan Administration, in Washington, D.C., as quoted in Bureau of National Affairs, *Daily Labor Report*, June 4, 1982, p. A-3.

⁵¹ GAO: *Financial Management Problems at the Equal Employment Opportunity Commission* (1981) (hereafter cited as *1981 GAO Financial Management Report*) and *Continuing Financial Management Problems at the Equal Employment Opportunity Commission* (1982) (hereafter cited as *1982 GAO Financial Management Report*). The latter cited (pp. i-ii), for example, “unreliable”

TABLE 2.1
EEOC Budget Totals, FY 1980-88
(In thousands of dollars)

Fiscal year	Appropriation ¹ (annualized)
1980	\$124,562
1981	141,200
1982	144,739
1983	147,421 ²
1984	154,039 ³
1985	163,655 ⁴
1986	157,905 ⁵
1987	165,000 ⁶
1988 (request)	193,457

¹Figures represent what EEOC could have spent during a whole fiscal year under each spending ceiling.

²This figure includes a \$4.6 million pay raise supplemental appropriation that EEOC received for FY 83.

³This figure includes a \$2.6 million pay raise supplemental appropriation that EEOC received in FY 84.

⁴This figure includes a \$2.9 million pay raise supplemental appropriation that EEOC received in FY 85.

⁵The Balanced Budget and Emergency Deficit Control (Gramm-Rudman-Hollings) Act of 1985 reduced EEOC's FY 86 appropriation by \$7.1 million.

⁶This figure includes a \$4.5 million pay raise supplemental appropriation request not yet acted upon.

Sources: John Seal, Director, Office of Management, Equal Employment Opportunity Commission, letter to Deborah P. Snow, Assistant Staff Director for Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Sept. 13, 1983 (for FY 80, 81, 82, and 83 appropriations), as cited in U.S. Commission on Civil Rights, *Federal Civil Rights Commitments: An Assessment of Enforcement Resources and Commitments* (1983), p. 139; U.S. Executive Office of the President, Office of Management and Budget, *Budget of the United States Government: FY 86* (for FY 84); *Budget of the United States Government: FY 87* (for FY 85); EEOC, *1987 Budget Submitted to the Congress of the United States* (1986), p. iii (for FY 86); and Ronald Passero, Director, Budget and Finance Division, Financial and Resource Management Services, Office of Management, EEOC, telephone interviews, Nov. 21, 1986 (for FY 87) and Jan. 12, 1987 (for FY 88).

collegiality and harmony among the Commissioners has been another welcome development.⁵⁷

⁵⁷ Eleanor Holmes Norton, former Chair, EEOC, interviews, Apr. 9, 1986 and May 28, 1986, and Barry L. Goldstein, NAACP Legal Defense and Education Fund, interview, Mar. 17, 1987 (hereafter cited as Goldstein Interview). Serious dissension between the Chair and individual Commissioners has drawn public attention in the past. See, e.g., J.W. Singer, "EEOC Censures Chairman, White House Probes Leadership," *National Journal Report*, Mar. 1, 1975, pp. 315-16, and *Washington Post*, Mar. 4, 1975, editorial, p. A-14, as cited in Vol. V, p. 483, n.1486. See also National Urban League, Washington Bureau, *The Right to Equal Employment Opportunity: Further Retreat or New Commitment*, discussion paper (1976), p. 34, which noted that internal

TABLE 2.2
EEOC Full-Time, Permanent Staff
Positions, FY 1980-88

Fiscal year	Authorized ¹	Actual ²
1980	3,777	3,433
1981	3,416	3,366
1982	3,326	3,149
1983	3,127	3,084
1984	3,125	3,044
1985	3,107	3,097
1986	3,125	3,017
1987	3,125	— ³
1988 (request)	3,198	

¹Number of full-time positions permitted under congressional budget measures. Figures for FY 80-82 are for full-time, permanent positions. In FY 83, EEOC began reporting staffing data based on full-time equivalent positions (the total number of comparable hours in each fiscal year). Figures for FY 83-88, therefore, reflect full-time equivalent positions. There is little difference in the staffing figures derived from these two approaches.

²Number of full-time staff (permanent from FY 80-82 and full-time equivalent from FY 83-87) actually employed. Figures are for the last day of the fiscal year.

³Figure not yet available.

Source: Ronald Passero, Director, Budget and Finance Division, Financial and Resource Management Services, Office of Management, EEOC, interview, May 19, 1986, and telephone interviews, Nov. 21, 1986 and Jan. 12, 1987.

Resources

As table 2.1 shows, EEOC's appropriations, by far the largest of the three agencies discussed in this report, increased almost every year from FY 80 to 87:⁵⁸ in "real" dollars, however, the agency's spending power has essentially remained stable since FY 80.⁵⁹

As table 2.2 shows, EEOC staffing has declined since FY 80, both in authorized positions and actual onboard employees. EEOC was authorized 3,125

dissension among the Commissioners had a "detrimental" effect on the agency.

⁵⁸ As noted, since its establishment, EEOC's budget has increased significantly. For example, it doubled between FY 73 and FY 76, rising from \$32 million to nearly \$64 million. Eighth Annual Report, EEOC, Rep. 81, Lab. L. Rep. (CCH) 30 (1975), and 11th Annual Report, p. 31. By 1979, EEOC's budget had risen to \$107 million. 14th Annual Report, p. 25.

⁵⁹ Using the consumer price index, one very rough basis for assessing this budget in real dollars, after allowing for inflation in various agency costs, EEOC's appropriation in FY 80 was \$125 million and \$164 million in FY 85.

full-time equivalent positions in FY 86 and 87, as well as in FY 84.⁶⁰ As will be seen later in this chapter, resource constraints are impinging severely on important agency activities, limiting or undermining the effort to improve the quality of program operations, a fact that no doubt accounts for the significant increase in both money and staff the administration has requested for EEOC for FY 88.

Management Reforms

Among the first steps taken by Chairman Thomas, consistent with his top priority, qualitative improvements throughout EEOC, was reform of the agency's financial management system in accordance with GAO recommendations.⁶¹ This required, among other measures, reconciliation of obligations, filling of "critical" vacancies and replacement of some personnel in the finance office, establishment of a debt collection program for outstanding travel advances, and a review of all unliquidated obligations from earlier years to determine their validity.⁶² In 1984, GAO approved the agency's accounting system, commending EEOC for its progress in that area.⁶³

Other steps, including downgrading of some positions, were taken to deal with administrative problems cited by OPM, such as "[s]ubstantial" overgrading in the Office of Administration and two district offices, an "[e]xcessive" supervisory structure, and personnel management that resulted in poor staff morale and performance.⁶⁴ Reforms concerning operations of EEOC's Office of Review and Appeals are noted later in this chapter.

⁶⁰ By comparison, in FY 73 the Commission had a total of 1,909 authorized positions. *Tenth Annual Report*, p. 32. By FY 76, EEOC's authorized staffing level reached 2,584. *11th Annual Report*, p. 31. In FY 79, EEOC had a total of 3,752 authorized positions, reflecting in part the transfer of additional authority to EEOC by Reorganization Plan No. 1 of 1978. *14th Annual Report*, p. 25.

⁶¹ See generally *1981 GAO Financial Management Report and 1982 GAO Financial Management Report*.

⁶² *1982 GAO Financial Management Report*, pp. i-iv.

⁶³ Milton J. Socolar, Acting Comptroller General of the United States, letter to Clarence Thomas, Chairman, EEOC, June 28, 1984, and Virginia B. Robinson, Associate Director, Accounting Systems Policy and Methodology Group, GAO, letter to John Seal, Director, Office of Management, EEOC, Oct. 2, 1984.

⁶⁴ OPM, *Personnel and Administrative Management in the U.S. Equal Employment Opportunity Commission* (1982), pp. 1 and 2.

⁶⁵ The Civil Rights Commission said in 1977 that the Commissioners, except for the Chair, "have essentially remained pro forma functionaries. . . merely rubber stamping" staff recommendations. *Sequel*, pp. 185-86.

⁶⁶ Clarence Thomas, Chairman, EEOC: "Statement on Reorganization Plan," Aug. 17, 1982, and speech before FBA-EEO

Reorganization

In another step aimed at improving agency management, a reorganization was implemented in 1982 to strengthen the Commissioners' role in policy development,⁶⁵ streamline procedures, and improve management accountability.⁶⁶ Headquarters offices were reduced in number from 14 to 10 (and later to 7). A new Office of Legal Counsel was established to oversee inhouse legal services and interagency coordination activities previously carried out by separate offices. Organizational performance activities, financial management operations, and employee training were consolidated and upgraded in the Office of Management, and all public and private sector compliance activities were coordinated under a single Office of Program Operations. As part of the reorganization, the Chairman abolished the position of Executive Director, temporarily assuming the basic management duties of that position himself, and then dividing them between the Office of Program Operations and the Office of Management.⁶⁷

At least one major objective of the reorganization, strengthening the Commissioners' role in policy development, appears to have been fulfilled, whether as a result of the reorganization or of the current Chairman's management style. For example, one Commissioner was particularly involved in revising agency policies concerning remedies and litigation,⁶⁸ and all cases not conciliated are brought to all

Conference, Washington, D.C., Sept. 30, 1982, p. 15. In another subsequent reorganization step, all enforcement litigation, including pattern or practice (systemic) cases, was placed within the Office of the General Counsel in 1985. In 1978 a civil rights group recommended folding the entire systemic effort, investigations and litigation, into the Office of General Counsel. *Lawyers' Committee Testimony in 1978 House Oversight Hearings*, p. 492.

⁶⁷ Thomas Univ. of Pa. Speech, p. 8. A reorganization of field offices intended to improve delivery of services, provide better agency coverage in underserved areas, and streamline administrative and compliance functions was implemented in 1984. EEOC, *18th Annual Report, 1983* (1984), p. 5 (hereafter cited as *18th Annual Report*); EEOC, Office of Program Operations, *Annual Report, FY 1985*, p. 3 (hereafter cited as *FY 85 OPO Report*). This involved upgrading 17 of 26 area offices to include units to undertake extended investigations. Clarence Thomas, Chairman, EEOC, statement, *Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1985*, Hearings Before the Subcommittee of the Senate Committee on Appropriations, 98th Cong., 2d Sess. (1984), p. 271 (hereafter cited as Thomas 1985 Senate Appropriation Testimony).

⁶⁸ Barbara Lipsky, special assistant to Commissioner Fred W.

Commissioners for their consideration.⁶⁹ In addition, the director of the Office of Program Operations, which now houses all compliance operations, said he has been delegated extensive authority, permitting faster decisionmaking.⁷⁰ However, the Chairman indicated that, in retrospect, a top managerial position, separate from that of the Chairman, probably is needed and may be reestablished.⁷¹

Quality Assurance Program

In line with the Chairman's doubts about the quality of EEOC staff work, a new "quality assurance" program has been implemented. New programs have been initiated at district offices to train managers, supervisors, and employees to use systems concepts and statistical control procedures. "Management quality circles" identify quality characteristics of various activities, such as charge processing and litigation, and then design a measurement approach to obtain data on, for example, the numbers of defective products and most frequent errors. An improvement strategy for correcting the problems is then developed.⁷²

EEOC reports that this effort has generated a very positive response from office directors, who "report improvements in communication among

work units, reduction in conflict, more effective use of meeting time, and generally improved morale on the part of those involved. . . ."⁷³ The Chairman said continued development of this program would be one of his top priorities during his second term.⁷⁴

Staff Training

Finally, with regard to agency emphasis on better management, training for EEOC staff has been another priority, with the training budgets increasing from \$200,000 in FY 82 to over \$631,000 in FY 83 and to over \$1 million in FY 84.⁷⁵ The number of training participants increased from 2,400 in FY 80⁷⁶ to 6,500 in FY 84⁷⁷ and 8,039 in FY 85.⁷⁸ Labor Department staff who transferred to EEOC under the 1978 reorganization have been trained in processing Title VII complaints, while EEOC investigators have been trained in ADEA and EPA charge processing.⁷⁹ Other training has covered trial and discovery techniques for attorneys; advanced clerical skills, word processing, and time management for clerical and secretarial employees; and skills in statistics and investigative writing, among other areas.⁸⁰

In FY 85 the training budget was reduced to \$870,000, and the FY 86 training budget, originally

Alvarez, EEOC, telephone interview, May 23, 1986. These policies are discussed later in this chapter. Further, Armando Rodriguez, a Commissioner who served under both Ms. Norton and Mr. Thomas from 1978 to 1983, reflected that under the latter, Commissioners were better prepared and were getting involved in agency matters earlier than they did previously, meaning "a lot more work" for them. Armando Rodriguez, Commissioner, EEOC (1978-83), interview cited in Bureau of National Affairs, *Daily Labor Report*, Sept. 13, 1983, p. A-2.

⁶⁹ Fred W. Alvarez, Commissioner, EEOC, "Recent Developments in Law Enforcement at EEOC," speech before Bureau of National Affairs and Industrial Relations Research Association Fifth Annual Conference on EEO and Affirmative Action, Washington, D.C., June 5, 1986, pp. 14-15 (hereafter cited as Alvarez BNA Speech).

⁷⁰ James Troy, Director, Office of Program Operations, EEOC, interview, June 19, 1986.

⁷¹ Clarence Thomas, Chairman, EEOC, interview, Nov. 13, 1985, p. 3 (hereafter cited as Thomas Interview).

⁷² For a fuller discussion of this program, see EEOC, Office of Management, "EEOC's Approach to Quality Assurance," July 1985.

⁷³ *Ibid.*, pp. 13-14. The quality assurance program has fostered increased communication between employees and managers and compelled managers to provide staff clear, well-defined tasks and expectations. In one office where compliance staff and legal staff had "refused to talk to each other for a number of years," the program led to an increase in cases recommended for litigation from 1 to 13 between FY 84 and 85. John Seal, Director, Office of Management, EEOC, interview, July 16, 1985, p. 2. For details on the program, see EEOC, "Quality Assurance Pilot Project in the Baltimore District Office: A Case Study" (July 1985); "Quality

Assurance Pilot Project in the Oregon Bureau of Labor and Industries, A Case Study" (September 1985); "Quality Assurance Pilot Project in the Philadelphia Human Relations Commission, A Case Study" (September 1985); "Quality Assurance Pilot Project in the Los Angeles District Office, A Case Study" (September 1985); and "Quality Assurance Pilot Project in the New Jersey Division on Civil Rights, A Case Study" (September 1985).

⁷⁴ Thomas Interview, p. 8.

⁷⁵ Larry Koziarz, Director, Staff Development and Training Division, Office of Management, EEOC, telephone interviews, May 22 and Nov. 26, 1986. According to the Chairman, "Without more and more training, EEOC . . . is doomed to permanent mediocrity." Clarence Thomas, Chairman, EEOC, statement, *Oversight Hearing on the EEOC's Enforcement Policies*, Hearing Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 98th Cong., 2d sess. (1985), p. 3.

⁷⁶ EEOC, *15th Annual Report, 1980* (1981) (hereafter cited as *15th Annual Report*), p. 31.

⁷⁷ EEOC, "Management Report for the Equal Employment Opportunity Commission, FY 1983 and FY 1984" (December 1984), p. 12 (hereafter cited as "FY 83 and 84 OM Report").

⁷⁸ EEOC, "FY 1985 Annual Report of the Office of Management" (undated), ch. 3, p. 6 (hereafter cited as "FY 85 OM Report").

⁷⁹ *15th Annual Report*, p. 31.

⁸⁰ "FY 83 and 84 OM Report," pp. 13-14. Training reported in 1980 covered compliance procedures, legal training, management development, and administrative skills. *15th Annual Report*, pp. 31-32.

over \$840,000, was reduced to \$213,000 as a result of the Gramm-Rudman-Hollings sequestration.⁸¹ In June 1987, EEOC planned to conduct a major training program to be attended by every EEOC investigator, investigator supervisor, and compliance manager in the field.⁸²

Meanwhile, serious concerns over the quality of work of charge intake staff once again have surfaced. A congressional staff study reported that downgrading of those positions (from GS-11s to GS-5s, GS-7s, and GS-9s) has meant that new employees with minimal experience now are responsible for critical charge intake tasks.⁸³ EEOC acknowledges this problem and is now intensifying training of intake staff, who will handle the "full range" of complaint operations, with their promotion potential to be raised to the GS-11 level.⁸⁴

Policy

Comparable Worth

As noted, policy generally has been secondary to management in importance at EEOC since 1981. In 1985, EEOC did set new policy, however, by

rejecting the comparable worth concept as a means of determining job discrimination under Title VII.⁸⁵ EEOC's decision addressed the question of whether claims of comparable worth can be redressed under Federal civil rights laws. The issue had been left open by the Supreme Court in its 1981 ruling in *County of Washington v. Gunther*⁸⁶ and was subsequently raised in a charge filed with EEOC against a municipal housing authority. Citing the Court's language, EEOC determined that a claim by individuals of entitlement to "increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community" does not prove a violation of Title VII.⁸⁷

EEOC maintained that Congress never intended that the Federal Government be a party to the complete restructuring of wages set by the nondiscriminatory decisions of employers, in negotiations, or by the marketplace.⁸⁸ While rejecting the notion of "pure" comparable worth, EEOC did note that sex-based wage discrimination can be found where there is evidence of "discriminatory application of a wage policy. . . or the discriminatory use of wage-

⁸¹ Koziarz Telephone Interviews.

⁸² The series of three 1-week training courses will be conducted at a central facility. Training will be devoted entirely to the conduct of onsite investigations, including the interviewing of charging parties, neutral witnesses and respondents, the gathering and analysis of evidence, and general case development. The workshops will require the active participation of the attendees and will include videotaped role-plays with one-on-one feedback provided by an instructor. The training conference will be attended by over 1,400 EEOC employees, and it is anticipated that over \$1 million will be spent on the program. Deborah Graham and Mike Freeman, Office of Communications and Legislative Affairs, EEOC (Suggested Corrections EEOC Chapter, Commission Report on Federal Enforcement of Equal Employment Requirements) (undated), p. 3 (hereafter cited as "EEOC Staff Comments").

⁸³ Staff of the House Committee on Education and Labor, *A Report on the Investigation of Civil Rights Enforcement in the Equal Employment Opportunity Commission*, 99th Cong., 2d Sess (1986), pp. 19-20 (hereafter cited as *1986 Cong. Staff Report*). "Investigators in the processing units complained that they often have to reinterview the charging parties because of the poor quality of the case file" assembled by these staff. Ibid. EEOC staff said that the reclassification of that category of position was required under OPM job classification standards for Federal agencies. The reclassification took place at the time of the field reorganization. Samuel Dean, Chief, Classification and Position Management Branch, Personnel Management Services, Office of Management, EEOC, telephone interview, May 22, 1986.

⁸⁴ "EEOC Staff Comments."

⁸⁵ Comparable worth refers to "the general formulation that employees in jobs held predominantly by females should be paid the same as jobs of comparable worth to the employer held predominantly by males." U.S. Commission on Civil Rights,

Comparable Worth: An Analysis and Recommendations (1985), p. 2. Comparable worth does not connote equal pay for equal work. However, it is often confused with the equal pay concept because comparable worth advocates oftentimes use the term "pay equity," which sounds relatively innocuous, in place of comparable worth. Under the Equal Pay Act (EPA), which prohibits discrimination on the basis of sex in compensation, equal pay must be provided men and women "for equal work or jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions. . . ." 29 U.S.C. §206(d)(1) (1982). The determination whether two jobs are the same or nearly the same is an objective one, based on the job duties involved. Because comparable worth is distinguishable from equal pay, it is not cognizable under EPA. Ibid; see also generally U.S. Commission on Civil Rights, *Comparable Worth: Issue for the 80's, a Consultation of the U.S. Commission on Civil Rights, June 6-7, 1984* (2 vols.) (undated).

⁸⁶ 452 U.S. 161 (1981).

⁸⁷ In that case, the employer's administrative staff was 85 percent female and the maintenance staff was 88 percent male. The charging parties alleged wage discrimination because the employer paid employees in the female-dominated administrative jobs less than employees in the male-dominated maintenance positions, even though the duties performed in the female-dominated jobs were similar in skill requirements, effort, and responsibility to those in the male-dominated jobs. EEOC found, however, that there was no evidence of intentional discrimination, nor was there any statutory basis or case law support to conclude that evidence "based solely on such a comparison is sufficient to establish a Title VII violation." EEOC, News Release: "Statement by Chairman Clarence Thomas on First EEOC Comparable Worth Decision," June 17, 1985 (with attached "Statement of Charge"), pp. 2-3 (hereafter cited as *EEOC Comparable Worth Decision*).

⁸⁸ *EEOC Comparable Worth Decision* (attachment), p. 7.

setting techniques such as job evaluations or market surveys, or where. . . [there is a] preponderance of direct or circumstantial evidence that wages are intentionally depressed because of the sex of the occupants of the job.”⁸⁹ EEOC noted that it seeks to achieve pay equity not only by eliminating sex-based wage discrimination, but also by eliminating sex discrimination in other areas of compensation, such as pension plans.⁹⁰

Goals and Timetables

EEOC’s position has fluctuated with regard to the inclusion of numerical goals and timetables for hiring or promotion in relief sought in agency settlements with employers. Goals and timetables were included in various settlements during much of the first term of the Reagan administration, as well as in previous administrations.⁹¹ Subsequently, however, goals no longer were sought because of EEOC “skepticism about the value of goals and timetables, relative to the value of other available remedies in providing equal employment opportuni-

ties and eradicating discrimination.”⁹² According to the Chairman, that change reflected the belief that:

Numerically based remedies which focus on sex, race or ethnic considerations have the potential to undermine the ultimate goals of nondiscrimination embodied in Title VII. . . . Beyond that, the improper use of goals and timetables can allow an employer to hide continued discrimination by showing a “good bottom line,” can lead to a perception that women and minorities need preferential treatment to compete even after the discrimination has ended and can dilute the relief available to actual victims of discrimination through negotiating tradeoffs involving goals and timetables.⁹³

The Chairman also has observed that goals and timetables are “unworkable” in the growing litigation of cases involving age discrimination and also compensation or pregnancy benefits.⁹⁴ In any event, the Chairman’s expression of support for victim-specific remedies in late 1984⁹⁵ represented a major change in his thinking from 18 months earlier.⁹⁶

This shift involved no formal policy decision and drew intense criticism both on substantive and procedural grounds.⁹⁷ At the same time, however,

⁸⁹ Ibid., p. 4.

⁹⁰ Clarence Thomas, Chairman, EEOC, testimony in 1985 Cong. Pay Equity Hearings, p. 89. It may be noted that EEOC was criticized for being “very slow to address” the comparable worth issue. Rep. Barney Frank (D-Mass.), opening statement, *Equal Employment Opportunity Commission Update: Policies on Pay Equity and Title VII Enforcement*, Hearing Before a Subcommittee of the House Committee on Government Operations, 99th Cong., 1st Sess. (1985), p. 3. (hereafter cited as 1985 Cong. Pay Equity Hearings). EEOC had held hearings on “job segregation and wage discrimination” in 1980. Eleanor Holmes Norton, Chair, EEOC (1977–81), statement, *Pay Equity: Equal Pay for Work of Comparable Value—Part I*, Joint Hearings Before the Subcommittee on Human Resources, Civil Service, and Compensation and Employee Benefits of the House Committee on Post Office and Civil Service, 97th Cong., 2nd Sess. (1983), p. 40. EEOC maintained that action on only about 25 comparable worth charges had been delayed pending the decision. Clarence Thomas, Chairman, EEOC, testimony in 1985 Cong. Pay Equity Hearings, p. 86. In fact, EEOC said, public debate on the comparable worth issue is “grossly disproportionate to the actual number of charges of discrimination based on comparable worth filed with EEOC.” *EEOC Comparable Worth Decision*, p. 2.

⁹¹ Some 25 percent of EEOC cases settled or tried between FY 77 and FY 82 resulted in settlements or court orders that provided for such relief, and as of May 1983, EEOC was monitoring consent decrees that provided for such relief in 20 cases alleging a pattern or practice of broad discrimination. EEOC submitted briefs in some 26 cases between FY 72 and FY 82 that supported the legality of “affirmative action in general or the legality of specific affirmative action plans.” Clarence Thomas, Chairman, EEOC, statement before House Committee on Judiciary Subcommittee on Civil and Constitutional Rights, May 9, 1983, as quoted in Bureau of National Affairs, *Daily Labor Report*, May 9, 1983, p. F-1 (hereafter cited as Thomas May 1983 Testimony).

⁹² Clarence Thomas, Chairman, EEOC, testimony, *Equal Employment Opportunity Commission Policies Regarding Goals and Timetables in Litigation Remedies*, Hearings Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 99th Cong., 2d Sess. (1986), p. 25 (hereafter cited as Thomas March 1986 Testimony).

⁹³ Ibid., pp. 25–26.

⁹⁴ Ibid., p. 32.

⁹⁵ See Bureau of National Affairs, *Daily Labor Report*, Nov. 15, 1984, p. A-6. The Chairman added that EEOC would examine new remedial approaches, such as removal of the head of a personnel office. Ibid.

⁹⁶ At that time, the Chairman said the victim-specific approach “would prohibit the courts from responding with broad remedial prospective relief, and thereby limit remedies even for systemic Title VII violations to the more limited ‘make whole’ remedies characteristic of single-plaintiff lawsuits.” Clarence Thomas, Chairman, letter to William French Smith, U.S. Attorney General, Mar. 21, 1983.

⁹⁷ The Acting General Counsel had orally instructed regional staff attorneys not to include goals in new settlements, based on his view that most Commissioners opposed them. The Commissioners supported the Acting General Counsel’s position. See generally comments and testimony by Johnny J. Butler, Acting General Counsel; Clarence Thomas, Chairman; Fred W. Alvarez, Tony E. Gallegos, Rosalie Gaul Silberman, and William A. Webb, Commissioners, EEOC, *Equal Employment Opportunity Commission Policies Regarding Goals and Timetables in Litigation Remedies*, pp. 3–98. The Chairman contended that the Acting General Counsel “acted within the scope of his statutory authority to conduct Commission initiated litigation.” Clarence Thomas, Chairman, EEOC, letter to Augustus F. Hawkins, House of Representatives, Jan. 31, 1986. Elsewhere, however, several Commissioners were critical. According to one, “It’s a policy question that the Commission should address. I have

the Chairman said EEOC "honors the provisions of consent decrees entered into by previous Commissions and monitors compliance with them, whether or not they contain goals and timetables."⁹⁸

EEOC did not issue an interpretation of the Supreme Court's 1984 decision in *Firefighters Local No. 1784 v. Stotts*.⁹⁹ The Chairman indicated in March 1986, however, that several other Court cases then pending might "enlighten" EEOC concerning the legality of the use of goals and timetables.¹⁰⁰ Following decisions in those cases¹⁰¹ in May and July 1986, EEOC headquarters advised field staff to adhere to the standards in those decisions concerning the use of goals.¹⁰² EEOC staff said the agency would continue to look to the Supreme Court for further guidance concerning the appropriate use of goals in Title VII case remedies.¹⁰³

Meanwhile, EEOC has no plans to alter the agency's 1979 guidelines that describe the circum-

questions about goals and timetables, but the policy should not be made through some ad hoc decision promulgated by the General Counsel." Commissioner William Webb, quoted in Lynda Robinson, "EEOC Aides Told to Stop Seeking Numerical Goals," *Baltimore Sun*, Feb. 12, 1986. For other comments on this development, see, e.g., Alfred W. Blumrosen, Professor, Rutgers University Law School, testimony, *Equal Employment Opportunity Commission Policies Regarding Goals and Timetables in Litigation Remedies*, pp. 274-78, and Gregory K. Hiestand, Epstein, Becker, Borsody and Green, P.C., testimony in above, pp. 303-09. According to the latter: "Those in the private sector who are charged with the duty of complying with Title VII, managers of corporations which my firm and others like it represent, are entitled to certain conduct in the formulation of policy by the administrative agency charged with the obligation of enforcing Title VII. Specifically, management is entitled to publicly formulated policy which is clear, consistently applied and in conformity with applicable law. With respect to the now evident policy and practice of the EEOC disfavoring the use of goals in (Title VII resolutions), we have instead had an example of policy, clandestinely established, which is . . . confusing and unduly confrontational." *Ibid.*, p. 304.

⁹⁸ *Ibid.*, p. 32. See also testimony before the same subcommittee of Fred W. Alvarez, Commissioner, EEOC, confirming that EEOC "has taken no steps to modify or renegotiate such existing court decrees or conciliation agreements." (p. 55) (hereafter cited as Alvarez 1986 Testimony). However, the Acting General Counsel reportedly said elsewhere that EEOC was not seeking enforcement of provisions of conciliation agreements involving numerical goals and timetables until the Supreme Court resolved several pending cases. "We will proceed if specific victims of bias are involved," but not otherwise, according to one publication. Cheryl M. Fields, "Supreme Court Decisions Are Expected to Resolve Lingering Issues," *Chronicle of Higher Education*, Jan. 29, 1986, p. 15.

⁹⁹ 467 U.S. 561 (1984). In that case, a majority of the Supreme Court held that a court may not order an employer to lay off more senior employees in favor of less senior employees on the basis of race, in derogation of a bona fide seniority system, for the purpose of preserving a specific percentage of racial minority employees. The EEOC Chairman noted that *Stotts* involved a public sector case (not within EEOC's Title VII purview) and

stances in which voluntary affirmative action is appropriate and that set standards for developing voluntary affirmative action plans which do not violate Title VII.¹⁰⁴ In addition, EEOC has continued to require that Federal agencies submit to EEOC affirmative action plans that include numerical goals and timetables.¹⁰⁵ In fact, this requirement, which officially expired in 1986, was extended into 1987.¹⁰⁶

Enforcement

EEOC has taken significant steps toward recasting or strengthening the agency's enforcement role to ensure more complete, make-whole relief for identified victims of past discrimination and to enhance the agency's overall enforcement credibility. In September 1984 the agency announced it would place greater emphasis on litigation. Under this new emphasis, every case in which a reasonable-

also that the decision has little impact on "[EEOC's] day to day operations." 1985 Cong. Pay Equity Hearings, p. 105.

¹⁰⁰ Thomas March 1986 Testimony, p. 29.

¹⁰¹ The cases include *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842 (1986), in which the Court ruled 5-4 that a Michigan school board's policy of laying off white teachers before minority-group teachers with less seniority was unconstitutional; *Local 28 of the Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019 (1986), in which the Court, also by a 5-4 majority, approved a lower court order requiring a New York City sheet metal workers' local to meet a 29 percent minority membership goal by 1987 as a remedy for past discrimination, stating that Title VII relief need not be limited to actual victims; and *Local 93 v. Cleveland*, 106 S. Ct. 3063 (1986), in which a 6-3 majority held that the limitations, if any, that Title VII may place on court-ordered race-conscious relief do not apply to settlement agreements voluntarily entered into by employers.

¹⁰² Johnny J. Butler, Acting General Counsel, and James H. Troy, Director, Office of Program Operations, EEOC, Memorandum, "Guidance on Remedies," to All District Directors and Regional Attorneys, EEOC (July 25, 1986) (hereafter cited as Butler-Troy Memorandum).

¹⁰³ William Ng, Deputy General Counsel, EEOC, telephone interview, Feb. 27, 1987. Staff also suggested that the goals and timetables question at EEOC has received greater attention than warranted. They report that there were no cases approved by EEOC during the period October 1985-July 1986 in which goals and timetables were an "issue." "EEOC Staff Comments," p. 1.

¹⁰⁴ See n.37, this chap., and Thomas March 1986 Testimony, p. 30.

¹⁰⁵ EEOC, "Management Directive 707," January 1983 (initially issued in June 1981), requires all Federal agencies to submit multiyear plans that include goals and timetables for correcting any underrepresentation of women and minority males in various positions.

¹⁰⁶ The directive was to expire in June 1986 but was extended until the end of September 1987. Douglas Bielan, Director, Public Sector Programs, Office of Program Operations, EEOC, telephone interview, June 25, 1986. The Chairman has indicated, however, that EEOC will revise this requirement. Thomas Interview, p. 5.

cause finding has been made or in which a letter of violation has been issued and conciliation has failed is to be submitted to the Commission for possible litigation.¹⁰⁷ This approach would help achieve "certainty and predictability of enforcement."¹⁰⁸

In February 1985, EEOC issued a policy statement that identified five elements required to ensure that identifiable discrimination victims receive full and corrective relief. These elements are:

- All employees in the affected facility should be notified of their right to be free of unlawful discrimination and be assured that the types of discrimination found or conciliated will not recur.
- Corrective, curative, or preventive action should be taken, or measures adopted, to ensure that similar violations of the law will not recur.
- Each identified victim of discrimination should be unconditionally offered placement in the position the person would have occupied had the discrimination not occurred.¹⁰⁹

¹⁰⁷ Clarence Thomas, Chairman; Tony E. Gallegos, William A. Webb and Fred W. Alvarez, Commissioners; EEOC, Memorandum, "Statement of Enforcement Policy," to Johnny Butler, General Counsel, and Odessa Shannon, Director, Office of Program Operations, Sept. 11, 1984, app. F in *1986 Cong. Staff Report*, pp. 104-07 (hereafter cited as "Statement of Enforcement Policy.")

¹⁰⁸ *Ibid.*, p. 104.

¹⁰⁹ This could mean bumping an incumbent from a position. See *Brewer v. Muscle Shoals Board of Education*, 790 F.2d 1515 (11th Cir. 1986), and *Walters v. City of Atlanta*, 803 F.2d 1135 (11th Cir. 1986), in which the appeals court held that in some circumstances bumping may be in order. "Bumping" is an extraordinary remedy to be used sparingly and only when careful balancing of the equities indicates that absent 'bumping,' plaintiff's relief will be unjustly inadequate." *Walters* at 1149.

¹¹⁰ EEOC, "Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination," Feb. 5, 1985, app. F in *1986 Cong. Staff Report*, pp. 108-09 (hereafter cited as *Remedies Statement*).

¹¹¹ *Remedies Statement*, p. 108.

¹¹² *Ibid.*, p. 113. Section 706(g) of Title VII provides: "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. . . ." 42 U.S.C. §2000e-5 (1982).

- Each identified victim should be made whole for any loss of earnings suffered as a result of the discrimination.

- The affected facility should stop engaging in the specific unlawful employment practice.¹¹⁰

EEOC said that "[p]redictable enforcement and full, corrective, remedial and preventive relief are the principal components of the method with which the Commission intends to pursue this agency's mission of eradicating discrimination in the workplace."¹¹¹ Backpay is among the types of make-whole relief to be sought.¹¹² (These shifts have raised a number of questions¹¹³ that are addressed later in this chapter.) Another element of EEOC's new enforcement approach involves its investigative compliance policy. Consistent with its new emphasis on "certainty and predictability in enforcement and the securing of full remedial, curative and preventive relief from unlawful employment discrimination," EEOC has streamlined its subpoena process to

¹¹³ Some Members of Congress called for a GAO review of this and other matters, observing, for example, "[i]nflexible insistence on 'full' relief offers employers little incentive to reach voluntary settlements and may generate more litigation than would otherwise have been the case." They also questioned whether EEOC resources could handle a "vast" number of individual claims. Rep. Augustus Hawkins, Chairman, House Committee on Education and Labor, letter to Comptroller General Charles Bowsher, July 15, 1985 (cosigned by Sens. Edward Kennedy, Alan Cranston, and Lowell P. Weicker, Jr., and Reps. Matthew G. Martinez, Pat Williams, Barney Frank, and Gerry Sikorski), p. 1 (hereafter cited as *Hawkins Letter to GAO*). Similar criticisms were raised by employer representatives. See, e.g., Jeffrey A. Norris, "Impact of EEOC's Modified Litigation Policy on Corporate Employers," paper presented at the Bureau of National Affairs and Industrial Relations Research Association Conference on EEO and Affirmative Action in a Second Reagan Administration, Washington, D.C., June 6, 1985. See also William L. Robinson and Richard T. Seymour, Lawyers' Committee for Civil Rights Under Law, statement, *Oversight Hearing on the Equal Employment Opportunity Commission's Enforcement Policies*, Hearing Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 99th Cong., 1st Sess. (1985), pp. 40-51, and Marcia D. Greenberger, National Women's Law Center, "Impact of Modified EEOC Litigation Policy on Protected Groups," paper presented before 1985 BNA conference. The latter concluded that: "In essence, this new EEOC policy reflects an Administration decision to embark on a course of challenging long-accepted remedies of goals and timetables, while at the same time attempts to substitute in their place remedies which are far less accepted, and which carry with them obvious potential for creating ill will and resentment much greater than any engendered by the goals and timetables to which Chairman Thomas objects." (pp. 6-7).

ensure compliance by respondents who fail to cooperate with EEOC investigations.¹¹⁴

Adverse Impact, Use of Statistics, and Class Actions

In a fundamental policy area, use of the "adverse impact" standard¹¹⁵ and reliance on statistics in finding discrimination,¹¹⁶ EEOC appears largely to have adhered to previous agency practice. According to the Chairman, for example, "[i]n dealing with questions of liability, the Commission will utilize all available relevant evidence, including statistical [sic] evidence, as well as testimonial, which will shed light on the question of whether unlawful discrimination has in fact occurred or has not occurred."¹¹⁷ At the same time, however, the Chairman has

criticized overreliance on statistics at times to prove discrimination¹¹⁸ and said changes in the Uniform Guidelines on Employee Selection Procedures may be necessary because of the "rigid and mechanical mathematical approach" concerning discrimination embodied in the guidelines.¹¹⁹ Meanwhile, however, the guidelines remain in effect.¹²⁰

Pursuit of class action and pattern and practice, as well as individual, cases also has continued to characterize agency policy since 1984. According to the Chairman, "[d]iscrimination often affects whole classes of persons rather than merely individuals. The remedies then must address this broad group while making sure that in protecting the rights of some, we do not wind up abridging the rights of others."¹²¹

¹¹⁴ EEOC, "Investigative Compliance Policy Statement," July 14, 1986. The statement calls for (1) improvements in EEOC's internal subpoena process; (2) pursuit of litigation on the merits rather than prolonged involvement in disputes over subpoena enforcement; and (3) use of adverse inferences against employers who frustrate the investigatory process.

¹¹⁵ In *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), the Supreme Court ruled that to prove a violation of Title VII, a plaintiff need not prove discriminatory intent, but need only prove that the employment practice, procedure, or test operates to exclude minority members and is not justified by business necessity.

¹¹⁶ In *Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977), the Supreme Court said that a statistical showing of racial and ethnic imbalance in a work force "is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."

¹¹⁷ Clarence Thomas, Chairman, EEOC, *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations For 1986*, Hearing Before the Subcommittee of the House Committee on Appropriations, 99th Cong., 1st Sess. (1985), p. 357 (hereafter cited as Thomas 1986 Appropriation Testimony). The Chairman also has said: "Experience has taught us all that apparently neutral employment systems can still produce highly discriminatory effects. They can also perpetuate the effects of past discrimination. As a result, the consequences, the effects of employment practices must be monitored and addressed." (Emphasis in original.) Speech Before the American Society of Personnel Administrators, Washington, D.C., Mar. 17, 1983, p. 4 (hereafter cited as Thomas ASPA Speech). In a Title VII case, a plaintiff bears the initial burden of proof that an employment decision was based on a discriminatory criterion. The elements of proof may vary, depending on the case. Proof of a discriminatory pattern and practice in hiring, for example, creates a presumption that individual class members were discriminated against. The burden then shifts to the employer to show a legitimate, nondiscriminatory reason for the employment practice or decision. *Teamsters*, at 357-60 and 359 n.45 and *Sledge v. J.P. Stevens*, 585 F.2d 625, 637 (4th Cir. 1978).

¹¹⁸ Thomas Interview, p. 5. He also reportedly said that *Griggs* has been "overextended and overapplied" by lower courts. Juan

Williams, "EEOC Chief Cites Abuse of Racial Bias Criteria," *Washington Post*, Dec. 4, 1984, p. A-13. One Commissioner said his view on the use of statistics is consistent with that of the Supreme Court; like the Court, he thought that "statistics are not irrefutable; they come in infinite variety and, like any other kinds of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." William A. Webb, Commissioner, EEOC, statement citing *Teamsters* at 340, in *March 1986 Cong. Hearings*, p. 79. Another Commissioner concurred that statistics are "important in establishing an inference of discrimination and buttressing anecdotal evidence." Rosalie Gaul Silberman, Commissioner, EEOC, statement, *March 1986 Cong. Hearings*, p. 82.

¹¹⁹ Thomas FY 86 Appropriation Testimony, p. 354. Statistical disparities in employment may indicate "inadequate job preparation" rather than discrimination. Clarence Thomas, Chairman, EEOC, Speech before Conference on EEO and the Reagan Administration, sponsored by Bureau of National Affairs and the Industrial Relations Research Association, June 3, 1982, published in Bureau of National Affairs, *Daily Labor Report*, June 4, 1982, p. E-2 (hereafter cited as Thomas BNA Speech). See also Thomas Interview. The guidelines embrace what is known as the "four-fifths" or 80 percent rule to determine adverse impact. 29 C.F.R. §1607(4)(D) (1986). Under that rule the rates of hire or promotion of minorities are compared to the rates for nonminorities. If the minority rate is less than 80 percent of the nonminority rate, adverse impact is deemed established. For other criticisms of the four-fifths rule, see W. Sullivan, M. Zimmer, and R. Richards, *Federal Statutory Law of Employment Discrimination* (§1.5, at 48-51, 1980) and Shoben, *Comment, Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 Harv. L. Rev. 793 (1978). For a fuller discussion of the rule, see Blumrosen, *The Bottom Line Concept in Equal Employment Opportunity Law*, 12 N.C. Cent. L.J. 1, 17-18 (1980). These sources are cited in Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 U.C.L.A. L. Rev. 305, 308 (1983).

¹²⁰ Clarence Thomas, Chairman, EEOC, *Oversight Hearing on EEOC's Proposed Modification of Enforcement Regulations, Including Uniform Guidelines on Employee Selection Procedures*, Hearing Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 99th Cong., 1st Sess. (1986), p. 5 (hereafter cited as Thomas UGESP Testimony).

¹²¹ Thomas ASPA Speech, p. 5. Further, "The Commissioners

Regulatory Program

On a number of policy issues requiring regulatory activity, EEOC to date has accomplished very little. One such issue concerns interpretive policies under the Age Discrimination in Employment Act (ADEA).¹²² Since EEOC received ADEA enforcement authority in 1979, the agency has been deliberating possible reversal of long-held Department of Labor (DOL) policies on issues such as pension accruals past age 65 and apprenticeship programs. Both DOL policies sanction exclusion on the basis of age.

Pension Accrual

In 1979, 2 months before it relinquished ADEA enforcement authority to EEOC, DOL amended its ADEA interpretations to provide that employers are not required to provide any form of pension benefit accruals after the employee reaches age 65.¹²³ With the transfer of ADEA responsibility in 1979, EEOC began a substantive review of DOL's position on pension accrual.¹²⁴ Meanwhile, DOL's 1979 position remained in effect.¹²⁵

have. . . [reaffirmed] our commitment to class actions and our commitment to our systemic program." Fred W. Alvarez, Commissioner, EEOC, remarks before Labor and Employment Law Section of American Bar Association, La Quinta, Calif., Jan. 24, 1986, cited in full in Bureau of National Affairs, *Daily Labor Report*, Jan. 27, 1986, p. E-1 (hereafter cited as Alvarez ABA Speech). In April 1985 the Commission said, "[I]t has been, and continues to be, the policy of the EEOC to investigate and litigate 'pattern or practice' charges and cases. . . ." Clarence Thomas, Chairman; Fred W. Alvarez, Tony Gallegos, Rosalie G. Silberman, and William A. Webb, Commissioners; EEOC, letter to Rep. Pat Williams, Apr. 23, 1985, p. 2.

¹²² 29 U.S.C. §623 (1982). The act prohibits discrimination on the basis of age in hiring, promotion, discharge, and compensation, as well as other terms, conditions, and privileges of employment.

¹²³ 44 Fed. Reg. 30,658 (1979), codified at 29 C.F.R. §860.120(f)(1)(iv) (1986). Credit for years of service, salary increases, and benefit improvements that occur after an employee reaches normal retirement age under the plan need not be taken into account in calculating pension benefits, and plans are not required to adjust actuarially the benefit accrued as of normal retirement age for an employee who continues to work beyond that age. *Id.* In 1978 Congress amended ADEA to enlarge the protected age group to include persons between age 65 and 70. 29 U.S.C. §631(a) (1982). The amendments also expressed "congressional intention" to prohibit the involuntary retirement of employees before age 70. Gitt, *The 1978 Amendments to the Age Discrimination in Employment Act—A Legal Overview*, 64 Marquette L. Rev. 602, 633 (1981) (hereafter cited as Gitt, *1978 ADEA Amendments*).

¹²⁴ In 1980, EEOC expressed concern that compelling older workers to forego retirement compensation solely because of their age "may violate both the intent and clear language" of ADEA. Eleanor Holmes Norton, Chair, EEOC, testimony, *EEOC Enforcement of the Age Discrimination in Employment Act*,

In late 1980 the Secretary of Labor opposed any change in this position, citing the legislative history of ADEA.¹²⁶ EEOC continued to review the issue following the change in administrations in January 1981 and finally, in June 1984, voted to replace the existing interpretation with rules to require employers to continue contributions and credit employees for working beyond the normal retirement age.¹²⁷ EEOC staff then undertook a regulatory impact analysis, which was completed in April 1986, and circulated its proposal for interagency comment.¹²⁸ The Chairman indicated that employer cost concerns at the Office of Management and Budget (OMB) blocked any further action on this issue,¹²⁹ which had dragged on without resolution for 7 years. Finally, in October 1986, Congress enacted legislation prohibiting reduction or discontinuation of benefit accruals or continued allocations to an employee's account under defined benefit or contribution plans "on account of a specified age."¹³⁰ EEOC voted to rescind its regulatory process in November 1986, opting instead to devote its re-

Hearing Before the Select Committee on Aging, House of Representatives, 96th Cong., 2d Sess. (1980), p. 44 (hereafter cited as *Norton ADEA Testimony*). Civil Rights Commission staff agreed the issue "ought to be reopened for further consideration and debate" and encouraged "early publication of the changes [EEOC would] propose for public comment." Louis Nunez, Staff Director, U.S. Commission on Civil Rights, letter to Eleanor Holmes Norton, Chair, EEOC, Aug. 13, 1980 (hereafter cited as Nunez Letter).

¹²⁵ 44 Fed. Reg. 37974 (1979).

¹²⁶ Ray Marshall, Secretary of Labor, letter to Eleanor Holmes Norton, Chair, EEOC, Oct. 17, 1980, cited in Bureau of National Affairs, *Daily Labor Report*, Oct. 31, 1980, pp. E-1—E-5.

¹²⁷ Jeffrey Zuckerman, Chief of Staff, EEOC, telephone interview, May 28, 1986. EEOC disagreed with, among other things, DOL's "misplaced" reliance on the legislative history of ADEA. Clarence Thomas, Chairman, EEOC, testimony, *Oversight Hearing on the Employee Retirement Income Security Act: Requiring Pension Accruals for Work Beyond Normal Retirement Age*, Hearing Before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, 98th Cong., 2d Sess. (1985), p. 7.

¹²⁸ Zuckerman Telephone Interview.

¹²⁹ *Ibid*; Thomas Interview. See also Gitt, *1978 ADEA Amendments*, at 637, which refers to employer cost concerns.

¹³⁰ P.L. 99-509, Subtitle C, §9201 (Oct. 17, 1986), amending ADEA §4, 29 U.S.C. 623. In February 1987 a Federal district court criticized EEOC for its "slothful delay" in resolving this issue and ordered the agency to issue a final rule within 80 days of the order requiring employer pension contributions. *American Association of Retired Persons v. EEOC*, Civ. A No. 86-1740 (Feb. 26, 1987). While the order is under appeal, EEOC proceeded to publish a notice of proposed rulemaking in early April. 52 Fed. Reg. 10584 (1987).

sources to developing regulations implementing the new statute.¹³¹

ADEA Coverage of Apprenticeship Programs

Another long unresolved policy question concerns the current exclusion of apprenticeship programs from ADEA coverage.¹³² Here again, EEOC has been uncomfortable with a DOL position it inherited.¹³³ In 1983 a Federal district court in New York ruled that the exemption of apprenticeship programs from ADEA coverage is invalid.¹³⁴ In response to that ruling, the Chairman noted that EEOC staff also had "concluded that the language and the legislative history of the ADEA do not support such an exclusion."¹³⁵ In June 1984, following another lengthy review, EEOC voted to rescind the DOL interpretation and issue a substantive rule providing that those programs are covered by ADEA.¹³⁶ The EEOC proposal was sent to OMB for review in July 1984.¹³⁷ OMB returned it to EEOC in December 1985, requesting reconsider-

¹³¹ "EEOC Staff Comments," p. 4.

¹³² 29 C.F.R. §1625.13 (1986). The exemption is based on the view "that apprenticeship is an extension of the educational process to prepare young men and women for skilled employment." *Id.* Commission on Civil Rights staff have questioned EEOC about the exemption, noting that it appears contrary to the protections envisioned in the ADEA and that age restrictions in apprenticeship programs may act as obstacles to older workers, including minorities and women, who wish to enter the skilled trades. See Nunez Letter; Bert Silver, Acting Staff Director, U.S. Commission on Civil Rights, letter to Anthony DeMarco, Acting Assistant General Counsel, Legal Counsel Division, EEOC, Aug. 27, 1981; and Linda Chavez, Staff Director, U.S. Commission on Civil Rights, letter to Clarence Thomas, Chairman, EEOC, Mar. 12, 1984.

¹³³ *Norton ADEA Testimony*, p. 44. *Id.*

¹³⁴ *Quinn v. New York State Elect. and Gas Corp.*, 569 F. Supp. 655 (N.D. N.Y. 1983). The court ruled that the exemption "finds no support in, and is contrary to, the language of the ADEA." *Id.* at 661.

¹³⁵ Clarence Thomas, Chairman, EEOC, letter to Linda Chavez, Staff Director, U.S. Commission on Civil Rights, Mar. 30, 1984.

¹³⁶ Consistent with the purpose of the act, according to EEOC, ending the exemption would "allow those forty years of age and older the same opportunities to participate in apprenticeship programs as are currently enjoyed by younger individuals." 50 Fed. Reg. 17,857 (1985).

¹³⁷ *Id.*

¹³⁸ OMB said the proposed rule could "stifle" creation of new apprenticeship programs and lead to elimination of existing ones, since employers and unions view apprenticeship programs as providing youth training, the "initial investment" that "can be recouped over the apprentice's work life." Wendy L. Gramm, Administrator for Information and Regulatory Affairs, OMB, letter to Clarence Thomas, Chairman, EEOC, Dec. 2, 1985 (quoting the Solicitor of Labor, letter to EEOC, May 3, 1984).

¹³⁹ Thomas Interview. The Chairman also expressed the view that OMB has "too great" a role in this issue. OMB is authorized

ation.¹³⁸ The Chairman has indicated there is little further EEOC can do on this issue.¹³⁹

Handicap Guidelines

The need for new EEOC Federal sector guidelines concerning definitions of "handicapped individual" and "reasonable accommodation" is another important policy issue that EEOC has acknowledged¹⁴⁰ but not resolved to date. According to EEOC, "[i]mplementation of Federal prohibitions against employment discrimination based on handicap is still a new and developing area."¹⁴¹

EEOC received responsibility in 1979 for enforcing affirmative action provisions of laws and regulations for handicapped individuals in Federal employment¹⁴² and began a review of existing, related Civil Service Commission regulations. By FY 83 the agency had completed its review¹⁴³ and identified as important needs new guidance to agencies on the extent to which an agency must accommodate individuals' disabilities and also the appropriate

to review proposed Federal rules "to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, . . . minimize duplication and conflict of regulations, and insure well-reasoned regulations. . . ." Exec. Order No. 12,291, 3 C.F.R. 1981 Comp., Rev'd Jan. 1, 1982, p. 127.

¹⁴⁰ EEOC is processing an "increasing volume of complaints alleging handicap discrimination by Federal agencies in violation of section 501 of the Rehabilitation Act of 1973." U.S. Executive Office of the President, Office of Management and Budget (OMB), *Regulatory Program of the United States Government, April 1, 1985-March 31, 1986* (1985), p. 527 (hereafter cited as *Federal Regulatory Program*). In the agency's view, its "existing regulations are inadequate" concerning (1) "the appropriate definition of handicapped individuals who are protected by Federal statutes from discrimination and/or on whose behalf affirmative action is to be undertaken and (2) the extent to which an agency must accommodate these individuals' disabilities." *Ibid.* A year later, EEOC again identified this as a "significant" regulatory item but said its existing regulations "may be inadequate and further guidance necessary." OMB, *Regulatory Program of the United States Government, April 1, 1986-March 31, 1987* (1986), p. 514.

¹⁴¹ EEOC, Office of the Legal Counsel, *Coordination of Federal Equal Employment Opportunity Programs*, Oct. 1, 1983-Sept. 30, 1984 (1985), p. 4 (hereafter cited as *FY 84 Coordination Report*). Regulations setting government-wide nondiscrimination standards for employment under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (1982), and regulations concerning, among other things, Federal agency affirmative action programs for the employment of handicapped individuals under 29 U.S.C. §791 (1982) were not issued until 1978. 29 C.F.R. 1613.701-709 (1986). "The lack of guidance in this area has been particularly troublesome because employment discrimination on the basis of handicap raises some unique questions that cannot be answered by reference to other civil rights statutes and case law."

¹⁴² Reorg. Plan No. 1.

¹⁴³ *FY 84 Coordination Report*, p. 4.

definition of handicapped individuals who are protected by Federal law from discrimination.¹⁴⁴ Draft directives on the definition of "handicapped individual" and on the requirement for "reasonable accommodation" were prepared and were submitted to the Commission's policy review process for review.¹⁴⁵ In mid-1985, EEOC projected possible publication of a proposed rule in January 1986.¹⁴⁶ By summer 1986, however, neither directive had cleared the internal review process, and the Chairman could not estimate when the new definitions would be available for public comment.¹⁴⁷ In late April 1987, EEOC said its next steps on the issue were "undetermined."¹⁴⁸

Federal Sector Complaint Process

An EEOC program generally viewed as in need of major reform involves the handling of Federal employee discrimination complaints. Federal employees are assured equal employment opportunity under section 310 of the Civil Service Reform Act of 1978¹⁴⁹ and section 717 of Title VII.¹⁵⁰ Until 1979 the Civil Service Commission was responsible for enforcing these laws. In 1975 the Commission on Civil Rights criticized many aspects of the Federal sector complaint process and concluded that Federal

employees were denied the same basic Title VII protections enjoyed by private sector employees.¹⁵¹ A 1977 Commission report reiterated such criticisms and noted that the time for processing Federal discrimination complaints had nearly doubled, from 201 days in FY 74 to 398 days in FY 76.¹⁵² GAO also issued two reports in 1977; one reported problems in the Federal sector program regarding "fairness and impartiality, timeliness, and complaint resolution,"¹⁵³ and the other concluded that the "basic thrust of the Federal equal employment opportunity program is in many ways still confused, fragmented, and in disarray. . . ."¹⁵⁴ In 1979 responsibility for overseeing the Federal sector equal employment program was transferred to EEOC because the Civil Service Commission had been "lethargic in enforcing fair employment requirements within the Federal government."¹⁵⁵

That same year EEOC implemented a pilot program to test possible changes in the program.¹⁵⁶ The EEOC Chair subsequently said she expected EEOC to begin in FY 81 to take over the investigative process at Federal agencies.¹⁵⁷ That did not

¹⁴⁴ *Federal Regulatory Program*, p. 528.

¹⁴⁵ *FY 84 Coordination Report*, p. 5. According to the report, guidance on the definition of a "qualified handicapped individual" was to follow later in FY 85.

¹⁴⁶ *Federal Regulatory Program*, p. 528.

¹⁴⁷ Thomas Interview. According to EEOC staff, the issues are extremely complex and highly judgmental. Further, draft proposals have had to be revised in light of recent relevant court decisions. Sharon Wilkin, EEO specialist, Handicapped Individual Branch, Public Sector Programs Division, Office of Program Operations, EEOC, telephone interview, May 15, 1986 (hereafter cited as Wilkin Telephone Interview), and Richard Komer, special assistant to the Chairman, Office of the Chairman, EEOC, telephone interview, May 15, 1986 (hereafter cited as Komer Telephone Interview).

¹⁴⁸ 52 Fed. Reg. 14926 (1987). EEOC staff are, however, developing a definition of "handicapped individual" and recently circulated internally a management directive on reasonable accommodation. EEOC also is working with OPM "on developing regulations for reassignment of handicapped employees [as well as] a memorandum to all Federal agencies addressing the issue of temporary disabilities." "EEOC Staff Comments," p. 4.

¹⁴⁹ 5 U.S.C. §7201 (1982). That act directs each Executive agency to "conduct a continuing program for the recruitment of . . . minorities. . . in a manner designed to eliminate underrepresentation of minorities. . . within the Federal service."

¹⁵⁰ 42 U.S.C. §2000e-16 (1982). The complaint process set up under these laws features (1) agency intake of complaints; (2) agency investigation; (3) agency proposed disposition; (4) EEOC hearing (if requested); (5) EEOC recommended decision; and (6) appeal to EEOC, if complainant is dissatisfied with the agency's response to EEOC's recommendation. EEOC cannot require

agencies to comply with its decisions. Regulations governing this process can be found at 29 C.F.R. §1613 (1986).

¹⁵¹ *Vol. V*, pp. 61-86, 619. The Commission noted congressional concern in 1971 that Federal sector complaint procedures were biased against the complainant because the allegedly discriminatory agencies investigated the complaints and rendered final decisions. *Ibid.*, p. 61.

¹⁵² *Sequel*, pp. 32-36.

¹⁵³ 1977 *GAO Report*, p. ii. A civil rights group concluded that a "first priority for EEOC is to reform the system for the processing of Federal EEO complaints." NAACP Legal Defense and Educational Fund testimony in 1978 *House Oversight Hearings*, p. 368.

¹⁵⁴ *Problems in the Federal Employee Equal Employment Opportunity Program Need to be Resolved* (1977), p. i. For example, GAO found "confusion" as to when a numerical employment target in agency affirmative action plans is a "permissible goal" or an "impermissible quota." It also found that the "goal-setting process for hiring is not often carefully conducted, and, where the process has been carefully conducted, it is generally based directly or indirectly on proportional representation with little regard to available and qualified people with needed skills, experience, and training. . . ." *Ibid.*, p. ii.

¹⁵⁵ Message of the President, accompanying Reorganization Plan No. 1 of 1978, 3 C.F.R. 321 (1979), reprinted in 42 U.S.C. §2000e-4 app. at 41 (hereafter cited as *President's Reorganization Message*).

¹⁵⁶ The principal change tested at five Federal agencies was investigation of complaints by EEOC rather than by the agencies. EEOC found the remedy rate increased "substantially" in this pilot program and also that the time for processing was "well below" that of the agencies. 14th *Annual Report*, pp. 9-10.

happen, however, because of budget restrictions.¹⁵⁸

In 1982 and again in 1983, the Office of Management and Budget criticized the costs involved in the Federal sector complaint process.¹⁵⁹ OMB said the administration "would continue to examine ways in which equal employment can be implemented in the Federal Government with greater fairness and efficiency."¹⁶⁰ Meanwhile, GAO issued another study in 1983 concluding that the Federal sector complaint process "continues to be plagued with problems," such as the long time taken to process complaints.¹⁶¹

Finally, in spring 1985, EEOC informally submitted to OMB proposals that would be a "radical departure" from the current process.¹⁶² These were to a large extent the same changes that tested positively 5 years previously.¹⁶³ In October 1985 congressional criticism of the lack of movement on those proposals was expressed.¹⁶⁴ The EEOC Chairman, although agreeing that a new "streamlined, centralized" system should reduce problems of unfairness, costliness, and inefficiency, said that EEOC's inability to get a commitment concerning needed funds and personnel was a principal obstacle

to implementing the reforms.¹⁶⁵ In August 1986, EEOC published for comment proposed, limited revisions of the system, including additional grounds for dismissing a complaint (such as if the complainant refuses to accept in settlement complete relief), allowing hearing examiners to issue decisions without holding a hearing when the facts of a case are not in dispute, and measures to assure timely agency compliance with EEOC case decisions.¹⁶⁶ These are steps in the right direction toward needed reform of the Federal complaint process.

Uniform Guidelines on Employee Selection Procedures

As noted, Chairman Thomas has expressed reservations about the Uniform Guidelines on Employee Selection Procedures, specifically the adverse impact mechanism they set forth. There has been considerable criticism by others as well on other grounds, and there is some indication that compliance with the guidelines has proven so difficult that many employers have simply stopped using employment tests.¹⁶⁷

¹⁵⁷ Eleanor Holmes Norton, Chair, EEOC, statement, *Civil Service Reform Oversight—1980 Equal Employment Opportunity*, Hearing Before the Subcommittee on the Civil Service of the House Committee on Post Office and Civil Service, 96th Cong., 2d Sess. (1981), p. 7. She cited the "poor record of delay, unprofessional investigations and even conflicts of interest in agency-conducted investigations... inherent in a system that incorrectly assumed that agencies with other missions could be expected to conduct professional, objective and technically proficient investigations of themselves." Ibid.

¹⁵⁸ EEOC, News, "Report Declares Federal EEO Complaint Process Ineffective," July 29, 1982.

¹⁵⁹ U.S. Executive Office of the President, Office of Management and Budget: *Special Analyses, Budget of the United States Government, 1983* (1982), Special Analysis J, p. 22, (hereafter cited as *FY 83 Special Analysis J*), and *Special Analyses, Budget of the United States Government, Fiscal Year 1984* (1983), pp. J-25 and J-26. The former said the process cost an average of more than \$8,000 per closed complaint—over 10 times the average cost for EEOC processing of charges involving private employers. *FY 83 Special Analysis J*, p. 22.

¹⁶⁰ *FY 83 Special Analysis J*, p. J-27.

¹⁶¹ GAO, *Problems Persist in the EEO Complaint Processing System for Federal Employees* (1983), p. i (hereafter cited as 1983 GAO Report).

¹⁶² Douglas J. Bielan, Director, Public Sector Programs, Office of Program Operations, EEOC, interview, July 24, 1985.

¹⁶³ For example, the changes would provide for factfinding conferences and early resolution efforts, as well as EEOC, rather than agency, investigations. Ibid.

¹⁶⁴ Rep. Barney Frank, comments, *Processing EEO Complaints in the Federal Sector—Problems and Solutions*, Hearing Before a Subcommittee of the House Committee on Government Operations, 99th Cong., 1st Sess. (1985), pp. 89-95 (hereafter cited as *Federal EEO Problems Hearings*).

¹⁶⁵ The Chairman said a 20 percent increase in agency funds

could be necessary, along with 1,000 additional staff. Statement in *Federal EEO Problems Hearing*, pp. 63, 91, 97.

¹⁶⁶ 51 Fed. Reg. 29,482 (1986).

¹⁶⁷ Michael A. Warner, partner, Seyforth, Shaw, Fairweather, and Geraldson, "Should the Uniform Guidelines on Employee Selection Procedures Be Modified?" paper presented at Bureau of National Affairs and Industrial Relations Research Association Conference on EEO and Affirmative Action in a Second Reagan Administration, Washington, D.C., June 6, 1985, pp. 2-3, and two group interviews with members of the Equal Employment Advisory Council (individual names on file at the Commission), Dec. 7, 1984, and Jan. 28, 1985, in which substantial dissatisfaction with the guidelines was expressed because of the high costs of validation, which may dissuade employers from using tests. In 1982, GAO called for a review and revision of the guidelines in connection with problems associated with collecting and maintaining adverse impact data, searching for alternatives during validation, the relationship of merit laws to the guidelines, and determining how to make the guidelines more understandable to their users. GAO, *Uniform Guidelines on Employee Selection Procedures Should be Reviewed and Revised* (1982), pp. 17-18. The Department of Labor generally shared GAO's concerns, and the Department of Justice and the Office of Personnel Management concurred that the guidelines should be reviewed. Ibid., apps. III, IV, and V. Further, a government report has concluded: "It is disingenuous to impose test validation requirements that employers, even with the best will and a sizeable monetary investment cannot meet." U.S. National Research Council, Assembly of Behavioral and Social Sciences, Committee on Ability Testing, *Ability Testing: Uses, Consequences, and Controversies*, Part 1: Report of the Committee, by Alexandra K. Wigdor and Wendell R. Garner, eds. (Washington, D.C.: National Academy Press, 1982), p. 107. One expert in the field has testified that the guidelines fail to represent "good contemporary scientific knowledge, and thus... good contemporary practice." Benjamin

On January 22, 1981, the President established a Presidential Task Force on Regulatory Relief,¹⁶⁸ which subsequently identified the guidelines as among the Federal regulations that might be excessively burdensome, unnecessary, or counterproductive.¹⁶⁹ EEOC then proceeded to review the recordkeeping provisions of the guidelines, which require employers to maintain data showing the impact of their selection procedures on members of a racial, sex, or ethnic group.¹⁷⁰ In July 1984 the agency decided to expand its review to the entire guidelines, including substantive, nonrecordkeeping portions.¹⁷¹ Again, to date it has failed to report its conclusions or to produce any proposals, even of a minor technical nature, for public consideration.¹⁷² In January 1987 the Chairman said he was "intensifying" efforts and would propose "major changes" in the guidelines to the Commission in spring 1987.¹⁷³

Equal Pay Act Interpretations

Finally, completion of needed revisions of Equal Pay Act (EPA) interpretations to replace those

Schneider, American Psychological Association and Society for Industrial and Organizational Psychology, testimony, *Oversight Hearing on the Equal Employment Opportunity Commission's Enforcement Policies*, p. 75. See also Edward E. Potter, ed., *Employee Selection: Legal and Practical Alternatives to Compliance and Litigation*, 2d ed. (Washington, D.C.: National Foundation for the Study of Equal Employment Policy, 1986), p. iv, in which the author noted growing perceptions by employers and industrial psychologists, among others, of the need to revise the guidelines because, in part, of inconsistencies with Title VII case law and the "accepted practices of the psychological profession."

¹⁶⁸ *Public Papers of the Presidents of the United States, Ronald Reagan, 1981* (1982), p. 30.

¹⁶⁹ U.S., The Vice President, Office of the Press Secretary, White House, Press Release, "Remarks of Vice President George Bush at the Presidential Task Force on Regulatory Relief Briefing," Washington, D.C., Aug. 12, 1981, p. 5.

It may be noted that, on another issue, the task force also cited "[c]oncern" that EEOC's sexual harassment guidelines are "vague and fail to provide guidance on what constitutes prohibited behavior." *Ibid.*, pp. 4-5. EEOC voted in 1983, however, to retain those guidelines without change. In 1986 the Supreme Court upheld EEOC's position, citing these guidelines, that sexual harassment in the form of a "hostile environment" may constitute discrimination under Title VII. *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399 (1986).

¹⁷⁰ 29 C.F.R. §1607.4A, 1607.15(A)(1)(2) (1986). See also 48 Fed. Reg. 34,766 (1983) where EEOC invited comments on various questions posed about those provisions. Civil Rights Commission staff responded that the review should help identify ways to simplify or reduce some recordkeeping requirements and lead to useful clarification as to what data should be retained and for how long. The Staff Director said she believed, "in general, . . . that some employers may be keeping documents that are not essential, or that could be discarded earlier than they may realize." Linda

issued 20 years ago by DOL also has been very slow.¹⁷⁴ Ten years ago, the Commission on Civil Rights expressed concern over deficiencies in EPA interpretations.¹⁷⁵ In 1977, DOL said it planned major revisions of them, affecting some matters of concern to the Commission.¹⁷⁶ However, under Reorganization Plan No. 1, EPA enforcement authority was transferred to EEOC before the revisions became final rules.¹⁷⁷

Upon receiving EPA enforcement responsibility in 1979, EEOC undertook a review of existing EPA regulations, declaring that DOL interpretations would remain in effect until EEOC issued its own. Employers were cautioned, however, that they should rely upon DOL interpretations only "to the extent that they are not inconsistent with statutory revisions and judicial interpretations."¹⁷⁸ EEOC acknowledges that the guidance from EEOC with respect to the act is "almost useless to employers and employees because it is almost impossible for them to know which regulations the EEOC deems effective and which it considers to have been overruled."¹⁷⁹

Chavez, Staff Director, U.S. Commission on Civil Rights, letter to Anthony J. DeMarco, Office of Legal Counsel, EEOC, Sept. 8, 1983, p. 4.

¹⁷¹ According to EEOC, during its review of the recordkeeping provisions questions arose, including the purpose of the guidelines, whether there still is a need for them, the theory of adverse impact and the method for determining when such impact is significant, and how to establish test validity. 51 Fed. Reg. 14,594 (1986).

¹⁷² EEOC staff submitted a study to the Chairman in July 1985 that "did not adequately set forth the analysis which the Commission [was] seeking." Thomas UGESP Testimony, p. 5.

¹⁷³ Bureau of National Affairs, *Daily Labor Report*, Jan. 26, 1987, p. A-5.

¹⁷⁴ 29 C.F.R. Part 800 (1986).

¹⁷⁵ One Commission criticism was that DOL's interpretative policies on fringe and maternity benefits and training programs were inconsistent with EEOC policies on those issues. *Sequel*, p. 153. For example, DOL's position as articulated in EPA regulations permitted employers to provide discriminatory pension plans (plans that provide smaller payments to women than to men when both have received equal pay during their working years), while EEOC guidelines required that all employees receive the same benefits and stipulated that a plan which pays men and women different rates could constitute sex discrimination. *Ibid.*, pp. 158-60. The Commission also criticized DOL for its failure to explain the essential contents of a bona fide merit or seniority system. *Vol. V*, pp. 437; *Sequel*, p. 154.

¹⁷⁶ 43 Fed. Reg. 166 (1978).

¹⁷⁷ 44 Fed. Reg. 38,671 (1979).

¹⁷⁸ *Federal Regulatory Program*, p. 524. "Thus, not even employers and employees who are aware of the 1979 notice have any reliable guidance concerning the EEOC's interpretation of their obligations and rights under the Equal Pay Act." *Ibid.* pp. 525-26.

¹⁷⁹ See 44 Fed. Reg. 148 (1979); 45 Fed. Reg. 150 (1980); 46 Fed.

Each year since 1979, EEOC identified development of EPA interpretative regulations as an agency priority.¹⁸⁰ On September 1, 1981, EEOC did propose guidelines presenting revised interpretations.¹⁸¹ For 5 years, however, the agency did not issue the revised interpretations in final form. Finally, a draft proposed final rule was approved by the Commission in April 1986 and published in August 1986.¹⁸² Generally similar to the 1981 proposals, the final EPA interpretations, while belated, generally were responsive to previous Commission comments.¹⁸³

In 1982 a Senate Committee staff paper concluded that ADEA development at EEOC has been "excruciatingly slow and indecisive."¹⁸⁴ The same conclusion generally appears valid with regard to the regulatory matters identified above. With respect to these items, there has been a generally widespread perception, shared by EEOC itself during the past two administrations, that review and revision of various apparently defective equal employment enforcement policies are necessary. Since 1981, EEOC has not achieved major regulatory reform. It is true that complex technical matters often are involved and that this deficiency clearly cannot be attributed to EEOC alone.¹⁸⁵ The Commission on Civil Rights and no doubt other concerned groups and individuals continue to look for decisive Executive branch action in identifying problems in Federal equal employment opportunity requirements and propos-

ing for public comment changes that would address them.

Complaint Processing

This section reviews data and developments concerning processing by EEOC of complaints or "charges" of employment discrimination by private and Federal sector employees, and also charge processing through the State and local program. Growing charge inventories and qualitative concerns face this entire charge processing effort. As will be seen, reforms have been initiated to address these problems, but resource constraints are undermining these efforts, particularly as charges continue to increase.

Private Sector

The number of employment discrimination complaints or charges filed with EEOC under Title VII, ADEA, and EPA has continued to increase since FY 81. Over 66,000 charges (not including those deferred to State and local agencies) were received in FY 85,¹⁸⁶ compared to 56,425 in FY 80.¹⁸⁷ Title VII complaints have remained the most numerous (over 75 percent of all charges received during this period).¹⁸⁸ Age discrimination charges have nearly doubled in number since FY 80.¹⁸⁹

In FY 83, EEOC eliminated the longstanding backlog of old (pre-January 1979) charges.¹⁹⁰ Today the agency reports success in keeping its total charge

Reg. 64 (1981); 46 Fed. Reg. 191 (1981); 47 Fed. Reg. 71 (1982); 48 Fed. Reg. 201 (1983); 49 Fed. Reg. 77 (1984); and 50 Fed. Reg. 209 (1985).

¹⁸⁰ 46 Fed. Reg. 43,848 (1981). These interpretations were to replace those issued by DOL at 29 C.F.R. Part 800 (1982). Although many DOL interpretations were incorporated, the EEOC proposal would update the issue and provide better organization, and in some cases, codification for the first time. It also addressed the interrelationship between the Commission's jurisdiction under EPA and Title VII, stating that where the jurisdictional prerequisites of both acts are satisfied, any violation of the Equal Pay Act is also a violation of Title VII.

¹⁸¹ For final rules, see 51 Fed. Reg. 29,816 (1986).

¹⁸² See n.175, this chap.

¹⁸³ *Equal Employment Opportunity Commission Enforcement of the Age Discrimination in Employment Act: 1979 to 1982*, An Information Paper prepared by Staff of the Senate Special Committee on Aging, 97th Cong., 2d Sess. (1982), p. 11.

¹⁸⁴ Further, according to EEOC staff, more time is involved now in policy development because the Chairman requires that numerous options be prepared for Commissioner consideration. Allyson Duncan, Acting Legal Counsel, EEOC, interview, Aug. 23, 1985.

¹⁸⁵ EEOC, *Office of Program Operations, Annual Report, FY 1985*, p. 13 (hereafter cited as *FY 85 OPO Report*).

¹⁸⁶ EEOC, *16th Annual Report, 1981*, p. 7 (1982) (hereafter cited as *16th Annual Report*).

¹⁸⁷ *Ibid.*, p. 5, and *FY 85 OPO Report*, p. 13. Race continued to be the most common basis of the complaints. The two most common issues in these complaints were discharge and terms or conditions of employment. Most respondents continued to be private employers. *1981 Annual Report*, pp. 140-41, and EEOC, *18th Annual Report, 1983* (1984), pp. 61-71 (hereafter cited as *18th Annual Report*); *19th Annual Report* (as submitted to printer for publication in 1987), pp. 80, 85. FY 73 followed this same pattern. *Vol. V*, pp. 510-12.

¹⁸⁸ Age discrimination charges rose from 8,779 in FY 80 to 16,784 in FY 85. *1981 Annual Report*, p. 8, and *FY 85 OPO Report*, table ("EEOC Receipts By Statute FY 82-85").

¹⁸⁹ Less than 5 percent of the charge inventory at the end of FY 83 was over 300 days old. *18th Annual Report*, p. 9.

¹⁹⁰ *FY 85 OPO Report*, p. 4.

inventory at a "manageable" level despite its reduced staffing.¹⁹¹

Basic concerns previously raised about the effects of the rapid charge process on the quality or effectiveness of the handling of new charges have persisted, however.¹⁹² Some are, in fact, shared by the agency. For example, the General Counsel in 1984 stated:

[T]housands of charge investigations have been curtailed and closed, thousands more have been settled prematurely and for inadequate relief, and still thousands more have been lost as litigation vehicles simply and solely because of the production quota mandate to arbitrarily close most charges as soon as possible after their receipt. Moreover, [there has been] an unacceptable tendency by field legal units to submit for litigation authorization inadequately investigated cases which are not worthy, in a purely factual sense, of litigation by the Commission.¹⁹³

In December 1983, EEOC decided to process more charges through full or "extended" investigations than through the rapid charge system and to

¹⁹¹ One group, for example, maintained that "charges are being determined 'no cause' indiscriminately because of a lack of training on the part of the intake and investigative staff, a lack of resources to complete adequate investigations, and management's emphasis on closing files rather than quality intake and investigation." Women Employed, "Justice Denied: The Equal Employment Opportunity Commission Under the Reagan Administration" (1986), p. 8 (hereafter cited as *Justice Denied*). As noted, a congressional staff report also complained of untrained, low-grade, and inexperienced intake staff. See text accompanying n.80, this chap.

¹⁹² David L. Slate, General Counsel, EEOC, Memorandum, "Directive re Attorney Involvement in the Administrative Charge Process," to Regional Attorneys, Jan. 20, 1984, pp. 1-2.

¹⁹³ EEOC, "New Charge Processing Approach," p. 2. According to one Commissioner: "There seems to be a consensus that a hundred percent reliance on a rapid charge system—focused only on settlement—didn't work. Sure, it worked to perform a miracle, and that miracle was the elimination of our pre-1979 backlog. Respondents, charging parties, the General Accounting Office. . . and we ourselves. . . came to look at EEOC more as a claims adjustment bureau rather than a law enforcement agency." Alvarez ABA Speech, p. E-1.

For previous complaints about the rapid charge, early settlement approach, see text accompanying n.46, this chap. Part of this change has been the reduced use of the factfinding conference. EEOC was holding "factfinding conferences that did not find any facts or yield any usable evidence [emphasis in original]. No transcripts were made, no tapes were made, no one was under oath." Alvarez BNA Speech, p. 8.

Also, it was difficult for the charging party to have his case heard. "A typical investigation on behalf of a charging party consisted of intake notes and notes from a factfinding conference, [compared to the] thick stack of [respondent] documents which were typed neatly, tabbed and thoroughly prepared. . . ." Ibid., p. 8. In 1977 the Commission on Civil Rights warned with regard to the factfinding conference: "There is an obvious risk that more sophisticated respondents may intimidate charging parties or, at the least, better articulate their case, thereby overly impressing

reduce its emphasis on early settlements.¹⁹⁴ A year later, about 35 percent of EEOC staff were working on "full" investigations.¹⁹⁵

The shift toward more full investigations has resulted in development of a new, although to EEOC "acceptable," buildup in inventory as well as slower processing of charges.¹⁹⁶ Some reports suggest, however, that the quality of EEOC charge investigations has improved and that the investigations are more thorough.¹⁹⁷ Others have alleged that serious mishandling of charges is occurring.¹⁹⁸ As noted, EEOC is acting to improve the quality of charge intake.¹⁹⁹

Data indicate some promising trends, however, concerning charge processing. More charges are being resolved on their merits, for example, as opposed to being disposed of through "administrative" closure.²⁰⁰ There has been no decline in the

[EEOC] representatives as to the validity of their position. Also, respondents are more likely to have private counsel available for consultation than are complainants." *Sequel*, p. 219 (citation omitted). Some civil rights group representatives have welcomed the deemphasis on rapid charge processing for such reasons. See, e.g., Goldstein Interview.

¹⁹⁴ Alvarez ABA Speech, p. E-4.

¹⁹⁵ The percentage of 300-day-old charges rose from 3 to 5.6 between FY 84 and FY 85. *FY 85 OPO Report*, p. 4. Overall charge processing time increased from 181 days in FY 84 to 195 days in FY 85. Ibid., p. 14.

¹⁹⁶ See Jeffrey Norris, "Impact of Recent EEOC Developments on Corporate Employers," paper presented at Bureau of National Affairs and Industrial Relations Research Association Conference on EEO and Affirmative Action, Washington, D.C., June 5, 1986, pp. 3-4 (hereafter cited as Norris BNA Paper).

¹⁹⁷ *Justice Denied*, pp. 10-11, and Richard Seymour, Lawyers' Committee for Civil Rights Under Law, remarks at Bureau of National Affairs and Industrial Relations Research Association, conference on "EEO and Affirmative Action," Washington, D.C., June 5, 1986. A congressional staff study maintained that attempts have been made to "pad" the number of charges processed in order to present better case processing statistics and to make some district offices "look good." *1986 Cong. Staff Report*, p. vii.

¹⁹⁸ See notes 83 and 84 and accompanying text, this chap.

¹⁹⁹ Resolutions on their merits rose from 38 percent of all closures in FY 82 to 59 percent in FY 85. *FY 85 OPO Report*: app. (pie charts). The percentage of administrative closures declined from 32.7 in FY 82 to 26.3 in FY 85. Ibid. Administrative closures include cases closed, for example, because of lack of jurisdiction, inability to locate the charging party, failure of the charging party to accept full remedy, and withdrawal of the charging party without settlement. *17th Annual Report*, pp. 4-5. Administrative closures were 40 percent of all closures in FY 81. *16th Annual Report*, pp. 5-6. Between 1972 and 1975, according to GAO, the administrative closure rate was 61 percent. *1976 GAO Report*, p. 11.

number of "reasonable-cause" findings,²⁰¹ although there is a sizable increase in "no-cause" findings.²⁰² EEOC has acted to address concern about the increase in no-cause findings by proposing a formal mechanism for charging parties to appeal no-cause findings.²⁰³ Commission on Civil Rights staff have endorsed this proposal.²⁰⁴

Further with regard to trends and developments related to charge processing, negotiated settlements are declining,²⁰⁵ a reflection of the reduced emphasis on early settlement, and there are increases in dollar benefits to persons resulting from charge processing.²⁰⁶ Finally, field staff are recommending many more cases to the Commission for litigation.²⁰⁷ The additional 120 (full-time equivalent) positions (mostly equal opportunity specialists who investigate charges) EEOC seeks in FY 88 for its field offices²⁰⁸ appear necessary if EEOC is to be able to continue to achieve qualitative improvements in

private sector charge processing while also controlling the new charge backlog (300-day-old charges).²⁰⁹

The full remedies policy has been criticized, in part, as too inflexible. One civil rights organization, for example, has suggested that it is "unrealistic" to seek "full relief" in every case involving a finding of reasonable cause and that employers would have "no incentive to conciliate a charge or settle a case," nor would the policy "allow Commission staff to moderate settlement demands in light of the relative chances of success if the matter were to be litigated to trial."²¹⁰ Recent reports suggest, however, that the policy is being implemented with flexibility.²¹¹

Pattern and Practice (Systemic) Charge Processing

EEOC is authorized to investigate relatively complex pattern and practice or "systemic" discrimination through the filing of a charge by a Commis-

²⁰⁰ These have been between 3 and 4 percent of all closures in recent years. Troy 1986 Interview. The agency reports increased rates of reasonable-cause findings in FY 83 and FY 84. *19th Annual Report*, p. 25. The current "reasonable-cause" standard, which, if met, requires that the case be litigated if conciliation fails, can be compared to the requirement, adopted in 1977, that such a case could be litigated. Johnny J. Butler, Acting General Counsel, EEOC, telephone interview, June 25, 1986. In 1977 the Civil Rights Commission noted that EEOC had never had a uniform standard for what constitutes reasonable cause. The standard adopted that year was considered an "absolute necessity if the agency's enforcement efforts are to achieve credibility." *Sequel*, p. 225.

²⁰¹ No-cause findings have increased from 28.5 percent of closures in FY 80 to 56.2 percent in FY 85. *Justice Denied*, table 1. One observer has concluded that "of those who take the time, effort, and in many cases, risk to file charges against an employer they believe to be discriminatory, over half are turned away from the agency and must either bear the expense of an attorney and a lawsuit or drop their charges." *Justice Denied*, p. 8. Others maintain that the data suggest a diminished willingness to prematurely settle "marginal" charges. Norris BNA Paper, p. 3-5. EEOC field staff have told Commission staff that EEOC investigations have improved and that the standard for discrimination has not been raised. U.S. Commission on Civil Rights, Mid-Atlantic Regional Office, "Civil Rights Developments in the Mid-Atlantic Region: March 1984 to May 1985" (unpublished), p. 101.

²⁰² 52 Fed. Reg. 11503 (1987). According to the Chairman, this new procedure should "further strengthen our credibility as a law enforcement agency and . . . enhance the public's confidence in our investigations." *Id.* at 11504.

²⁰³ Susan J. Prado, Acting Staff Director, U.S. Commission on Civil Rights, letter to Cynthia Matthews, Executive Secretariat, EEOC, May 6, 1987.

²⁰⁴ Settlements declined from 32.1 percent of all cases in FY 80 to 14.4 percent in FY 85. *Justice Denied*, table 1.

²⁰⁵ EEOC obtained over \$107 million in benefits through charge resolution in FY 85, compared to \$104.5 million in FY 84. *FY 85 OPO Report*. In FY 80, \$55.5 million was obtained. *15th Annual Report*, p. 36.

²⁰⁶ Over 700 cases were recommended in FY 85 compared to 276

in FY 84. *FY 85 OPO Report*, p. 14. In FY 80, 393 cases were recommended. *16th Annual Report*, p. 29.

²⁰⁷ *1988 Budget Request*, p. 13.

²⁰⁸ With those additional positions, EEOC projects a reduction of its pending inventory of private sector charges from 9.3 months in FY 86 to 6.8 months in FY 88. *Ibid.*

²⁰⁹ William L. Robinson, Lawyers' Committee for Civil Rights Under Law, testimony in *1985 Cong. Pay Equity Hearings*, p. 60. See also *Justice Denied*, p. 19, which concluded that the new "get tough" remedial policy is "unrealistic and counterproductive to conciliation."

²¹⁰ One observer noted that "the remedies policy appears to have been applied in practice with greater flexibility than one might reasonably have expected given the relatively strong language used in the policy statement. While notices are being secured by many district offices and efforts are being made to acquire more complete relief for charging parties, there have not been many reports of the Commission sacrificing reasonable settlement agreements in order to recover total relief." Norris BNA Paper, p. 3-7. See also GAO, *Equal Opportunity Information on the Atlanta and Seattle EEOC District Offices*, (1986) p. 2 (hereafter cited as *1986 GAO Fact Sheet*).

In October 1985 field staff were advised that the remedies policy "accords considerable discretion to field offices to determine whether the violation found has been remedied by a particular agreement. . . . The Commission did not intend to diminish the discretion of district directors to make reasonable compromises within the range of possible resolutions that could achieve compliance with the law." James H. Troy, Director, Office of Program Operations, and Johnny J. Butler, Acting General Counsel, EEOC, Memorandum, "Implementation of the Policy Statement on Relief and Remedies for Individual Cases of Unlawful Discrimination ('Remedies Policy')," to District and Area Directors, Regional Attorneys, Oct. 15, 1985, p. 1. For a detailed discussion of the remedies policy and its rationale, see Fred W. Alvarez, Commissioner, EEOC, and Barbara Lipsky, special assistant to Commissioner Alvarez, *Remedies for Individual Cases of Unlawful Employment Discrimination: A Law Enforcement Perspective*, to appear in the spring 1987 issue of "Labor Law."

²¹¹ 42 U.S.C. §2000e-6(e) (1982).

sioner on behalf of a private complainant, as well as filings by private individuals.²¹² Although this power is extremely important,²¹³ the agency's systemic effort has never been implemented to any significant degree. As a congressional staff report recently noted, it has been:

plagued with instability in staffing, vague and constantly changing policy directives and the mammoth task of having staff take years to analyze volumes of data to substantiate multi-based, multi-issue allegations on which to file suit against targeted employers. As a result, it has typically taken 3 to 5 years, or longer, to investigate and resolve systemic charges.²¹⁴

After elimination of the charge backload in 1983, a review of the systemic program began, with priority upon improvement of the program's focus.²¹⁵ In October 1983, upon settlement of a 10-year-old systemic case against General Motors Corporation, the Chairman noted that EEOC would be "pressing ahead with more cases in the future. We intend to go the systemic route and push these cases."²¹⁶ Agency data through FY 85, however, continued to reflect a rather fledgling systemic charge program.²¹⁷

²¹² See Eleanor Holmes Norton, Chair, EEOC, statement in 1978 *House Oversight Hearings*, pp. 3 and 8.

²¹³ 1986 *Cong. Staff Study*, p. 33.

²¹⁴ "FY 83 was a period of self-examination, reevaluation, definition and structuring for the managers and staff of Systemic Programs." Further, "massive training efforts of headquarters systemic staff were undertaken." 18th *Annual Report*, p. 29.

²¹⁵ EEOC, news release, "EEOC, General Motors and Union Sign Record-setting Equal Opportunity Accord," Oct. 18, 1983, cited in 1983 *Enforcement Report*, p. 152, n.58.

²¹⁶ According to EEOC data, in FY 81, 20 systemic charges were filed; only 1 was filed in 1982, 11 in FY 83, and 19 in FY 84. Five systemic charges were filed in FY 85. EEOC data cited in 1986 *Cong. Staff Report*, table 7A, p. 196.

²¹⁷ Of the 99 charges filed between 1974 and 1977, nearly all were against employers with 1,000 or more employees. *Sequel*, p. 203. Subsequently, EEOC required that systemic charges be prepared only against employers with 500 or more employees, but that requirement no longer exists. Alvarez BNA Speech, pp. 18-20.

²¹⁸ Butler-Troy Memorandum.

²¹⁹ Alvarez BNA Speech, pp. 17-18.

²²⁰ According to GAO, EEOC staff welcome this refocusing and the greater discretion it accords them in targeting systemic investigations. Specifically, EEOC field staff found few employers in their districts who meet the 500-employee requirement who have not already been investigated and who do not have affirmative action plans. Staff at one district office also felt that earlier identification of victims should reduce the amount of time needed to resolve systemic cases. 1986 *GAO Factsheet*, p. 2.

²²¹ EEOC has more than doubled its docket of systemic cases since the beginning of FY 86, with 19 cases in active litigation as of March 1987, compared to 8 in September 1985. "EEOC Staff Comments," p. 2.

In June 1986, EEOC outlined changes in that program. Because smaller employers represent a steadily increasing portion of the workplace, the focus of systemic efforts will be changed:²¹⁸ less emphasis will be placed on multibased, multi-issue charges, more onsite investigations will be conducted, and as with individual charges, the agency will be fully prepared to sue should conciliation fail. The type of relief to be sought, such as numerical hiring goals, is to be consistent with recent Supreme Court decisions.²¹⁹ These changes, according to the EEOC, are designed to permit a "reorganized, revitalized, retooled, and reenergized" systemic effort, which had become a "dinosaur,"²²⁰ with better investigations in important areas and faster settlements.²²¹ EEOC has provided some evidence that its systemic charge program, as revised, may now finally be advancing.²²²

Federal Sector

Employment discrimination charges by Federal employees have increased significantly since FY 81.²²³ The nature of the complaints also has changed. For example, reprisal complaints have

²²² Between FY 81 and FY 83, the government-wide charge inventory rose 18 percent while the number of complaints filed rose by 24 percent (from 13,525 to 16,770). EEOC, *Report on Precomplaint Processing and Complaint Processing for FY 83*, p. 2. Preliminary data for FY 84 show that 17,916 complaints were filed by Federal employees. Jodi Martin, EEO specialist, Public Sector Programs, EEOC, telephone interview, Jan. 21, 1986.

According to EEOC staff, "The reasons for the increase include (1) greater sensitivity to or awareness of EEO requirements, (2) the broadened base for filing complaints (e.g., sexual harassment), and (3) weak grievance systems at agencies, [with employees using] the complaint process as an alternative." Douglas Bielan, Director, Public Sector Programs, Office of Program Operations, EEOC, interview, July 24, 1985, pp. 2-3 (hereafter Bielan July 1985 Interview). In addition, many complaints are rejected due to untimeliness or do not fall within the purview of the regulations. The mean percentage of Federal sector complaints closed due to such rejections was 15 in FY 82. In the private sector, only 3 percent of the complaints were closed due to such rejections that year. EEOC, Public Sector Programs, *Report on Precomplaint Processing and Complaint Processing for FY 82*, p. 6.

²²³ In FY 84 reprisal complaints accounted for 19 percent of all alleged complaints, compared to 11.7 percent in FY 82; the percentage of the total complaints that were filed by blacks declined from 21.3 percent in FY 82 to 17.9 percent in FY 84. Bielan Interview and FY 82 *Complaint Processing Report*, table II, p. 5.

"The data on reprisal complaints underscore the fundamental problems with the complaint process, including the long time involved. Complaints are filed, and subsequent investigations and decision-making are so drawn out that the relationship between the agency and complainant. . . deteriorates, and the complainant begins to see reprisal in virtually every [agency] action affecting him. . . or her." Bielan July 1985 Interview, p. 3.

increased since 1982 while charges of discrimination against blacks have decreased.²²⁴ Since it inherited the Federal sector equal employment opportunity program, EEOC has acted vigorously to implement and monitor it. For example, virtually all Federal agencies have complied with EEOC affirmative action requirements.²²⁵ In addition, onsite reviews of agency field EEO programs have begun. The first such review of a Federal agency's affirmative employment program for handicapped individuals was conducted in FY 85.²²⁶

In addition, EEOC has attempted to improve its handling of hearings and appeals of Federal sector complaints. In two successive reports,²²⁷ GAO criticized EEOC's Office of Review and Appeals (ORA)²²⁸ for its performance as final arbiter of Federal sector complaints, specifying its failure to be cooperative and provide guidance to Federal agencies. GAO said it found many allegations of management and operating problems in ORA to be valid.²²⁹

²²⁴ Ninety-seven percent of all agencies have developed and submitted, as required, affirmative action plans, compared to 45 percent of agencies prior to FY 81. Bielan July 1985 Interview; Clarence Thomas, Chairman, EEOC, statement, *National Endowment for the Humanities and the Equal Employment Opportunity Commission Hiring Policies*, Hearing Before a Subcommittee of the House Committee on Government Operations, 98th Cong., 2d Sess. (1984), p. 19. Further, in FY 83 all agencies submitted a section 501 plan for the first time since enactment of the Rehabilitation Act of 1973. Clarence Thomas, Chairman, EEOC, speech at George Mason University Seminar, Arlington, Va., Mar. 5, 1984, p. 13.

²²⁵ *FY 85 OPO Report*, p. 11.

²²⁶ See generally 1982 GAO Report on Office of Review and Appeals and 1983 GAO Report.

²²⁷ The Office of Review and Appeals (ORA) exercises final administrative (appellate) authority over Federal sector complaints under Title VII, ADEA, section 501, and the Civil Service Reform Act. When an agency has rendered a final decision on an employee's discrimination complaint, that employee, if not satisfied, is entitled to file an appeal from the agency's decision with ORA. Depending upon the type of appeal, ORA may directly render a decision, recommend a decision to the Commission, concur or disagree in the case of a Merit Systems Protection Board position, or return the complaint to the agency if ORA believes further processing is needed.

²²⁸ 1982 GAO Report on Office of Review and Appeals, p. 2. With regard to productivity, for example, GAO found that the average time to process an appeal increased from 314 days in FY 81 to 355 days in the first half of FY 82 because it was taking more time to reproduce, log, and mail case decisions after they were written. *Ibid.*, p. 1. There also were staff time and attendance problems. *Ibid.*, p. 8.

²²⁹ For example, the ORA director was removed in March 1982 due to allegedly inadequate supervision. *Ibid.*, p. 16.

²³⁰ 1983 GAO Report, p. iii. Overall, "the problems agencies allege to have had with Commission decisions and dealing with the Office of Review and Appeals, perhaps more than any others, have created a lack of agency confidence in the Commission's ability to provide oversight of the discrimination complaint processing system." *Ibid.*, pp. iii-iv.

Elsewhere, GAO cited complaints that ORA lost case files, rendered "duplicate and inconsistent" decisions, was uncooperative with agencies, and failed to provide needed guidance to agencies.²³⁰ GAO also observed that new EEOC leadership was "aware of the problems" and was acting to address them.²³¹

In FY 83, ORA was reorganized and additional staff allocated. EEOC also strengthened its appellate compliance program and instituted a system that closely monitors ORA decisions.²³²

Despite these reforms, delays in processing appeals have continued.²³³ In FY 83, ORA received 3,458 new cases, a 16 percent increase in its caseload over FY 82. ORA closed 3,157 cases in FY 83, leaving the office with an inventory of 2,350 cases.²³⁴

In FY 84, ORA received 3,336 cases and closed

²³¹ Delores Rozzi, Director, Office of Review and Appeals, EEOC, interview, July 30, 1985 (hereafter cited as Rozzi Interview). Changes made in response to GAO's findings included eliminating duplicate files; establishing a professionalized intake review system; developing an internal format on standards for production, quality, and consistency; expanding technical assistance and training; and monitoring staff time and attendance. *Ibid.*, p. 2-4. The number of ORA attorney positions was increased from 21 to 30 writing attorneys and 2 new supervisory attorneys were added. Douglas Bielan, Director, Public Sector Programs, Office of Program Operations, EEOC, testimony, *The Equal Employment Opportunity Commission Collection of Federal Affirmative Action Goals and Timetables and Enforcement of Federal Sector EEO Complaints*, Hearing Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 99th Cong., 1st Sess. (1985), p. 27 (hereafter cited as *Federal Sector Enforcement Hearings*).

²³² When EEOC received responsibility for handling appeals of Federal sector discrimination complaints in 1979, about 3,000 appeals cases were pending. 1982 GAO Report on Office of Review and Appeals, app. II, p. 15.

²³³ 18th Annual Report, p. 44; Rozzi Interview, p. 4.

²³⁴ The reduced number of closures in FY 84 resulted primarily from a single practice that existed in ORA prior to the initiation of new practices in FY 84. Before FY 84, the decisions issued by ORA were "short form" decisions, limited to the bare specifics of a particular case. Agencies and appellants alike complained that these decisions did not provide sufficient guidance, information, and detail concerning ORA decisions. To overcome this problem, in FY 84, ORA eliminated the short form decision and replaced it with a more comprehensive document that detailed the facts of the case, as well as the case law that addressed the specific issues in that case. Clarence Thomas, Chairman, EEOC, Testimony, *Federal EEO Problems Hearings*, p. 71. Wholesale issuance of long decisions in FY 84 took much more attorney time and could further aggravate the existing backlog. Following reevaluation of this approach, ORA now issues a mix of long and short decisions. The orientation, however, of staff to long decisions has improved the overall quality of decisions. Rozzi Interview, p. 5.

2,100.²³⁵ Despite productivity increases, the FY 84 appeals inventory grew to about 3,800.²³⁶ "In FY 1985, ORA received 3,836 employee appeals. . . , an increase of 500 appeals over the previous year. . . . The office closed 3,626 cases, some 1,521 more than were closed in FY 1984 and 469 more than FY 1983."²³⁷ ORA's case inventory was 4,168 at the end of FY 85.²³⁸ Case closures in both FY 86 and 87 were projected at lower than FY 85 rates,²³⁹ while inventories are expected to increase by approximately 1,000 cases each year.²⁴⁰ Despite increases in budget and staff in critical areas, ORA still appears to be losing ground due to the increasing volume of EEO complaints.²⁴¹

EEOC's FY 88 request for some 25 additional positions for ORA addresses this problem.²⁴² Meanwhile, various civil rights groups have indicated general satisfaction with EEOC's efforts to improve the Federal sector complaint program, including the agency's proposed intention to take over complaint investigations.²⁴³

State and Local Program

Under the State and local program, EEOC funds reimburse State and local fair employment practice

agencies (FEPAs) for resolving Title VII and ADEA complaints.²⁴⁴ This program also has, since 1981, experienced continued increases in the number of complaints received, in funding, and in the number of agencies working with EEOC. Charges received by these agencies increased from 33,449 in FY 81²⁴⁵ to over 52,000 in FY 85.²⁴⁶ Funding increased from \$18 million in FY 81²⁴⁷ to \$20 million in FY 85,²⁴⁸ and the number of State and local agencies participating increased from 69 to 80.²⁴⁹

The quality of charge processing by FEPAs long has been questioned.²⁵⁰ In 1976, GAO and congressional staff noted the need for technical assistance and training for FEPAs.²⁵¹ By 1981, GAO noted the increased financial support for FEPAs and EEOC's success improving their productivity.²⁵² It recommended, however, that EEOC increase its contracts with smaller FEPAs to assist further in processing changes.²⁵³

²³⁵ Ibid., p. 4.

²³⁶ Clarence Thomas, Chairman, EEOC, Testimony, *Federal EEO Problems Hearings*, p. 71. In FY 85 nearly 50 percent of ORA case receipts involved the U.S. Postal Service. "EEOC Staff Comments," p. 4.

²³⁷ *1987 Budget Request*, p. 15. An estimated 3,800 complaints were expected to be received in FY 86 and 4,000 in FY 87. Ibid. and Rozzi Interview, p. 4.

²³⁸ Ibid.

²³⁹ Rozzi Interview, p. 4.

²⁴⁰ See Rozzi Interview. Additional positions are needed to keep pace with the increasing volume of complaints and to begin to reduce the backlog of appeals. Rozzi Interview, p. 6.

²⁴¹ The FY 88 budget request calls for 25 additional ORA positions so that the pending inventory of ORA cases could be reduced from over 14 months in FY 86 to just over 6 months by the end of FY 88. *1988 Budget Request*, p. 14.

²⁴² For example, one witness told Congress, "[w]e applaud the EEOC for its efforts in improving certain internal operations, particularly in the Office of Review and Appeals." James E. Rogers, Jr., National President, Blacks in Government, testimony, *Federal Sector Enforcement Hearings*, p. 203. Representatives of the President's Committee on Employment of the Handicapped felt that the EEOC Chairman was "extremely supportive" of the handicap program and that senior EEOC staff members appeared determined to enforce it. Bernard Posner, executive director; June Wakeford, deputy director; Richard Sheppard, director, State relations; and Ruth Ellen Ross, employment advisor, interview, June 11, 1985, p. 1. According to another observer, EEOC staff in recent years have "handled section 501 (handicap) complaints in a reasonably prompt and fair manner," and display more competence and knowledge than their Labor Department counterparts who handle section 503 complaints. Marc Charnatz,

director, National Association of the Deaf Legal Defense Fund, interview, Apr. 22, 1985, p. 1.

²⁴³ 42 U.S.C. §2000e-8(b) (1982). A major purpose of this deferral program (deferral from the EEOC to State and local fair employment practices agencies) has been assistance in reducing EEOC's charge backlog. Leap and Grigsby, *State Fair Employment Practice Laws: Problems and Prospects*, 32 Lab. L.J. 810 (1981) (hereafter cited as Leap and Grigsby, *State FEP Laws*).

²⁴⁴ *16th Annual Report*, p. 8.

²⁴⁵ *1987 Budget Request*, p. 37.

²⁴⁶ *16th Annual Report*, p. 4.

²⁴⁷ *1987 Budget Request*, p. 36.

²⁴⁸ *16th Annual Report*, p. 4; *FY 85 OPO Report*, p. 13.

²⁴⁹ See, e.g., H. Hill: "Is the Past Prologue? The Law and Employment Discrimination," *The Crisis*, February 1975, pp. 56-57, and *Twenty Years of State Fair Employment Practices Commissions: A Critical Analysis With Recommendations*, 14 Buffalo L. Rev. 22 (1964), cited in Leap and Grigsby, *State FEP Laws*, at 808. See generally also American Jewish Congress, *State Civil Rights Agencies: The Unfulfilled Promise* (1986).

²⁵⁰ Ibid., p. 237, citing 1976 GAO Report, pp. 25-26, and 1976 Cong. Staff Report, pp. 17, 31. See also generally Shawe, *Employment Discrimination-The Equal Employment Opportunity Commission and the Deferral Quagmire*, 5 Balt. L. Rev. 221 (1976).

²⁵¹ *1981 GAO Enforcement Report*, p. 20. The State and local program budget increased from \$10.4 million in FY 78 to \$15 million in FY 79 and FY 80. Ibid.

²⁵² Ibid. At the time the agencies had to contract for a minimum of 100 charge resolutions per year. Ibid.

²⁵³ Ronnie Blumenthal, Director, Special Services Staff, Office of Program Operations, EEOC, interview, Aug. 16, 1985, p. 1 (hereafter cited as Blumenthal Interview).

Since 1981, EEOC has attempted to "refine" the growing and "increasingly sophisticated" State and local program.²⁵⁴ Its primary objectives have been to eliminate the duplication involved in doing case by case reviews of FEPA charge resolutions and "to provide substantive training and technical assistance. . .to improve the quality of [FEPA] compliance efforts and charge processing management."²⁵⁵ As noted, FEPAs have handled a steadily growing number of charges.²⁵⁶ They have also increased their charge closures.²⁵⁷ In addition, the funding formula for EEOC reimbursement of FEPAs changed so that funding is now based on "acceptable charge resolutions produced and management quality goals achieved."²⁵⁸ For each charge resolution, agencies are awarded \$450.²⁵⁹ Further, EEOC now generally monitors FEPA decisions on a selective basis.²⁶⁰ EEOC, however, has not yet required FEPAs to adopt EEOC's new enforcement approaches.²⁶¹

A significant problem with the program, according to EEOC staff, is inadequate resources. Like EEOC, FEPAs reportedly have faced serious resource constraints, along with increasing workloads, and are having great difficulty maintaining high-quality charge investigations without falling seriously behind.²⁶² Senior staff suggested the need for as much as a 40 percent increase in program funding to overcome these problems.²⁶³

²⁵⁴ EEOC, *1983 Budget Submitted to the Congress of the United States* (1982), p. 26.

²⁵⁵ Blumenthal Interview, p. 2. The FEPAs' charge workload is similar to that of EEOC in terms of the jurisdiction for charges (about 60 percent involve race, 30 percent sex, and about 10 percent age). *Ibid.*

²⁵⁶ In 1981, 38,740 charges (43 percent of the national workload) were resolved. EEOC, Staff Discussion Paper, Fifth Annual EEOC-FEP Agency Conference, Feb. 26, 1982, p. 2 (hereafter cited as EEOC-FEP Paper). Over 46,400 charges were resolved in FY 85. *1987 Budget Request*, p. 37.

²⁵⁷ *Ibid.*, p. 1. A FEPA now is not paid for charges closed administratively in excess of 25 percent of all charges closed. Ann Jeffreys, Special Services Staff, EEOC, telephone interview, July 8, 1986, p. 1 (hereafter cited as Jeffreys Telephone Interview).

²⁵⁸ Troy 1986 Interview. This figure reflects an increase from \$375 per resolution in FY 82. EEOC-FEP Paper, p. 1.

²⁵⁹ For example, one district office, which monitors resolutions of seven FEPAs, reviews only cases in which conciliation failed, the charging party failed to accept full relief or requested an EEOC review, all age discrimination cases, and a sample of no-cause findings. *GAO 1986 Fact Sheet*, p. 19.

²⁶⁰ *1986 GAO Fact Sheet*, p. 2. The FEPAs never used the rapid charge system as fully as EEOC once did, so their mixture of rapid charge and extended charge cases is similar to that of EEOC now. Jeffreys Telephone Interview.

²⁶¹ Blumenthal Interview; Troy 1986 Interview. See also,

A congressional staff report has also said resource problems may be harming the program. It maintained that understaffing at some EEOC district offices is a factor in their allegedly "superficial and insubstantial quality reviews" of FEPA work.²⁶⁴ EEOC has requested \$24.2 million in FY 88 for the State and local program, compared to \$20 million provided for it in FY 87.²⁶⁵

Litigation

This section notes changes, such as greater productivity demands on staff attorneys, that have been followed by a sharp increase in agency litigation since fiscal year 1985 after several years of decline. Record levels of monetary awards resulting from this recent trend also are noted. These changes illustrate EEOC's determination to sharpen significantly its role as an enforcement agency. This section also notes that although ADEA case filings have increased markedly, EEOC *amicus* brief filings declined markedly between FY 80 and 85, before increasing in FY 86. Other information concerning EEOC litigation activities since 1981 is provided in this section.

Between FY 81 and FY 84, EEOC litigation activity declined, with 358 cases filed in FY 80, 444 in FY 81, 241 in FY 82, 195 in FY 83, and 310 in FY 84.²⁶⁶ Among the reasons for the decline, according to EEOC staff, were (1) a comprehensive review by

EEOC-FEP Paper, p. 3, which referred to the "reduced level of resources available to most public agencies. . .in these circumstances, it is imperative that Commission programs, including the State and local program, be as cost effective as possible."

²⁶² Troy 1986 Interview, p. 3. FEPAs now are processing more charges than EEOC can afford to pay them for. Jeffreys Telephone Interview.

²⁶³ The report also contended that EEOC is reviewing too few FEPA resolutions. *1986 Cong. Staff Report*, p. IX.

²⁶⁴ *1988 Budget Request*, p. 38. With that increase, EEOC projects that FEPA charge closures would increase from 42,574 in FY 86 to 54,000 in FY 88. *Ibid.*, p. 39. A GAO report, requested by Members of Congress and to be completed late in 1987, will examine charge processing generally by EEOC and State and local agencies. Al Jojokian, group director, Human Resources Division, GAO, telephone interview, Mar. 4, 1987. "We would like GAO to review both the work-sharing agreements and the enforcement record of these state and local agencies. . .[and particularly funding of FEPAs] despite EEOC quality reviews which demonstrate substandard performance." *Hawkins Letter to GAO*, July 15, 1985, p. 2.

²⁶⁵ EEOC, *A Report on the Operations of the Office of General Counsel, June 1984 through September 1985*, Nov. 19, 1985, p. 8 (hereafter cited as *1985 OGC Report*). These figures include subpoena enforcement actions.

²⁶⁶ Phyllis Berry, Acting Director, Office of Congressional Affairs, EEOC, letter to James B. Corey, Chief, Education and

the Office of General Counsel (OGC) to improve the quality of cases recommended; (2) closer Commissioner scrutiny of case recommendations; and (3) the loss of approximately 50 attorneys through attrition. (Their vacant positions subsequently were lost.)²⁶⁷

In September 1984, as noted, the agency announced that under its new enforcement policy, each case in which a reasonable cause finding has been made and conciliation has failed is to be submitted to the Commissioners for possible litigation.²⁶⁸ By demonstrating "certainty and predictability of enforcement," EEOC meant to encourage greater employer cooperation with the agency.²⁶⁹ Along with this new emphasis, management changes in OGC were made, including the establishment of agencywide performance standards that increased the average caseload of each staff attorney from 2.5 to five.²⁷⁰ Further, in July 1985, EEOC transferred the systemic litigation functions to OGC, while consolidating systemic compliance functions under the Office of Program Operations.²⁷¹

In FY 85 the number of case filings rose to 411.²⁷² In FY 86 a reported record 526 court actions were filed.²⁷³ (EEOC had predicted that over 500 cases would be filed in FY 86 and again in FY 87.)²⁷⁴ Citing these data as evidence of a more effective enforcement program, EEOC has also pointed to increased monetary benefits (primarily backpay) resulting from litigation, totaling over \$46 million in FY 86,²⁷⁵ compared to \$16.2 million in FY 81 and

\$20.9 million in FY 80.²⁷⁶

The agency cites various cases as demonstrating its intention to pursue class actions, as well as individual cases, especially class actions that lend themselves to monetary as well as more unusual kinds of make-whole relief. For example, an October 1983 settlement with General Motors and the United Auto Workers represented the largest nonlitigation settlement in the history of the agency, with GM agreeing to provide over \$42 million to resolve alleged discrimination against minorities and women in hiring, training, and promotion. According to the Chairman, the most significant aspect of this innovative settlement (which included hiring and promotion goals) was the provision for \$15 million in educational endowment and scholarships.²⁷⁷ In another settlement, with Burlington Northern, \$10 million in backpay was awarded to victims of past discrimination. Also, minorities who had been "excluded or removed from the locomotive engineer training program due to unvalidated tests which adversely affected them"²⁷⁸ were to be given priority entry into new training classes. Further, an ADEA suit against Equitable Life Assurance in FY 85 resulted in \$12.5 million in benefits for over 360 persons allegedly terminated unlawfully because of their age.²⁷⁹

A \$5 million consent decree was obtained in an equal pay case brought under Title VII claiming that Allstate Insurance Company was paying a lower guaranteed minimum salary to females than to males

Employment Division, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Mar. 25, 1983, as cited in U.S. Commission on Civil Rights, *Federal Civil Rights Commitments: An Assessment of Enforcement Resources and Performance* (1983), p. 154. See also 1985 OGC Report, pp. 2-3, which reported "a number of serious organizational and managerial problems. . . [such as] inadequate budget planning and monitoring. . . and serious staffing needs in the field," that harmed the litigation program.

²⁶⁷ See 1986 Cong. Staff Report, n.83 of this chap.

²⁶⁸ Ibid.

²⁶⁹ Johnny J. Butler, Acting General Counsel, EEOC, interview, Aug. 8, 1985, pp. 1-2. In addition, approximately one-third of the regional attorneys were replaced. Johnny J. Butler, Acting General Counsel, EEOC, interview, June 3, 1986, p. 1.

²⁷⁰ 1985 OGC Report, p. 16.

²⁷¹ Ibid., p. 8. The 411 cases included 125 subpoena enforcement actions. Ibid. In FY 80 only 32 cases and in FY 81, 76 cases were subpoena actions. 15th Annual Report, p. 14, and 16th Annual Report, p. 28, respectively. As had been the pattern in the past, Title VII cases continued to be the most numerous (172), but the 96 ADEA suits reportedly were a record. EEOC, news release, "EEOC Enforcement on Rise," Dec. 2, 1985. In FY 80, Title VII cases also accounted for about two-thirds of all cases filed, while 47 ADEA cases were filed in FY 80 and 89 in FY 81. 16th Annual Report, p. 29.

²⁷² Of that total, 427 suits dealt with the merits of charges while 99 involved subpoena enforcement actions. Title VII cases filed totaled 289, and another 109 cases were filed under ADEA, both new records according to EEOC. EEOC, news release, "EEOC Achieves Record Enforcement Activity in Fiscal Year 1986," Feb. 9, 1987 (hereafter cited as "FY 86 Enforcement Activity").

²⁷³ 1987 Budget Request, p. 14.

²⁷⁴ "FY 86 Enforcement Activity," p. 2.

²⁷⁵ 16th Annual Report, p. 29.

²⁷⁶ Ibid., p. 9. Some of the money was designated for 28 universities to fund the scholarship endowments. The remaining funds would go to a selected foundation for scholarships. "All scholarship money is exclusively for minorities and females with first priority to the affected class, including those on layoff, or their spouses or children." Ibid. Further, "[t]his offers the opportunity for people to prepare for upper management positions or to move closer to the new technologies." Ibid., p. 10.

²⁷⁷ Ibid., pp. 10-11. Other provisions of the settlement involved special transfer rights and seniority accumulation that would allow class members "in predominantly or exclusively minority jobs, to be trained and transferred to new crafts." Ibid., p. 11.

²⁷⁸ 1985 OGC Report, p. 25.

²⁷⁹ Ibid., p. 26.

for performing the identical job of sales agent. That decree was expected to benefit 3,200 persons.²⁸⁰ Another class action case, against Southern Pacific Transportation Company, resulted in a consent decree providing \$3.4 million in monetary benefits and job offers worth \$30 million. The company and 13 defendant unions had allegedly discriminated against blacks, females, and Hispanics in discharges, promotions, transfers, assignments, and hiring.²⁸¹ All of these cases had been filed before 1980.

Class action suits declined sharply between FY 80 and FY 82. In FY 80, 218 class cases were 67 percent of all nonsubpoena cases filed; by comparison, in FY 82, only 69 class cases were filed, accounting for 42 percent of cases filed.²⁸² In FY 83, however, 75 class action suits were 55 percent of all cases filed, and in FY 84, 112 class action suits accounted for 51 percent of all nonsubpoena enforcement actions.²⁸³ In FY 85 the number of class suits rose to 155 (54 percent of the total) while in FY 86 class action cases totaled 148 (35 percent of all nonsubpoena cases).²⁸⁴ New cases illustrating continuing class action litigation at EEOC since 1981 include, for example, suits filed in 1985 against Citizens Bank and Trust Company of Maryland; against Petersen,

Howell, and Heather and its parent company, PHH Group; and also in Chicago, against Panduit Corporation. The suits alleged lengthy periods of systemic discrimination against women and minority males in recruitment, hiring, promotion, and assignments. According to the Chairman, "As more thorough, better investigated systemic cases are presented to the Commission for litigation, more cases will be filed."²⁸⁵

EEOC litigation data show decreasing activity in other respects. For example, agency filings of *amicus* briefs declined sharply between FY 80 and FY 85, although they then increased in FY 86.²⁸⁶ EPA case filings (as well as EPA charges) have also declined substantially.²⁸⁷

EEOC also has suffered some notable reverses in court.²⁸⁸ In February 1986 a Federal district court ruled against EEOC in a major sex discrimination case involving Sears, Roebuck and Company. The court said that "EEOC did not prove even one individual instance of pay discrimination by Sears, and it presented no credible evidence of a nationwide pattern or practice of pay discrimination."²⁸⁹ EEOC has appealed the ruling.²⁹⁰

²⁸⁰ Ibid., p. 26.

²⁸¹ It should be noted, however, that the FY 80 and 81 figures are "projections, based on types of recommendations received" by OGC. That office did not maintain complete data on the types of cases filed before FY 82. EEOC, OGC, "Number of Suits Filed, by Type of Litigation by Fiscal Year, FY 1979-FY 1985," January 1986, p. 1.

²⁸² Ibid.

²⁸³ Ibid and "FY 86 Enforcement Activity."

²⁸⁴ EEOC, press release, *EEOC Attacks Systemic Employment Discrimination*, Nov. 12, 1985, pp. 1-2.

²⁸⁵ In FY 85, 16 such briefs were filed. 1985 OGC Report, p. 50. Comparable figures were 89 in FY 80 and 61 in FY 81. 15th Annual Report, p. 11, and 16th Annual Report, p. 25. According to EEOC staff, this trend reflected litigative "priorities" dictated by resource constraints. Gwendolyn Reams, Acting Associate General Counsel, Appellate Services, OGC, EEOC, telephone interview, May 27, 1986. In FY 86, EEOC filed 26 *amicus* briefs. EEOC, *A Report on the Operations of the General Counsel, October 1985 through September 1986* (1987), p. 57 (hereafter cited as 1986 OGC Report).

²⁸⁶ In FY 86, 12 EPA cases were filed, compared to 18 in FY 85, 50 in FY 81 and 79 in FY 80. "FY 86 Enforcement Activity" and Bureau of National Affairs, *Daily Labor Report*, Dec. 3, 1985, p. A-6. The Acting General Counsel maintained that EEOC field staff "tend to shy away" from EPA cases, which can be very complex. He was "not pleased" with the agency's EPA litigation program and said he was developing new guidance to help strengthen it. Johnny J. Butler, Acting General Counsel, EEOC, interview, Aug. 8, 1985, p. 4. In addition, the downturn in EPA litigation reflects the decline in EPA charges, according to another staff member, who suggested that employee fears of

retaliation by employers were restraining such charges. Ruth Weyand, counsel for equal pay, Trial Services, OGC, EEOC, telephone interview, May 21, 1986, p. 1. Charges filed under EPA declined from 1,875 in FY 85 to 1,239 in FY 86. "EEOC Staff Comments," p. 5.

²⁸⁷ In the past, EEOC has lost a substantial number of the cases in which trials have been held. In FY 80, for example, it won 27 and lost 20 such cases. 15th Annual Report, p. 15. In FY 81 it won 24 and lost 15. 16th Annual Report, p. 30. This reflects in large part the fact that EEOC pursues "high-risk" cases, frequently against major employers with ample legal resources. Norton Interviews.

²⁸⁸ EEOC v. Sears, Roebuck and Co., 628 F. Supp. 1264 (N.D. Ill. 1986). The nationwide suit charging Sears with discrimination against women in pay, hiring, and promotion was originally filed in 1979 and was brought almost totally on the basis of statistical evidence. The court in Sears observed that "[s]tatistical evidence like other evidence, must not be accepted uncritically" and "[c]ourts have not blindly adopted any test of statistical or practical significance." Sears, Roebuck and Co., at 1285-86.

²⁸⁹ 1986 OGC Report, p. 45, citing EEOC v. Sears, Roebuck and Company, C.A. No. 79-C-4373 (N.D. Ill.).

²⁹⁰ The court said the case was "a perfect example of the delay which can undermine the policies and purposes of Title VII. . . ." EEOC v. Firestone Tire and Rubber Co., 626 F. Supp. 90, 93 (N.D. Ga. 1985). Individual plaintiffs had filed charges in 1974, but EEOC did not serve the company copies of the charges until 3 years later. Conciliation efforts broke down in 1978, and in 1979 EEOC filed suit, notifying the company for the first time that it intended to pursue class discrimination claims extending beyond the individual cases. "Sporadic" discovery then proceeded for another 4 years. *Id.* at 92.

In another recent case, a Federal district court dismissed a race and sex discrimination suit against Firestone Tire and Rubber Company, citing the "inexcusable and unreasonable" 5-year delay between the time EEOC brought a complaint and the time it filed suit.²⁹¹ In yet another recent case, a Federal district court dismissed a suit, alleging pregnancy-related sex discrimination by Indiana Bell Telephone Company, because "EEOC inexcusably and unreasonably" delayed filing suit.²⁹² The Chairman feels that EEOC must select more "manageable" cases, and he particularly regrets the agency's effort to pursue the *Sears* case.²⁹³

Serious questions exist over the feasibility and appropriateness of EEOC's new emphasis on litigation. One question is whether EEOC resources can support a major sustained increase in lawsuits.²⁹⁴ Further, some regard the new approach as inflexible and excessively adversarial.²⁹⁵

The Chairman believes that resources are adequate but that greater productivity is needed from staff attorneys.²⁹⁶ EEOC also insists that the quality of cases will not suffer because EEOC maintains quality controls.²⁹⁷ Finally, the agency believes that although resources will be strained as litigation

increases, increased predictability of litigation eventually will induce a greater willingness by employers to settle before suit is filed.²⁹⁸

This enforcement approach, characterized by increased litigation, full relief, more complete investigations, and a strict investigative compliance standard, represents a significant and bold direction for the agency. Although reservations expressed about resources are well-taken, the determination upon which this policy is based, i.e., to strengthen EEOC as a credible law enforcement agency, is important.²⁹⁹ It manifests a commitment to enhance EEOC's effectiveness in carrying out its vital statutory mandate.³⁰⁰

Monitoring

As noted, EEOC's monitoring of its consent decrees and conciliation agreements has been inadequate in the past.³⁰¹ The attorney and paralegal staff at the district offices normally carry out this function, which generally involves reviewing required compliance reports from defendants, ensuring that the reports are filed promptly, and if needed, conducting onsite inspections to identify possible violations.³⁰² Some EEOC staff members feel that

²⁹¹ The initial charge in the case was filed in 1972, but EEOC did not file suit until 1981. *EEOC v. Indiana Bell Telephone Co.*, U.S.D.C. S. Ind., No. 1P 81-408-C., Mar. 28, 1986, cited in Bureau of National Affairs, *Daily Labor Report*, Apr. 30, 1986, p. A-1.

²⁹² "It's a case we inherited and attempted to settle. . . . It hurts the agency when we lose these cases. I don't intend to get EEOC into cases of this magnitude that we lose. . . . We have to take a long, hard look at the way we handle these cases in the future." Clarence Thomas, Chairman, EEOC, cited in Bureau of National Affairs, *Daily Labor Report*, Feb. 6, 1986, p. A-8. The costs to EEOC of the *Sears* case were so great as to threaten an agencywide staff furlough at one point. John Seal, Director, Office of Management, EEOC, interview, July 16, 1985, p. 2. EEOC staff maintain the agency is now filing cases on a more timely basis, so such adverse rulings will be much less likely. Barbara Lipsky, special assistant to Fred W. Alvarez, Commissioner, EEOC, telephone interview, Apr. 30, 1987.

²⁹³ *Justice Denied*, pp. 18-19, and Jeffrey Norris, "Impact of EEOC's Modified Litigation Policy on Corporate Employers," paper presented at Bureau of National Affairs Conference on EEO and Affirmative Action in a Second Reagan Administration, Washington, D.C., June 16, 1985, pp. 95-97 (hereafter cited as Norris 1985 BNA Paper). Norris pointed to the additional burden of a litigation increase on the Commissioners, who must read and approve all cases to be filed, as well as staff attorneys.

²⁹⁴ *Justice Denied*, pp. 19-20, and Norris 1985 BNA Paper, pp. 97-103.

²⁹⁵ Thomas Interview. See also Butler 1985 Interview. According to another Commissioner, litigation support has top priority, and the agency would implement a total furlough rather than undermine the litigation effort. Remarks of Fred W. Alvarez following 1986 BNA Speech.

²⁹⁶ *Ibid.*

²⁹⁷ Fred W. Alvarez, Commissioner, EEOC, testimony, *Oversight Hearing on the Equal Employment Opportunity Commission's Enforcement Policies*, July 18, 1985, p. 10.

²⁹⁸ It may be noted in this regard that the EEOC Chairman has called for stricter penalties for Title VII violations. Thomas testimony, 1985 *Cong. Pay Equity Hearings*, pp. 105-06. The Lawyers' Committee for Civil Rights has agreed that upgrading monetary relief would be appropriate. William L. Robinson, Director, Lawyers' Committee for Civil Rights Under Law, *Oversight Hearing on the Equal Employment Opportunity Commission's Enforcement Policies*, p. 40, n.1.

²⁹⁹ According to a representative of one civil rights organization, EEOC's recent enforcement policy statements and increased case filings have contributed to a "growing feeling that there is a commitment (at EEOC) to enforce the laws." Goldstein Interview. The entire new enforcement approach could be construed as a plausible response to the agency's traditionally low rates of successful conciliation. The 25 percent conciliation success rate as of March 1973 rose to 31.5 percent for the first 8 months of 1977. *Sequel*, p. 197. In 1975 the Civil Rights Commission said that increased successful conciliations may follow more successful court actions in which backpay is awarded. *Vol. V*, p. 525. According to EEOC, successful conciliations increased by 32.9 percent between FY 85 and FY 86. "EEOC Staff Comments," p. 2.

³⁰⁰ 1976 *GAO Report*, pp. 51-52; 1981 *GAO Enforcement Report*, pp. 36-37; 1976 *Cong. Staff Report*, pp. 39-40. Former EEOC Chair Eleanor Holmes Norton agrees. Norton Interviews, p. 3.

³⁰¹ Butler 1985 Interview, pp. 2-3.

³⁰² Monitoring of "major" cases is "poor" and has "fallen by the wayside," according to one EEOC staff member, who believes

this monitoring effort suffers from a "lack of will" on the part of staff, rather than from inadequate resources.³⁰³ In April 1986 the Chairman stated that existing consent decrees were "never monitored" and that the agency would bring more contempt proceedings to enforce those decrees.³⁰⁴ The Civil Rights Commission stated over a decade ago, "to determine and assure compliance with any agreement, followup and monitoring are essential."³⁰⁵ EEOC's challenge in this regard may be all the greater at a time when a large number of new settlements is being added to the agency's monitoring workload.

Coordination

Conflict and inconsistency in the Federal equal employment enforcement effort have recurred as major problems. Open policy conflicts between EEOC and the Department of Justice (DOJ) over Federal policy on affirmative action, among other

issues, have occurred, and EEOC believes it does not have the actual authority to carry out its responsibilities as the lead agency in coordinating Federal equal employment enforcement activities under Executive Order 12067.³⁰⁶ The conflicts are reminiscent of the kinds of dissension that have undermined the credibility and effectiveness of Federal equal employment enforcement in the past.³⁰⁷

For instance, as discussed more fully in the next chapter, DOJ has since 1981 pursued the position of opposing numerical goals and timetables in employment while supporting victim-specific, make-whole relief.³⁰⁸ On the other hand, EEOC has continued, until relatively recently, to pursue its previous affirmative action policies.³⁰⁹ This difference was dramatized in early 1983 when the two agencies developed differing briefs in support of the government's position in an affirmative action case involving the New Orleans police department.³¹⁰ DOJ

there is a need to "instill more aggressiveness" in monitoring. Philip Sklover, Associate General Counsel, Trial Services, OGC, EEOC, telephone interview, May 28, 1986, p. 1.

³⁰³ Clarence Thomas, Chairman, EEOC, interview, Bureau of National Affairs, *Daily Labor Report*, Apr. 25, 1986, p. A-2. One observer believes EEOC lacks a long term plan for monitoring its settlements, thus undermining its enforcement credibility. Goldstein Interview. EEOC maintains it has a formal monitoring program, however, "with monitoring being a part of written audit guidelines for field legal units." Further, since 1983 the systemic program has "updated" about 40 major settlement, "leading to six enforcement actions with two to three others expected to be filed" in FY 87. "EEOC Staff Comments," p. 2.

³⁰⁴ *Vol. V*, p. 528.

³⁰⁵ Exec. Order No. 12067, 3 C.F.R. 206 (1979), reprinted in 42 U.S.C. §§2000e app. at 32-33 (1982). According to this order, EEOC is to "provide leadership and coordination to the efforts of Federal departments and agencies to enforce [equal employment] statutes, Executive orders, regulations, and policies. . . and shall strive to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the Federal departments and agencies having responsibility for enforcing such statutes, Executive orders, regulations, and policies." *Id.* at §1-201. In the event of a dispute between EEOC and another Federal agency "concerning the issuance of an equal employment opportunity rule, regulation, policy, procedure, order," the matter would be referred to the Executive Office of the President for resolution. *Id.* at §1-307(b). According to President Carter, who signed this order, the reorganization made EEOC "the principal Federal agency in fair employment enforcement. . . and lays for the first time, the foundation of a united, coherent Federal structure to combat job discrimination." The President noted that "each new prohibition against discrimination unfortunately has brought with it a further dispersal of Federal equal employment opportunity responsibility. This fragmentation of authority. . . has meant confusion and ineffective enforcement for employees, regulatory duplication and needless expense for employers. . . ." Further, "Its experience and broad scope make the EEOC suitable for the

role of principal Federal agency in fair employment enforcement." *President's Reorganization Message* at 40-41.

³⁰⁶ See *Vol. V*, pp. 647-54, in which the Civil Rights Commission recommended that the Equal Employment Opportunity Coordinating Council be abolished because of the failure to solve serious difficulties between the agencies, its lack of enforcement authority, the lack of permanent staff, and the infrequency with which it had met. The Council had been established by the 1972 amendments to Title VII. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. §2000e-14) (1982). See *Sequel*, pp. 331-32, in which the Commission concluded: "Beyond their individual shortcomings, the [equal employment enforcement] agencies did not collectively comprise an effective Federal effort. They disagreed with one another on matters of substantive policy. . . [such as appropriate written] Federal positions on such issues as employee selection guidelines and pension benefits. There also remained disagreement. . . as to the meaning of discrimination and how discrimination, once identified, should be remedied. . . . [Agency activities] do not add up to a comprehensive or coordinated. . . Federal effort to end discrimination" in employment. See generally also Lamb, *Administrative Coordination in Civil Rights Enforcement: A Regional Approach*, 31 Vanderbilt L. Rev. 855 (1978).

³⁰⁷ See chap. 1, above, text accompanying n.37.

³⁰⁸ In May 1983 the Chairman was quoted as saying that disagreements (with DOJ) were "part of the ballgame" and although he personally agreed with DOJ that "the Constitution and Title VII are race neutral and sex neutral," enforcement policies at EEOC had not changed. "The same remedies," including sex- and race-conscious goals, "are in place. . . . The Commission has not given the attorneys any orders." Interview, Bureau of National Affairs, *Daily Labor Report*, May 26, 1983, pp. A-9-A-10.

³⁰⁹ *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984). In that case the court ruled that relief for past discriminatory conduct is not limited to identifiable victims and that the lower court did not abuse its discretion in approving a particular promotion quota. DOJ had intervened against a one-to-one black-white promotional quota in a proposed consent decree.

prevailed, with EEOC withdrawing its proposed brief.³¹¹

The two agencies clashed again over an employment testing case in Connecticut.³¹² They took different views on the "bottom line" theory, with DOJ's brief submitted on behalf of the government, but as the Supreme Court pointedly noted, EEOC which "[shares] responsibility for federal enforcement of Title VII. . . declined to join" that brief.³¹³

A third example of DOJ-EEOC conflict occurred when DOJ refused to file its own affirmative action plan, with goals and timetables, with EEOC as EEOC maintained was required.³¹⁴ DOJ maintained that the requirement was neither lawful nor appropriate.³¹⁵ Today EEOC maintains that it cannot enforce the requirement.³¹⁶

³¹⁰ According to the EEOC Chairman, "judicial ratification of the Justice Department's position would undermine the Commission's guidelines, settlements, consent decrees and court orders providing for affirmative relief and would prevent employers and other entities from using non-controversial recruitment and training efforts, as well as flexible, numerical goals and timetables." He also said, however, that "due to a difference of opinion as to the Commission's legal status and the Commission's authority under Title VII to file a brief in a case involving a State or municipal employer, the Commission decided not to file a brief *amicus curiae* in the *Williams* case after all." Thomas May 1983 Testimony, p. F-1. In a letter to the Attorney General 5 months earlier, signed by all the Commissioners, EEOC sharply criticized the Justice Department's "unacceptable" attempt "to initiate a major. . . change in the government's Civil Rights policy, without even consulting (EEOC)," which constituted "not only a sharp departure from acceptable standards of interagency protocol but was an action taken in derogation of this agency's statutory designation as the chief interpreter of Title VII of the Civil Rights Act of 1964, as amended." Clarence Thomas, Chairman; Cathie A. Shattuck, Vice Chairman; Armando M. Rodriguez, Tony E. Gallegos, and William A. Webb, Commissioners; letter to William French Smith, U.S. Attorney General, Jan. 26, 1983.

³¹¹ *Connecticut v. Teal*, 457 U.S. 440 (1982). The divided Court (5-4) held that a promotional process may be ruled discriminatory when the written examination component of the process has an adverse impact on black examinees, even though the "bottom line" result of the process is an appropriate racial balance.

³¹² *Id.* at 451, n.1. This case is discussed in more detail in the next chapter.

³¹³ EEOC has cited sec. 717(B)(1) of Title VII and Executive Order 11748 as requiring Federal agency equal employment opportunity plans, including affirmative action goals, to be reviewed and evaluated by EEOC. Clarence Thomas, Chairman, EEOC, speech before NASA Equal Opportunity Council Meeting, Hampton, Va., May 26, 1983, pp. 10-11.

³¹⁴ DOJ said: "The [policy] adopted by the EEOC in the last years of the last Administration, require[s] numerical objectives which might be read as quotas or as imposing a preference—contrary to our policy. We do not believe that the law requires this Department—or other Departments—to adopt numerical formulae which require or might lead to the granting of improper preferences." Kevin D. Rooney, Assistant Attorney General for Administration, DOJ, letter to John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 10, 1983. The

Most recently, the Supreme Court noted at several different points in its decision in *Sheet Metal Workers v. EEOC* major differences between the position on remedial goals EEOC had taken during earlier litigation of the case and that taken in the case by the Solicitor General before the Supreme Court.³¹⁷

Such public conflicts have subsided somewhat, particularly as EEOC's position on preferential remedies has moved closer to that of DOJ.³¹⁸ However, differences with OMB, as noted, continue.³¹⁹

Meanwhile, the Chairman has been criticized for not aggressively seeking White House support under the Executive order in such conflicts.³²⁰ He notes, however, that Reorganization Plan No. 1 is the root

National Endowment for the Humanities has taken a similar position. William J. Bennett, Chairman, National Endowment for the Humanities, testimony in *National Endowment Hearings*, p. 7. It subsequently filed the required plan, however, with "great regret." "Humanities Fund, with 'Great Regret,' Submits its Hiring Goals to EEOC," *Chronicle of Higher Education*, Jan. 29, 1986, quoting John Agresto, Acting Chairman of the Endowment.

³¹⁵ According to the Chairman, "if the [provision] is to be enforced. . . I think it does need some kind of enforcement provision. Those do not exist now. We simply report to Congress and the President." *National Endowment Hearings*, p. 24.

³¹⁶ For example, the Court noted that: "The Solicitor General challenges the membership goal. . . even though the EEOC has, throughout this litigation, joined the plaintiffs in asking the courts to order numerical goals, implementing ratios, and timetables." See n.24 of decision, cited in full at n.104, this chap.

³¹⁷ In another recent case, however, the Supreme Court ruled that the amount of attorneys' fees available to the prevailing party in a civil rights case is not limited by the monetary damages recovered by the plaintiffs. *City of Riverside v. Santos Rivera*, 106 S. Ct. 2686 (1986). The Court's decision was consistent with EEOC's position, which the Justice Department has rejected. EEOC has maintained that application of a proportionality rule for legal fee awards under Title VII could result in less than full relief because of the limitations on monetary recovery available under Title VII. Johnny J. Butler, Acting General Counsel, EEOC, Memorandum, "Recommendation for participation as *amicus curiae* in *City of Riverdale v. Rivera*, cert. granted, 54 U.S.L.W. 3270 (Oct. 22, 1985) (No. 85-224)," to Charles Fried, Solicitor General, Dept. of Justice, Nov. 18, 1985, cited in Bureau of National Affairs, *Daily Labor Report*, Jan. 9, 1986, pp. E-1. See also Al Kamen, "Party's Over but Disagreement Goes On," *Washington Post*, Mar. 30, 1986, p. A-12.

³¹⁸ Thomas Interview, p. 7.

³¹⁹ See remarks by Rep. Matthew Martinez in *Federal EEO Problems Hearings*, Oct. 8, 1985, p. 100; Norton Interviews, p. 3.

³²⁰ Thomas Interview, p. 7. For example, EEOC now must clear with OMB its comments on legislation before submitting them to Congress, a change from past practice. Pamela Talkin, special assistant, EEOC, telephone interview, Feb. 18, 1987. On the one hand, the Chairman has said: "Under Executive Order 12067, the Commission is responsible for maintaining an active coordination program which has established ongoing communication with all government agencies which enforces equal employment opportu-

of EEOC's weakness in that the agency has lost its independent status as a result of that change and therefore is just another executive agency, notwithstanding its ostensible leadership role.³²¹

To be sure, EEOC is carrying out an important coordination role. For example, it developed with DOJ a new procedure for processing employment discrimination complaints against recipients of Federal financial assistance. Federal agencies now refer to EEOC individual complaints of employment discrimination filed under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and other grant statutes with similar prohibitions against discrimination, if these complaints also are covered by Title VII or EPA.³²² The new system prevents overlap in individual complaint processing by EEOC and sets uniform standards and procedures for handling complaints of all agencies.³²³

Further, EEOC has been working with other Federal agencies, such as the Merit Systems Protection Board, the National Labor Relations Board, OPM, and the Office of Special Counsel, to improve

nity laws. Accordingly, our relationship with the Civil Rights Division is no different from our relationship with other enforcement agencies. This relationship is professional, and it is based on a frank and candid exchange of ideas and opinions. Occasional differences in opinion have not jeopardized the nature of our relationship." *Thomas FY 86 Appropriation Testimony*, p. 357. On the other hand, in *Federal EEO Problems Hearings*, p. 97, the Chairman said: "I don't think EEOC should be an executive branch agency. It should be clearly independent and it should litigate and defend its own processes. . . . The agency has to be independent. That concession, to me, is the major problem that we are experiencing now." The Library of Congress concurs that "the placement of EEOC in the executive branch and the seeming acceptance of that structure by both the agency and Congress, would seem to dictate that the Commission is limited in its ability to pursue policies contrary to those of the executive." Richard Ehlke, specialist on American law, Congressional Research Service, Library of Congress, "Status and Litigating Authority of the Equal Employment Commission," to House Government Operations Committee, Manpower/Housing, Subcommittee, Feb. 27, 1985, published in *1985 Pay Equity Hearings*, pp. 155-63. Former EEOC staff maintain that internal policy disputes between EEOC, DOJ, and DOL between 1979 and 1980 generally were resolved through close consultation and also that "neither the Congress nor the President sought to alter, in any way, the unfettered authority of the EEOC to go into court. . . to argue its interpretation of Title VII mandates. . . the preemptory recent actions of the Department of Justice are not consistent with the kind of coordination in this area that usually occurred as a matter of course." Francesta E. Farmer, former Director, Office of Interagency Coordination, EEOC, unpublished testimony, hearing by House Judiciary Committee Subcommittee on Civil and Constitutional Rights, May 9, 1983, p. 4.

³²¹ 29 C.F.R. Part 1691 (1986).

³²² EEOC, Office of Legal Counsel, *Coordination of Federal Equal Employment Opportunity Programs*, July 1, 1982-September

resolution of Federal employee-management disputes. EEOC has designed a comprehensive dispute resolution training and technical information program involving those agencies, several related national conferences have been held, and a guidebook on Federal dispute resolution systems has been developed jointly.³²⁴

In any event, the policy conflicts that have occurred since 1981 have frustrated not only EEOC but also employers.³²⁵ Such disputes may also have encouraged employers to relax compliance³²⁶ and civil rights groups to infer administration disinterest in effective enforcement.³²⁷

Technical Assistance

Finally, EEOC efforts aimed at qualitative improvements in program operations, and also EEOC responsiveness to criticism, are reflected in the area of technical assistance. EEOC is authorized under Title VII to provide technical assistance to all groups protected by or subject to the statute.³²⁸ The Age Discrimination in Employment Act also empowers the agency "to cooperate with regional,

30, 1983 (1984), p. 5. For additional details on routine EEOC coordination activities, see generally this report and also EEOC, Office of Legal Counsel, *Coordination of Federal Equal Employment Opportunity Programs*, October 1, 1983-September 30, 1984 (1985).

³²³ "EEOC Staff Comments," p. 5.

³²⁴ See, e.g., Equal Employment Advisory Council, *Annual Report*, 1985, p. iv, which concluded: "The lack of an identifiable policy for dealing with employment discrimination, a problem which has plagued the Reagan Administration since it took office in 1981, continued through 1984. This absence of high-level policy guidance has permitted the three principal equal employment enforcement agencies. . . to follow different approaches in carrying out their responsibilities. One result has been to reinforce the feeling of the leadership of many civil rights groups that the Administration is not committed to vigorous enforcement of equal employment laws and regulation." The following year, the same organization observed: "Corporate efforts to comply with employment regulations have been impeded by the Reagan Administration's lack of a well-defined policy for dealing with employment discrimination." *Annual Report*, 1986, p. iv.

³²⁵ The EEOC Chairman said in 1983 that "[t]he Executive Branch in particular can exert leadership. . . by making sure its own house is in order. We cannot expect to be effective in enforcing the EEO laws in the private sector if we do not do all we can to comply with those laws ourselves." Clarence Thomas, Chairman, Speech, National Urban League, New Orleans, La., Aug. 2, 1983. See also interview in Bureau of National Affairs, *Daily Labor Report*, May 25, 1983, pp. A-10 and A-11, in which the Chairman observed that some employers were becoming more recalcitrant because of what they perceived as a more relaxed enforcement approach by the administration.

³²⁶ Goldstein Interview.

³²⁷ 42 U.S.C. §§2000e-17 (1976) and Supp. V (1981).

³²⁸ 29 U.S.C. §§60D (1976 and Supp. III 1979).

State, local and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this Act.”³²⁹ Before 1983, EEOC had little in the way of a structured technical assistance program.³³⁰ EEOC’s “efforts to fulfill these [technical assistance] obligations have been limited and sometimes unreliable due to distribution of inaccurate and outdated information.”³³¹

In 1983, EEOC identified the need for improvements in its technical assistance program.³³² For example, the Chairman has acknowledged that “Hispanics are a segment of our population who have been underserved by some of the Commission’s programs,”³³³ and he pledged that he would strengthen EEOC’s ability to serve all persons by enhancing public access to the Commission staff.

In 1983 an “Expanded Presence Program” began at some field offices to “alleviate problems created by the lack or unavailability of service to various areas. . . .”³³⁴ The program includes regular visits by small teams of existing EEOC field staff to designated areas to provide “equal employment

opportunity assistance to businesses and residents” of areas not in proximity to EEOC field offices or FEPAs.³³⁵ Charges may be filed with EEOC staff during these visits. In FY 85 the program became fully operational in the field.³³⁶ It has continued, with the support of organizations such as the League of United Latin American Citizens and the NAACP, and appears to have been generally effective in generating new charges.³³⁷ Given EEOC difficulties in handling its current workload, however, district offices question their ability to provide “adequate” resources for this program.³³⁸

EEOC has also implemented a “Voluntary Assistance Program” to inform small employers and unions (employing or representing less than 500 persons) about Federal equal employment opportunity requirements.³³⁹ This effort is accomplished by means of conferences and seminars, public service announcements for radio and television, news releases, and the dissemination of brochures. Plans are underway to develop college and university minic-

³²⁹ Technical assistance, for the most part, was provided on an informal basis by EEOC field office personnel. There was no uniformity among regions; instead, the nature and scope of the technical assistance furnished was determined by the relationship that existed between a specific field office and the surrounding business community rather than generated by headquarters directives. In most instances, field office staff were called upon by the business community to provide information on nondiscrimination in employment matters on an ad hoc basis. U.S. Commission on Civil Rights, “Federal Technical Assistance Effort to Promote Voluntary Compliance with Civil Rights Requirements,” unpublished report, November 1983, EEOC appendices (hereafter cited as Federal Technical Assistance Efforts). See also Troy 1985 Interview, p. 4.

³³⁰ *The Equal Employer*, Touro College School of Law, vol. 7, no. 9, May 2, 1983, ¶94, p. 8.

³³¹ In January 1983, consistent with its field reorganization, the agency called for “improvements” in agency coverage in “underserved areas” and “voluntary assistance to employers.” *18th Annual Report*, p. 5.

³³² Clarence Thomas, Chairman, EEOC, testimony, *Oversight of the Equal Employment Opportunity Commission, 1983*, Hearing Before the Senate Committee on Labor and Human Resources, 98th Cong., 1st Sess. (1984), p. 176. According to the Chairman, EEOC faced allegations that the agency “had historically failed to serve the Hispanic community and that it failed to show interest in or devote resources to remedying this problem.” *Ibid.*, p. 174.

³³³ *18th Annual Report*, p. 5.

³³⁴ *Ibid.* For example, rotating workshops have been held in Spanish and English in the Chicago area and “extension offices” were opened in east Los Angeles and in the Rio Grande valley area in Texas to provide bilingual information and service. Clarence Thomas, Chairman, EEOC, speech at “EEO Conference in the Caribbean,” San Juan, P.R., May 9, 1984, pp. 12-13. Tulio Diaz, program analyst, Region III, Office of Program

Operations, EEOC, telephone interview, Dec. 3, 1986. EEOC subsequently closed the east L.A. “office,” where a bilingual equal opportunity specialist had been stationed once a week, because few charges were filed there. *Ibid.*

³³⁵ *FY 85 OPO Report*, p. 5.

³³⁶ Paul Royston, Director, Office of Program Research, memorandum, “Expanded Presence Evaluation Report,” to James Troy, Director, Office of Program Operations, EEOC, Oct. 7, 1985, pp. ii-iii (hereafter cited as “Expanded Presence Report”). In FY 85 field staff made 1,033 visits to their contact points and received 3,520 charges. *Ibid.* In FY 84, 445 visits were made. *FY 84 OPO Report*, p. 4.

³³⁷ “Expanded Presence Report,” p. ii.

³³⁸ According to the Chairman, the program “will clarify rights and obligations under EEO laws in special training sessions and answer questions raised by employers and unions regarding forms, procedures, interpretations of statutes, regulations and case decisions. In addition, these sessions give general advice and guidance on relevant laws and procedures.” Speech before American Bar Association, New Orleans, La., May 3, 1984, p. 4. In February 1985, for example, EEOC staff participated in a U.S. Chamber of Commerce broadcast on the chamber’s own business network to more than 200 affiliates to discuss theories of discrimination, age discrimination, and discrimination under the Equal Pay Act and Title VII. Members of the affiliates could phone in questions for the staff panelists during the broadcast. *Ibid.*, p. 6. EEOC does not assist in the development of affirmative action plans, and its guidance is nonbinding. 48 Fed. Reg. 65 (1983).

³³⁹ In FY 85 field staff conducted 110 symposia, involving 5,936 participants representing 4,664 companies or organizations. *FY 85 OPO Report*, p. 6. In FY 84, 56 seminars were held, attended by over 2,100 representatives. *FY 84 OPO Report*, p. 4. In FY 85, EEOC staff and George Washington University officials developed a concept paper for such courses at that university. *Thomas Pay Equity Testimony*, p. 93.

courses on equal employment responsibilities for future managers.³⁴⁰ The program continued at a reduced level due to its budget for FY 86 having been cut in half.³⁴¹

In 1983 Commission staff welcomed these initiatives.³⁴² EEOC also recently installed a nationwide

toll-free number (800 USA-EEOC) that provides information and assistance in English and Spanish concerning equal employment laws, including how to file a charge.³⁴³ This is another low-cost step that should help to improve communication between the agency and both employers and employees.

³⁴⁰ James Troy, Director, Office of Program Operations, EEOC, telephone interview, June 26, 1986. For fall 1987, EEOC has planned a nationwide satellite teleconference. Small business and labor groups, as well as the general public, are being invited to attend the teleconference in one of the 50 planned host cities. The seminar is to provide participants basic training in equal employment laws. "EEOC Staff Comments," p. 5.

³⁴¹ John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, letter to Treva McCall, Executive Secretariat, EEOC, May 4, 1983.

³⁴² Bureau of National Affairs, *Daily Labor Report*, Apr. 28, 1986, p. A-10.

³⁴³ Donald Elisburg, Assistant Secretary for Employment Standards, Department of Labor, letter to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, July 30, 1977, as cited in *Sequel*, p. 155. The letter said draft revisions would be ready for publication in fall 1977. Subsequently, a Supreme Court decision questioned aspects of the DOL interpretations. *City of Los Angeles v. Manhart*, 435 U.S. 702, 711-14 (1978).

3. Department of Justice, Civil Rights, Division, Employment Litigation Section

Summary

The Department of Justice (DOJ) implemented a major policy change in opposing the use of numerical goals or quotas in hiring, promotions, or layoffs as a part of the relief to be sought for victims of discrimination or to correct underrepresentation of minority males or women in employment. DOJ has stressed instead greater recruitment efforts and complete make-whole relief for actual victims of discrimination. Supreme Court decisions in 1986 and 1987 have clarified some of the complex and highly controversial issues involved in the national debate over affirmative action generally, leaving in doubt the likely outcome of DOJ initiatives to eliminate remedial hiring goals or quotas. Additional court rulings in this area can be expected, however. Additional research into the actual results to date of DOJ's new remedial policy (in terms of promoting increased job applications by and actual hiring and promoting of minority males and women) is also needed. Meanwhile, DOJ has continued agency practice of filing predominantly pattern or practice cases and of relying heavily on statistics in determining possible discrimination. The latter has drawn sharp criticism from some defendant employers.

Further with regard to continuity in the work of the Employment Litigation Section, the volume and nature of Title VII cases filed between 1981 and 1984 generally were similar to those filed between 1977 and 1981. Additional individual cases were filed, however. Sex discrimination suits increased, and race and national origin cases decreased slightly. This expansion of DOJ litigation is consistent with a

past Commission recommendation. DOJ has moved into new areas, such as pregnancy discrimination and employment of minority teachers in suburban areas, and is seeking to develop a needed uniform test for firefighters and police officers. The number of consent decrees (45) obtained between 1981 and 1984 was lower than that (59) obtained during the previous 4 years (although an additional 37 decrees were obtained in 1985 and 1986), while backpay obtained between 1981 and 1984 was comparable to that obtained between 1977 and 1980.

Unresolved, basic policy conflicts between DOJ, the Equal Employment Opportunity Commission (EEOC), and the Labor Department remain serious and are impeding needed coordination and consistency in Federal equal employment opportunity enforcement. Inadequate coordination between these agencies has been a fundamental problem during previous administrations.

Improved management has been a DOJ priority affecting the Employment Litigation Section. For example, a backlog in issuances of right-to-sue notices was eliminated. Resources available for the Employment Litigation Section have remained essentially stable but tight since 1980. Although increased computer resources have contributed to Section productivity, the ability of the Section to litigate large cases while maintaining a relatively high level of case filings generally, in addition to effectively monitoring settlements, is doubtful. A reorganization of the Civil Rights Division (CRD) in 1983 had minimal effect on the Division's equal employment enforcement effort.

These and other issues and developments since 1981 in the areas of policy, litigation, monitoring, coordination, and management and administration are reviewed in this chapter. First, however, brief descriptions are provided of the origin, responsibilities, organization, past performance, and priorities since 1981 of the Employment Litigation Section within DOJ's Civil Rights Division. (Although the immediate focus of this chapter is the Employment Litigation Section, related equal employment litigation activities of the Appellate Section in CRD and of the Office of the Solicitor General in DOJ are subsumed within this broad discussion of DOJ's equal employment enforcement effort.)

Origin and Responsibilities

The Civil Rights Division was established within DOJ under the Civil Rights Act of 1957.¹ The Employment Section was established in CRD in 1969, following an extensive reorganization,² and reflected a shift in division priorities from voting rights and school desegregation to employment discrimination cases.³ From 1969 to 1974, the Employment Section was the major unit of the Federal Government bringing lawsuits alleging unlawful employment discrimination. The Attorney General had exclusive authority to litigate alleged violations of Title VII⁴ and was also responsible for litigating violations of Executive Order 11246⁵ referred by the Department of Labor (DOL).⁶

¹ Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634, 637, providing for an additional Assistant Attorney General who is now one of 10 under 28 U.S.C. §506 (1982). This step followed a recommendation in 1947 by President Truman's Committee on Civil Rights that the Civil Rights Section, previously created by an order (No. 3,204, Feb. 8, 1939) of then-Attorney General Frank Murphy, be expanded into a full Division. U.S. Commission on Civil Rights, *Statutory Reports, 1961, Justice* (1961), p. 2. For a discussion of the early activities of the Civil Rights Section, see, e.g., Robert Carr, *Federal Protection of Civil Rights: Quest for a Sword* (Ithaca, N.Y.: Cornell Univ. Press, 1947) (hereafter cited as *Quest for a Sword*).

² Initially, the Division was organized along functional lines (e.g., trials, appeals, research), then along geographic lines (the eastern, western, southwestern, and southeastern regions of the Nation), with each of the four units handling all matters within its geographic area. Richard P. Nathan, *Jobs and Civil Rights* (Washington, D.C.: prepared for the U.S. Commission on Civil Rights by the Brookings Institution, 1969), p. 79.

³ *Ibid.*, pp. 80-81.

⁴ Pub. L. No. 88-352, §§706-707, 78 Stat. 241, 259-61 (1964); Pub. L. No. 92-261, §§4-5, 86 Stat. 103, 104-107 (1972).

⁵ 3 C.F.R. 339 (1964-1965), *reprinted in* 42 U.S.C. §2000e note (1982).

⁶ For the specific authority of DOJ on referral, see *Id.* at §209(a)(2).

Private complainants may also litigate on their own behalf, of course, after receipt of the requisite right-to-sue notices, discussed later in this chapter.

The 1972 amendments to Title VII diminished the Employment Section's authority by transferring, effective 2 years later, to EEOC the Attorney General's power to file pattern or practice suits against private employers.⁷ At the same time, however, the amendments extended the coverage of Title VII to include State and local government employers,⁸ giving the Attorney General exclusive authority to bring suit against them.⁹

In 1977 the Labor Department issued new regulations under Executive Order 11246 that, in effect, gave back to the Employment Section some of the authority it had lost under the 1972 amendments to Title VII. The regulations authorized the Attorney General to initiate investigations and civil actions against Federal contractors.¹⁰ The Attorney General could, thereby, once again file pattern or practice suits against a large group of private employers—those who hold Federal contracts.

In 1979 the Employment Section was eliminated as a separate unit as the result of a CRD reorganization that combined it with the litigation-component of the Federal Programs Section, creating the Federal Enforcement Section.¹¹ In addition to retaining all Employment Section responsibilities, the new unit enforced nondiscrimination laws for

⁷ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§4-5, 86 Stat. 103, 104-07 (1972), 42 U.S.C. §2000e-6 (1982).

⁸ 42 U.S.C. §2000e(a), (f) (1982).

⁹ The amendments authorize the Attorney General to bring suit against State and local governments where EEOC has been unable to conciliate individual charges of discrimination according to procedures provided in section 706 of Title VII. 42 U.S.C. §2000e-5 (1982). The Attorney General's authority, under the 1972 amendments, to initiate pattern or practice suits against State and local government employers was subsequently reaffirmed by section 5 of Reorganization Plan No. 1 of 1978, as implemented by Exec. Order 12,068. Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 42 U.S.C. §2000e-4 note (1982); Exec. Order No. 12,068, 3 C.F.R. 209 (1978), *reprinted in* 42 U.S.C. §2000e-6 note (1982).

¹⁰ Prior to filing suit against a contractor found in noncompliance with the Executive order, the Attorney General must attempt to secure compliance and offer the contractor the opportunity to conciliate. The Attorney General's authority to initiate investigations and civil actions is, in each instance, subject to the approval of the Director of the Office of Federal Contract Compliance Programs (OFCCP). See 41 C.F.R. §60-1.26 (f) (1984).

¹¹ This was intended to "permit better coordination of related matters." U.S. Department of Justice (DOJ), *Annual Report of the Attorney General of the United States, 1979* (1980), p. 110.

programs and activities (other than housing and education) receiving Federal financial assistance.¹² In 1983 another CRD reorganization transferred the latter function to a newly created Housing and Civil Enforcement Section.¹³ The Federal Enforcement Section was renamed the Employment Litigation Section.

Today, the primary responsibility of the Employment Litigation Section is enforcement of Title VII against State and local governments employing over 4.5 million persons full time.¹⁴ Section litigation activity includes filing suits, trying cases in court, and negotiating consent decrees.¹⁵ In addition, the Section may intervene in civil actions which the Attorney General certifies to be of "general public importance."¹⁶ Further, the Section consults with the Appellate Section of CRD, which prepares and argues briefs in equal employment and other civil rights cases in appellate courts, and with the Office of the Solicitor General, which approves such cases for appeal and prepares and argues them before the Supreme Court. This appellate court activity includes cases in which DOJ represents the Federal Government when it is a party, as well as the filing of *amicus curiae* briefs in cases in which DOJ wishes to influence the development of case law. The Section also monitors compliance with trial and consent decrees to which it is a party. If compliance problems are found, the Section will attempt to

resolve them informally but may go back to court to compel compliance, if necessary. Another litigation responsibility, which occupies about 10 percent of Section staff time,¹⁷ involves defending Federal agencies, notably the Departments of Labor and Transportation, against suits brought by employers.¹⁸

Organization

The Employment Litigation Section is one of nine sections within the Civil Rights Division, as shown in chart 3.1. The Section has no units. Each case is supervised by a lead attorney, with the assistance of two to five other attorneys and one to three paralegal specialists. The section chief and two deputy chiefs, all career Federal officials, share responsibility for supervising lead attorneys and overseeing the Section's caseload. The section chief reports to one of three Deputy Assistant Attorneys General, who in turn reports to the Assistant Attorney General for Civil Rights. The Assistant Attorney General is subject to Senate confirmation.

Past Performance

The Commission on Civil Rights and other observers have expressed respect for the Civil Rights Division in terms of the challenges it has faced and the quality of its work over the years.¹⁹ Traditional concerns regarding equal employment enforcement

¹² DOJ, *Annual Report of the Attorney General of the United States, 1980* (1981), p. 127.

¹³ DOJ, *Annual Report of the Attorney General, 1984* (1985), p. 149 (hereafter cited as *1984 Annual Report*).

¹⁴ U.S. Equal Employment Opportunity Commission, "1985 EEO-4 Nationwide Summary," p. G-13. In addition to its Title VII and Executive Order 11246 authority, the Section also can initiate litigation under Title IX of the Education Amendments of 1972, 20 U.S.C. §1618-86 (1982) in matters involving discriminatory employment practices; Title I of the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. §6716 (prohibited discrimination) (1982); and Title I of the Omnibus Crime Control and Safe Streets Act of 1968, as amended through the Crime Control Act of 1976, 42 U.S.C. §3701-97 (1982). Title IX prohibits discrimination on the basis of sex in education programs; the State and Local Fiscal Assistance Act prohibits State and local governments receiving funds under the act from discriminating on the basis of race, color, national origin, or sex in the expenditure of funds; and the Omnibus Crime Control and Safe Streets Act prohibits discrimination on the basis of race, color, and national origin in the expenditure of funds for reducing crime and improving criminal justice.

¹⁵ This activity seeks "to remedy all forms of purposeful discrimination and practices having a discriminatory impact, such as those that result from restrictive seniority and transfer systems superimposed upon the patterns of initial discriminatory assignments and exclusion; the use of unvalidated tests and other selection and promotional practices and standards which have

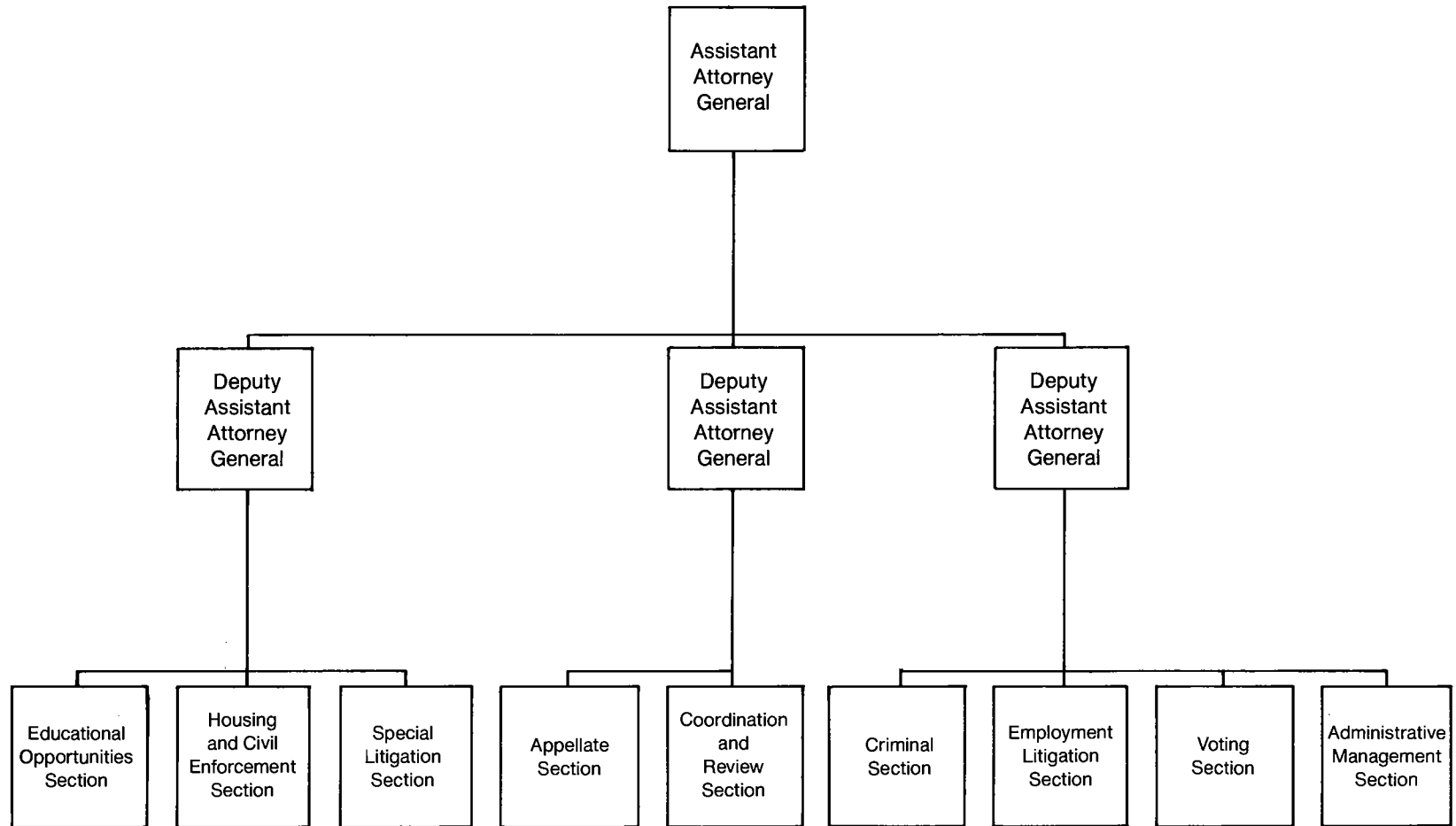
disproportionate adverse impact upon racial, ethnic, and religious minorities and upon females; abuses of managerial discretion; and, discriminatory training systems and programs." DOJ, "Spring Planning Call" report (FY 87), pp. 45-46. This report is a CRD budget planning document.

¹⁶ 42 U.S.C. §2000e-5(f) (1982).

¹⁷ Robert Moore, Deputy Chief, Employment Litigation Section, DOJ, telephone interview, Apr. 23, 1986. It should be noted that the Employment Litigation Section does not process discrimination complaints. All complaint letters received by the Section are transferred to EEOC. David L. Rose, Chief, Employment Litigation Section, Civil Rights Division, DOJ, letter to Linda Chavez, Staff Director, U.S. Commission on Civil Rights, Oct. 3, 1984 (hereafter cited as *Rose 1984 Letter*).

¹⁸ For example, in 1981, 14 such suits were brought by various State contractors' associations or companies seeking to enjoin the application of minority business enterprise regulations in the contract awarding of Federal funds. DOJ, "Spring Planning Call" report (FY 85), p. 53.

¹⁹ See, e.g., *Quest for a Sword*; Harold C. Flemming, "The Federal Executive and Civil Rights: 1961-1965," *Daedalus*, Fall 1965, pp. 935-40; and U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1977, To Eliminate Employment Discrimination: A Sequel* (1977) pp. 262, 275-76 (hereafter cited as *Sequel*), which referred specifically to the "high quality of work. . . dedication and skill of [Employment Section] staff," and to the Section's "positive record" in establishing "good equal employment opportunity law."

CHART 3.1
Civil Rights Division

by DOJ have centered on the amount of resources available for litigation, the level of enforcement achieved with these resources, and the adequacy of coordination between equal employment enforcement agencies.

As early as 1971, for example, this Commission concluded that the Employment Section was handicapped in its enforcement efforts by its small size. The number of authorized attorney positions (32) within the Section was considered insufficient to have a significant effect on employment discrimination.²⁰ Although, as noted, EEOC received litigation authority in 1972 and soon developed a much larger staff of attorneys than that of the Section, the Commission in 1977 again concluded that the small size of the Section was its principal weakness.²¹

A second concern has been how the Section has used its resources. In 1971, for example, the Commission on Civil Rights criticized the Section's practice of "piecemeal litigation."²² The Commission also observed that the Section's failure to make adequate use of its pattern and practice authority under Title VII was one basis for the 1972 transfer of the Section's Title VII authority to EEOC.²³ In 1977 the Commission concluded that the adequacy of the volume of litigation by the Section was "debatable" even within its limited resources.²⁴

Further, as noted previously in this report, the Commission has repeatedly found that inadequate coordination by equal employment enforcement agencies has weakened their effectiveness. For example, in 1971 the Commission reported that the Employment Section, EEOC, and the then-Office of Federal Contract Compliance "had not yet begun to coordinate their efforts effectively."²⁵ By 1977

coordination had improved, but further progress was still needed.²⁶ Other criticisms have included inadequate emphasis on backpay as retroactive relief²⁷ and insufficient monitoring of court orders and consent decrees obtained by DOJ.²⁸

Section Priorities Under the Reagan Administration

Senior DOJ officials who took office in 1981 believe that employment discrimination against minorities and women still exists although the problem is more complicated than in the past. According to the then-Solicitor General of the United States, for example, "The struggle for civil rights in this country has been as protracted as it has been difficult. The struggle is far from over."²⁹ The Assistant Attorney General for Civil Rights observed that:

The clash between the fundamental principle of racial equality and the wholly antithetical notion that one can, and indeed should, be judged according to his or her race, is a historic and continuing one.

This struggle against the inhumanity of racism has been waged countless times in countless places. We have seen it in the shackles of slavery. . . in the death camps of Auschwitz, Dachau and others. And, we see it today. Contemporary racism, though often expressed in subtler forms of discrimination, has the same stifling, choking effect on the creative spirit of its victims.³⁰

Among the areas of particular DOJ concern are employment testing, the validity of physical job requirements, racial discrimination in the employment of public school teachers in suburban school districts, and "reverse discrimination," which is "fairly widespread."³¹ Inadequate recruitment of

²⁰ U.S. Commission on Civil Rights, *Federal Civil Rights Enforcement Effort* (1971), p. 136 (hereafter cited as *Federal Civil Rights Enforcement*).

²¹ According to the Commission, the number of attorney positions (24) in 1977 was "not sufficient to have a significant impact upon the discriminatory practices of public and private employers." The Commission noted the "large amounts" of staff resources needed to analyze the "voluminous records. . . and extremely technical, factual, and legal questions involved" in assessing possible discrimination in hiring, testing, seniority lines, and other employment practices. *Sequel*, pp. 264-65.

²² *Federal Civil Rights Enforcement*, p. 136. The Commission also criticized the Section for limiting its litigation to cases involving discrimination against blacks and suggested more cases should be brought in which American Indians, Hispanics, and women were the major victims of discrimination. *Ibid*.

²³ *Sequel*, pp. 248-49.

²⁴ *Ibid.*, p. 278.

²⁵ *Federal Civil Rights Enforcement*, p. 136. See also U.S.

Commission on Civil Rights, *Federal Civil Rights Enforcement Effort: One Year Later* (1971), pp. 36-37.

²⁶ For example, EEOC's case referrals to DOJ often did not meet the Section's litigation standards, and the Section provided EEOC "inadequate feedback" on the reasons for rejecting most referrals. A similar situation existed with DOL case referrals. *Sequel*, p. 282-88.

²⁷ Lawyers' Committee for Civil Rights Under Law, "Comments on Reorganization of Enforcement of Nondiscrimination in Employment," Aug. 18, 1977, p. 45, as cited in *Sequel*, p. 279.

²⁸ *Sequel*, p. 280.

²⁹ Rex E. Lee, speech before the Hillsboro County Bar Association, Tampa, Fla., Aug. 4, 1983. Mr. Lee served as Solicitor General from August 1981 to June 1985 and was eventually replaced by Charles Fried.

³⁰ William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, DOJ, remarks before the National Civil Rights Committee of the Anti-Defamation League of B'nai B'rith, Washington, D.C., June 9, 1983.

minority and female job applicants is another DOJ concern.³² Overall, the Section has continued to maintain as its broad, long range goal the substantial reduction of discrimination in employment by State and local governments and Federal contractors.³³

In 1981, DOJ announced as a top priority a significant policy change concerning the types of relief it would seek in equal employment litigation. The relief previously sought in employment discrimination cases consisted of affirmative relief for identified victims, injunctions against future discrimination, and affirmative action plans that often included hiring goals and timetables.³⁴

DOJ's new policy has opposed the use of numerical hiring and promotion goals and quotas on the grounds that they grant preferences based on race, sex, or national origin to persons who are not identified as victims of a particular employer's prior discriminatory practices. According to DOJ, "Race-conscious or sex-conscious preferences are . . . divisive techniques which go well beyond the remedy that is necessary to redress, in full measure, those injured by a particular employer's discriminatory practices."³⁵ In place of relief centering on numerical hiring and promotion goals and timetables, DOJ has sought backpay, retroactive seniority, reinstatement, or hiring of identifiable victims of discrimination, and enhanced recruitment of minorities and women.³⁶ In addition to this major change in civil rights enforcement policy, the Section also has emphasized management improve-

ments, such as reducing a backlog of right-to-sue notices.³⁷

Policy

With regard to DOJ's major change in equal employment enforcement policy, the Assistant Attorney General for Civil Rights has explained that:

[T]his Administration enthusiastically endorses use of affirmative measures, such as recruitment and outreach programs, to bring increased numbers of minorities and women into the workforce and has insisted on "make whole" relief for all individual victims of the discriminatory practices. But we have declined on both legal and moral grounds, to use race or sex-conscious techniques (quotas, goals, set-asides, etc.) that assign to nonvictims of the employer's discrimination a preference based on race, sex, or national origin.

Once liability has been established, the Justice Department seeks the remedies of backpay, retroactive seniority, reinstatement, and hiring and promotion priorities, for all individual victims of the employer's discriminatory conduct in order to restore them to their "rightful place"—that is, to the position they would have attained but for the discrimination.

Moreover, the offending employers under our decrees are required to make special, affirmative efforts to recruit minority and female workers from those communities that had been ignored in the past, and to file periodic reports on their recruitment efforts. . . . This relief works. . . without the stigmatization, unfairness and polarization inherent in a system built on preferential treatment tied to race or sex.³⁸

See also DOJ, *Annual Report of the Attorney General of the United States*, 1982 (1983), p. 157.

³⁶ *Reynolds 1981 Testimony*, pp. 138–39.

³⁷ 1984 *Annual Report*, p. 150. Section 706(f)(1) of Title VII provides that if within 180 days the Attorney General has not filed a civil action against a public respondent, the Attorney General should issue a right-to-sue letter to the charging party. The Department of Justice issues right-to-sue letters to complainants where EEOC has found "reasonable cause," failed in its conciliation efforts, referred the matter to DOJ, and when DOJ has decided not to bring suit, or where prior to the exhaustion of the EEO process, the charging party requests a right-to-sue letter. 42 U.S.C. §2000e–2000e–17 (1982). A complainant cannot file suit in court until a right-to-sue notice has been received.

³⁸ William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, DOJ, testimony, *Affirmative Action*, Joint Oversight Hearings on Affirmative Action Before the Subcommittee on Civil and Constitutional Rights of the House Committee on Judiciary and the Subcommittee and the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 99th Cong., 1st Sess. (1986), pp. 255–56 (hereafter cited as *Reynolds 1985 Testimony*). See also *Reynolds 1981 Testimony*, and the Assistant Attorney General's speech at the Church of the Master, Harlem, New York City, Mar. 17, 1984.

³¹ David L. Rose, Chief, Employment Litigation Section, Civil Rights Division, DOJ, interview, July 29, 1985 (hereafter cited as Rose July 1985 Interview). The "fairness and credibility" of selection devices for hiring and promotion and the absence of effective standards for measuring the validity of such devices is a major concern with regard to testing. James Turner, Deputy Assistant Attorney General, Civil Rights Division, DOJ, interview, Aug. 6, 1985 (hereafter cited as Turner Interview). "Reverse discrimination" refers to employer discrimination in favor of racial or ethnic minorities or women to the detriment of white males.

³² William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, DOJ, interview, May 6, 1986.

³³ DOJ, "FY 86 Budget Request," p. 174. This was also the general, long range goal of the Section during the previous administration. DOJ, "FY 81 Budget Request," p. 33.

³⁴ David L. Rose, Chief, Employment Litigation Section, Civil Rights Division, DOJ, telephone interview, Oct. 16, 1985.

³⁵ William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, DOJ, testimony, *Oversight Hearings on Equal Employment Opportunity and Affirmative Action*, Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 97th Cong., 1st Sess., part 1 (1982), pp. 134–35 (hereafter cited as *Reynolds 1981 Testimony*).

The Assistant Attorney General cited the Supreme Court decision in *Firefighters Local Union No. 1784 v. Stotts*³⁹ in support of his view that “the Federal courts may neither require nor permit race-conscious or gender-conscious hiring, promotion or layoff procedures as an element of Title VII relief (whether incorporated in a court order or a consent decree) in an employment discrimination case.”⁴⁰ Consistent with this policy, DOJ no longer includes numerical goals or quotas in the relief it has sought in employment discrimination cases.

In *Stotts*, the Court held that, under Title VII, a court may not order an employer to lay off more senior employees in favor of less senior employees on the basis of race to preserve a certain racial mix in the work force, if there is a preexisting bona fide seniority system. Significant to this holding was the Court’s understanding of section 706(g) of Title VII, which provides, in part, that no court order shall extend relief to an individual “if such individual was refused admission, suspended, or expelled for any reason other than discrimination on account of race, color, religion, sex or national origin.”⁴¹ According to the Court, the “policy behind” this provision “affects the remedies available in Title VII litigation.”⁴² Interpreting this provision broadly, the Court cited statements “repeatedly expressed by the sponsors of the Act during the congressional de-

bates”⁴³ and concluded that the remedial policy of Title VII “is to provide make-whole relief only to those who have been actual victims of illegal discrimination.”⁴⁴ Pointing to this language, DOJ interpreted *Stotts* as extending beyond the context of seniority rights to a court’s remedial authority under Title VII.

Following *Stotts*, DOJ wrote to jurisdictions, including such cities as Buffalo, Los Angeles, Miami, and Indianapolis, as well as State defendants such as New York State, requesting that they modify 51 existing consent decrees to conform with DOJ’s understanding that goals and timetables and employment quotas were no longer permissible.⁴⁵ It filed motions in three cities to modify decrees and also filed briefs in continuing appellate cases in three courts of appeal, opposing numerical goals or quotas as remedies.⁴⁶ Finally, DOJ, in another demonstration of this policy change, refused to file with EEOC an affirmative action plan for its own work force, alleging that EEOC’s Federal sector affirmative action requirements for goals and timetables are unauthorized.⁴⁷

The new policy, and the initiatives, notably the filing of *amicus* briefs in various cases, that flowed from it, generated a storm of controversy. Civil rights organizations and some Members of Congress were highly critical.⁴⁸ Others were supportive.⁴⁹

³⁹ 467 U.S. 561 (1984).

⁴⁰ *Reynolds 1985 Testimony*, p. 257.

⁴¹ 42 U.S.C. §2000e-5(g).

⁴² *Stotts* at 579–80.

⁴³ *Id.* at 580.

⁴⁴ *Id.*

⁴⁵ See, e.g., John M. Gadzichowski, senior trial attorney, Employment Litigation Section, DOJ (for William Bradford Reynolds, Assistant Attorney General, Civil Rights Division), letter to Robert J. Rossi, county attorney, Onondaga County Department of Law, Syracuse, N.Y., and John Driscoll, Assistant Attorney General for State of New York, Albany, New York, Jan. 9, 1985, in which DOJ called for substitution of a recruitment program for hiring goal provisions contained in a consent decree to which Onondaga County is a party.

⁴⁶ In two of the cities, Buffalo and Chicago, DOJ said it responded “to motions filed by other parties in ongoing litigation.” *Reynolds 1985 Testimony*, p. 258.

⁴⁷ DOJ stated that “[n]either the statute (Section 717(b), 42 U.S.C. 2000e-16(b)), nor the regulation require ‘affirmative action,’ nor does either require hiring or promotion goals. . . . The management directives which were adopted by the EEOC in the last years of the last Administration require numerical objectives which might be read as quotas or as imposing a preference—contrary to our policy. We do not believe that the law requires this Department—or other Departments—to adopt numerical formulae which require or might lead to the granting of improper preferences.” Kevin D. Rooney, Assistant Attorney

General for Administration, DOJ, letter to John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 10, 1983 (hereafter cited as Rooney Letter). See also Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, DOJ, letter to Rep. Patricia Schroeder, Chairwoman, House Subcommittee on Civil Service, Committee on Post Office and Civil Service, Apr. 14, 1983.

⁴⁸ One critic called the policy change “a complete abandonment of this Nation’s affirmative action policy. . . and an affront to black Americans.” Benjamin L. Hooks, executive director, National Association for the Advancement of Colored People, *Oversight Hearings on Equal Employment Opportunity and Affirmative Action*, Hearings Before the House Subcommittee on Employment Opportunities of the Committee on Education and Labor, 97th Cong., 1st Sess., part 1 (1982), pp. 205–06. Another charged that DOJ was “abandoning affirmative action. . . and embarking on a new course and getting way out into waters that no one has been able to show would prove satisfactory in the elimination of discrimination” (remarks by Rep. Augustus Hawkins). *Ibid.*, p. 143. One group called for “defunding” DOJ activities in employment, as well as in education, because of “efforts to narrow the rights and remedies established by the Constitution, the 1964 Civil Rights Act, and decisions of the federal courts.” William L. Taylor, Center for National Policy Review (on behalf of the Leadership Conference on Civil Rights), statement, p. 14, in *House Authorization Hearing*.

⁴⁹ See, e.g., Nathan Perlmutter, “Testimony of Anti-Defamation League of B’nai B’rith,” U.S. Commission on Civil Rights,

The results of these initiatives to date have been mixed. Since its ruling in *Stotts*, the Supreme Court has issued five opinions regarding the propriety of race- or sex-conscious hiring, promotions, and layoffs. Three of these rulings, *Wygant v. Jackson Board of Education*,⁵⁰ *Local No. 93 v. Cleveland*,⁵¹ and *Local 28 of the Sheet Metal Workers v. Equal Employment Opportunity Commission*,⁵² were issued in 1986. The other two, *United States v. Paradise*⁵³ and *Johnson v. Transportation Agency, Santa Clara County, California*,⁵⁴ were issued in 1987. DOJ filed briefs as a party or as *amicus* in all of these cases.

In *Wygant v. Jackson Board of Education*, the Court held that the Constitution prohibited retaining less-senior black teachers in Jackson, Michigan, while laying off white teachers with greater seniority, when the goal was to maintain the racial balance achieved prior to the layoffs.⁵⁵ In invalidating this plan, however, the Court sent a mixed message on the constitutionality of affirmative action plans. While finding that a racially balanced work force was an impermissible objective,⁵⁶ all nine Justices indicated that a public employer may respond to perceived discrimination by developing a "narrowly tailored" affirmative action plan that grants preferences to minority candidates in hiring and promotion decisions.⁵⁷ Furthermore, a majority of Justices indicated that a substantial imbalance is a sufficient basis for a voluntary race-conscious remedial plan.⁵⁸ Such remedial plans, however, must be "narrowly tailored" to address perceived actual discrimination, not societal discrimination.⁵⁹

In *Local 93 v. Cleveland*, the Court held that an employer (public or private) may settle a Title VII lawsuit by developing an affirmative action hiring and promotion plan. Specifically, the Court valida-

ted a district court-approved settlement between the city of Cleveland and minority firefighters, which provided that minority and nonminority candidates were to be promoted on an "evenly split" basis to fill 66 lieutenant positions. In fact, there were enough openings so that all minorities who qualified were to be promoted.⁶⁰ Following these promotions, the city, using out-of-turn promotions, if necessary, was to promote additional minority candidates to the lieutenant position.⁶¹

DOJ, along with the predominantly white firefighters union, challenged this decree as inconsistent with Title VII. Emphasizing the "policy" of make-whole relief expounded in *Stotts*, DOJ claimed that the settlement agreement was outside the bounds of permissible court-ordered Title VII relief.⁶² The Supreme Court did not rule on this question; instead, it held that, for Title VII purposes, the consent decree was identical to a private out-of-court settlement.⁶³ The Court thereby concluded that *Local 93* was indistinguishable from *Steelworkers v. Weber*,⁶⁴ in which it had held that a private employer may voluntarily adopt a race-conscious plan to increase minority employment.⁶⁵

In *Sheet Metal Workers v. EEOC*, the Justices, by a 4-1-4 vote, rejected DOJ's argument that Title VII relief is limited to the actual victims of discrimination, holding that Title VII "does not prohibit a court from ordering in appropriate circumstances, affirmative race-conscious relief as a remedy for past discrimination."⁶⁶ Noting the union's contemptuous racial discrimination and successive attempts to evade all efforts to end that discrimination,⁶⁷ the plurality upheld the lower court's order that it adopt

Selected Affirmative Action Topics in Employment and Business Set-Asides, Consultation/Hearing Before U.S. Commission on Civil Rights, Washington, D.C., March 6-7, 1985, vol. 1, pp. 193-201 (hereafter cited as *Affirmative Action Topics*). One group said that because of the harm racial quotas in employment have done to Italian Americans, DOJ's policy change reflects a "major" achievement. Peter Boromeo, consultant and former deputy director, National Italian American Foundation; Francis Femminella, associate professor of sociology and education, State University of New York at Albany and member of the board, Italian American Civil Rights League; and Alfred Rotondaro, executive director, National Italian American Foundation, interview, Mar. 14, 1985. See also George F. Will, "Battling the Racial Spoils System," *Newsweek*, June 10, 1985, p. 96, in which the author concluded that "the acid of 'race conscious' policies has been seeping into the law, eroding a bedrock principle of this republic, the principle that rights inhere in individuals, not groups."

⁵⁰ 106 S. Ct. 1842 (1986).

⁵¹ 106 S. Ct. 3063 (1986).

⁵² 106 S. Ct. 3019 (1986).

⁵³ 107 S. Ct. 1053 (1987).

⁵⁴ 107 S. Ct. 1442 (1987).

⁵⁵ 106 S. Ct. at 1851-52.

⁵⁶ *Id.* at 1848.

⁵⁷ *Id.* at 1852-57 (O'Connor, J., concurring).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ 106 S. Ct. at 3069.

⁶¹ *Id.*

⁶² *Id.* at 3071, 3077-78.

⁶³ *Id.* at 3072-77.

⁶⁴ 443 U.S. 193 (1979).

⁶⁵ 106 S. Ct. at 3073.

⁶⁶ 106 S. Ct. at 3034.

⁶⁷ *Id.* at 3026-30, 3050-52.

a membership goal to reflect the area's minority population (29.23 percent).⁶⁸ The plurality, however, did limit the use of such relief to instances "where an employer or labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination."⁶⁹

DOJ said the last two decisions were narrow and carved out exceptions to the Court's "general recognition" of DOJ's position on the preferability of victim-specific remedies.⁷⁰ Nonetheless, DOJ subsequently dropped its effort to bring about modification of existing decrees to eliminate preferential treatment provisions.⁷¹

The Supreme Court's decisions in 1987 in *United States v. Paradise* and *Johnson v. Transportation Agency* further undermined Department of Justice policy in this area. In *Paradise*, a divided Court voted 4-1-4 to uphold a Federal district court order requiring that, until 25 percent of the officers are black, one black State trooper be promoted for each white trooper within the Alabama Department of Public Safety. Rejecting DOJ's argument that the promotion plan violated the equal protection clause, the plurality ruled that "[i]t is now well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination."⁷²

Crucial to this ruling was the Court's determination that the public safety department's longstanding, blatant discriminatory conduct made the one-for-one requirement the only "effective remedy available" to the district court.⁷³ For this reason, the Court concluded that "the relief ordered survives even strict scrutiny analysis: it is 'narrowly tailored' to serve a 'compelling governmental purpose.'"⁷⁴ In

contrast, the Court emphasized that the district court order was "not a disguised means to achieve racial balance."⁷⁵

In *Johnson v. Transportation Agency*, the Court upheld on Title VII grounds an affirmative action plan that allowed the Santa Clara Transportation Agency to consider the sex of a qualified applicant in its hiring decisions. Under this voluntarily adopted affirmative action plan, the county hired a qualified female applicant over a more qualified male applicant for a road dispatcher position. A significant factor in this hiring decision was that none of the 238 dispatcher-level positions was held by a woman. Although acknowledging that this disparity did not make the county guilty of discrimination,⁷⁶ the Court concluded that consideration of the sex of applicants for "skilled craft jobs was justified by the existence of a 'manifest imbalance' that reflected under-representation of women in 'traditionally' segregated jobs categories."⁷⁷ In so ruling, the Court emphasized that its holding was limited to the Title VII issue "since we do not regard as identical the constraints of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans."⁷⁸ This ruling contradicted DOJ's view that strict scrutiny is the appropriate standard for review under Title VII for gender-based discrimination, since Congress intended to extend to it the same standard of prohibition afforded against race-based discrimination. According to one newspaper account, some DOJ officials had concluded that the five affirmative action decisions in 1986 and 1987 indicated that DOJ's position has little hope of prevailing with a majority of the current Supreme Court Justices.⁷⁹

⁶⁸ *Id.* at 3051 n.49.

⁶⁹ *Id.* at 3034.

⁷⁰ Bureau of National Affairs, *Daily Labor Report*, July 7, 1986, pp. A-2, A-3, citing Attorney General Edwin Meese and Assistant Attorney General Reynolds.

⁷¹ David Rose, Chief, Employment Litigation Section, Civil Rights Division, DOJ, telephone interview, Jan. 5, 1987. Bureau of National Affairs, *Daily Labor Report*, July 7, 1986, p. A-3. In August 1986, for example, DOJ withdrew its challenge of a consent decree in Indianapolis, Indiana. *United States v. City of Indianapolis*, No. 1P78-388-C, Motion for Withdrawal (U.S.D.C. S.D. Ind., Aug. 4, 1986). Most officials in the communities involved had indicated to DOJ their intention to retain those provisions on the grounds they were not affected by *Stotts*. See, e.g., Robert E. Steele, Jr., attorney, Malory and Steele (for the city of Macon, Ga.), letter to Mark L. Shaffer, Civil Rights Division, DOJ, Apr. 15, 1985, and Grant F. Langley, city

attorney, and Thomas C. Goeldner, assistant city attorney, Milwaukee, Wisc., letter to William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, and Marybeth Martin, attorney, Employment Litigation Section, DOJ, Apr. 18, 1985.

⁷² 107 S. Ct. at 1064.

⁷³ *Id.* at 1067-70.

⁷⁴ 107 S. Ct. at 1064 (quoting *Wygant v. Jackson Bd. of Ed.*, 106 S. Ct. 1842, 1846 (1986)).

⁷⁵ *Id.* at 1071.

⁷⁶ 107 S. Ct. at 1452-53 n.10.

⁷⁷ *Id.* at 1452 (quoting *Steelworkers v. Weber*, 443 U.S. 193, 197 (1979)).

⁷⁸ *Id.* at 1452.

⁷⁹ Stuart Taylor, Jr., "Justice Dept. Aide Under Fire for Comment on High Court," *New York Times*, Mar. 28, 1987, p. 8, citing remarks by Terry Eastland, DOJ public affairs director, and Charles Fried, Solicitor General.

TABLE 3.1
Litigation Activity, 1977-84

	1977-1981	1981-1984
Types of discrimination alleged:		
Pattern or practice	39	35
Individual	2	14
Total	41	49
Race only	4	8
National origin only	0	1
Race/nat'l origin	2	1
Sex only	9	24
Race/sex	13	11
Race/sex/nat'l origin	13	3
Religion	0	1
Total	41	49

Note: During both periods, hiring, recruitment, and promotion, in that order, were the employment practices most commonly alleged to be discriminatory. Since January 1981 eight cases alleged discrimination in benefits: no such cases were filed between 1977 and 1981.

Source: David L. Rose (on behalf of William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, DOJ), letter to Linda Chavez, Staff Director, U.S. Commission on Civil Rights, Oct. 3, 1984 (Enclosures 1 and 2).

Apart from the major change in DOJ policy concerning preferential treatment,⁸⁰ other fundamental elements of the Department's traditional equal employment philosophy and policy appear not to have changed, and the Section is "doing business as usual."⁸¹ No policy change has occurred with regard, for example, to DOJ's emphasis on pattern

⁸⁰ As discussed later in this chapter, the extent to which DOJ policy on race-conscious, preferential treatment, as reflected in its *amicus* positions and official speeches and testimony, has changed, in terms of the actual provisions of its consent decrees, is subject to debate. See n.113.

⁸¹ Turner Interview.

⁸² Remarks before "Fourth Annual Conference on Equal Employment Opportunity: Recent Developments in Federal Regulatory and Case Law," cosponsored by the Federal Bar Association Council on Labor Relations Committee on Equal Employment Opportunity and Bureau of National Affairs Education Systems, Washington, D.C., Oct. 20, 1981, p. 8; see also *The Justice Department's Enforcement of Title VII*, 34 Lab. L.J. 259 (1983) (hereafter cited as Reynolds, *DOJ Title VII Enforcement*), where the Assistant Attorney General maintained that in the "sizeable number of public employment cases already in process either in an investigatory stage or in actual litigation" when he took office, the approach taken "in pursuit of liability. . .has

or practice litigation. According to the Assistant Attorney General:

[W]e have no intention of limiting ourselves to separate lawsuits on behalf of separate individuals. We will, as in the past, bring "pattern and practice" suits against employers engaging in discriminatory practices affecting a substantial number of applicants or employees; and we will seek relief on behalf of all identifiable victims of discriminatory practices—whether they be dozens or hundreds.⁸²

Similarly, DOJ has continued to rely on statistical analyses and the adverse impact principle in determining liability. According to the Assistant Attorney General:

The Supreme Court in *Griggs v. Duke Power Co.* (citation omitted) and its progeny set a clear course to be followed in establishing a Title VII violation. We take those decisions as we find them and apply the law in each case in accordance with outstanding Supreme Court precedents. Both disparate treatment and disparate impact analyses are used in our litigation efforts, and statistical evaluations are a regular part of our investigations and trial preparation.

From this it follows. . .that we look for discriminatory effects in the employment field no less than for discriminatory intent. . . . The Department's litigation strategy in this regard has undergone no change.⁸³

The following section illustrates how DOJ litigation since 1981 reflects both policy change and continuity.

Litigation

Between January 1981 and the end of 1984, the Section filed 49 employment discrimination suits, 8 more than were filed during the previous 4 years.⁸⁴ As table 3.1 shows, 35 of those 49 were pattern or practice suits and 14 were individual suits. Of the 41 suits filed between 1977 and 1981, 39 were pattern or

continued without interruption and on precisely the same terms as urged by my predecessors." 34 Lab. L.J. at 260.

⁸³ Ibid. (footnote and citation omitted). Reagan administration policy continuity in this regard has been opposed by some. See, e.g., Charles L. Heatherly, ed., *Mandate for Leadership, Policy Management in a Conservative Administration* (Washington, D.C.: Heritage Foundation, 1981), p. 449, in which the authors recommended that an Executive order be issued directing that "[n]o 'pattern of discrimination case' may be filed unless there is clear proof of an intent to discriminate based upon substantial evidence other than a) evidence of non-intentional discriminatory impact or b) statistical or census evidence that shows unequal results, unless there is also substantial evidence of discriminatory intent [emphasis in original]."

⁸⁴ Table 3.1. In 1985, DOJ filed 21 new suits, and in 1986, 18 new cases were filed. DOJ, Civil Rights Division, *Enforcing the Law*, Jan. 20, 1981-Jan. 31, 1987, app. IV-B (hereafter cited as *Enforcing the Law*).

practice and 2 were individual cases. Thus, the number of pattern or practice cases filed by the last two administrations is comparable while the current administration has, in addition, increased the number of individual cases filed.

Among the benchmarks used to judge DOJ's performance in the past has been its record in bringing significant cases that established new parameters in civil rights law.⁸⁵ One such "ground-breaking" case cited by DOJ involves Cicero, Illinois, the pilot case in an unprecedented 12-suit program against suburban communities in Cook County, Illinois.⁸⁶

In the *Cicero* case, DOJ alleged that the town, acting through its officials:

with the intent and for the purpose of denying housing to individuals on account of race and color, has refused to participate in the Community Development Block Grant Program, despite the town's status as an entitlement community eligible to receive substantial monetary sums that would have provided the opportunity for a substantial degree of desegregated housing in Cicero.⁸⁷

In addition to the novel Title VIII⁸⁸ allegation, it was alleged in count II that the town discriminated under Title VII:

among other ways, through the maintenance and enforcement of a durational residency ordinance restricting eligibility for municipal employment to those who have resided in Cicero for one year, which has operated in conjunction with other exclusionary municipal policies so

as to effectively ensure that blacks are not employed by the Town of Cicero.⁸⁹

A Federal appeals court remanded the case to the district court for a trial under standards set by the Supreme Court in *Griggs v. Duke Power Co.*,⁹⁰ under which "a plaintiff can make a prima facie showing of racial bias under Title VII if he shows that a facially neutral employment practice has a disproportionate adverse [statistical] impact on blacks."⁹¹ The durational residency requirement, though "facially neutral" in its application to both whites and blacks, was said to impact adversely upon blacks, few of whom live in Cicero. The combination of a Title VII charge with a Title VIII charge is unique to these Chicago-area cases.⁹² DOJ has emphasized the Cook County, Illinois, litigation program as one "aimed at eliminating durational residence requirements," rather than stressing the novelty of the combination of theories in the *Cicero* case.⁹³ DOJ also has filed suit against 15 Detroit, Michigan, suburbs that had "employment practices and profiles" similar to those of the Chicago suburbs.⁹⁴

In another precedent, the Supreme Court agreed with DOJ's argument that Title VII prohibits discrimination by law firms and other voluntary professional associations in partnership decisions.⁹⁵ Apart from its *amicus* role in that case, which involved a female plaintiff, DOJ has increased substantially the number of cases filed involving sex

⁸⁵ *Sequel*, pp. 275-78, and Drew S. Days III, Assistant Attorney General, Civil Rights Division, DOJ (1977-81), interview, July 19, 1984.

⁸⁶ William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, DOJ statement, *Hearings Concerning Civil Rights Authorization for 1987*, Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 99th Cong., 2d Sess. (1986), pp. 12-13 (hereafter cited as *Reynolds 1986 Testimony*). According to DOJ, these municipalities had over 2,300 municipal employees, of which not one was black. *Enforcing the Law*, p. 1.

⁸⁷ *United States v. Town of Cicero*, No. 83-C-014 (N.D.Ill., Jan. 21, 1983 (Complaint, Count I(8)(b)); denial of preliminary injunction, rev'd and remanded, No. 85-2513 (7th Cir. Mar. 20, 1986).

⁸⁸ Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§3601-3619 (1982).

⁸⁹ *United States v. Town of Cicero* (Complaint, Count II (14)).

⁹⁰ 401 U.S. 424 (1971).

⁹¹ Bureau of National Affairs, *Daily Labor Report*, Mar. 27, 1986, p. A-6 (full text of appeals court opinion reported at p. D-1).

⁹² William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, DOJ: letter to Linda Chavez, Staff Director, U.S. Commission on Civil Rights, June 18, 1984; speech at the Church of the Master, Harlem, New York City, Mar. 17, 1984, p. 5.

⁹³ *Reynolds 1986 Testimony*, p. 12. The *Cicero* case led to judicial approval of a consent decree ending the residency requirement. Alexander Ross, special litigation counsel, Civil Rights Division, DOJ, telephone interview, July 7, 1986. It is noteworthy, however, for the current administration to argue that a local government is practicing racial discrimination by its refusal to participate in a Federal program. See *James v. Valtierra*, 402 U.S. 137, 140, 143 (1971), a landmark housing case which held that the Federal legislation does not purport to require that local governments accept public housing. Cf. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 270-71, n.21 (1977), in which the Court noted that proof that a zoning decision was motivated in part by a racially discriminatory purpose would shift the burden to the town to establish that the same decision would have resulted even had that purpose not been considered.

⁹⁴ As of January 1987, decrees had been obtained in four of these suits. *Enforcing the Law*, p. 2.

⁹⁵ *Hishon v. King & Spalding*, 467 U.S. 69 (1984). The Commission considers this decision "a significant step toward securing equality of opportunity for women and minorities in a variety of professions." U.S. Commission on Civil Rights, "Statement Concerning *Hishon v. King & Spalding*," July 11, 1984.

discrimination, as table 3.1 shows. These include the first case⁹⁶ filed by the Federal Government to hold a State government liable for sex discrimination under the Pregnancy Discrimination Act of 1978.⁹⁷ Race discrimination case filings also have increased, as table 3.1 notes.

In another relatively new area of activity, DOJ has acted to address its concern over possible discrimination against minorities, particularly blacks, in the employment of public school teachers in white suburban school districts.⁹⁸ One such case was filed in Pasadena, Texas, a Houston suburb.⁹⁹ Another case in the same suburban area was filed in 1984.¹⁰⁰ DOJ's reliance on statistics in the *Pasadena* case, which DOJ maintains was generally consistent with past practice,¹⁰¹ drew sharp criticism from the defendant employer.¹⁰² (A unique feature of the case was the judge's decision, over DOJ objections, to empanel an advisory jury under rule 39(c) of the Federal Rules of Civil Procedure¹⁰³ to assist the

court in determining the facts of the case.¹⁰⁴) DOJ contends that its use of statistics is consistent with the law and entirely appropriate in attacking employment discrimination in State and local government.¹⁰⁵

A pattern or practice suit brought against Fairfax County, Virginia, in 1978 by DOJ and settled in 1982 was a major settlement and another example of continuity in litigation policy.¹⁰⁶ That action alleged that the county engaged in a pattern or practice of employment discrimination against blacks and women in recruitment, hiring, assignments, and promotions.¹⁰⁷ DOJ offered statistical data and proved significant disparities between what it claimed was the labor pool for females and for blacks, and the defendant's work force, as well as between the applicant pool and the new hires by the county during a 5-year period.¹⁰⁸ DOJ had alleged both disparate impact and disparate treatment through the use of statistical evidence showing a racial and

⁹⁶ *Reynolds 1985 Testimony*, p. 4.

⁹⁷ Pub. L. 95-555, §1, 92 Stat. 2076; 42 U.S.C. 2000e(k) (Supp. 1986). The Commission had complained in 1977 that the Section "did not adequately address the issue of sex discrimination." *Sequel*, p. 272.

⁹⁸ Rose July 1985 Interview.

⁹⁹ *United States v. Pasadena Independent School District*, Civ. A. No. H-83-5107 (S.D. Tex. Aug. 19, 1983). DOJ describes this as a recruitment and hiring case involving a major disparity between the availability of minority teachers and the number hired. George Henderson, staff attorney, Employment Litigation Section, DOJ, telephone interview, May 2, 1986.

¹⁰⁰ *United States v. Spring Branch Independent School District*, Civ. A. No. H-84-2949 (S.D. Tex. July 12, 1984).

¹⁰¹ David L. Rose, Chief, Employment Litigation Section, DOJ, telephone interview, June 19, 1986.

¹⁰² DOJ relied on the work of an expert witness, a labor market economist, to develop a theory of an appropriate labor market for teachers, using school district records of the origins of previous applications to extrapolate race-based applicant pools. Her report includes "applicant flow analyses and external availability analyses," including "gravity models." Janice Fanning Madden, Econ-sult Corporation, "The Hiring of Black Teachers in the Pasadena Independent School District, 1977-84," prepared for the U.S. Department of Justice, Mar. 31, 1986. A defense attorney in the case charges that the methodology DOJ is employing has been altered and confusing, with DOJ numbers "worked up" after filing of its suit, and that the methodology for constructing the "relevant" labor market is still evolving. Carla Cox, Martin, Cox, Greenberg, and Jones, Austin, Tex., telephone interview, Apr. 30, 1986.

¹⁰³ Fed. R. Civ. P. Rule 39(c) (1982).

¹⁰⁴ In February 1987 the advisory jury found the school district had engaged in a pattern or practice of disparate treatment against black teaching applicants and engaged in a "regular business practice" of granting preference to teaching applicants who had previous contact with the school district, a policy that had a disparate impact on black applicants. *United States v. Pasadena Independent School District*, U.S.D.C. S.D. Tex., No. H-83-5107, Feb. 10, 1987, cited in Bureau of National Affairs, *Daily*

Labor Report, Feb. 18, 1987, p. A-4. DOJ called 52 witnesses during the trial, including 30 black applicants who had been denied jobs. *Daily Labor Report*, Feb. 18, 1987, citing David Rose, Chief, Employment Litigation Section, DOJ. The judge in that case accepted the jury's finding and ruled that 29 of the 30 black applicant witnesses had been subject to discriminatory treatment: a comprehensive decree was entered and \$537,000 in backpay awarded. David L. Rose, Chief, Employment Litigation Section (for William Bradford Reynolds, Assistant Attorney General, Civil Rights Division), DOJ, letter to Susan J. Prado, Acting Staff Director, U.S. Commission on Civil Rights, June 22, 1987, p. 2 (hereafter cited as DOJ Comments, Commission Report on Federal Equal Employment Enforcement).

¹⁰⁵ Reynolds Interview; Rose June 1986 Telephone Interview. See also DOJ Comments, Commission Report on Federal Equal Employment Enforcement, in which DOJ stated, "[I]t is settled law that a gross disparity between the racial composition of the qualified and interested labor market and the work force of a particular employer gives rise to an inference of purposeful discrimination. . . while our practice (as illustrated in the *Pasadena* case above) has been to supplement the inference arising from statistics with testimony and other evidence, we could not properly enforce the law if we failed to analyze and utilize relevant statistics which tend to show past discriminatory practices."

¹⁰⁶ Reynolds, *DOJ Title VII Enforcement*, at 260. The backpay award of \$2.75 million obtained on behalf of 685 victims of discrimination "was the largest Title VII recovery in the history of the Department." William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, DOJ, remarks before the Mid-western Meeting, American Bar Association, Equal Employment Committee, Longboat Key, Fla., Mar. 4, 1983, p. 3.

¹⁰⁷ *United States v. County of Fairfax*, 629 F.2d 932, 935-36 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981). 25 FEP Cases 662, 26 EPD ¶31,983 (E.D. Va., 1981) (decision on trial after remand); consent decree entered, Civ. A. No. 78-862-A (E.D. Va. Apr. 29, 1982).

¹⁰⁸ *United States v. County of Fairfax*, 629 F.2d at 937.

sexual imbalance in the county's work force and an adverse impact upon blacks of hiring and promotion tests.¹⁰⁹

The Justice Department's case was vehemently protested by a local official at a Senate hearing and characterized as a "grotesque establishment of statistical guilt in place of real guilt."¹¹⁰ DOJ, however, cited continuity of policy in handling the case and noted that the district court, upon retrial, found that the county had engaged in a pattern and practice of intentional discrimination.¹¹¹

Among the provisions of the *Fairfax County* consent decree were the following:

The defendants shall continue to modify the selection process. . . so as to eliminate adverse impact on blacks or women, or replace those selection procedures with procedures which have been properly validated, within the

¹⁰⁹ *Id.* at 937, 942.

¹¹⁰ John F. Herrity, chairman, Board of Supervisors, Fairfax County, Commonwealth of Virginia, statement, *Affirmative Action and Equal Protection*, Hearings Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 1st Sess. (1981), pp. 475-82 (hereafter cited as Senate Affirmative Action Hearings).

¹¹¹ William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, DOJ, letter to Sen. Orrin Hatch, Sept. 18, 1981, published in Senate Affirmative Action Hearings, pp. 484-85.

¹¹² Consent Decree, Civ. A. No. 78-862-A (E.D. Va. Apr. 29, 1982), p. 3.

¹¹³ "[T]he quest for equal opportunity for those holding [views different from his own]. . . has been turned in a new direction: their insistence is now upon equality of results. Numerical parity, or at least numerical proportionality, has for them become the test of nondiscrimination." Speech at Annual Conference of State Advisory Committee Chairpersons, U.S. Commission on Civil Rights, Washington, D.C., Sept. 12, 1983, p. 7. Further, DOJ maintains that the Fairfax decree language, which, "reflects the defendants' intentions," is "ambiguous" with respect to the term "relevant labor market." According to DOJ, its decrees since early 1982 "have made it clear that the qualified and available labor force is the appropriate standard for comparison, rather than simply the undifferentiated labor force or population. The Division [opposes] proportional representation, but continues to believe that the qualified and interested labor market is a relevant basis for measuring equal employment opportunity." DOJ Comments, Commission Report on Federal Equal Employment Enforcement. Under this definition, a "refinement" of the previous DOJ standard, applicant flow is among the key benchmarks for this measurement. William Fenton, Deputy Chief, Employment Litigation Section, DOJ, telephone interview, June 25, 1987. Meanwhile, the Office of Management and Budget has complained that "the clear concept of discrimination is [being] replaced by complicated numbers games played by lawyers and government administrators." U.S. Executive Office of the President, Office of Management and Budget, *Special Analyses, Budget of the United States Government, Fiscal Year 1986* (1985), p. J-3. Civil rights groups have argued that despite DOJ's "nonquota" remedial policy, its consent decrees, in fact, "are replete with numerical remedies." They maintain that "The numerical provi-

meaning of the *Uniform Guidelines on Employee Selection Procedures* (1978). . . .

The defendants. . . intend. . . to achieve at the earliest reasonable date a workforce which reflects the racial and sexual composition of the relevant labor market.¹¹²

Despite the language in this decree, it should be noted that the Assistant Attorney General has criticized elsewhere the concept of mandating proportional representation in the workplace.¹¹³

Further, DOJ has been concerned with the legal problems that have developed with respect to the use of hiring and promotion tests by employers. In its view, Federal courts have interpreted Title VII so that "no test is valid under the current mode," and the future course of legal development in the

sions contained in [the] decrees include the following: (1) orders specifying that a particular number of rejected applicants will receive preferential hiring treatment, (2) orders setting a numerical *ceiling* [emphasis in original] on the number of persons entitled to 'preferential job offers' that a defendant need actually hire, (3) orders setting specific percentages of blacks, Hispanics, Indians or women that a defendant is required to recruit and 'expected' to hire, (4) orders requiring that the percentage of minorities hired on the basis of a non-job related test shall be the same as the percentage of minorities taking that test." Brief Amicus Curiae of the NAACP Legal Defense and Educational Fund, National Association for the Advancement of Colored People, Mexican American Legal Defense and Educational Fund, National Urban League, Puerto Rican Legal Defense and Education Fund, Asian American Legal Defense and Education Fund, and the New Jewish Agenda at 3-4, Local 93, Cleveland, 106 S. Ct. 3063 (1986). The Fairfax County decree and the decree in *United States v. Nassau County Police*, Civ. A. No. 77-C-1881 (E.D.N.Y. July 13, 1985) were cited as examples of inconsistency or contradiction between DOJ's purported policy and the actual implementation of policy concerning remedial affirmative action. *Id.* at 25-38.

Further, the Leadership Conference on Civil Rights maintained that DOJ's insistence on "color blind" remedies is "belied" by its "own admission of the effectiveness of numerical race conscious goals as measurement devices through [its] acceptance of them for recruitment." Leadership Conference on Civil Rights, *Without Justice, A Report on the Conduct of Justice Department in Civil Rights in 1981-82*, Feb. 1982, p. 43. DOJ maintains it has not sought numerical goals in recruitment "at least since 1982." The agency has reiterated that "Statistics as a reference point for reporting the results of *past* transactions suggests no prospective action tied to numbers (emphasis in original). It is rather but another way to look at the employment decisions already made. Statistics serve as a means of stating certain facts of record that exist or existed, without resort to projections or 'guesstimates' of what a workforce might look like statistically in the future." Further, "the use of [statistical] analyses to prove past discriminatory practices does not compel future racial preferences, nor is such use in any way inconsistent with opposition to such preferences in court ordered remedies and voluntary 'affirmative action' plans." DOJ Comments, Commission Report on Federal Equal Employment Enforcement.

testing area "needs considerable thought and attention."¹¹⁴ DOJ's *amicus* stance in *Connecticut v. Teal*¹¹⁵ is an example of this concern.¹¹⁶

In *Teal*, a written test that was the initial component of the promotion process acted as a barrier to further consideration for those who failed. Black plaintiffs failed the test and alleged that it had a disparate impact upon blacks. Although blacks had a higher failure rate, the employer countered with evidence that the test was only one component of the promotion process, which included past work performance, supervisors' recommendations, and seniority, as well as the State's affirmative action program to ensure that minorities were well represented as supervisors, and that the overall impact of all these components considered together (the "bottom line") was not disparate.¹¹⁷ The Supreme Court ruled that even though the "bottom line" was that blacks were promoted at a greater rate than whites, the unsuccessful blacks who failed the test had established a *prima facie* case of racial discrimination against the employer and the "bottom line" result was not a defense.¹¹⁸

In its *amicus* brief, however, DOJ did not attack the use of disparate impact theory by the plaintiffs. It argued:

[The] burden is properly placed on the [employer] defendant; it is a burden of going forward with evidence. Thus, as a conceptual matter, the "bottom line" theory is best viewed as a defense. Title VII plaintiffs who can show that the test has a disparate impact should not be required to show that the eventual results will also necessarily have such an impact. Once the disparate impact of a test is established, it is reasonable to infer that the process as a whole will have a similar impact. . . .¹¹⁹

¹¹⁴ Reynolds Interview. DOJ seeks a uniform system of test validation for certain jobs such as firefighters and police officers. Rose July 1985 Interview. For an example of how DOJ is achieving research in that direction by litigating against local governments, see David P. Jones and Erich P. Prien, "Review and Criterion-Related Validation of the Nassau County Police Officer Selection Test (NCPOST)" (report prepared in response to Consent Order in *United States v. Nassau County Police*, No. 77-C-1881 [E.D.N.Y. Consent Order filed July 13, 1985]). Over 300 police departments throughout the United States are using tests similar to the one challenged by DOJ in *Nassau*, developed by the Educational Testing Service of Princeton, N.J. 1985 *Reynolds Testimony*, p. 6.

¹¹⁵ 457 U.S. 440 (1982).

¹¹⁶ Reynolds Interview.

¹¹⁷ Brief for United States as *amicus curiae*, pp. 2-5.

¹¹⁸ 457 U.S. 442 (1981). In his dissent, Justice Powell, speaking for four members of the Court, called the result in *Teal*, "a holding inconsistent with the very nature of disparate-impact claims. . . ." *Id.* at 456. Quoting from a court of appeals decision in a previous case, the dissenters stated, "This conclusion should

DOJ's approach in *Teal* embracing traditional disparate impact theory in equal employment opportunity cases further reflects basic continuity in Section litigation policies since the 1981 change in administrations.

Apart from the above cases, which reflect both new areas of DOJ litigation and continuity with past litigation, DOJ claims it is giving greater attention to litigation on behalf of American Indians, citing a recent settlement with Gallup, New Mexico, as an example.¹²⁰ There, the city will provide \$750,000 in backpay and priority job offers to at least 225 American Indians and 3 non-Indian women who were denied jobs by the city.¹²¹ Although the consent decree does not set numerical goals, it states that: "Absent explanation, it is expected that an appropriate recruitment program will attract qualified applicants in numbers which reflect their availability in the relevant labor market."¹²²

Another example of continuity in DOJ litigation involves a case against Whitney National Bank, referred by the Labor Department. In that case, DOJ alleges that the bank has engaged in racially and sexually discriminatory employment practices and has failed to adopt and implement "an affirmative action program consistent with Executive Order 11246. . . ." ¹²³ The case is scheduled for trial in August 1987. The DOJ trial attorney has observed that the Labor Department is the "client" of DOJ in this case and that DOJ is not in a position to negate the Labor Department's affirmative action demands, "even though the Justice Department does not favor numerical requirements."¹²⁴

be as obvious as it is tautological: there can be no disparate impact unless there is [an ultimate] disparate impact." *Id.* at 460 (Powell, J., dissenting, quoting *EEOC v. Greyhound Lines, Inc.*, 635 F.2d 188, 192 (1980)).

¹¹⁹ Brief for the United States as *amicus curiae*, p. 18, n.17.

¹²⁰ Fenton Telephone Interview.

¹²¹ Bureau of National Affairs, *Daily Labor Report*, Mar. 20, 1986, pp. A-3-A-4, citing *United States v. City of Gallup, New Mexico*, No. 83-1395M (D.N.M. Mar. 12, 1986). The decree provides "the most thorough relief and the most back pay for American Indians in any employment discrimination case." *Reynolds 1986 Testimony*, p. 13.

¹²² *Daily Labor Report*, Mar. 20, 1986, p. A-4.

¹²³ *United States v. Whitney National Bank of New Orleans*, Civ. A. No. 82-5111 (E.D. La. Nov. 10, 1982) (Complaint, p. 5, ¶i (2)).

¹²⁴ Robert Moore, Deputy Chief, Employment Litigation Section, DOJ, telephone interview, June 24, 1987. See the following chapter for discussion of Labor Department affirmative action requirements.

A "small handful"¹²⁵ of other litigated cases reflects DOJ departure from, rather than general consistency with, previous agency policy on affirmative action. One example of DOJ's participation in a "reverse discrimination" case growing out of an affirmative action plan is found in *United States v. District of Columbia*.¹²⁶ In this case, DOJ took no position on the proper labor market¹²⁷ or the proper statistical basis for the applicant flow,¹²⁸ but argued that numerical goals used for hiring and promotions violated Title VII by requiring preferences based on race, color, or sex.¹²⁹

The court upheld the hiring aspects of the plan as "minimally acceptable under Title VII and the Constitution," but found the promotional aspects in violation of Title VII in that they unnecessarily trammelled the rights and interests of nonminority firefighters.¹³⁰ The hiring aspects of the affirmative action plan were appealed and subsequently invalidated by a divided panel of the United States Court of Appeals for the District of Columbia Circuit.¹³¹ Ruling that the District did not demonstrate that the race-conscious hiring remedy redressed insidious discrimination,¹³² the appellate court concluded that the District was without authority to implement

such a plan. Key to this appellate court holding was its determination that the relevant labor pool was defined by the Washington metropolitan area (in which 29.3 percent of the population is black) and not the District itself (in which 74.5 percent of the population is black).¹³³ The appellate court also chided the District for its failure to consider non-race-based alternatives, such as validating an entrance examination for firefighters.¹³⁴ DOJ welcomed this ruling.¹³⁵

While eschewing numerical hiring or promotion goals, DOJ has continued to seek and obtain monetary relief for identifiable victims of employment discrimination. Forty-five consent decrees were obtained between 1981 and 1984, compared to 59 decrees obtained between 1977 and 1980.¹³⁶ Between 1977 and 1984, the Section gained over \$15 million in backpay for over 12,000 victims.¹³⁷ Of that amount, \$7,745,899 was obtained between 1981 and 1984 and \$7,700,650 between 1977 and 1980.¹³⁸

Monitoring

The Section has been criticized in the past for failing to monitor adequately the court orders and consent decrees that it has obtained.¹³⁹ Monitoring

¹²⁵ Rose July 1985 Interview.

¹²⁶ The case was consolidated with two other cases, one by black firefighters alleging discrimination, *Hammon v. Barry*, Civ. A. No. 84-0903 (Mar. 22, 1984), and one by white firefighters alleging reverse discrimination in promotions, *Byrne v. Coleman*, Civ. A. No. 85-0782 (Mar. 8, 1985). 606 F. Supp. 1082 (D.C.D.C. 1985).

¹²⁷ *Hammon v. Barry*, 606 F. Supp. at 1091.

¹²⁸ *Id.* at 1092.

¹²⁹ *Id.* at 1086.

¹³⁰ *Id.* at 1099. In March 1985 the fire chief promoted five black firefighters to the rank of sergeant, pursuant to the plan which stated that the fire department should promote the five highest ranking blacks who had not been promoted from the 1982 register. Those promotions were made retroactive to October 1984. The Federal district court said that because "there were several higher ranking whites, these black firefighters would not have been promoted to sergeant but for their race." *Id.* at 1086. Further, "[i]f the plan had a formula whereby the final decision on whom to promote would be based on the individual qualifications and merits of the candidates then it would be more easily acceptable as race would not be the deciding factor. . . ." *Id.* at 1098. The court said the plan to be resubmitted should be prepared "after a thorough investigation into viable alternatives to race-conscious numerical goals or quotas." *Id.* at 1099.

¹³¹ *Hammon v. Barry*, Civ. A. No. 85-5669 (D.C. Cir. Feb. 27, 1987).

¹³² *Id.* at 31 (slip op.).

¹³³ *Id.* at 34-35.

¹³⁴ *Id.* at 38-39.

¹³⁵ DOJ said the decision, issued before the Supreme Court's ruling in *Johnson*, "reflects the strict limits the Supreme Court has placed on the use of racial and gender preferences applied most

recently in their decision in *United States v. Paradise*." DOJ, press release, Feb. 27, 1987. Following *Johnson*, DOJ said the Supreme Court's position in that case "had very little impact" on the firefighters' case, since the latter raised the constitutional standard under the 14th amendment, while the *Johnson* decision was based on the Court's interpretation of Title VII. Robert Pear, "Administration Attacks Affirmative Action Plan," *New York Times*, Apr. 1, 1987, p. A-14, citing the Assistant Attorney General for Civil Rights.

¹³⁶ *Enforcing the Law*, app. IV-D. In 1985, 15 consent decrees were entered and \$5,364,722 in backpay was obtained; in 1985, 22 decrees were entered, and backpay awards totaled \$1,607,469. *Ibid.*, apps. IV-C and IV-D.

¹³⁷ Rose Oct. 3, 1984, letter (enclosure 1).

¹³⁸ *Ibid.* If measured in current dollars, of course, the awards were larger in the 1977-80 period. Apart from its productivity since 1981, as reflected in these various litigation data, the Employment Litigation Section also reports a record of continuing success regarding cases filed. In only one case since 1981 has there been a final loss on the merits. *Enforcing the Law*, p. 3, citing *United States v. Texas Highway Dept.*, Civ. A. No. A-78-287 (W.D. Tex. 1982) (decision denying relief dated Aug. 17, 1982). The Section also lost a Pregnancy Discrimination Act case on a procedural point, although the suit resulted in the victims receiving most of the relief to which they were entitled. *Ibid.*, citing *United States v. Glendale*, Civ. A. No. 84-0682(R) (C.D. Cal. 1984) (filed Feb. 2, 1984; summary judgment entered Apr. 2, 1984). Of approximately 53 suits in which the Section defended Federal agencies during this same period, the Section "has prevailed either procedurally or on the merits in 46; we have lost one such case; and the remaining six are pending." *Ibid.*

¹³⁹ See, e.g., *Sequel*, p. 280.

generally entails regular "informal" review of semi-annual reports that the Section receives from defendants.¹⁴⁰ Each Section attorney monitors his or her own decrees, as the Section has no separate unit to perform this function. A disadvantage of using attorneys to monitor is that conflicts arise between the attorney's competing responsibilities, such as monitoring versus preparation for trial.¹⁴¹

DOJ has noted that "entry of the decree in many cases is only the first step in the process of securing compliance with the law."¹⁴² It also reports that the number of decrees DOJ enforces rose from approximately 85 in January 1981 to 142 six years later.¹⁴³ Examples of recent trials resulting from monitoring of decrees include the San Francisco fire department decree and a decree involving the New Jersey State government.¹⁴⁴ Since 1981, however, the Section has filed fewer motions for supplemental relief under existing decrees than it did between 1977 and 1980.¹⁴⁵

According to DOJ, decrees are generally reviewed after they have been in place for 5 years. The Assistant Attorney General, however, favors their dissolution at that time if they no longer serve a purpose (for example, if all parties agree that the plaintiff is in compliance).¹⁴⁶

Consistent with this policy, DOJ has, since 1981, dissolved more consent decrees at the 5-year mark than it did during the previous 4 years.¹⁴⁷ This may be due, in part, to the fact that the 5-year mark is being reached in many of the existing decrees, and there are more of these decrees in place than previously. For example, in 1974 there were only five public decrees in place (these would have reached the 5-year mark in 1979).¹⁴⁸ In 1980, 100 public decrees were in place that would reach the 5-year mark in 1985.¹⁴⁹

Finally, in connection with monitoring of its settlements, DOJ maintains that there is some

evidence of the effectiveness of strong recruitment measures, as opposed to hiring and promotion goals or quotas. In areas where few minorities and women have been employed in the past, DOJ expects enlarged applicant pools and correspondingly increased employment of those groups.¹⁵⁰

DOJ data indicate instances in which minority and female applicants for positions covered by consent decrees exceeded estimates of their availability in the labor force.¹⁵¹ They indicate that of 81 job categories open in 20 agencies and municipalities included in consent decrees, 37 attracted blacks in greater numbers than estimates of their availability in the labor pool.

DOJ has cited Fairfax County, Virginia, as an example of a jurisdiction where the new policy has been successful.¹⁵² There, in five of six job categories, the percentages of black job applicants have been greater than the percentages in the available labor pool since the consent decree providing for greater recruitment, among other measures, was implemented in 1983. This suggests that blacks will apply for jobs if they are so encouraged. Further, DOJ data indicate that actual hires of black applicants have exceeded estimated availability in three categories.¹⁵³

Similar positive results were reported in other communities. For example, the percentage of black applicants for municipal positions in Little Rock, Arkansas, exceeded their estimated availability in five of seven categories (including police officer). Black applicants for professional positions with the Virginia Highway Department also exceeded their relative availability, as did the percentage of blacks actually hired for those positions.¹⁵⁴ In general, however, DOJ staff agree that the evidence to date of the actual results of "affirmative recruitment" is fragmentary and inconclusive.¹⁵⁵ More research in this area is necessary to determine the effectiveness

¹⁴⁰ Rose August 1985 Interview.

¹⁴¹ Ibid.

¹⁴² *Enforcing the Law*, p. 3.

¹⁴³ Ibid.

¹⁴⁴ *United States v. San Francisco*, C.A. No. 77-2084, N.D. Cal.; *United States v. New Jersey*, C.A. No. 77-2054, D.N.J., as cited in *Reynolds 1986 Authorization Testimony*, p. 15.

¹⁴⁵ The Section filed approximately 33 motions for supplemental relief between 1977 and 1981, while it filed 25 such motions between 1981 and 1985. Employment Litigation Case List, Status of Cases, Employment Litigation Section, Civil Rights Division, DOJ, Aug. 27, 1985.

¹⁴⁶ Rose August 1985 Interview.

¹⁴⁷ Ibid.

¹⁴⁸ David L. Rose, Chief, Employment Litigation Section, Civil Rights Division, DOJ, letter to Linda Chavez, Staff Director, U.S. Commission on Civil Rights, Dec. 17, 1984.

¹⁴⁹ The Reagan administration dissolved 12 decrees, and the Carter administration dissolved 4.

¹⁵⁰ William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, DOJ, letter to Sen. Edward M. Kennedy, June 4, 1985 (hereafter cited as Reynolds to Kennedy Letter).

¹⁵¹ Ibid.

¹⁵² Reynolds to Kennedy Letter; Rose August 1985 Interview.

¹⁵³ Reynolds to Kennedy Letter.

¹⁵⁴ Ibid.

¹⁵⁵ Rose August 1985 Interview; Turner Interview.

of enhanced recruitment as an alternative to preferential hiring and promotion goals and quotas.

Coordination

As discussed in chapter 2,¹⁵⁶ a major characteristic of Federal equal employment enforcement since 1981 has been inconsistency and even open policy conflicts between DOJ and EEOC. DOJ maintains it is responsible for interpreting the law, notwithstanding Executive Order 12067 provisions that place responsibility on EEOC for coordinating the development and enforcement of Federal equal employment policy.¹⁵⁷

Consistent with this position, and with its opposition to the use of goals and timetables, DOJ refused¹⁵⁸ to submit to EEOC an affirmative action plan containing them and intervened on behalf of the United States in *Williams v. City of New Orleans*

against a one-to-one black-white promotional quota in a proposed consent decree.¹⁵⁹

In another continuing dispute, DOJ has disagreed with the Department of Labor (DOL) over the type of affirmative action Executive Order 11246 should require of Federal Government contractors. In this additional highly publicized conflict, DOJ officials support modification of the requirement under the Executive order that Federal contractors prepare affirmative action plans, including numerical hiring goals, and DOL opposes such modifications.¹⁶⁰ The protracted, unresolved disagreements between DOJ and DOL under Executive Order 11246 and between DOJ and EEOC under Executive Order 12067 reflect important policy differences that the President alone can settle. The result of the irresolution to date has been a perceived instability as to civil rights enforcement policy that is at best unseemly and, at worst, a hindrance to effective

¹⁵⁶ See text accompanying notes 306-318.

¹⁵⁷ Exec. Order No. 12,067, 3 C.F.R. 206 (1979) reprinted in 42 U.S.C. §2000e note at 32-33 (1982). DOJ, however, believes it is autonomous vis a vis other agencies in setting its litigation policy. "There is nothing whatever . . . that would . . . require[] . . . the Department of Justice to conform the exercise of its statutory responsibility [under Title VII] to the policies adopted by the EEOC." *NAACP v. Meese*, Order, p. 8, Civ. A. No. 85-1406 (D.C. July 2, 1985). Further, "[t]he Department of Justice is the one that the executive order contemplates quite clearly is going to speak to the legal issues. . . . if [EEOC] policy pronouncements are ones that depend on legal analysis of the question, then it is clearly the Department of Justice that is going to take the lead role in articulating what the legal requirements are." William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, DOJ, interview in Bureau of National Affairs, *Daily Labor Report*, Oct. 19, 1981, p. A-4. The order does, in fact, stipulate that "Nothing in the order shall limit the Attorney General's role as legal advisor to the Executive Branch." Exec. Ord. No. 12,067, §I-502. Further, the Section Chief maintains that the line between law and policy does not really exist and that some people ascribe more to Executive Order 12067 than is warranted. Rose July 1985 Interview. The former Assistant Attorney General for Civil Rights (1977-81) commented similarly that most executive agencies understand that DOJ directly oversees civil rights executive orders and their implementation and that DOJ will always effectively assert actual authority over EEOC whatever the language of the executive order. Days Interview.

¹⁵⁸ See chap. 2, text accompanying notes 314-316.

¹⁵⁹ 729 F.2d 1554 (5th Cir. 1984). See chap. 2, text accompanying notes 308-313, 317, for discussion of the conflicts with EEOC in this case, in *Local 28 of the Sheet Metal Workers v. Equal Employment Opportunity Commission*, 106 S. Ct. 3019 (1986), and also in *Connecticut v. Teal*, in which Supreme Court Justice Brennan, writing for the majority, noted that EEOC, which shares the "responsibility for Federal enforcement of Title VII. . . declined to join" the Justice Department's brief before the Court. 457 U.S. 440, 451, n.11 (1982). In another case, *Bratton v. City of Detroit and Guardians of Michigan*, No. 80-1837,

involving an 8-year-old challenge to an affirmative action plan in use by the Detroit police department, the U.S. Court of Appeals for the Sixth Circuit rejected DOJ's request to intervene as a party, noting that DOJ's "claim. . . lacks much of the weight it might otherwise carry given the conflict between the position the Department has taken here and that taken by others vested with enforcement powers under Title VII, particularly the Equal Employment Opportunity Commission." Order, May 27, 1983, at 3. DOJ's position in *Riverdale v. Rivera*, 106 S. Ct. 2686 (1986) in favor of a proportionality rule for attorneys' fees awards under Title VII, as noted, also conflicted with the position recommended by EEOC. It also generated sharp criticism by some civil rights groups. One representative called it "extraordinarily hypocritical" in that DOJ's approach would undercut private enforcement of Title VII cases when DOJ equal employment litigation represents only a "pittance" of all such litigation nationwide. Barry L. Goldstein, NAACP Legal Defense and Education Fund, telephone interview, Mar. 26, 1987.

¹⁶⁰ See chap. 4 for DOL views in this dispute. See also Robert Pear, "The Cabinet Searches for Consensus on Affirmative Action," *New York Times*, Oct. 27, 1985, p. E-5; Howard Kurtz, "Labor Dept. is Accused of Using Hiring Quotas," *Washington Post*, Mar. 29, 1986, p. A-5. See also Ellen Shong Bergman, former Director, Office of Federal Contract Compliance Programs, Department of Labor (1981-83), interview, July 24, 1984; Reynolds Interview.

enforcement.¹⁶¹ The Chief of the Employment Litigation Section at DOJ is "uncomfortable" that the "administration has not gotten its act together" in a situation in which all of the agencies involved are "uncomfortable."¹⁶²

Management and Administration

Finally, as noted, improved management of Employment Litigation Section and CRD activities generally has been an area of DOJ attention. This section reviews resources available to the Employment Litigation Section since 1980, CRD reorganization, and the administrative problem of a backlog of right-to-sue notices that the Section has addressed in recent years.

Resources

As shown in table 3.2, the Section's FY 87 appropriation provided over \$3.6 million, or almost a 50 percent increase over the Section's FY 80 budget of \$2.5 million and almost three times the Section's FY 78 budget of \$1.2 million: in "real" dollars, however, the Section has experienced stable spending since FY 80.¹⁶³

As table 3.3 indicates, there has been little change in the Section's actual staffing level since 1980, although the authorized staffing level has declined.¹⁶⁴ The two statisticians now included among Section staff prepare regression analyses and compile other statistical evidence for use in litigation. The high quality and experience of staff remain major factors in the productivity of the Section,

¹⁶¹ See chap. 2, text accompanying notes 325-327. See also, e.g., Kim Masters, "Conflict, Confusion Mark U.S. Civil Rights Policies," *Legal Times of Washington*, Jan. 11, 1982, pp. 14-15. An employer organization supporting current Labor Department affirmative action regulations concluded, "[a] major problem that exists in the enforcement area is the lack of a cohesive and comprehensive federal civil rights policy. Employers are getting mixed signals from the various federal agencies with civil rights enforcement jurisdiction." William McEwen, Monsanto Corporation (on behalf of National Association of Manufacturers), testimony, *Affirmative Action*, p. 217. A congressional critic of the Labor Department's policy has complained that "everyone on this subcommittee and probably the public in general is confused because the Administration is acting like the Tower of Babel on these particular areas. . . . I think it would be beneficial to all parties concerned that the matter get resolved—that there be a single cohesive policy of the Administration and that everybody in the Administration enunciate that policy." Rep. James Sensenbrenner, quoted in Bureau of National Affairs, *Daily Labor Report*, Apr. 22, 1986, p. A-3.

¹⁶² Rose July 1985 Interview.

¹⁶³ David L. Rose, Chief, Employment Section, Civil Rights Division, DOJ, Memorandum to Cynthia Graae, Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil

TABLE 3.2
Employment Litigation Section
Budget Totals, FY 1980-88
(In thousands of dollars)

Fiscal year	Appropriation ¹ (annualized)
1980	2,489
1981	2,878
1982	2,622
1983	2,918 ²
1984	3,132
1985	3,255
1986	3,187 ³
1987	3,631
1988 (request)	4,493

¹Figures represent what the Section could have spent during a whole fiscal year under each spending ceiling.

²Section renamed Employment Litigation Section. Figure represents a \$77,000 supplemental increase for step increases and promotions.

³Figure reflects \$67,000 added for salary increases and \$143,000 reduction resulting from the Gramm-Rudman-Hollings budget deficit reduction legislation.

Source: Mildred Fowble, Budget Officer, Employment Litigation Section, Civil Rights Division, DOJ.

according to the Section chief.¹⁶⁵ On the other hand, the number of attorneys actually employed

Rights, "Operations of Civil Rights Division—Employment Section," July 26, 1977, as cited in *Sequel*, p. 258; Rose July 1985 Interview. Using the consumer price index, for example, the Section's appropriation in FY 1980 was \$3.249 million, compared to \$3.255 million in FY 1985.

¹⁶⁴ Freezes on executive branch hiring left authorized positions vacant for lengthy periods between 1977 and 1980. Mildred Fowble, budget officer, Employment Litigation Section, Civil Rights Division, DOJ, telephone interview, Apr. 21, 1986.

¹⁶⁵ Rose July 1985 Interview. See also *Sequel*, p. 262. In addition to Section attorneys, a special litigation counsel and a special assistant work directly for the Assistant Attorney General for Civil Rights on employment cases. Rose July 1985 Interview. In addition, DOJ has introduced microcomputers to support word processing and increased access by CRD attorneys to automated legal data bases such as JURIS and LEXIS. The microcomputers also have improved productivity by automating tabular tasks previously performed manually. Further, CRD has automated its 20-year-old filing system. The Employment Litigation Section has made "extensive use of the . . . growing computer resources in the prosecution of suits; and in the identification of persons harmed by [discrimination], both in contested litigation and pursuant to consent decrees." DOJ, *Annual Report of the Attorney General 1985* (1986), pp. 166, 169.

TABLE 3.3
Employment Litigation Section
Full-Time, Permanent Staff
Positions, FY 1980-88

Fiscal year	Authorized ¹	Actual ²
1980	76	60
1981	75	62
1982	61	61 ³
1983	61	56 ⁴
1984	61	50
1985	61	56
1986	63	58
1987	63	58 ⁵
1988 (request)	63	

¹Number of full-time, permanent staff permitted under congressional budget measures.

²Number of full-time, permanent staff actually employed by the Section.

³Administration budget cuts eliminated 14 authorized positions.

⁴Section renamed Employment Litigation Section. Staff losses attributed to attrition.

⁵As of mid-November 1986. This figure included 30 attorneys (the section chief and 2 deputies, 9 senior trial attorneys, and 18 trial attorneys), 14 paralegal specialists, 2 statisticians, 1 office manager, and 14 clerical staff. In contrast, as of late July 1977, the Section consisted of 42 employees: a chief and 2 deputies (all attorneys); 1 senior trial attorney, 9 trial attorneys, and 11 attorneys; 7 paralegal specialists; and 11 clerical staff members. In addition, there were vacancies for 1 attorney and 1 paralegal specialist. U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—(1977), To Eliminate Employment Discrimination: Sequel (1977)*, p. 258.

Source: Mildred Fowble, Budget Officer, Employment Litigation Section, Civil Rights Division, DOJ.

has decreased from 33 to 30 since FY 80, and a reduction in support positions from 16 to 14 since FY 80 "has pinched" in terms of resource constraints because of the steadily larger volume of material that must be processed in connection with Title VII suits.¹⁶⁶

Overall, although there has been no major cut in resources actually available to the Section since FY

¹⁶⁶ Rose July 1985 Interview.

¹⁶⁷ In addition, the time-consuming process of identifying individual victims of discrimination through correspondence and newspaper advertisements, among other techniques, contributes to the staff workload. William Fenton, Deputy Chief, Employment Litigation Section, Civil Rights Division, DOJ, telephone interview, May 5, 1986. See also *Sequel*, pp. 264-66, 281.

¹⁶⁸ See text accompanying notes 106-112, this chap.

¹⁶⁹ According to DOJ, "The inability to initiate more litigation was partially attributable to the decrease in . . . resources and the greater demands upon them. For example, the second trial in the Fairfax County case involved four attorneys full time during the second quarter of 1981, five attorneys full time during the period June through October 1981, and variously six or seven full time until the case was finally resolved. . . . The equivalent in workyears was even greater, since during most of the first half of

80, a "chronic problem" of the need to "juggle people around"—between preparing major cases and monitoring of other cases, for example—continues.¹⁶⁷ The burden on staff of litigating the major case involving Fairfax County, Virginia,¹⁶⁸ was such that it is questionable whether the Section can afford to pursue such cases in the future without additional staff.¹⁶⁹ On the other hand, the degree of "recalcitrance" to be encountered upon the filing of a suit against a local government is often difficult to predict or to plan for in terms of required resources. The Assistant Attorney General for Civil Rights said that Section staffing is somewhat below the "optimum" level and would, in his view, benefit specifically by the addition of several experts on test validation.¹⁷⁰

Nonetheless, the Section would not receive any more positions under the DOJ budget for FY 88. The substantial increase in funding requested for FY 88 would cover uncontrollable costs (such as pay and rent increases) and also the cost of contracting out more of the Section's data analysis function.¹⁷¹

Reorganization

As part of the CRD emphasis on management, the re-creation of a section dealing solely with employment litigation was part of the 1983 CRD reorganization that aimed at more "clearly defined management channels" and elimination of "some diffusion" of the Division's "thrust and direction."¹⁷² The major change was the disbandment of the existing "unwieldy" General Litigation Section (one of eight sections at the time) and the creation of two new sections, Educational Opportunities and Housing and Civil Enforcement. Litigation responsibility for statutes covering discrimination in municipal services under federally funded programs was transferred from the Federal Enforcement Section to the

1982, the attorneys assigned to the case were working from sixty-five to seventy-five hours per week. While the result [was] the largest back pay award assessed against a state or local governmental unit, the demands on the . . . unit's resources diminished [its] ability" to bring new cases. DOJ, "Spring Planning Call" report (FY 84), p. 54 (hereafter cited as "FY 84 Planning Report").

¹⁷⁰ Reynolds Interview.

¹⁷¹ Mildred Fowble, Budget Officer, Employment Litigation Section, Civil Rights Division, DOJ, telephone interview, Feb. 26, 1987.

¹⁷² William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, DOJ, Memorandum, "Reorganization of the Civil Rights Division," to Kevin D. Rooney, Assistant Attorney General for Administration, DOJ, Sept. 15, 1983.

new Housing and Civil Enforcement Section, with the former unit renamed the Employment Litigation Section and retaining primary responsibility for equal employment litigation. The shift of responsibility for municipal services litigation had minimal effect on the employment litigation efforts of the Section, since it accounted for only a small part of the Section workload. No Federal Enforcement Section resources were transferred to the new Housing and Civil Enforcement Section.¹⁷³

Right-to-Sue Notices

An administrative problem with which the Section has wrestled, apparently successfully, in recent years concerns right-to-sue notices.¹⁷⁴ These notices are important in that they permit a charging party to bring suit against a public agency.

Timely issuance of notices had become a serious problem for the Section. In 1978, for example, of 3,800 cases referred to DOJ for litigation or issuance of right-to-sue notices, the Section processed only 2,300.¹⁷⁵ The following year, right-to-sue referrals amounted to about 5,000, including referrals left over from the previous year, and the Section processed 4,200 that year.¹⁷⁶ In 1980, DOJ received 6,000 referrals and issued about 5,000 notices.¹⁷⁷

¹⁷³ Moore Telephone Interview. The Housing and Civil Enforcement Section now litigates under the Fair Housing Act, 42 U.S.C. §3613 (1982); the Equal Credit Opportunity Act, 15 U.S.C. §1691 (1982); the Housing and Community Development Act of 1974, 42 U.S.C. §5309(c) (1982); the Revenue Sharing Act, 31 U.S.C. §6716; and, Title VI of the Civil Rights Act of 1964 (federally assisted programs) 42 U.S.C. §§2000d—2000d-6 (1982).

¹⁷⁴ See note 37 and section 706(f)(1) of Title VII, 42 U.S.C. §2000e-5 (f)(1) (1982).

¹⁷⁵ DOJ, "Spring Planning Call" report (FY 78), p. 103.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid. DOJ staff said a backlog of notices began to build, in part, because of keypunch errors that led to misfiling of several thousand notices in a computer program. Herbert Goldsmith, attorney, Employment Litigation Section, Civil Rights Division, DOJ, telephone interview, Oct. 23, 1986. More significant, however, was the fact that EEOC referred a very large number of cases to DOJ for issuance of right-to-sue notices during its major effort at the time to reduce its complaint backlog and expedite handling of new complaints. Moore Telephone Interview.

¹⁷⁸ Pursuant to regulations it issued July 21, 1980, EEOC now

A 1980 plan by which EEOC issues notices when it dismisses charges against State and local government units¹⁷⁸ eased DOJ's workload significantly, although the notices issued by EEOC require only automatic or form letter answers while the Section remains responsible for notices requiring more complete, time-consuming responses.¹⁷⁹ In 1981, EEOC referrals fell to 1,250, and the Section processed over 4,000 notices.¹⁸⁰ It issued another 2,750 notices in the early part of 1982, substantially eliminating the backlog that year.¹⁸¹

A new problem arose in 1984 when EEOC decentralized its authority to transmit individual right-to-sue requests from EEOC to DOJ. EEOC's 49 area offices flooded DOJ with incomplete referrals that previously had been filtered through EEOC headquarters,¹⁸² where they were reviewed for completeness. DOJ and EEOC then jointly revised the transmittal procedures and forms, reducing the submission of incomplete transmittals from approximately one-third to fewer than 10 percent.¹⁸³ The Section also stepped up its use of word processors in the issuance of right-to-sue notices. According to DOJ, notices now usually are processed and issued within a week of the receipt of complete information from EEOC.¹⁸⁴

issues right-to-sue letters with regard to all charges filed against State and local government employers when EEOC finds no "reasonable cause" to find a Title VII violation or administratively dismisses the charge. Previously, DOJ issued all such notices. DOJ now is responsible for issuing notices when EEOC has found "reasonable cause," failed in its conciliation efforts, referred the case to DOJ, and DOJ has decided not to bring suit, or where, prior to exhaustion of the charge investigation process, the charging party requests a right-to-sue notice. 29 C.F.R. §1601.28(b) and (d) (1986).

¹⁷⁹ DOJ, "Spring Planning Call" report (FY 83), p. 76.

¹⁸⁰ "FY 84 Planning Report," pp. 54, 56.

¹⁸¹ Ibid., p. 54.

¹⁸² Goldsmith Interview.

¹⁸³ For example, transmittals would be sent to DOJ without required attachments. "FY 86 Budget Request," pp. 176-77.

¹⁸⁴ Ibid., p. 177. In FY 85, the last year for which figures are available, DOJ received 1,190 referrals and issued 1,368 notices, with virtually no backlog remaining. Mildred Fowble, Budget Officer, Employment Litigation Section, Civil Rights Division, DOJ, telephone interview, Apr. 29, 1986.

4. Department of Labor, Office of Federal Contract Compliance Programs

Summary

The Federal contract compliance program has evolved over a 45-year period. After years of ineffective enforcement authority and fragmentation, the entire program was consolidated within the Office of Federal Contract Compliance Programs (OFCCP) in 1978. Top agency priorities since 1981 have been reform of the agency's regulations, management improvements, and elimination of what was considered the basically adversarial approach of OFCCP toward Federal contractors.

With respect to policy, OFCCP's regulatory reform effort, aimed at reducing some reporting and recordkeeping requirements, has failed thus far because of a major unresolved policy dispute within the Executive branch over Department of Labor (DOL) retention of its requirement that goals and timetables be included in written affirmative action plans and also because of contractor opposition to OFCCP retention of its backpay authority. Other regulatory matters, including congressionally mandated development of affirmative action regulations under the Joint Training Partnership Act, are also stalled. The agency recently reversed changes made earlier in the Reagan administration that narrowed OFCCP remedial policy concerning systemic discrimination and also backpay policy. Following confusion and controversy over some oral and written policy communications between OFCCP headquarters and field staff, OFCCP is reviewing the need to put in writing any policies that may still be in question.

In the area of management and administration, the organizational status of OFCCP within DOL continues to be an issue. Leadership turnover in the contract compliance program has been severe, compared to the relatively stable leadership at the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ). OFCCP has sustained significant reductions in resources since 1981, limiting its training program (although it is now launching a major new training program) and financial ability to improve its system for selecting construction contractors for review. Increased productivity standards, however, have led to increased compliance reviews and virtual elimination of a complaint backlog. First-time reviews of contractors and the number of employees covered by compliance reviews have also increased substantially. OFCCP is acting to address serious doubts, shared even by some contractors, about the quality or effectiveness of its compliance reviews.

Although OFCCP continues to find the same rate of violations in its reviews, it has emphasized resolution of those violations short of debarment or administrative enforcement. Debarments and cases referred for enforcement have, in turn, declined sharply, leading to perceptions by critics that enforcement is inadequate. In cases that have proceeded to enforcement, DOL has upheld OFCCP requirements. Class action cases also appear to have declined, although there is a question about the accuracy of the comparative data. Overall financial relief awarded victims of discrimination declined between FY 80 and 86, except for one year, contrary

to trends at DOJ and EEOC. Some enforcement data (e.g., case referrals to the Solicitor and back-pay) showed marked increases during the first half of FY 87. Further, OFCCP recently dropped a requirement it imposed a few years ago that regions send enforcement cases and conciliation agreements to headquarters for review. This should expedite the enforcement process.

In the area of coordination, the prolonged public conflict between DOL and DOJ over affirmative action requirements for Federal contractors has created uncertainty at DOL and among contractors over their compliance obligations. Lack of effective OFCCP coordination with EEOC concerning its regulatory proposals and some policy communications drew sharp complaints from EEOC about inadequate consultations. Intensified programs to encourage liaison groups and recognize contractors for outstanding equal employment efforts have been well received by staff and contractors.

Although the immediate focus of this chapter is OFCCP, related enforcement activities of DOL's Office of the Solicitor are subsumed within this discussion.

Origin and Responsibilities

Executive action to prevent employment discrimination by Federal contractors began with Executive Order 8802,¹ issued by President Franklin D. Roosevelt in 1941. A response, in part, to civil rights protests and demands,² Executive Order 8802 prohibited employment discrimination based on

race, color, creed, or national origin in the defense industry and in the Federal Government. Successive Executive orders strengthened and broadened the coverage of that order. In 1943, for example, all Federal procurement contractors and subcontractors, as well as defense contractors, were added to Executive Order 8802's coverage.³ These orders were administered by committees chaired by the Vice President, who had no authority to enforce them.⁴

In 1961 President Kennedy issued Executive Order 10925, which established the President's Committee on Equal Employment Opportunity and gave the committee authority to debar noncomplying contractors or to terminate their contracts.⁵ The Kennedy order also added a provision requiring for the first time that contractors take affirmative action to ensure nondiscrimination in employment.⁶ In 1963 another Executive order extended coverage of Executive Order 10925 to construction contractors.⁷

In 1965 President Lyndon B. Johnson signed Executive Order 11246, which made the Secretary of Labor, rather than a presidential committee, responsible for administering the program, including developing regulations to implement the order. Responsibility for enforcing the order and its implementing regulations remained, however, with other Federal agencies, which awarded and administered most Federal Government contracts for goods and services.⁸ In 1967 sex was added as a prohibited basis of discrimination by Executive Order 11375.⁹

¹ Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943 Comp.). For accounts of the development of the contract compliance program, see Richard P. Nathan, *Jobs and Civil Rights* (Washington, D.C.: prepared for the Commission on Civil Rights by the Brookings Institution, 1969), pp. 87-89 (hereafter cited as *Jobs and Civil Rights*); U.S. Commission on Civil Rights, *Federal Civil Rights Enforcement Effort* (1971), pp. 45-54 (hereafter cited as *Federal Civil Rights Enforcement*); Barry L. Goldstein, assistant counsel, NAACP Legal Defense and Educational Fund, "The Importance of the Contract Compliance Program: Historical Perspective," May 1981, published in *Oversight Hearings on the OFCCP's Proposed Affirmative Action Regulations*, Hearings Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 98th Cong., 1st Sess. (1983), pp. 453-505 (hereafter cited as "Historical Perspective"); and U.S. Department of Labor (DOL), Office of Federal Contract Compliance Programs (OFCCP) Task Force, "A Preliminary Report on the Revitalization of the Federal Contract Compliance Program" (1977), pp. 1-11 (hereafter cited as "Preliminary Report").

² *Jobs and Civil Rights*, p. 87; Note, *Executive Order 11246: Anti-Discrimination Obligations in Government Contracts*, 44 N.Y.U. L. Rev. 590 (1969).

³ Exec. Order No. 9346, 3 C.F.R. 1280 (1938-1943 Comp.). The order noted that "the successful prosecution of the war demands the maximum employment of all available workers regardless of race, creed, color, or national origin."

⁴ *Jobs and Civil Rights*, pp. 87-89; *Federal Civil Rights Enforcement*, pp. 45-46.

⁵ Exec. Order No. 10,925, 3 C.F.R. 448, 452 §312(d) and (e) (1959-1963 Comp.). The order gave Federal contracting agencies primary responsibility for obtaining compliance with the rules, regulations, and orders of the Committee.

⁶ According to section 301(l) of the order: "The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, or national origin. Such action shall include but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship."

⁷ Exec. Order No. 11,114, 3 C.F.R. 774 (1959-1963 Comp.).

⁸ Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 Comp.), reprinted in 42 U.S.C. §2000e app. at 28-31 (1982 & Supp. I 1983).

Today Executive Order 11246, as amended, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin by firms with Federal Government contracts. It also requires contractors to take affirmative action to ensure that applicants are hired, and that employees are treated during employment, without regard to race, color, religion, sex, or national origin.¹⁰

Regulations implementing the affirmative action obligations of contractors developed over a 10-year period, culminating in what is now commonly referred to as Revised Order No. 4.¹¹ That order applies to contractors employing 50 or more persons and holding a Federal contract or subcontract of \$50,000 or more. It requires such a contractor to conduct a "utilization analysis" of its work force at all its facilities to determine if there are fewer women or minorities in each job group than would reasonably be expected given their "availability" for the jobs in question. If there is "underutilization," the contractor is required to develop goals and timetables to obtain "prompt and full" utilization of these groups.¹² The order also contains the concept of "good faith" efforts by which to judge contractor compliance.¹³ Revised Order No. 4 applies only to nonconstruction contractors.¹⁴

In 1975 the former Office of Federal Contract Compliance (OFCC), established in 1965 within the Labor Department, became the Office of Federal Contract Compliance Programs. This reflected the fact that by then the office was responsible for the

Executive order program and also enforcement of section 503 of the Rehabilitation Act of 1973, as amended,¹⁵ and equal employment provisions of the Vietnam Era Veterans Readjustment Assistance Act of 1974.¹⁶ In 1978, in a major development, President Carter consolidated all contract compliance enforcement responsibilities, shared then by 11 Federal agencies, in OFCCP.¹⁷

Approximately 115,000 nonconstruction and 100,000 construction contractors are covered by the Federal contract compliance program.¹⁸ These contractors include the largest companies in the Nation, employing more than a quarter of the Nation's workers.¹⁹

OFCCP monitors contractor compliance with Executive order requirements through routinely scheduled compliance reviews and through complaint investigations. A compliance review consists of a desk audit of a contractor's affirmative action program; an onsite review to collect facts, including supporting documentation, to make a determination regarding problems identified during the desk audit; and, where necessary, an offsite analysis of information supplied by the contractor during or pursuant to the onsite review.²⁰ If violations, such as failure to develop an affirmative action plan, are found, OFCCP solicits by means of conciliation and persuasion the contractor's agreement to correct them within certain time frames.²¹ If the contractor

⁹ Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970 Comp.). In addition, part I of Executive Order 11,246, which pertained to Federal employment, was replaced by Executive Order 11,478, 3 C.F.R. 803 (1966-1970 Comp.).

¹⁰ Exec. Order No. 11,246.

¹¹ 41 C.F.R. §60-2 (1986). The then-Office of Federal Contract Compliance (OFCC) issued Order No. 4 in 1970 and revised it to add requirements concerning employment of women in 1971. For more information on the development of the affirmative action concept under the contract compliance program, see U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, vol. V, *To Eliminate Employment Discrimination* (1975), pp. 236-44 (hereafter cited as *Vol. V*); "Historical Perspective," pp. 34-43; and "Preliminary Report," pp. 65-69.

¹² 41 C.F.R. §60-2.11 (1986).

¹³ According to the order, for example, "Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work." *Id.* §60-2.12(e) (1986).

¹⁴ Affirmative action requirements for construction contractors are different. Goals for hiring and promotion are included in all solicitations for offers and bids on Federal and federally assisted construction contracts or subcontracts in excess of \$10,000. Goals and timetables are set on the basis of a percentage of hours

worked in the contractor's aggregate work force for each trade. For minorities, goals are based on labor data for the geographic area where the contract is to be performed; for women, a single national goal is in effect (currently, 6.9 percent). Evaluation of contractor compliance is based on implementation of 16 specific affirmative action steps. 41 C.F.R. §§60-4.1, 4.2, 4.3, 4.6 (1986).

¹⁵ 29 U.S.C. §793(a) (1982 & Supp. I 1983) requires Federal contractors to take affirmative action to hire and promote qualified handicapped workers.

¹⁶ 38 U.S.C. §2012(a) (1982 & Supp. I 1983) requires Federal contractors to take affirmative action to hire and promote qualified Vietnam-era veterans and disabled veterans of all wars.

¹⁷ Exec. Order No. 12,086, 3 C.F.R. §230 (1978 Comp.).

¹⁸ Susan R. Meisinger, Deputy Under Secretary for Employment Standards, DOL, letter with enclosures to Linda Chavez, Staff Director, U.S. Commission on Civil Rights, Dec. 20, 1984, vol. I, sec. 1c (hereafter cited by volume and section number as DOL 1984 Response).

¹⁹ Robert B. Collyer, Deputy Under Secretary for Employment Standards, DOL, letter to Linda Chavez, Staff Director, U.S. Commission on Civil Rights, Sept. 28, 1983, p. 1 (hereafter cited as Collyer Letter).

²⁰ 41 C.F.R. §60-60.3 (1986).

²¹ 41 C.F.R. §60-1.20 (1986).

agrees, specific commitments are made in writing to correct deficiencies.²² If the contractor does not agree to correct the violations, OFCCP may institute an administrative enforcement proceeding to enjoin the violations, to seek appropriate relief that may include backpay, and to impose sanctions, such as contract termination or debarment.²³ OFCCP also can refer the matter to the Justice Department (DOJ) for judicial enforcement.²⁴

OFCCP also monitors compliance through its investigation of job discrimination complaints. Complaints alleging discrimination under Executive Order 11246 may be referred to EEOC for disposition under Title VII of the Civil Rights Act.²⁵ Individual complaints are normally referred to EEOC, but OFCCP normally investigates class discrimination complaints. All complaints alleging discrimination because of a handicapping condition or veterans' status also are investigated by OFCCP. OFCCP seeks voluntary compliance with its equal employment requirements through such measures as technical assistance and information exchange.

Organization

As chart 4.1 shows, OFCCP is one of three program units or offices within the Labor Department's Employment Standards Administration (ESA). OFCCP is headed by a Director, who does not require Senate confirmation. The Director currently reports to the Deputy Under Secretary of Labor for ESA. That position also does not require

Senate confirmation.²⁶ As chart 4.2 shows, OFCCP consists of two divisions in its headquarters office,²⁷ 10 regional offices,²⁸ and 59 area offices. The headquarters office develops policy, rules, regulations, and procedures; evaluates regional performance; and directs improvements in the program. The regional offices plan, direct, and administer the program in the regions. As chart 4.2 shows, each regional office is headed by an assistant regional administrator (ARA), who reports to the regional administrator for ESA. The area offices, where 78 percent of OFCCP's staff are located,²⁹ conduct compliance reviews, receive and investigate complaints, and maintain daily contact with contractors, other Federal, State, and local agencies, and organizations representing minorities, women, handicapped workers, and Vietnam-era and disabled veterans.

OFCCP receives support from other DOL units. ESA provides administrative services, such as data processing and copying equipment, personnel, and management services, such as budget and management analysis.³⁰ DOL's Office of the Solicitor provides legal review of all regulations, internal documents (directives, memoranda, and manuals), and external communications that have an effect upon or establish policy. It evaluates cases for enforcement action and handles defensive and enforcement litigation.³¹ Further, the Employment and Training Administration provides assistance to OFCCP concerning a program designed to increase

²² *Id.*

²³ 41 C.F.R. §60-1.26 (1986); Exec. Order No. 11,246, sec. 209(a)(5)(6).

²⁴ *Id.* OFCCP's regulations also give the Department of Justice (DOJ) authority to initiate investigations and civil actions against Federal contractors without a referral from DOL, subject to the approval of the OFCCP Director. 41 C.F.R. §60-1.26(f) (1986). Such referrals have been rare, however. Ellen Shong Bergman, former Director (1981-83), OFCCP, letter to James B. Corey, Office of General Counsel/Civil Rights Evaluation, U.S. Commission on Civil Rights, May 11, 1987 (hereafter cited as Bergman May 1987 Letter).

²⁵ 41 C.F.R. §60-1.24(a) (1986). See also Equal Employment Opportunity Commission (EEOC)-DOL, Memorandum of Understanding in 46 Fed. Reg. 7435-7438 (1981).

²⁶ As discussed later in this chapter, ESA was headed by an Assistant Secretary before 1981. That position was subject to Senate confirmation. DOL recently restored that position and abolished the Deputy Under Secretary position.

²⁷ These are the Division of Program Policy, Planning, and Review and the Division of Program Operations. The former oversees development of program policies, regulations, and procedures and assures their proper clearance and promulgation, and maintains liaison with contractors, public interest groups, and Federal and State agencies concerning policies. It also measures

program accomplishments and effect; compiles, analyzes, and depicts information on program workload and accomplishments; develops long range program recommendations; and provides analytical support for systemic employment discrimination cases. The Division of Program Operations monitors and supports regional compliance activities to assure program uniformity and consistency; provides technical assistance to field staff, contractors, and public interest groups; reviews and evaluates all complaint appeals submitted to the Director for decision; maintains liaison with Federal procurement agencies; and reviews and coordinates all proposed sanction cases involving novel issues and conciliation agreements involving large settlements or novel issues. OFCCP, Order No. 420a2, June 28, 1985.

²⁸ Those offices are: Region I—Boston; Region II—New York; Region III—Philadelphia; Region IV—Atlanta; Region V—Chicago; Region VI—Dallas; Region VII—Kansas City; Region VIII—Denver; Region IX—San Francisco; and Region X—Seattle.

²⁹ OFCCP staff, telephone interview, Nov. 21, 1986. The Deputy Under Secretary for Employment Standards requested that names of OFCCP staff interviewed not be identified in this report.

³⁰ OFCCP staff, telephone interview, Aug. 6, 1985.

³¹ DOL 1984 Response, vol. I, sec. I-2.

CHART 4.1
Employment Standards Administration

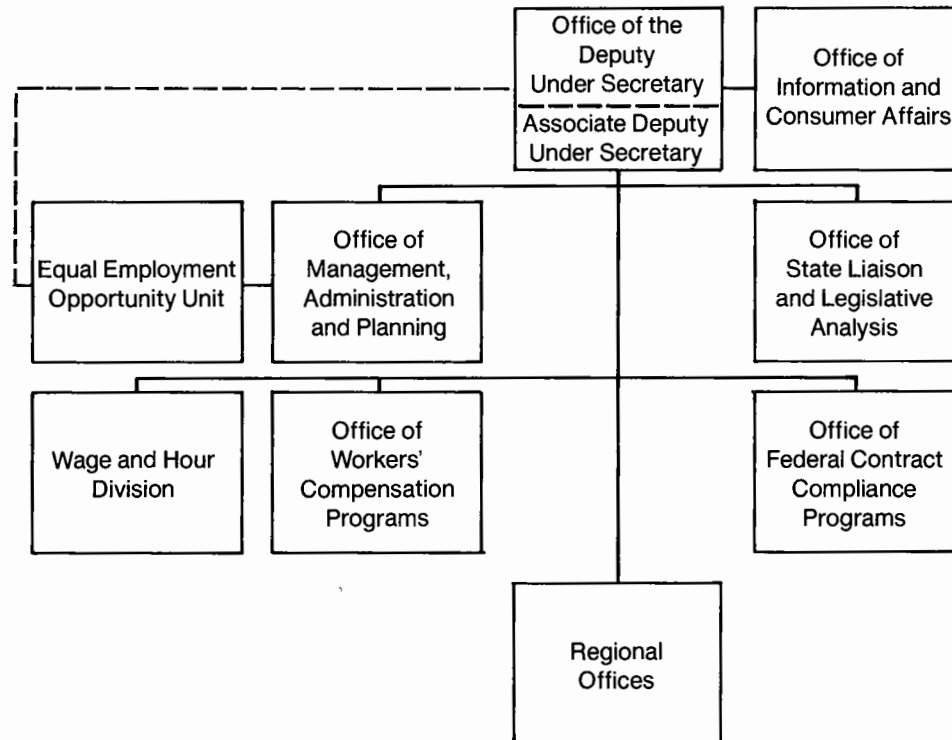
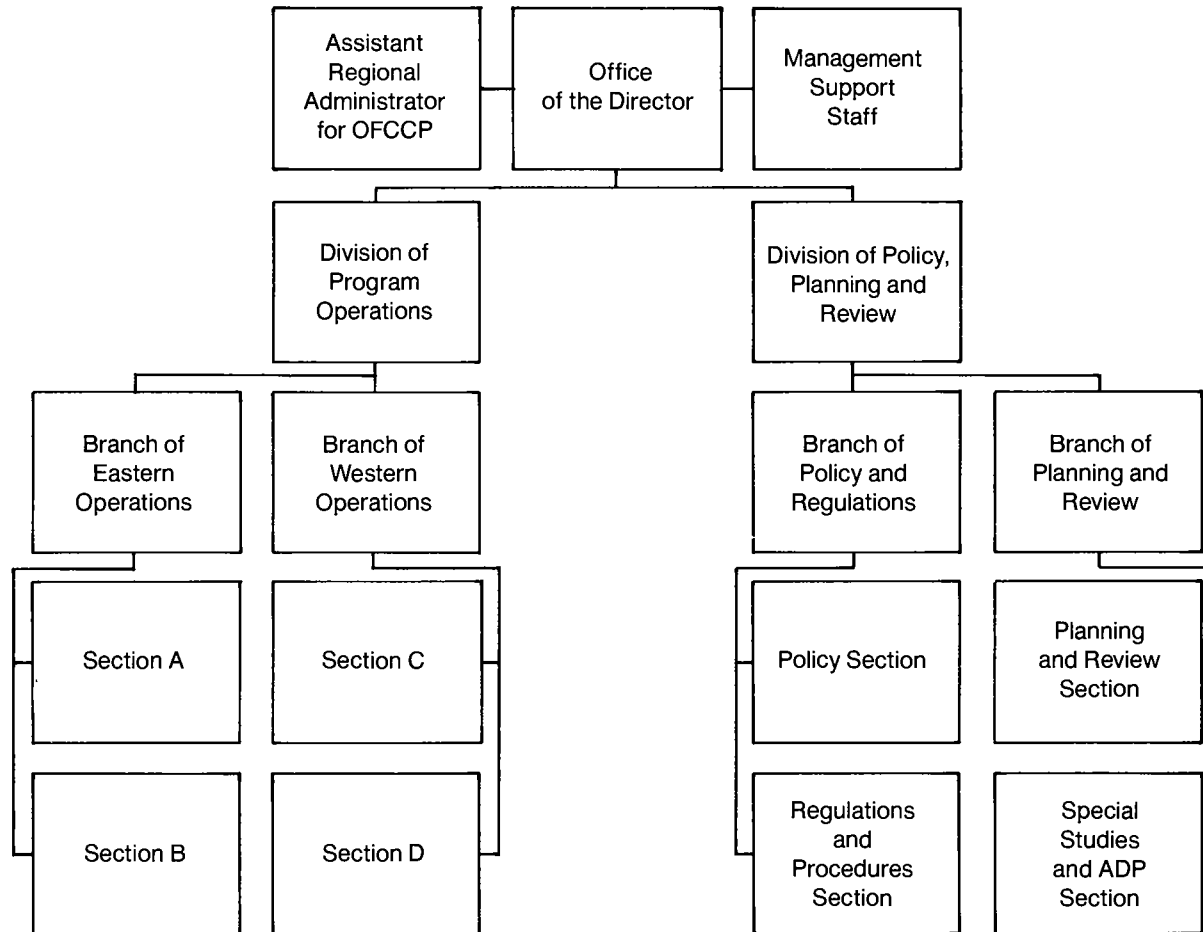


CHART 4.2**Office of Federal Contract Compliance Programs**

Proposed Ultimate Structure



employment opportunities for minorities, women, and handicapped workers.³²

Past Performance

A basic characteristic of the contract compliance program until 1961 was the lack of any enforcement authority.³³ Although Executive Order 10925 filled that void, as of 1965:

The sense of high priority and presidential interest initially communicated to the contracting agencies soon diminished. From the beginning the Committee was beset by internal dissension over the balance to be struck between persuasion, education, promotion of voluntary action, on the one hand, and systematic compliance and enforcement efforts, on the other. The ultimate sanction—contract termination—has never been applied, no hearings have been held, and only a few companies have been put on the list of ineligible for future contracts pending improved performance.³⁴

Other criticisms of the contract compliance program followed the issuance of Executive Order 11246 in 1965 and the establishment of OFCC. These

criticisms have included lack of coordination and consistency among the Federal compliance agencies in enforcement policy and operations, insufficient leadership and direction, failure to afford agency civil rights officials sufficient status or authority to carry out their functions effectively, lack of adequate resources, and failure to assess the effect of equal employment opportunity programs on the employment of minorities and women.³⁵ In 1975 the General Accounting Office (GAO) also found, among other defects, inadequate monitoring of the compliance agencies, a need for improved and timely guidance to those agencies and better training of their personnel, failure to take appropriate enforcement action, and ineffective coordination between DOL and EEOC.³⁶

Other fundamental concerns voiced in the early 1980s included conflicts between Executive Order 11246 and Title VII regarding legal requirements,³⁷ the evolution of an alleged "quota" program under the order,³⁸ and paperwork demands on contractors

³² This program was established in 1979. When a contractor has failed to meet its goals and timetables because of difficulty generating appropriate applicants, OFCCP establishes a linkage between the contractor and ETA-funded delivery agents. The program was expanded in 1984 to include recruitment areas from other organizations, such as Women in Nontraditional Jobs and the Urban League. OFCCP staff interview, May 17, 1985.

³³ U.S. Commission on Civil Rights, *Statutory Reports*, book 3, *Employment* (1961), p. 15; *Federal Civil Rights Enforcement*, p. 46; *Vol. V*, pp. 631-37.

³⁴ Harold C. Flemming, "The Federal Executive and Civil Rights: 1961-1965," in *Daedalus*, Fall 1965, pp. 933-34. See also *Federal Civil Rights Enforcement*, p. 46, which noted that, "Although the order had important potential because of its sanctions, it did not bring about significant changes because its penalty provisions were never employed."

³⁵ See generally *Jobs and Civil Rights*, pp. 86-149; *Federal Civil Rights Enforcement*, pp. 50-85; *Vol. V*, pp. 631-37; "Preliminary Report." See also U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1977, To Eliminate Employment Discrimination: A Sequel* (1977), pp. 61-143 (hereafter cited as *Sequel*). For example, OFCC failed to issue regulations until 2½ years after it was created. The OFCC Director during that period defined affirmative action "vaguely, in terms of undefined results that had to be achieved," the Civil Rights Commission noted. According to the Director in January 1967, "Affirmative action is going to vary from time to time from day to day from place to place, from escalation to escalation. . . . There is no fixed and firm definition of affirmative action. I would say that in a general way, affirmative action is anything that you have to do to get results. But this does not necessarily include preferential treatment. The key word here is 'results.'" Edward C. Sylvester, Jr., in "Report of 1967 Plans for Progress Fifth National Conference," Jan. 23-24, 1967, pp. 73-74, cited in *Federal Civil Rights Enforcement*, p. 51. Eight years later the Commission said OFCC still had not provided "sufficiently clear instructions on the proper development of goals." *Vol. V*, p. 632.

³⁶ U.S. General Accounting Office (GAO), *The Equal Employ-*

ment Opportunity Program for Federal Nonconstruction Contractors Can Be Improved (1975), pp. 7, 13, 16, 27, 38-40. Similar concerns can be found in Samuel W. Washington and William D. Faughnan, "The Old Compliance Ball Game and the New," *Journal of Intergroup Relations* (September 1979), pp. 4-15.

³⁷ See, e.g., *Remedying Discrimination in Seniority Systems: The Conflict Between Title VII and Executive Order No. 11,246*, 59 Tex. L. Rev. 1077 (1981), which noted that Congress exempted bona fide seniority systems from Title VII coverage while OFCCP considered "any seniority system that perpetuates past discrimination open to attack under its authority." See also Brody, *Congress, The President, and Federal Equal Employment Policymaking: A Problem in Separation of Powers*, 60 B.U.L. Rev. 304 (1980), which argued that Executive Order 11246 is unconstitutional in that it operates beyond Title VII boundaries, particularly with regard to affirmative action, to "create a distinct, presidential equal employment policy." For further discussion of this issue and other criticisms, see generally, *Oversight of the Activities of the Office of Federal Contract Compliance Programs of the Department of Labor*, Hearings Before the Senate Committee on Labor and Human Resources, 97th Cong., 1st Sess. (1982), parts 1 and 2 (hereafter cited as *Senate Oversight Hearings*).

³⁸ As noted, DOJ opposes, as preferential treatment for minority males and women, numerical hiring and promotion goals. The Assistant Attorney General for Civil Rights has questioned the validity of this approach under the Executive order in light of Supreme Court decisions, which he maintains emphasize "narrowly tailored" remedies for discrimination. William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, Department of Justice, Speech, "Wygant: A Yes or No to Affirmative Action?" at Bureau of National Affairs and Industrial Relations Research Council conference on "EEO and the Reagan Administration," Washington, D.C., June 6, 1986. He has also argued that ostensible "goals" have been conveyed by OFCCP and implemented by contractors as "quotas," notwithstanding official DOL policy. Robert Pear, "Justice Official Says Data Show Quotas for Jobs," *New York Times*, Mar. 29, 1986, p. 1. In late 1984 the Assistant Attorney General for Civil Rights said that

that some deem excessive, along with undue rigidity and arbitrariness by OFCCP in dealing with contractors.³⁹ In the past, the Commission on Civil Rights and others recommended consolidation of the Title VII program administered by EEOC and the contract compliance program to overcome many of these problems.⁴⁰ The 1978 consolidation of the contract compliance program in OFCCP was an important, although more limited, step in that direction.

Agency Priorities Under the Reagan Administration

Key DOL officials who took office in 1981 believed that the overtly discriminatory employment practices of the past⁴¹ had mostly been eliminated but that job discrimination still existed among Federal contractors.⁴² DOL officials suggested that smaller contractors are more likely to discriminate in hiring because they do not have

the Reagan administration expected to see the definition of affirmative action stripped of any inference of preferential treatment, with the concept defined as equal opportunity rather than equality of results. He added that OFCCP's regulations would be made consistent with his position and would define affirmative action as recruitment and outreach. Bureau of National Affairs, *Daily Labor Report*, Nov. 13, 1984.

³⁹ For example, in 1981 the president of Harvard University cited the "emphasis on extraordinarily elaborate plans that require institutions to spend much valuable time and money that could better be directed to actually trying to achieve concrete results. . . use of detailed statistical analyses to set goals and indicate underutilization, using methods that are dubious, since they rely on seriously flawed conceptions of the potential candidates for faculty positions. . . [f]requent changes in the methodology required for reporting to the government which often accomplish little except to cause further administrative expense and continuous uncertainty. . . and the lack of personnel sufficiently trained to understand affirmative action and the peculiar problems and workings of universities." Derek C. Bok, letter to Arthur S. Flemming, U.S. Commission on Civil Rights, Mar. 16, 1981, published in U.S. Commission on Civil Rights, *Consultations on the Affirmative Action Statement of the U.S. Commission on Civil Rights*, vol. 1, *Papers Presented*, Feb. 10 and Mar. 10-11, 1981, Washington, D.C., p. 267. Another observer maintained that sections of the OFCCP compliance manual published in 1979 were "unclear," have been "applied by agency personnel in an inflexible manner, appear to exceed OFCCP's legitimate regulatory authority, incorporate questionable statistical methodologies, or for a variety of reasons have operated to hinder rather than advance the enforcement process." Jeffrey A. Norris, *Contract Compliance Under the Reagan Administration: A Practitioner's Guide to Current Use of the OFCCP Compliance Manual* (Equal Employment Advisory Council, 1982), p. v.

⁴⁰ See, e.g., U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—A Reassessment* (1973), p. 64; Vol. V, pp. 649-50, and GAO, *Major Federal Equal Employment Opportunity Programs for the Private Sector Should be Consolidated* (1978), pp. iv, 42. GAO said consolidation would resolve "serious problems of overlapping and inconsistency which are caused by

systems in place to prevent it, while in larger companies, discrimination occurs more frequently in the performance appraisal process and promotions.⁴³

These officials agreed with many contractor criticisms of the Executive order program. Their priorities for carrying out the objectives of Executive Order 11246 and other laws included regulatory reform and elimination of unnecessary paperwork burdens on Federal contractors; management improvements, including better use of resources and staff training; improved, more constructive communication with contractors; and increased technical assistance to induce greater voluntary compliance. They also placed priority on reducing a complaints backlog that had grown under the previous administration.⁴⁴ Fundamental policy change was not identified as a priority.

the division of management responsibility" between EEOC and DOL. Ibid., cover letter in report. See also Lawyers' Committee for Civil Rights Under Law, *Comments on Reorganization of Enforcement of Nondiscrimination in Employment* (1977), p. 7, which suggested consolidation.

The Commission subsequently altered its position, concluding that "given recent positive efforts of Federal agencies. . . the creation of a totally new entity at this time might be counterproductive." *Sequel*, p. 333.

⁴¹ Examples include, among others, "racially segregated facilities, union contracts which permitted sons or relatives of white male incumbents to be given preference or exclusive entry rights into skilled trades, and racially discriminatory seniority systems, apprentice selection systems, and on-the-job training programs." Robert B. Collyer, Deputy Under Secretary for Employment Standards, DOL, testimony, *Senate Oversight Hearings*, p. 8 (hereafter cited as Collyer Senate Testimony).

⁴² DOL said recent compliance reviews and complaint investigations had disclosed failure to recruit and hire qualified minorities and women, disparate treatment in promotion and job assignments, concentration of women in lower paying positions as a result of discriminatory placement actions, failure to afford training opportunities to minorities and women and the handicapped, failure to maintain a working environment free of harassment, and hiring qualified minorities and women at salaries below the established minimum for white males. Ibid., p. 9.

⁴³ Ellen Shong Bergman, former OFCCP Director (1981-83), interview, July 20, 1984 (hereafter cited as Bergman Interview); Susan R. Meisinger, Deputy Under Secretary for Employment Standards, DOL, interview, July 29, 1985 (hereafter cited as Meisinger July 1985 Interview).

⁴⁴ Bergman Interview; Robert Collyer, former Deputy Under Secretary of Labor for Employment Standards (1981-83), telephone interview, May 7, 1985 (hereafter cited as Collyer Telephone Interview); Collyer Senate Testimony, p. 11. As for the "equal opportunity philosophy" at DOL, another official said: "[T]he mission of the OFCCP is to ensure that government contractors' affirmative action efforts produce real equal opportunity in the workplace and that the employment of protected

Management and Administration

Leadership Turnover

Leadership at OFCCP has been unstable in recent years, compared to the leadership of DOJ and EEOC. For 5 months in early 1981, four OFCCP senior staff members were assigned the task of running OFCCP until a new Director was named.⁴⁵ The ESA Deputy Under Secretary was appointed in April 1981, but an OFCCP Director was not appointed until June 1981, 5 months after the Reagan administration took office. In 1983 both of these officials resigned, leaving OFCCP without permanent direction until a new Deputy Under Secretary was appointed in February 1984.⁴⁶ (That person also held the position of Acting OFCCP Director for 1½ years, from December 1983 until July 1985.) Meanwhile, Secretary of Labor Raymond J. Donovan resigned in March 1985. A new OFCCP Director was not appointed until after William E. Brock became Secretary of Labor in April 1985.⁴⁷ A substantial amount of administrative work faced the new Director when he took office in July 1985 because there was no full-time Director for 19 months.⁴⁸ He resigned in January 1987, however, again leaving OFCCP without a full-time Director.⁴⁹ At the end of June 1987, the Deputy Under Secretary resigned following the confirmation of the new Assistant Secretary for ESA.⁵⁰

groups does not vary to a major degree from the availability of their qualified, willing members in the work force. . . in the past, the agency has concentrated on form, rather than substance. . . Its enforcement was frequently geared not to contractors' performance but to the process of demonstrating 'compliance'. . . [M]any of the current regulations and previous enforcement strategies not only failed to further the objective of jobs but in fact compelled a focus on form rather than on substance." Lovell, *New Directions for OFCCP*, 32 Lab. L.J. 767-68 (1981). See also Ellen Shong, Director, OFCCP, letter to John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, Mar. 25, 1983. Joseph N. Cooper, who became OFCCP Director in mid-1985, expressed similar objectives. Interview, Oct. 28, 1985 (hereafter cited as Cooper 1985 Interview). See also Cooper, *New Directions Within OFCCP*, 37 Lab. L.J. 3 (1986). Priorities set for FY 89 are very similar. See DOL, ESA, "FY 1989 Program Goals and Objectives."

⁴⁵ These were the Directors of Policy, Program Operations, Program Analysis, and Enforcement Coordination. The Director of Program Analysis was named the coordinator of the group. Doris Wooten, ESA Regional Administrator for Region II, telephone interview, Mar. 26, 1981. This committee of four was not routinely invited to high level DOL meetings to discuss the future direction of the agency. Ibid.

⁴⁶ Susan R. Meisinger served as Acting ESA Deputy Under Secretary until her appointment to the position.

TABLE 4.1
OFCCP Budget Totals, FY 1980-88
(In thousands of dollars)

Fiscal year	Appropriation ¹ (annualized)
1980	\$53,053
1981	49,680
1982	43,150
1983	43,815
1984	46,333
1985	46,630
1986	45,639 ²
1987	47,191 ³
1988 (request)	51,186

¹Figures represent what OFCCP could have spent during a whole fiscal year under each spending ceiling.

²The Balanced Budget and Emergency Deficit Control (Gramm-Rudman-Hollings) Act of 1985 reduced OFCCP's FY 86 appropriation by \$1,962,000. (This reduction is not reflected in the above figure.)

³Amended request.

Source: Office of Federal Contract Compliance Programs, Department of Labor.

Resources

Resources to carry out OFCCP's responsibilities have been cut significantly since FY 80. As table 4.1 shows, OFCCP's appropriation was cut by over \$6

⁴⁷ Secretary Brock appointed Joseph N. Cooper as OFCCP Director on July 26, 1985. The Secretary announced that one of his major priorities was to fill vacant positions within the Labor Department generally. DOL, "Cooper to Head Labor Department Contract Compliance Office," *News*, July 26, 1985. GAO identified the high turnover rate of political appointees in top program management positions as a general problem in a report on DOL. GAO, *Strong Leadership Needed to Improve Management at the Department of Labor* (1984), p. i.

⁴⁸ This administrative work included, for example, review of the Inspector General's report and personnel matters involving job classifications and transfer of some staff from headquarters to the field. Joseph N. Cooper, Director, OFCCP, interview, Aug. 19, 1986 (hereafter cited as Cooper 1986 Interview).

⁴⁹ Mr. Cooper reportedly cited proposed OFCCP staff reductions and policy differences within DOL on affirmative action as reasons for his departure. A DOL spokesman reportedly defended the staff reduction plans and denied the alleged policy differences. Howard Kurtz, "Affirmative Action Official Quits Over Staff Cuts, Lack of Support," *Washington Post*, Jan. 22, 1987, p. A-19.

⁵⁰ The Senate confirmed Fred W. Alvarez, EEOC Commissioner since 1984, as Assistant Secretary on June 19, 1987.

TABLE 4.2
OFCCP Full-Time, Permanent Staff
Positions, FY 1980-88

Fiscal year	Authorized ¹	Actual ²
1980	1,482	1,304
1981	1,482	1,211
1982	1,008	988
1983	979	971
1984	979	997
1985	964	986
1986	935	860
1987	910	840 ³
1988 (request)	860	

¹Number of full-time, permanent staff permitted under congressional budget measures.

²Number of full-time, permanent staff actually employed by OFCCP. Except as noted, figures are for the end of the fiscal year.

³As of April 30, 1987.

Source: Office of Federal Contract Compliance Programs, Department of Labor.

million, from just over \$53 million in FY 80 to \$45.6 million in FY 86. That decline is still greater, of course, when measured in "constant" dollars. OFCCP's FY 88 appropriation request is \$2 million less than the amount appropriated in FY 80 and basically allows for inflationary increases in operating costs.⁵¹ Similarly, as table 4.2 shows, there has been a major reduction (39 percent) in OFCCP's authorized staffing level since FY 80 (and a 31 percent reduction in its onboard staff). The proposed

⁵¹ OFCCP staff interview, May 21, 1987.

⁵² Ibid. Of the 860 positions projected, 500 would remain compliance staff. Ibid.

⁵³ See, e.g., U.S. Commission on Civil Rights: *The Federal Civil Rights Enforcement Budget: Fiscal Year 1983* (1982) pp. 123-25 (hereafter cited as *FY 83 Enforcement Budget*); *Federal Civil Rights Commitments: An Assessment of Enforcement Resources and Commitments* (1983) pp. 113-35 (hereafter cited as *1983 Commission Report*). See also Women Employed, "Damage Report, The Decline of Equal Employment Opportunity Enforcement Under the Reagan Administration," November 1982, p. 12 (hereafter cited as "Damage Report").

⁵⁴ Susan R. Meisinger, Deputy Under Secretary for Employment Standards, DOL, testimony before the House Appropriations Committee, Subcommittee on Labor, Health and Human Services, Education and Related Agencies, Feb. 27, 1986, p. 464 (hereafter cited as Meisinger Budget Testimony). Former OFCCP Director Bergman said that if OFCCP staff can properly review only 3 percent of its compliance universe, that may be enough to do a creditable job, depending on how the reviews are determined. Bergman Interview. In 1975 the Commission found the compliance agencies reviewed approximately 7 percent of the

elimination of 50 authorized positions in FY 88 affects only overhead, not compliance staff positions.⁵²

These sharp reductions have raised questions about OFCCP's ability to monitor adequately its vast contractor universe.⁵³ Since FY 85, OFCCP has been able to review about 3 percent of contractors.⁵⁴ DOL officials, however, have maintained that the reductions have not adversely affected agency operations.⁵⁵ For example, budget pressures have not restricted staff travel for compliance reviews and complaint investigations or for biyearly managerial meetings, for technical assistance to contractors, or for operating OFCCP's management information system.⁵⁶ According to DOL, staffing reductions would be offset by better use of resources and increased productivity.⁵⁷

On the other hand, the resource reductions initially were predicated to a considerable extent on the expectation of a simplified, scaled-down enforcement program to result from regulatory changes.⁵⁸ As will be discussed later in this chapter, those regulatory proposals have been suspended, generally leaving OFCCP with its customary program responsibilities. Although OFCCP appears to have absorbed its budget cuts quite well, those cuts have negatively affected some program needs.

Reorganization

The location of OFCCP within ESA long has been an issue, particularly with regard to budget and support services.⁵⁹ In addition, as chart 4.1 indi-

cates, contractor universe. At that rate, a contractor was subject to review only every 14 to 15 years. *Vol. V*, p. 294. Compliance reviews are discussed more fully later in this chapter.

⁵⁵ Susan R. Meisinger, Deputy Under Secretary for Employment Standards, DOL, testimony before the House Appropriations Committee Subcommittee on Labor, Health and Human Services, Education and Related Agencies, Apr. 11, 1984, and Apr. 1, 1985; Bergman Interview; Collyer Telephone Interview; Meisinger July 1985 Interview; Cooper 1985 Interview.

⁵⁶ OFCCP staff interview, May 17, 1985; OFCCP regional staff interviews: Region I, Boston, Aug. 21, 1984, and Region VII, Kansas City, Sept. 21, 1984.

⁵⁷ Collyer Senate Testimony; Collyer Telephone Interview; Bergman Interview; Meisinger Budget Testimony, pp. 419, 473. A 1985 DOL audit of OFCCP concluded generally that the agency could be more effective at less cost but did not examine the effect of reduced resources on the different specific components of its program. See generally Office of Inspector General, DOL, *OFCCP Can Do More Enforcement and Have Greater Impact Using Fewer Dollars* (1985) (hereafter cited as *OIG Report*).

⁵⁸ *FY 83 Enforcement Budget*, p. 40.

cates, OFCCP field staff report to an ESA regional administrator, not to OFCCP headquarters.⁶⁰ These awkward lines of authority have not been altered, although then-OFCCP Director Cooper agreed with his predecessor during the Carter administration that they hampered his ability to manage the agency.⁶¹ A new congressional committee staff draft report recommends that OFCCP be established as a separate office in DOL, with an Assistant Secretary reporting directly to the President.⁶² This idea warrants consideration, given the above problems.

Another administrative problem that has been addressed, at least in part, was OFCCP's internal organization and structure, which limited productivity and the efficient use of its resources. According to DOL's Inspector General in 1985, OFCCP was organized and structured with excess overhead, large numbers of staff at high grades, an inefficient field structure, duplication and overlap of responsibilities among national office units and between the national office and regional offices, and redundant layers of review.⁶³ In June 1985 the number of headquarters divisions was reduced from four to three to eliminate duplication of functions.⁶⁴ OFCCP's field structure was realigned to provide more effective allocation of staff and to eliminate inefficiencies in the area office supervisory structure.⁶⁵ Excessive staffing generally was addressed

through attrition rather than a reduction in force.⁶⁶ To reduce overhead positions in headquarters, a transfer of headquarters employees to field enforcement positions began.⁶⁷

Overgrading was to be addressed by a position classification plan approved by the Office of Personnel Management.⁶⁸ In 1986 the problem of duplication of functions between headquarters offices was further addressed by consolidating the Divisions of Program Policy and Program Analysis and Review.⁶⁹ Finally, last winter OFCCP redelegated to the field responsibility for most conciliation agreements and enforcement cases. The only conciliation agreements now routinely submitted to headquarters for review are those involving 50 or more discriminatees, \$100,000 or more in financial settlements, or novel issues. The only enforcement cases that must be submitted to headquarters for review are those involving novel issues.⁷⁰

Management Reforms

The 1978 consolidation of the entire contract compliance program within OFCCP was a major administrative undertaking. In 1981, GAO reported that problems related to consolidation concerning staffing and inadequate facilities and equipment had generally been corrected.⁷¹ By that time, OFCCP had, for the first time, an operating manual that

⁶⁰ For example, OFCCP must compete with other ESA programs for limited funds, and "there are few indications that Executive Order 11246 has ranked high on ESA's list of priority programs." "Preliminary Report," pp. 56-57.

⁶¹ Vol. V, p. 257; "Preliminary Report," p. 60.

⁶² Cooper 1986 Interview. The then-Director said that while he had responsibility for the program, he lacked appropriate authority and believed the agency could be more influential with contractors if the position of Director were elevated to Assistant Secretary. See also generally, *Sequel*, pp. 86-92.

⁶³ House Committee on Education and Labor, "Summary of Staff Draft Findings/Recommendations of Investigation of the Civil Rights Enforcement Activities of the Office of Federal Contract Compliance Programs, U.S. Department of Labor," June 3, 1987, p. 7 (hereafter cited as 1987 Congressional Staff Summary).

⁶⁴ These problems may have been partially caused or compounded by the 1978 consolidation. *OIG report*, pp. 1-2. *OIG* recommended, for example, that OFCCP develop policies that encourage and permit decisionmaking at the lowest possible level, place responsibility for casework on the area and field offices, give the area office directors more signature responsibility, and eliminate mandatory forwarding of cases to regional and national offices. *Ibid.*, p. 25.

⁶⁵ OFCCP Order No. 420a2, June 28, 1985. The four divisions were: Program Policy, Program Operations, Enforcement Coordination, and Program Analysis and Review. The Divisions of Enforcement Coordination and Program Operations were merged under the reorganization because their responsibilities often overlapped, and guidance to the field sometimes resulted in inconsistencies.

⁶⁶ DOL 1984 Response, vol. I, sec. 1.4. Susan R. Meisinger, Deputy Under Secretary for Employment Standards, Memorandum, "OIG Report on OFCCP," for J. Brian Hyland, Inspector General, DOL, Feb. 10, 1986 (hereafter cited as ESA Response to *OIG Report*), attachment 1.

⁶⁷ Susan R. Meisinger, Deputy Under Secretary for Employment Standards, DOL, interview, Aug. 1, 1985 (hereafter cited as Meisinger August 1985 Interview). See also Meisinger Budget Testimony, p. 426; ESA Response to *OIG Report*, attachment 2.

⁶⁸ Meisinger August 1985 Interview. There were 24 overhead encumbered positions in headquarters. Three of the staff were voluntarily transferred to the field; 13 retired or left the agency; and OFCCP is seeking placement of the remaining 8 employees in other parts of ESA or the Department. OFCCP staff interview, July 7, 1986.

⁶⁹ ESA Response to *OIG Report*, p. 430.

⁷⁰ *Ibid.*, p. 432.

⁷¹ See OFCCP Directives Nos. 650c8, Dec. 19, 1986, and 650c9, Feb. 24, 1987, which reversed the requirement, imposed by then-OFCCP Director Ellen Shong, that all agreements and cases be submitted to headquarters for review with regard to quality. Some cases were returned to the regions for "more facts." John Fox, former executive assistant to the OFCCP director (1981-83), interview, Sept. 26 and Oct. 25, 1984 (hereafter cited as Fox Interview).

⁷² At the time of consolidation, OFCCP had 206 full-time positions. Some 1,511 positions were transferred to the agency, raising total authorized positions to 1,717. The government-wide

established specific procedures for determining contractor compliance, quality audit procedures to ensure that contractors were evaluated according to the manual, a policy directives system to update the manual and inform staff of developing equal employment issues, a formal skills training program, and an interim automated management information system to provide information on program activities.⁷² Although this was a good start, the program was by no means yet fully operational.⁷³

OFCCP Director Ellen Shong Bergman maintained that cases were taking too long to complete, a backlog of complaints needed to be addressed, and staff had to be held more accountable for their performance.⁷⁴ To address these problems, all managers were instructed to establish a case management system to track and monitor work in progress to ensure that reviews and investigations were completed within required time frames. More stringent performance standards also were established.⁷⁵ The emphasis on increased productivity and

hiring freeze in 1980, however, prevented filling of most vacancies, which included a significant number of key compliance officer positions. Training of transferred personnel was also needed. Edward A. Densmore (for Gregory J. Ahart, Director, Human Resources Division), GAO, letter report, "The Administration of the Contract Compliance Program Has Shown Improvement," to Raymond J. Donovan, Secretary of Labor, Oct. 9, 1981, pp. 6-9 of enclosure 1 (hereafter cited as *1981 GAO Report*).

⁷² Ibid., pp. 9-10. Although the manual was a vital step toward a standardized approach to enforcement, GAO found OFCCP staff were not always following the procedures it contained. Ibid.

⁷³ Bergman Interview. The previous OFCCP Director predicted that, with strong commitment and leadership, it would take 5 years for the program to become effective. Weldon J. Rougeau, former OFCCP Director (1977-81), interview, Feb. 11, 1981 (hereafter cited as Rougeau Interview). A former special assistant to the Director under both administrations agreed there was "plenty of room" for management improvements because the agency did not have time to polish "rough spots" before 1981. Caridad Dominguez, former special assistant to the OFCCP Director (1981-83), telephone interview, June 7, 1985 (hereafter cited as Dominguez Telephone Interview).

⁷⁴ Bergman Interview.

⁷⁵ Ibid. Under the case management system, regional managers monitor all work in progress and ensure that compliance reviews and complaint investigations are completed within required time frames. The system includes "timely identification and resolution of problems which might delay the completion of a particular review or investigation. Requests for extensions are subject to rigorous review." Robert B. Collyer, Deputy Under Secretary for Employment Standards, DOL, statement, *Oversight Hearings on the OFCCP's Proposed Affirmative Action Regulations*, pp. 29-30.

⁷⁶ See, e.g., Samuel Lynn, former assistant regional administrator, New York office, and Claudette D. Hill, former equal opportunity specialist, Chicago office, OFCCP, testimony, *Oversight Hearing on the OFCCP's National Self-Monitoring and Reporting System*, Hearing Before the Subcommittee on Employment

timeliness was interpreted by some staff, however, as more on raising numbers and less on quality.⁷⁶

The case management system, for example, was designed to track only the amount of time cases were taking to complete. New quality audit procedures may be of limited effectiveness, since the auditor most likely would have to repeat the work of the compliance officer to determine, for example, whether an affected class existed but was not identified by staff because of lack of time.⁷⁷ Reduced average hours for completing reviews and investigations,⁷⁸ although claimed by OFCCP staff to be sufficient for a thorough review,⁷⁹ may prompt staff to "beat" the numbers, rather than use as much time as is available.⁸⁰ OFCCP officials have acknowledged this problem, discussed further in subsequent portions of this chapter, and maintain they are addressing it effectively.⁸¹

Opportunities of the House Committee on Education and Labor, 98th Cong., 2d Sess. (1984), pp. 34-35, 136-38 (hereafter cited as *1984 OFCCP Oversight Hearing*). The latter witness testified that "it is incumbent upon [staff] to close a high number of cases to meet or exceed production requirements. Employees . . . are rated on the quantity of cases closed versus the quality of cases closed." Ibid., p. 137. A former OFCCP official warned that new time constraints could make OFCCP a "paper shuffling" program and prevent proper identification and resolution of discrimination. James Cisco, former Director, Program and Policy Division, OFCCP, comments at Bureau of National Affairs and Industrial Relations Research Association Conference on "Equal Employment Opportunity and the Reagan Administration," Washington, D.C., June 2, 1983, cited in *1983 Commission Report*, p. 127, n.31.

⁷⁷ OFCCP regional staff interview, Kansas City, Sept. 21, 1984.

⁷⁸ For example, staff were expected to spend an average of 200 hours to complete compliance reviews of a nonconstruction contractor in FY 81. This was reduced to 190 hours in FY 82; 160 hours in FY 83 and FY 84, and to 155 in FY 85. OFCCP, "FY 81, 82, and 83 Program Plans." The estimated average hours for completing various compliance actions are based primarily upon historical experience and are reassessed annually. DOL 1984 Response, vol. II, sec. II-6e. For FY 84 nonconstruction compliance reviews averaged 124 hours. OFCCP, "FY 84 Review and Analysis Feedback Report," p. 1.

⁷⁹ OFCCP regional staff interviews: Boston, Aug. 21, 1984, and Kansas City, Sept. 21, 1984.

⁸⁰ Bergman Interview.

⁸¹ The then-Acting Director of OFCCP said in 1984, for example, "I am sensitive to the concern that by forcing these performance numbers we could be reducing the quality of our review as well as the depth with which we're conducting our investigations. . . . We are . . . looking at the process by which we do accountability reviews, where we go out and visit the regions to determine if they are, indeed, doing the job according to the instructions" given them. Susan R. Meisinger, testimony, *1984 OFCCP Oversight Hearing*, p. 55.

Staff Training

Most staff transferred to OFCCP in 1978 had varied backgrounds. Before consolidation, some agencies were responsible for contractors in only one industry, and their compliance officers were not knowledgeable about contractors in other industries. Transferred staff had no experience with handicapped and disabled veterans programs. Some staff had limited experience in any contract compliance program.⁸² To address immediate training needs, upon consolidation the agency began training that included a general overview for compliance staff of the contract compliance program and courses in investigative and desk audit skills. Additional plans included a course on how to investigate and gather sufficient evidence to better support litigation by the Solicitor's Office.⁸³

Systemic discrimination training was a priority to the new OFCCP Director, partly because it would focus more staff attention on discrimination, rather than on process or technical deficiencies.⁸⁴ Although OFCCP considered training in employment discrimination law a necessity, such training has

⁸² 1981 GAO Report, pp. 7-8.

⁸³ Ibid., p. 8.

⁸⁴ Bergman Interview. According to the Director, OFCCP staff were "not knowledgeable" about agency regulations and did "not have a clue" as to how to carry out "a proper statistical analysis." Their penchant for strictly "going by the numbers," she said, "loaded the guns" of those who were critical of the program. Ibid. Her successor agreed on the need for such substantive training. Joseph N. Cooper, Director, OFCCP, remarks before College and University Personnel Association, Crystal City Hyatt Hotel, Arlington, Virginia, Feb. 17, 1986, p. 7. Contractors also had suggested that OFCCP personnel be better trained in agency regulations, both on a legal and regulatory basis. See *Committee Analysis of Executive Order 11246 (The Affirmative Action Program)*, prepared by the Senate Committee on Labor and Human Resources 97th Cong., 2d Sess. (1982), pp. 64-65, 79 (hereafter cited as *Senate Committee Analysis*).

⁸⁵ Fox Interview. A training conference on employment discrimination law was held for assistant regional administrators and area office directors in March 1983, but funds were not available for such training for other compliance staff. Ibid. OFCCP managers trained in March 1983 did, however, train their own staffs in turn. Susan R. Meisinger, Deputy Under Secretary, ESA, DOL, letter to Susan J. Prado, Acting Staff Director, U.S. Commission on Civil Rights, June 23, 1987 (hereafter cited as DOL comments, *Commission Report on Federal Equal Employment Enforcement*.) Substantive training in handicap issues in employment also has been provided to all staff. OFCCP staff interview, May 17, 1985.

⁸⁶ The equal opportunity specialist training consists of 16 modules covering both affirmative action and discrimination issues involving the handicap and veterans programs, as well as the Executive order, and provides basic instructions on complaint investigations and compliance reviews. The field manager training will center on a resource handbook on the operational

been limited due to lack of funds.⁸⁵ OFCCP did hold training in legal theories of systemic investigation for all field staff in February 1987, with a followup course on employment discrimination investigative skills to be held by the end of FY 87. Other training also was to be provided in FY 87 and 88 for equal opportunity specialists and first-line managers.⁸⁶

Management Information System

OFCCP has long needed a management information system to track the full range of its compliance and enforcement activity, to identify accurately its contractor universe, to assess the data that contractors are required to report, and to evaluate program results.⁸⁷ At one point, OFCCP cited the lack of such a system as an obstacle to complying with a court order.⁸⁸ OFCCP's management information system consists of various subsystems.⁸⁹ This system, according to DOL's Inspector General, still does not permit the agency to identify adequately its contractor universe, particularly in construction.⁹⁰

responsibilities of first-line OFCCP field supervisors. Other courses will cover OFCCP policy and procedures on construction industry reviews. The investigative skills course will cover such things as techniques in data display, as well as interviewing and conducting opening and exit conferences with contractors. DOL says: "In the long run, we plan to incorporate these and other courses in an 'Academy' whose curriculum will include a full course of continuing study—at basic, intermediate and advanced levels—for compliance officers and the managers of OFCCP." Susan R. Meisinger, Deputy Under Secretary for Employment Standards, DOL, statement before House Committee on Education and Labor, June 4, 1987, pp. 9-11 (hereafter cited as Meisinger 1987 Testimony).

⁸⁷ See, e.g., *Vol. V*, pp. 285-88; *Sequel*, pp. 114-20; "Preliminary Report," pp. 75-76; *Senate Committee Analysis*, pp. 69-70.

⁸⁸ Plaintiffs Women's Equity Action League et al.'s Motion for Order to Show Cause, *Women's Equity Action League v. Bell*, No. 74-1720 (D.D.C. June 24, 1981), *Adams v. Bell*, No. 3095-70 (D.D.C., June 24, 1981), at 14, cited in *1983 Commission Report*, p. 121, n.15. This case is discussed later in this chapter.

⁸⁹ These include, for example: (1) a compliance review information system that monitors results of compliance reviews; (2) a complaint administration system that tracks the processing of complaints and produces various management, operations, and court-ordered reports; (3) a system that provides comprehensive listings of all active Federal contractors and individual contracts (Federal Procurement Data Center data used in conjunction with Dun and Bradstreet data); (4) a litigation support and case analysis system that provides computerized statistical analyses of cases under study by headquarters or regional offices; and (5) an equal employment data system that provides information from EEO-1 forms to the regional and area offices on the EEO characteristics of the nonconstruction contractor universe to be used in selecting contractors for reviews. *1981 GAO Report*, pp. 11-15.

DOL reports new steps to improve both the data base for selecting construction contractors for review and in guidance on the selection process itself. For example, since November 1986, OFCCP headquarters has been reporting monthly to each area office on all ongoing public construction projects in the office's geographic area to provide a more complete basis for selecting construction contractors for review.⁹¹

Further, OFCCP still lacks an effective system for measuring its program results, according to the Inspector General in 1985. Although the agency (and others) cite such items as the number of compliance reviews conducted, the number of contractors provided technical assistance, the number and dollar amount of financial settlements, the number of noncompliance cases litigated, and the number of closed complaints, including those investigated and those closed administratively, to suggest productivity, its "real measure" of success, the

Inspector General suggested, should be the extent to which enforcement efforts "increase the employment and advancement of protected groups among Federal contractors where deficiencies are present."⁹² The Inspector General noted that OFCCP now is attempting to determine how best to develop a results measurement methodology.⁹³

Policy

Since 1981 a major debate over the future of the Executive order program has been waged within the Executive branch. The basic issue is whether OFCCP should continue to require the development by Federal contractors of written affirmative action plans containing numerical hiring and promotion goals to correct any "underutilization" of minorities or women. In fact, despite opposition,⁹⁴ which OMB has shared,⁹⁵ to this requirement, it has remained in place since 1981 with DOL vigorously defending it.⁹⁶ Secretary Brock maintains there

⁹⁰ OFCCP can identify "only a small portion of the construction contractor universe. The lack of information about these contractors results from inadequate reporting requirements, inadequate enforcement requirements, inadequate subcontractor identification efforts and inadequate control over and utilization of existing information. The lack of an adequate construction contractor universe severely limits OFCCP's ability to determine compliance with nondiscrimination and affirmative action requirements within the construction industry." *OIG Report*, p. 30. GAO previously questioned OFCCP's ability to identify accurately its contractor universe. GAO found that OFCCP's system contained inaccurate and untimely data. Even with the use of the Federal Procurement Data System, which also had inaccuracies, the information was not reliable. *1981 GAO Report*, p. 12. Resource constraints delayed development of a needed system for selecting construction contractors for compliance reviews. Cooper 1986 Interview.

⁹¹ Meisinger 1987 Testimony, pp. 14-15.

⁹² *OIG Report*, p. 45.

⁹³ *Ibid.*, p. 46. In 1983, OFCCP released an internal study that reported "significantly greater gains made by minorities and women in the employer establishments which have operated under the stimulus of affirmative action requirements as compared with employers generally who are only prohibited from discrimination." OFCCP, *A Review of the Effect of Executive Order 11246 and the Federal Contract Compliance Program on the Employment Opportunities of Minorities and Women* (1983), p. 33. In 1984, DOL released a study it had funded which concluded that affirmative action under the contract compliance program had led to improved employment opportunities for blacks. Jonathan S. Leonard, *The Impact of Affirmative Action* (1983).

⁹⁴ See generally, e.g., Herman Belz, *Affirmative Action From Kennedy to Reagan: Redefining American Equality* (Washington Legal Foundation, 1984); Ann E. Hagan, Cavanaugh, Hagan and Rossman, "Executive Order 11246 Goals and Timetables Impact on Corporate Employers," paper presented at Bureau of National Affairs and Industrial Relations Research Association conference on "EEO and the Reagan Administration," Washington, D.C., June 6, 1986. According to Lawrence Z. Lorber, OFCCP Director during the Ford administration: "the evolution of the

OFCCP into a major government agency has occurred with a minimum of review either by the Congress or . . . the program administrators. Whether by design or otherwise, the OFCCP has largely exerted a great deal of effort in obliterating the distinction between affirmative action and nondiscrimination, choosing to focus all its efforts on finding employers 'guilty' of discrimination. . . such a singleminded focus significantly distorts that agency's mission and tends to transform the affirmative action obligation into (a) very 'invidious quota.'" Statement in U.S. Commission on Civil Rights, *Consultations on the Affirmative Action Statement of the U.S. Commission on Civil Rights*, vol. II, *Proceedings*, p. 68, Feb. 10 and Mar. 10-11, 1981, Washington, D.C.

⁹⁵ In late 1984, OMB concluded: "The history of . . . [OFCCP]. . . offers stark evidence of how far an agency can 'proceed along the lines of assigning everyone to a group,' when it loses sight of the objective of equal opportunity for all." U.S. Executive Office of the President, Office of Management and Budget, *Special Analyses, Budget of the United States Government, FY 1985* (1984), p. J-14. In late 1985, OMB said: "OFCCP regulations. . . [converted] the worthwhile concept of affirmative action in the public mind into a simple euphemism for quotas. . . and, in effect, into a jobs redistribution program." OMB added, "through 1986, the Administration will work to achieve substantial reforms" in OFCCP's regulations "to correct this approach." U.S. Executive Office of the President, Office of Management and Budget, *Special Analyses, Budget of the United States Government, Fiscal Year 1986* (1985), pp. J-11-J-15.

⁹⁶ Former OFCCP Director Bergman supported the goals requirement and maintained that they are not "quotas" but believed that regulatory changes, management control of staff, greater staff competence and professionalism, and improvements in the administrative enforcement process were imperative. Bergman Interview. Similar views were shared by then-Deputy Under Secretary Collyer and then-Secretary Donovan. Collyer Telephone Interview. Secretary Brock believes that OFCCP affirmative action requirements are effective and have achieved new opportunities for people who have not enjoyed them before. Interview, *USA Today*, Oct. 28, 1985 (hereafter cited as Brock

must be some numerical quantification to measure contractor compliance.⁹⁷

Federal contractors also are divided over the issue of goals and timetables. Large companies tend to support hiring goals and timetables on the grounds that setting goals for minority and female participation is a way of measuring progress and focusing on potential discrimination.⁹⁸ Many of these companies say they would maintain goals and timetables even if not required to under the Executive order.⁹⁹

On the other hand, the Associated General Contractors of America (AGC)¹⁰⁰ and the U.S. Chamber of Commerce believe the order should be changed because employers are forced under the program to make race- and sex-conscious decisions that are, in effect, quotas.¹⁰¹ AGC, which has called for the rescission of Executive Order 11246, also believes that goals put pressure on construction contractors to hire marginally qualified and inexperienced women and minorities.¹⁰² AGC and the Chamber have recommended that the administration revise the order to emphasize the creation of job opportunities for women and minorities through education and skills training rather than "employment quotas."¹⁰³

In addition, some Members of Congress consider Executive Order 11246 a "mainstay of federal efforts to combat discrimination in the workplace" and

oppose any action on the order until there has been a full public review of the issue and an opportunity to assess its potential effect on protected group members.¹⁰⁴ Other Members of Congress favor changing the order. For example, Orrin Hatch, while Chairman of the Senate Committee on Labor and Human Resources, called for a new Executive order that would expressly limit the objectives, scope, and requirements of the program.¹⁰⁵ The new order, in his view, would limit the program to increasing the employment opportunities of qualified minorities and women by focusing on training.¹⁰⁶

In late 1985 the White House Domestic Policy Council¹⁰⁷ deliberated on three options for revising affirmative action requirements of Federal contractors. Those options included:

1. Issue a revised Executive order permitting the voluntary use of numerical goals and timetables so long as they do not discriminate but add language providing that nothing in the order can be interpreted as providing a legal basis for goals.
2. Make no change in the Executive order, but revise Labor Department regulations to prohibit mandatory quotas.
3. Issue a new Executive order explicitly prohibiting the use of mandatory quotas by government

Newspaper Interview). See also the Secretary's remarks at news conference at the NAACP convention, Dallas, Tex., June 24, 1985, transcript, pp. 11, 13-14, and before the National Urban League, Washington, D.C., July 23, 1985, pp. 6-7.

⁹⁷ Brock Newspaper Interview.

⁹⁸ See, e.g., "Why Bosses Like to Be Told to Hire Minorities," *Washington Post*, Nov. 10, 1985; Kenneth B. Noble, "Hiring Goals: A Big vs. Small Business Split," *New York Times*, Mar. 3, 1986; and William S. McEwen, human resources steering group chairman, National Association of Manufacturers, testimony, *Affirmative Action*, joint oversight hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary and the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 99th Cong., 1st Sess. (1986), pp. 213-24 (hereafter cited as McEwen Congressional Testimony). The latter contended that affirmative action has created a diversity in work force participation that has produced new ideas, opinions, and perspectives in management, product development, and marketing.

⁹⁹ A 1984 survey reported that most (95.3 percent) companies contacted said they "would continue to use race and sex specific numerical objectives to track the progress of minorities and women within their organization." George Sape, vice president, Organization Resources Counselors, which conducted the survey, quoted in Bureau of National Affairs, *Daily Labor Report*, Nov. 8, 1985, p. A-5. See also Bureau of National Affairs, "EEO Policies and Programs," PPF Survey No. 141, May 1986, which contained a similar finding, and group interviews with employer members of the Equal Employment Advisory Council, Dec. 7, 1984, and Jan. 28, 1985 (hereafter cited as EEAC Group Interviews).

¹⁰⁰ Hubert Beatty, executive vice president, letter to James W. Cisco, Acting Director, Division of Planning, OFCCP, Sept. 14, 1981 (hereafter cited as AGC Letter).

¹⁰¹ AGC, "Contractors Praise Administration Initiative on Affirmative Action Requirements," *News Release*, Aug. 16, 1985, and Vincent J. Apruzzese, vice chairman, Labor Relations Council, U.S. Chamber of Commerce, testimony, *Affirmative Action and Federal Contract Compliance*, Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 99th Cong., 1st Sess., on Affirmative Action and Federal Contract Compliance (1986), pp. 157-60.

¹⁰² AGC Letter. AGC also believes that goals foment resentment and personal animosity, polarizing the members of the opposite sexes and of different racial and ethnic groups.

¹⁰³ Bureau of National Affairs, *Daily Labor Report*, Nov. 6, 1985, pp. A-10-A-11.

¹⁰⁴ Reps. Augustus F. Hawkins, Chairman, and James M. Jeffords, Ranking Republican Member, House Committee on Education and Labor, letter (cosigned by 106 other Members of Congress) to President Ronald W. Reagan, Sept. 17, 1985.

¹⁰⁵ *Senate Committee Analysis*.

¹⁰⁶ *Ibid.*, recommendations B, C and D, pp. 80-81.

¹⁰⁷ The Domestic Policy Council includes the Secretaries of Education, Energy, Health and Human Services, Housing and Urban Development, and Interior, and the Director of the Office of Management and Budget. It is chaired by the Attorney General. Bureau of National Affairs, *Daily Labor Report*, Oct. 23, 1985, p. A-11.

contractors and make regulatory changes to deal with any abuses.¹⁰⁸

The Council and the Cabinet reportedly remain split on the issue, however,¹⁰⁹ and the administration reportedly decided it would reconsider the proposals following pending Supreme Court decisions.¹¹⁰ In April 1987 the Supreme Court issued its important ruling in *Johnson v. Transportation Agency, Santa Clara County, California*, in which it held that a statistical analysis of the number of women and minorities on payrolls and in particular jobs could be used to justify an affirmative action program, rather than requiring an employer first to admit past discrimination.¹¹¹ According to the Secretary of Labor, the decision "simply affirmed" that OFCCP's affirmative action efforts are "constitutionally right and proper."¹¹²

In other respects, as at EEOC, there has been fluctuation in basic OFCCP policy. Although class actions (affected class cases) would continue, for example, victims of discrimination henceforth would have to be identified, DOL said in 1983:

Any suggestion that we have eliminated, or propose to eliminate class actions, is wrong both in fact and in implication. Now, as in the past, OFCCP investigates and remedies discrimination against classes of persons. . . . However, OFCCP must determine their identities before remedies may be awarded to injured employees or applicants. It simply is not possible to award remedies without knowing the identity of the victim.¹¹³

Further, OFCCP continues to assert its authority under the Executive order to require backpay, although it has modified its backpay policy to make it consistent with Title VII.¹¹⁴ DOL has also defended OFCCP's jurisdiction or scope of authority against legal attacks by some contractors, as this chapter will discuss along with implementation of

OFCCP policies generally. As also will be seen, OFCCP recently has acted to modify or reverse some of the policy directions set earlier during the Reagan administration. The manner in which OFCCP policy has been established, clarified, or communicated to field staff itself has been a major issue, also discussed in this chapter.

Regulatory Reform

OFCCP has failed thus far to achieve one of its top priorities during the Reagan administration, regulatory reform, largely because of the policy conflict over goals and timetables requirements. Major attempts to reform agency regulations were made by the Carter administration. It planned, among other things, to incorporate into one set of agency regulations key provisions of separate regulations relating to the Executive order, veterans programs, and section 503. It further proposed to extend Executive order coverage to businesses having 50 employees and aggregate contracts of \$50,000 or more (compared to existing coverage of contractors with 50 employees and single contracts of \$50,000) and to require contractors to submit annual reports on their affirmative action plans. It also proposed to authorize expedited sanction procedures by requiring backpay awards in appropriate cases. In addition, financial institutions with no government contract other than Federal deposit insurance would have been covered by affirmative action requirements.¹¹⁵ Scheduled for final publication on January 29, 1981, these proposals were suspended just before that date while DOL prepared new ones.¹¹⁶

In August 1981 and April 1982, DOL proposed its changes in affirmative action requirements consistent with the perceived "need to reduce the compli-

not address the constitutionality of the transportation agency's affirmative action plan, confining its discussion instead to the permissibility of the plan under Title VII.

¹¹³ Collyer Testimony in *Oversight Hearings on Affirmative Action Regulations*, pp. 16-17. In early 1987, as discussed further in this chapter, OFCCP again permitted the use of class-wide relief where it could not effectively identify individual victims of discrimination.

¹¹⁴ OFCCP, Order No. 760a1, Mar. 10, 1983 (hereafter cited as *Order 760a1*.)

¹¹⁵ 45 Fed. Reg. 86216-58 (1980). These proposals were controversial among contractors because they "accelerated the growth of OFCCP powers. . . and raised the risks of employer liability and debarment." Kandel, *Current Developments in EEO*, 7 Emp. R.L.J. 490 (1981-82) (hereafter cited as Kandel, *Current EEO Developments*).

¹¹⁶ 46 Fed. Reg. 9084 (1981).

¹⁰⁸ Ibid.

¹⁰⁹ Howard Kurtz, "Affirmative Action Policy Gains A Reprieve," *Washington Post*, Oct. 25, 1985; Robert Pear, "Cabinet Searches for Consensus on Affirmative Action," *New York Times*, Oct. 27, 1985, p. E-5.

¹¹⁰ Bureau of National Affairs, *Daily Labor Report*, Apr. 7, 1987, p. A-1.

¹¹¹ 108 S. Ct. 1442 (1987).

¹¹² *Daily Labor Report*, Apr. 7, 1987, p. A-1. See also Larry Rogers, Associate Deputy Under Secretary for ESA, DOL, letter to Susan J. Prado, Acting Staff Director, U.S. Commission on Civil Rights, July 7, 1987, p. 2 (hereafter cited as DOL July Comments, Commission Equal Employment Enforcement Study), where DOL said: "the debate over goals and affirmative action was largely settled by the U.S. Supreme Court decision in *Johnson*. Goals are now recognized as a legal part of voluntary affirmative action." It may be noted that the Court in *Johnson* did

ance burdens" on contractors "without unnecessarily infringing" on protection of groups covered by equal employment requirements by DOL.¹¹⁷ These initiatives drew little support from anyone. According to OFCCP, DOJ and OMB were dissatisfied with the proposals because they continued to require goals and timetables and because the proposed eligibility determinations went beyond simple applicant flow.¹¹⁸ EEOC criticized various provisions as inconsistent with Title VII.¹¹⁹

Some Members of Congress and civil and women's rights groups thought the proposals relinquished too much enforcement authority.¹²⁰ Employers, although welcoming more flexibility to comply with affirmative action requirements, were unhappy because OFCCP did not disavow its authority to seek backpay.¹²¹ Commission on Civil Rights staff generally supported increasing the dollar threshold coverage level, given inflation; a proposed abbreviated affirmative action plan for some contractors; and the four-factor, rather than eight-factor, analysis

for determining availability. It expressed concern, however, over the "excessive" degree of discretion to be granted contractors in some instances in carrying out their responsibilities and also over OFCCP's apparent failure to evaluate the expected effect of the proposals on minorities and women.¹²² In autumn 1984 the proposals were, in effect, suspended.¹²³

Thus, OFCCP continues to enforce regulations in place since 1976. These regulations are considered burdensome not only by Federal contractors¹²⁴ but also by OFCCP, whose resources, as noted, have been significantly reduced. Nonetheless, at DOL as well as at EEOC, needed regulatory reform has not yet occurred, and it is questionable whether it will during the present administration.¹²⁵

DOL also has failed to meet other important regulatory objectives concerning affirmative action requirements under the Job Training Partnership Act of 1983¹²⁶ and payment of club dues.¹²⁷ The conflict over affirmative action policy has blocked

¹¹⁷ 46 Fed. Reg. 42968 (1981). See also 47 Fed. Reg. 17770 (1982). These proposals included, among other features, elimination of preaward compliance reviews, establishment of 5-year affirmative action plans for contractors who establish approved training programs and meet other eligibility requirements, and raising the threshold requirements for preparation of written affirmative action plans from 50 employees and a contract of \$50,000 or more per year to 250 employees and a single contract of \$1 million or more. They also reduced from eight to four the factors used to estimate availability of minorities and women for employment. The Presidential Task Force on Regulatory Relief listed OFCCP regulations as among Federal regulations that might be excessively burdensome in terms of time and cost of compliance. White House, "Remarks of Vice President George Bush at the Presidential Task Force on Regulatory Relief Briefing," press release, Washington, D.C., Aug. 12, 1981, p. 5.

¹¹⁸ Bergman Interview.

¹¹⁹ Douglas J. Bielan, Acting Director, Office of Interagency Coordination, EEOC, letter to Ellen M. Shong, Director, OFCCP, July 2, 1981 (hereafter cited as Bielan Letter to Shong). See also Clarence Thomas, Chairman, EEOC, testimony, *Oversight Hearings on Affirmative Action Regulations*, pp. 64, 523. Among the areas of EEOC concern were proper burdens of proof, discrimination with regard to pregnancy standards and sexual harassment, and religious accommodation and national origin standards.

¹²⁰ According to one Member of Congress, "These rules obviously are an effort . . . to dilute and rely on the good will of certain industries and certain employers." Rep. Julian C. Dixon, testimony in *Oversight Hearings on Affirmative Action Regulations*, p. 75. See also *Report on Affirmative Action and the Federal Enforcement of Equal Employment Opportunity Laws*, Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 97th Cong., 2d Sess. (1982), and *Staff Report on the Department of Labor's Proposed Final Affirmative Action Regulations*, Subcommittee on Employment Opportunities of the House Committee on Education and Labor (1983), which were critical of DOL's proposals. According to the latter: "the

net effect of the . . . proposed regulations would be severe damage to the gains made in equal employment opportunity during the past twenty years" (p. 19). See also testimony of Muriel Morisey, American Civil Liberties Union; Arkie Boyd, Women's Legal Defense Fund; Barry L. Goldstein, NAACP Legal Defense and Education Fund; and Antonia Hernandez, Mexican American Legal Defense Fund, opposing the regulations. *Ibid.*, pp. 82-95; 98-104; 108-43; and 170-81, respectively. See also Ronfeldt and Galloway, *Nullifying Affirmative Action Through Deregulation*, 16 U. Cal. D.L. Rev. 10 (1982).

¹²¹ George Sape, Organization Resources Counselors, testimony, *Hearings on Affirmative Action Regulations*, p. 236. See also *Proposed Changes to OFCCP Regulations on Back Pay, Job Groups, and Availability*, 9 EEO Today 188 (1982) and Callet, *The OFCCP Raises the Back-Pay Issue Again*, 9 EEO Today 223 (1982); Bergman Interview; Collyer Telephone Interview.

¹²² John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, letter to Ellen Shong, Director, OFCCP, May 24, 1982.

¹²³ Bergman Interview; Collyer Telephone Interview.

¹²⁴ EEAC Group Interviews; McEwen Congressional Testimony.

¹²⁵ DOL, in commenting on this chapter in draft, said "there is still time to achieve this goal" during the Reagan administration and noted that a new staff proposal has been prepared and submitted to DOL policymakers. DOL July Comments, Commission Equal Employment Enforcement Study, p. 2.

¹²⁶ Under this act contractors subject to the affirmative action obligations of the Executive order may establish or participate in training programs designed to assist contractors in meeting their affirmative action obligations. Contractors that have such training programs need only maintain an abbreviated affirmative action program. 29 U.S.C. §1781 (1982). No regulations have been proposed to implement this law, despite the fact that Congress, in the act itself, required OFCCP to issue regulations "setting forth how [it] will determine, during a compliance review, the degree to which a training program will satisfy the contractor's affirma-

OFCCP activity on some of those regulatory matters as well.¹²⁸

Informal Policymaking

Some changes in policies and procedures, and the manner in which they were communicated by OFCCP headquarters to field staff, have led to confusion and controversy. Previously, OFCCP's primary method for conveying policy or procedural changes was through the public comment process required by the Administrative Procedure Act¹²⁹ if the change was to its regulations, or through internal policy directives if the change was in policy. Although DOL recognized the importance of its internal policy directives system,¹³⁰ it wanted to expedite communication between headquarters and the field so that new priorities or emphases could be conveyed faster.¹³¹

However, new OFCCP policy directives, oral and written, created concern and confusion among staff and contractors. For example, in November 1982, OFCCP's regional managers were told, via tele-

phone, not to require or to accept affirmative action plans with goals exceeding availability unless there were identifiable victims of discrimination who would be made whole through hire, promotion, or reinstatement, in addition to selection goals established because of underutilization.¹³² The instruction raised a number of questions for OFCCP staff and contractors, who learned of it through the media or other non-OFCCP sources. It was not clear, for example, whether contractors would be held in noncompliance if they chose to keep higher goals. Some contractors also considered the new requirement rigid because it would not allow them quickly to correct statistical deficiencies.¹³³ The policy was clarified later to mean that contractors could continue to set annual goals higher than availability if they chose, but OFCCP could not require them to do so.¹³⁴

OFCCP also issued a written directive on timeliness of actionable discrimination and legal principles regarding burdens of proof that had been included in the proposed regulations but not yet finalized.¹³⁵

ative action obligations." *Id.* at 1781(b)(2). DOL says draft proposed regulations have been forwarded to DOL officials for review. DOL July Comments, Commission Equal Employment Enforcement Study, p. 4.

¹²⁷ Proposed final rules published on Jan. 16, 1981, the eve of the Reagan administration, would have made it a violation of the Executive order for Federal contractors to pay membership fees or other expenses for employees to join an organization that limits membership on the basis of race, color, religion, sex, or national origin. 46 Fed. Reg. 3892 (1981). In late March 1981, DOL proposed to withdraw this regulation on the grounds that Executive order requirements were sufficient "to prevent an employer from using such memberships to structure the conduct of its business in a manner which seeks employment discrimination." 46 Fed. Reg. 1904 (1981). The Commission had supported the proposed regulations. Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, letter to Raymond J. Donovan, Secretary of Labor, Mar. 17, 1981. No DOL final action has been proposed since then.

¹²⁸ According to DOL: "Due to the complexities of coordinating the operational aspects" of the Job Training Partnership Act regulations with the affirmative action proposals, the congressional deadline of October 1983 for regulations under the act "has not been met." U.S. Executive Office of the President, Office of Management and Budget (OMB), *Regulatory Program of the United States Government, Apr. 1, 1985—Mar. 31, 1986* (1985), p. 261. The handicap proposals were incorporated into the 1981 affirmative action proposals, so they too have been suspended. See also OMB, *Regulatory Program of the United States Government, Apr. 1, 1985—Mar. 31, 1987* (1986), p. 243, which reiterated the same point a year later.

¹²⁹ 5 U.S.C. §552 (1982 & Supp. I 1983).

¹³⁰ OFCCP Director Bergman established a task force to determine the extent to which policies and procedures were consistently applied by OFCCP field staff. The task force found that guidance was not getting to compliance officers quickly enough and that headquarters direction was often reinterpreted at

various levels, causing inconsistencies. The task force recommended that the system be modified so that regional and area offices would receive policy directives simultaneously, thus improving communication, establishing uniform interpretation, and allowing rapid implementation. John C. Fox, executive assistant to the Director, "Final Report: Field Enforcement Task Force," Jan. 14, 1983 (hereafter cited as "Field Enforcement Task Force Report"). See also Collyer Testimony, *Oversight Hearings on Affirmative Action Regulations*, pp. 34-35.

¹³¹ Collyer Telephone Interview.

¹³² Bennie L. Daugherty, Jr., Assistant Regional Administrator, OFCCP, memorandum for Area Office Directors, Kansas City, St. Louis, and Omaha, "AAPs and Availability," Nov. 24, 1982, referring to statement by Ellen Shong, Director, during telephone conference call; Jay F. Sauls, former Acting Regional Administrator, Region V, OFCCP, testimony in 1984 OFCCP Oversight Hearing, p. 39; OFCCP regional staff interviews, Aug. 31, 1984, and Sept. 21, 1984. According to one commentator, this meant, for example, that in the required affirmative action plan, yearly percentage goals for hiring blacks could not exceed the proportion of blacks in the work force available to do the job. DOL also said formal affirmative action plans could not contain long range hiring goals. Since there are only a limited number of job openings each year, most companies would have to exceed the availability level to achieve their affirmative action goals within a reasonable time. Robert S. Greenberger, "Federal Shift in Hiring Rules Stirs Criticism," *Wall Street Journal*, Mar. 5, 1983 (hereafter cited as *Wall Street Journal*, Mar. 5, 1983).

¹³³ *Wall Street Journal*, Mar. 5, 1983.

¹³⁴ Robert B. Collyer, Deputy Under Secretary for Employment Standards, DOL, letter to Clarence M. Pendleton, Jr., Aug. 25, 1983 (hereafter cited as Collyer Letter to Pendleton).

¹³⁵ Order 760a1. This directive discussed OFCCP policy concerning development of discrimination cases, a systematic method to be followed in investigating possible job discrimination, and the required ingredients of an employment discrimination case.

The Chairman of the Commission on Civil Rights questioned the directive on several grounds.¹³⁶ DOL responded that there was a misunderstanding as the result of incorrect news media reports.¹³⁷ A year after the Chairman's inquiry, DOL was reviewing the directive, which "clarified" OFCCP nondiscrimination standards, and had discussed it with EEOC, but had not decided on any revisions.¹³⁸ Finally, in January 1987, OFCCP rescinded the March 1983 order.¹³⁹ It issued a new written directive covering such matters as the levels of statistical significance required in class cases, liability periods, and remedies.¹⁴⁰ OFCCP also issued a new directive in early 1987 that brought the agency back to use of formula relief.¹⁴¹ These policy directives have been welcomed by some Members of Congress and civil rights groups.¹⁴²

DOL concedes that its communication of policy may have caused confusion initially.¹⁴³ Then-

Among other things, it made clear that once employer liability has been established, individual victims must be identified to determine properly a remedy. Formula or pro-rata backpay settlements were unacceptable because they provide "windfall recoveries to persons who, but for discrimination, would not have received the job (or pay in question) while the actual victims who suffer injury do not receive a complete remedy." It also noted that statistical differences inferring discrimination must be "gross and longstanding" to establish an intent to discriminate, with five or six standard deviations offered as a possible measure of "gross" disparities. (This standard subsequently was dropped, however, with OFCCP returning to the more conventional two or three standard deviation analysis.)

¹³⁶ Clarence M. Pendleton, Jr., Chairman, U.S. Commission on Civil Rights, letter to Robert Collyer, Deputy Under Secretary for Employment Standards, DOL, July 12, 1983. See also Linda Chavez, Staff Director, U.S. Commission on Civil Rights, letter to Susan R. Meisinger, Deputy Under Secretary for Employment Standards, DOL, July 11, 1984. The Chairman noted that a provision that OFCCP would not attempt to remedy any act of discrimination that occurred more than 2 years before OFCCP notified a contractor that the agency intended to review its compliance with affirmative action requirements appeared to alter policy in OFCCP's compliance manual permitting a 3-year recovery period with respect to backpay. The change was consistent, however, with Title VII, section 2000e-5(g) (1982) of which limits backpay to a period of 2 years before the filing of a complaint. The Commission has said that "generally established Title VII standards... should form the core of the Federal Government's equal employment opportunity policies." *Sequel*, p. 334. Further, OFCCP staff said that this section of the compliance manual had never been implemented, in fact. OFCCP staff telephone interview, July 6, 1987. The Chairman also said principles in the directive concerning burden of proof and remedies for discrimination had been "rejected repeatedly" by courts in Title VII cases. He also expressed concern, with regard to this directive and the oral one of late 1983, that OFCCP appeared to be implementing policy changes without prior consultation with EEOC, as well as contradicting policy stated in its regulations and/or compliance manual.

¹³⁷ Collyer Letter to Pendleton.

¹³⁸ Susan R. Meisinger, Deputy Under Secretary for Employ-

ment Standards, DOL, letter to Linda Chavez, Staff Director, U.S. Commission on Civil Rights, Sept. 10, 1984.
¹³⁹ OFCCP Order No. 640a2, Jan. 20, 1987.
¹⁴⁰ OFCCP Order No. 640a5, Feb. 23, 1987.
¹⁴¹ OFCCP said that "formula relief should be pursued where it is impossible or impractical to determine individual relief; that is, where the number of persons actually victimized by discrimination is so large that case-by-case determinations would be unduly burdensome, and/or where reconstruction of the employment decisions that, absent discrimination, would have been made involves mere speculation." Court decisions, notably *Pettway v. American Cast Iron Pipe Co.*, 498 F.2d 211, 7 FEP Cases 1115 (5th Cir. 1974), *cert. denied*, 439 U.S. 115 (1979), were cited in support of this position. OFCCP Order No. 660c7, Jan. 15, 1987.
¹⁴² See, for example, statement of Rep. Augustus F. Hawkins (D-Calif.), p. 2, 1987 Hearings on OFCCP; Nancy Kreiter, Women Employed, testimony before House Education and Labor Committee, June 3, 1987, p. 8 (hereafter cited as Kreiter Testimony), which indicated satisfaction that a new systemic manual for OFCCP staff and the new directives "reinstate the enforcement policies that this Administration earlier abandoned."
¹⁴³ Bergman Interview; Collyer Telephone Interview. OFCCP staff stress the importance that all policies and procedures be in writing. Interviews with OFCCP regional staff, Kansas City and Boston; OFCCP staff interview, July 17, 1985.
¹⁴⁴ Cooper 1985 Interview.
¹⁴⁵ Meisinger 1987 Testimony.
¹⁴⁶ Craig A. Berrington, Associate Deputy Under Secretary for Employment Standards, DOL, testimony, *Departments of Labor, Health and Human Services, Education and Related Agencies Appropriations for 1982*, Before the Subcommittee on Labor, Health and Human Services, Education and Related Agencies of the House Committee on Appropriations, 97th Cong., 1st Sess., part 1 (1981), pp. 678, 709, as cited in *1983 Commission Report*, pp. 122-23.
¹⁴⁷ OFCCP data cited in Kreiter Testimony. Reviews of construction contractors more than tripled during this period, from 538 in FY 80 to 1,648 in FY 85. DOL 1984 Response; OFCCP, "Fourth Quarter Review and Analysis Feedback Reports": FY 1985, p. 146; FY 1983, p. 2; FY 1980, p. 2; Meisinger Budget Testimony, p. 464.

Compliance Reviews

Compliance reviews have been OFCCP's most effective monitoring tool: they are twice as likely to result in corrective action as complaint investigations.¹⁴⁶ Despite sharply reduced resources, OFCCP has significantly increased the numbers of compliance reviews conducted. In FY 86, total reviews numbered 5,146, compared to 4,309 in FY 83 and 2,627 in FY 80.¹⁴⁷ The number of employees

covered by the reviews was approximately 3 million in FY 86, compared to 2 million in FY 81.¹⁴⁸

Equally impressive is the fact that OFCCP has increased the number of first-time reviews of contractors, from 25.4 percent of all reviews in FY 80 to more than 60 percent in FY 86.¹⁴⁹ Representatives of some employers told Commission staff that OFCCP staff now are also going to different contractor facilities, rather than the same ones.¹⁵⁰

The results of OFCCP compliance reviews are similar to those reported in FY 80. The agency is reporting approximately the same rate of violations (66 percent of all reviews in FY 85 and 63 percent in FY 83, compared to 62 percent in FY 80).¹⁵¹ The nature of discriminatory practices, such as hiring, promotion, termination, and job placement, found in reviews has not changed since 1980.¹⁵²

The number of violations found and corrected also has increased, from 1,311 contractors with violations in FY 80 to 3,487 in FY 86.¹⁵³ Violations cited in the area of affirmative action requirements, however, are different. Specifically, failure to meet goals was cited less often as a deficiency in FY 83 and FY 84 than in FY 79 and 80, when it ranked first among affirmative action violations.¹⁵⁴ Then-OFCCP Director Shong maintained in late 1982 that although OFCCP had never filed a complaint against a contractor simply for failure to achieve goals, OFCCP had, in fact, "erroneously" cited failure to achieve a goal as a deficiency.¹⁵⁵ She said

the new emphasis was on demonstrating a good faith effort to achieve a goal, not necessarily simply meeting it.¹⁵⁶

OFCCP has altered the system for selecting contractors for review. Because OFCCP has never had the resources to review a major portion of the contractors covered by the Executive order and other laws, a targeting system is important. For FY 81, for example, the Carter administration targeted whole industries, including banking, insurance, higher education, and electronics,¹⁵⁷ which it thought had the potential to increase significantly employment opportunities for protected groups.¹⁵⁸ That approach also was designed to focus on industries infrequently reviewed by the former compliance agencies and to help develop skills of newly transferred staff who may have reviewed only one type of industry while at their former agencies.¹⁵⁹ Consistent with that targeting, DOL reached major conciliation agreements with some firms in these industries.¹⁶⁰ The club membership rules published in 1980 arose from increased monitoring of the banking industry.¹⁶¹

OFCCP has dropped the industry approach (although the Director acknowledged that it may have improved participation of minorities and women in those industries), in part, because of the "presump-

¹⁴⁸ Meisinger 1987 Testimony, p. 472.

¹⁴⁹ Ibid; Meisinger Budget Testimony, p. 464; OFCCP, "Fourth Quarter Review and Analysis Feedback Reports": FY 1980, p. 4; FY 1985, p. 146. One observer has suggested that although OFCCP has had, "on paper," sensible formal targeting systems, "in practice, targeting. . . has for the most part been done on an ad hoc decentralized basis." With OFCCP staff "evaluated on fulfilling goals for compliance reviews. . . the fastest way to fill a production goal. . . is to review firms with good records and good behavior." It therefore "would not be surprising. . . to find that compliance reviews are concentrated on the largest firms. . . already. . . reviewed in the past." Jonathan S. Leonard, "Affirmative Action as Earnings Redistribution: The Targeting of Compliance Reviews," *Journal of Labor Economics*, vol. 3, no. 3 (1985), p. 374.

¹⁵⁰ EEAC Group Interview, Dec. 7, 1984.

¹⁵¹ OFCCP, "Fourth Quarter Review and Analysis Feedback Reports": FY 1985, p. 2; FY 1983, p. 3; FY 1980, p. 20; Meisinger 1987 Testimony, p. 3.

¹⁵² OFCCP, FY 80, 83, and 85 Fourth Quarter Review and Analysis Reports.

¹⁵³ Meisinger 1987 Testimony, p. 3.

¹⁵⁴ OFCCP, FY 80, 83, and 85 Fourth Quarter Review and Analysis Feedback Reports.

¹⁵⁵ Interview published in Bureau of National Affairs, *Daily Labor Report*, Dec. 13, 1982 (hereafter cited as Shong BNA

Interview). See also "Field Enforcement Task Force Report," p. 13, which found that letters of deficiency "arising out of construction reviews in particular have cited the contractor solely for failure to meet a goal without considering whether the contractor has exercised good faith efforts." Another DOL official said that "if there are examples of 'imprecise' language in agreements on this issue, OFCCP should correct the problem." Bureau of National Affairs, *Daily Labor Report*, Apr. 3, 1986, p. A-8.

¹⁵⁶ Shong BNA Interview, p. E-3; "Field Enforcement Task Force Report," p. 13.

¹⁵⁷ Weldon Rougeau, Director, OFCCP, "FY 81 Planning Workshop Feedback," Memorandum, for ESA Assistant Regional Administrators for OFCCP, Aug. 12, 1980, p. 2.

¹⁵⁸ OFCCP, *FY 82 Budget Submission to Congress*.

¹⁵⁹ OFCCP staff interview, 1986.

¹⁶⁰ For example, the first conciliation agreement with a major bank, Chase Manhattan, was reached in fall 1978. Donald Elisburg, Assistant Secretary for Employment Standards, DOL, testimony, before the House Committee on Education and Labor Subcommittee on Employment Opportunities, July 12, 1979, p. 5 (hereafter cited as Elisburg Testimony).

¹⁶¹ The issue of contractor payment of membership fees and related expenses first arose in 1976 during compliance reviews of banks conducted by the Treasury Department. See 45 Fed. Reg. 4954 (1980) and 46 Fed. Reg. 3892 (1981).

tion of guilt" that was implied for all firms in those industries.¹⁶² In addition, such targeting was based on limited data.¹⁶³ A new Nonconstruction Contractor Selection System established uniform selection criteria and uses a computerized method for ranking nonconstruction contractors. The computerized data base, called the Equal Employment Data System (EEDS), uses information from contractor EEO-1 reports and the Federal Procurement Data System.¹⁶⁴ EEDS computes participation rates of minorities and women by job category for particular industry groups (i.e., manufacturing, nondurable, durable, and machinery; transportation; wholesale trade; and communications) in Metropolitan Statistical Areas. It then compares each contractor establishment by industry within each statistical area against an average participation rate. If a contractor has less than average participation of minorities and women and shows a decreasing participation rate, that contractor is a prime candidate for review.¹⁶⁵

This ranking and trend analysis is provided to area office directors, who then select and schedule reviews based on such factors as recency and frequency of past reviews, previous review results and subsequent performance, existence of outstanding complaints, size of facility, and economic outlook (i.e., whether the contractor is hiring or laying off employees).¹⁶⁶ The system also provides that 15 percent of all reviews be random.¹⁶⁷ Area office

directors have limited discretion to select establishments for review that do not appear in the EEDS listings, provided such selections meet the above criteria.

Thus, establishments not reviewed for the longest time or not reviewed at all previously are accorded highest priority. Establishments reviewed within the past 2 years without findings of major deficiencies are given lowest priority.¹⁶⁸

The new system for targeting compliance reviews has been well-received by field staff.¹⁶⁹ OFCCP concedes, however, some deficiencies in that system.¹⁷⁰

The number of preaward reviews by OFCCP has declined. In FY 85, for example, OFCCP did 371 preaward reviews of the 22,238 clearance requests compared to 594 of 14,177 requests in FY 80.¹⁷¹ Although OFCCP regulations require preaward reviews,¹⁷² the agency opposes that requirement on the grounds it is unworkable and too inflexible.¹⁷³

OFCCP's proposal to eliminate the preaward review requirement¹⁷⁴ is suspended, along with its other proposed regulatory changes. Meanwhile, OFCCP has implemented a policy that, when a determination of noncompliance is made at the preaward stage, the contract is let, but the review

¹⁶² Shong BNA Interview, pp. A-4, E-4.

¹⁶³ 1984 DOL Response, vol. II 3(4).

¹⁶⁴ OFCCP, Order No. 520a4, Oct. 2, 1985, p. 1.

¹⁶⁵ Ibid., p. 37.

¹⁶⁶ Ibid., p. 39.

¹⁶⁷ Ibid., p. 2.

¹⁶⁸ Ibid., pp. 37-38.

¹⁶⁹ For example, the new system is perceived by contractors as "fairer" and is based on more accurate and comprehensive data. Interviews with regional staff, Kansas City, Sept. 21, 1984; OFCCP staff interview, Feb. 15, 1985. Other staff said previously targeted industries in their region had been saturated with reviews so it was time for a different approach. Interviews with regional staff, Boston, Aug. 31, 1984.

¹⁷⁰ OFCCP has initiated some changes following the Inspector General's findings that the system effectively removes too few potential targets to help OFCCP staff identify the poorest performing contractors and that staff documentation of the rationale for selections is "inadequate or nonexistent." *OIG Report*, p. 37. For example, it has issued instructions reiterating the requirement concerning preparation and filing of selection documents. *ESA Response to OIG Report*, p. 436.

¹⁷¹ OFCCP's A-11-53 Submission for FY 87 to Office of Management and Budget; OFCCP, "Fourth Quarter FY 80 Quarterly Review and Analysis Feedback Report," pp. 38-39, as cited in *1983 Enforcement Report*, p. 131.

¹⁷² Prior to the awarding of a \$1 million Federal contract,

OFCCP is required to do a compliance review of the company if it has not been reviewed within the previous 12 months. OFCCP must complete the review within 30 days of the awarding agency's request for the review. 41 C.F.R. §60-1.20(d) (1986).

¹⁷³ According to DOL: "federal courts have repeatedly ruled that the OFCCP cannot delay the award or instruct the contracting agency to pass over a bidder for a federal contract without a hearing. Previous Administrations lost on the issue in the courts in 16 out of the 18 times it has been litigated. The 30 days allowed by the procurement process . . . is inadequate to permit even a complete compliance review, much less a full administrative hearing which often takes years. The result is that a review in advance of the award of a contract . . . cannot accomplish anything more than a 'post award' review can accomplish, except to materially and negatively impact on the agency's ability to wisely use its resources. Furthermore, preawards result in the frequent and duplicative review of some contractors while many other contractors are not reviewed at all." Collyer Testimony in *Oversight Hearings on Affirmative Action Regulations*, pp. 15-16. The Carter administration had similar concerns about the preaward review requirements and proposed to modify it so that preaward reviews would be mandated only when the \$1 million contract was to be preawarded at an establishment with 250 or more employees where a review had not been conducted in the previous 24 months. 45 Fed. Reg. 86220 (1980).

¹⁷⁴ 46 Fed. Reg. 42973 (1981).

continues until the contractor comes into compliance or enforcement proceedings are initiated.¹⁷⁵ In 1981 Commission on Civil Rights staff agreed that the mandatory preaward review requirement should be changed but opposed complete elimination of such reviews and said OFCCP's authority to conduct them on a discretionary basis should be preserved.¹⁷⁶ EEOC took a similar position.¹⁷⁷ More recently, DOL's Inspector General agreed with OFCCP that the present preaward review requirement is "ineffective" and that resources devoted to them should be redirected to enforcement activities "yielding greater results and impact."¹⁷⁸

The quality of compliance reviews has been an issue since 1981, in part, because of the reduced average hours (from 200 in FY 81 to 155 hours in FY 85) for completion of reviews.¹⁷⁹ Limited evidence suggests that there has been improvement in staff professionalism and attitudes overall, although the quality of compliance reviews still remains uneven. For example, a former OFCCP staff member now employed with a major bank said that of two reviews of the bank in recent years, one was thorough and competent, the other considerably less so.¹⁸⁰ Another former OFCCP staff member now employed by a major defense contractor said compliance reviews are not as thorough as in the past because of time pressures, and staff need more training in legal theories. He credited OFCCP leadership, however, with developing more businesslike and less arrogant staff and said that in the past, some staff (5 or 10 percent) were indeed abusive and haughty.¹⁸¹ Some representatives of large electronics firms saw increasing OFCCP staff

competence and sophistication, demonstrating a greater knowledge of their jobs.¹⁸² The enforcement "attitude" at OFCCP reportedly has improved, with accessibility, receptivity, and a willingness to listen to contractors much more noticeable than in the past.¹⁸³

Other contractors recently audited expressed continuing reservations about the quality of OFCCP staff work. One suggested that with a "complete turnabout" in attitude at OFCCP, audits now are not so "mechanical and trivial" as before, but the agency may go to the other extreme of carrying out "superficial" reviews, possibly because of time constraints.¹⁸⁴ A university official questioned the thoroughness of a recent OFCCP review, noting that it was "very brief" and that staff seemed "pressed for time."¹⁸⁵ The new draft congressional staff study also concluded, based on extensive field work, that OFCCP "is driven by its program plan which creates undue pressure on the enforcement staff to 'meet the numbers' at the expense of quality investigations."¹⁸⁶

With respect to other related research, a 1982 GAO study of OFCCP activities in Chicago reported that most (at least 80 percent) contractors believed OFCCP review staff demonstrated "professional personal conduct," made reasonable demands for data, and provided contractors adequate opportunity to discuss the findings.¹⁸⁷ Over 80 percent of supply and service contractors expressed satisfaction with the manner in which the findings were settled, although only 40 percent of construction contractors felt that way.¹⁸⁸

¹⁷⁵ Leonard Biermann, Director of Policy, OFCCP, comments in *1984 OFCCP Oversight Hearings*, pp. 57-58.

¹⁷⁶ U.S. Commission on Civil Rights, "Comments on Proposed Rule (Affirmative Action Requirements for Federal Contractors) Issued by the Department of Labor, Office of Federal Contract Compliance Programs on August 25, 1981," Oct. 26, 1981, pp. 1-3. Staff also noted court-ordered requirements that educational institutions be reviewed before awards of contracts over \$1 million. *Ibid.*, p. 1, citing *Women's Equity Action League v. Califano*, No. 74-1720 (Dec. 29, 1977) (order at 38-39) (D.D.C.).

¹⁷⁷ Bielan Letter to Shong, p. D-1.

¹⁷⁸ *OIG Report*, p. 43.

¹⁷⁹ OFCCP, Order No. 520b1, Apr. 1, 1982.

¹⁸⁰ Dominguez Telephone Interview.

¹⁸¹ Kenneth Patton, former Acting Director of Operations, OFCCP (1979-81), telephone interview, Sept. 24, 1985.

¹⁸² EEAC Group Interview, Dec. 7, 1984.

¹⁸³ *Ibid.* Other contractors told Commission staff that OFCCP staff are much more "cooperative" in working with contractors and the agency conveys a more "open" atmosphere. Attitudes at OFCCP, and also EEOC, now are a world apart from those

during the previous administration, and the "we" vs. "they" enforcement approach is gone. EEAC Group Interview, Jan. 28, 1985. The Chairman of the Senate Labor and Human Resources Committee told the OFCCP Director in 1982 that "the management initiatives that you have taken have had a positive impact on the program. The compliance reviews are now being conducted more professionally and more equitably." Orrin G. Hatch, in *Senate Oversight Hearing*, p. 44.

¹⁸⁴ EEAC Group Interview, Jan. 28, 1985.

¹⁸⁵ *Ibid.*

¹⁸⁶ 1987 Congressional Staff Summary, p. 4.

¹⁸⁷ Gregory J. Ahart, Director, Human Resources Division, GAO, letter report, "The Office of Federal Contract Compliance Programs' Enforcement of Executive Order 11246 in Chicago," to Orrin G. Hatch, Chairman, Senate Committee on Labor and Human Resources, Sept. 17, 1982, pp. 18-20. Only 60 percent of construction contractors, however, believed they were given adequate opportunity to discuss findings. *Ibid.*, p. 19.

¹⁸⁸ *Ibid.*, p. 20. According to GAO, several construction contractors suggested that resolution was "dictated" by OFCCP rather than conciliated. "For example, one contractor felt forced

Civil Rights Commission staff found varying outcomes of compliance reviews during field work in Kansas City and Boston.¹⁸⁹ For example, Boston staff took significantly less time to complete nonconstruction reviews than Kansas City staff; Boston closed a relatively higher percentage of cases with notices of compliance, while Kansas City closed a higher percentage of its cases with conciliation agreements and enforcement recommendations; and Kansas City had a higher percentage of cases with findings of systemic discrimination violations.¹⁹⁰ In addition, Kansas City was more likely than Boston to follow manual and regulatory procedures.¹⁹¹ Staff in both regions said that some assistant regional administrators emphasized quantity over quality and rewarded area office directors who produced more completed cases.¹⁹²

OFCCP identified a number of variables that could account for some of these discrepancies.¹⁹³ However, OFCCP as well as GAO previously had found inconsistent application of procedures and failure to follow the manual.¹⁹⁴ Reflecting OFCCP's concerns about the possible effect of time constraints on the quality of compliance reviews, OFCCP did a

to sign a conciliation agreement to avoid the costly alternative of litigation; another felt 'blackmailed' into signing a conciliation agreement under the threat of debarment; and another complained about being made to make a verbal commitment that the next hire into one of two positions would be a female. Several other contractors said they had agreed to make changes they thought were unfair or not required by the regulations just to close out the review." Ibid.

¹⁸⁹ Commission staff examined 25 randomly selected cases in each region. Those cases were closed and involved reviews conducted between 1981 and 1984.

¹⁹⁰ For example, of the 25 cases reviewed in Boston, 12 contractors were found in compliance. Kansas City found only 5 of the contractors in its 25 cases reviewed in compliance. Of the 13 contractors Boston found in noncompliance, all except 1 were cited for technical deficiencies. Of the 20 contractors found in noncompliance in Kansas City, 16 were cited for technical deficiencies, while 4 were cited for substantive deficiencies.

¹⁹¹ For example, the OFCCP compliance manual requires that in cases where show-cause notices are issued (for failure to submit an affirmative action plan or to demonstrate a reasonable effort to comply with agency requirements, for example), those cases must be closed with a conciliation agreement. DOL, OFCCP, *Federal Contract Compliance Manual* (undated), secs. 8-40—8-90. In two such cases in Kansas City, conciliation agreements were developed. In two such cases in Boston, no conciliation agreement was prepared.

¹⁹² Interviews with regional staff, Kansas City and Boston.

¹⁹³ For example, Kansas City staff require more travel time than Boston staff, while Boston conducts a higher percentage of preaward reviews, which take significantly less time than other reviews, than Kansas City, thus explaining the disparity in time involved in completing nonconstruction reviews.

¹⁹⁴ See generally, "Field Enforcement Task Force Final Report."

study that failed to identify a direct relationship between quality and time for those reviews.¹⁹⁵ The study recommended, in fact, that average planning time for nonconstruction reviews be reduced by 10 to 15 percent in FY 87. It also recommended, however, that management continue to audit staff work carefully for possible quality problems.¹⁹⁶

In addition to increased staff training to be held in FY 88, OFCCP recently has delegated to regional officials authority to extend time frames for compliance review when warranted, and it is revising OFCCP's *Standard Compliance Review Report* to help improve the "quality and uniformity" of compliance reviews. A new related training manual is also to be developed.¹⁹⁷ Such steps clearly are vital if the agency is to control unjustified inconsistencies and violations of agency rules and procedures in compliance reviews and ensure that those reviews are sufficiently thorough.¹⁹⁸

Complaint Processing

OFCCP has reduced the size and age of its total complaint inventory since 1982.¹⁹⁹ At the end of FY

GAO found, for example, that in the Philadelphia and Atlanta regions show-cause notices were not always issued when they should have been in accordance with the manual and noted that an OFCCP review of its Seattle region's activities found, among other things, that conciliation agreements were not always negotiated as required by the manual. 1981 GAO Report, pp. 9-10.

¹⁹⁵ OFCCP, Division of Program Analysis and Review, *A Study of the Factors Affecting the Hours Used to Close Compliance Actions: FY 84* (1986), executive summary, p. 2.

¹⁹⁶ Ibid. The study said that "numerous factors in thousands of unique combinations and interactions do influence the time required for a particular compliance action. This finding presents a great challenge to the planning process." Ibid., p. 3. Former OFCCP Director Shong said area directors may have demanded "too much haste" on the part of staff and that there is "ample opportunity" for extensions of time to complete a case "when so justified." Ellen Shong Bergman, letter to James Corey, U.S. Commission on Civil Rights, July 30, 1984.

¹⁹⁷ Meisinger 1987 Testimony, pp. 11-12. In commenting on this chapter, DOL said staff "performance standards do not have a production quota; they require quality and timeliness based on reasonable requests for extensions to the regulatory 60-day review timeframe. . . . We have consistently told our managers that quality is as important as quantity, and that [staff] are to be evaluated accordingly." Staff averages 132 hours per review, "significantly less than the 149 allocated." DOL July Comments, Commission Equal Employment Enforcement Study, p. 2.

¹⁹⁸ For recent allegations of serious inadequacies in an OFCCP compliance review involving the Los Alamos National Laboratory, see "Congressional Staff Summary," p. 3.

¹⁹⁹ Complaints can be filed with OFCCP under Executive Order 11246, section 503 of the Rehabilitation Act of 1973, and section 402 of the Vietnam Era Veterans' Readjustment Act of 1972. Third party complaints may also be filed under these authorities.

81 the inventory totaled 3,953 complaints. By FY 85 that figure had been reduced to 753.²⁰⁰ At the end of FY 86 the inventory was at 746.²⁰¹

This reduction generally was achieved by correcting computerized data, revising complaint intake procedures, instructing regional offices to set up case management systems, and adding new requirements on complaint processing to staff performance standards.²⁰²

OFCCP data show a decline in the number of new complaints received, from 4,902 in FY 80 to 2,646 in FY 85,²⁰³ which may have contributed to the agency's ability to reduce its inventory. Section 503 complaints have accounted for a majority of all OFCCP complaints.²⁰⁴ Complaints against contractors based on race (black), then veterans complaints, followed by complaints based on sex (female), continue to account for the next most frequent complaints. Hiring, discharge, and promotion continue to be the practices most commonly cited, with layoff and job assignment the next most frequent sources of complaints.²⁰⁵

Data on the rate of findings of violations as a result of complaint investigations indicate a steady decline from 26 percent in FY 80 to 20 percent in FY 83 to 7 percent in FY 85.²⁰⁶ OFCCP said that if a complaint is resolved by a contractor, it is not counted as a violation and as a resolution. In the

past, staff allegedly counted some resolutions as violations, thus skewing this comparison.²⁰⁷

DOL was slow to resolve a problem that blocked expeditious processing of a number of handicap complaints. Over 100 section 503 complaints²⁰⁸ were held in abeyance pending DOL action on a case involving OFCCP jurisdiction under section 503. The issue was whether DOL had authority under section 503 to apply its affirmative action requirements to contracts and activities unrelated to Federal contracts and to waive the obligations over nonfederal contracts and activities upon request by the contractor.²⁰⁹ A complainant alleged that Western Electric Company terminated him because of a handicap in violation of section 503. OFCCP agreed, but Western Electric refused to settle, claiming that the complainant did not work for one of its facilities covered by a Federal contract. Following OFCCP issuance of an administrative complaint against the company and a hearing before an administrative law judge (ALJ), the ALJ agreed with the contractor that section 503 was not intended to impose affirmative action requirements over all activities and facilities of a Federal contractor, but only over those involved in carrying out a Federal contract. The ALJ recommended that the Secretary of Labor dismiss OFCCP's complaint.²¹⁰ OFCCP responded, however, that "it is not within the ALJ's

A backlog of complaints had grown because OFCCP resources had been devoted primarily to compliance reviews. Berrington Testimony, p. 678, cited in *1983 Commission Report*, p. 132, n.50.

²⁰⁰ *OIG Report*, p. 72; DOL July Comments, Commission Report on Equal Employment Enforcement, p. 3. In addition, the inventory of cases over 3 years old was reduced from 438 to 164 between FY 81 and FY 83. The inventory of cases between 1 and 3 years old was reduced from 1,048 to 194. Ellen Shong Bergman, unpublished paper, "Affirmative Action and OFCCP: Where Is The Government Going?" (undated), pp. 1-2, delivered at seminar, "Current EEO Issues," Continuing Legal Education Division, Georgetown University Law Center, Washington, D.C., June 29, 1984.

²⁰¹ Meisinger Budget Testimony, p. 4. The FY 87 objective was to return to the 550 level. *Ibid.*

²⁰² Richard L. Fogel, Director, Human Resources Division, GAO, letter report, "The Office of Federal Contract Compliance Programs' Actions to Improve Processing of Handicapped Employment Discrimination Complaints," to Lowell P. Weicker, Jr., Chairman, Senate Committee on Education and Labor Subcommittee on the Handicapped, and Robert T. Stafford, Senate Committee on Labor and Human Resources Subcommittee on the Handicapped, Jan. 31, 1984, p. 2 (hereafter cited as *1984 GAO Report*).

²⁰³ *OIG Report*, p. 72. Some OFCCP staff suggested that most Vietnam veterans have obtained jobs, accounting for fewer veterans complaints, and also that many contractors have not

been hiring. OFCCP regional staff interviews, Kansas City. A decline in Executive order complaints reported (from 2,017 in FY 80 to 765 in FY 85) reflects the fact that OFCCP no longer logs in individual complaints under the Executive order before it refers them to EEOC for processing. OFCCP regional staff interview, Boston. See *OIG Report*, p. 72. As in the past, OFCCP continues to investigate only Executive order complaints alleging class-wide discrimination.

²⁰⁴ *OIG Report*, p. 72.

²⁰⁵ DOL 1984 Response, IV-2, attachment A.

²⁰⁶ DOL 1984 Response, IV-2 and OFCCP, "Fourth Quarter Review and Analysis Report": FY 1985, p. 2; Dolores Brown, Policy, Planning and Review Division, OFCCP, telephone interview, Nov 25, 1986. The figure rose to 14 percent for the first half of FY 87. DOL July Comments, Commission Equal Employment Enforcement Study, p. 3.

²⁰⁷ Meisinger August 1985 Interview.

²⁰⁸ The section 503 complaint inventory was 680, more than one-half of which included complaints at least 1 year old. *1984 GAO Report*, p. 7.

²⁰⁹ OFCCP's section 503 regulations cover all of a Federal contractor's facilities and operations unless the contractor requests a waiver. 41 C.F.R. §60-741.2(a)(5) (1986).

²¹⁰ *OFCCP v. Western Electric Co.*, No. 80-OFCCP-29, Order Granting Defendant's Motion to Dismiss the Complaint (Mar. 4, 1981) (U.S. Dept. of Labor, Office of Administrative Law Judges, filed Apr. 14, 1981).

scope of authority to rule on the validity of the Secretary's regulations."²¹¹ The case went to the Deputy Under Secretary for Employment Standards for decision in 1981, but no decision was made until 4 years later when that official upheld OFCCP.²¹² At the time of the decision, over 130 section 503 complaints were pending: all pending complaints were resolved by the end of FY 86.²¹³

Enforcement

If a contractor is found not to be complying with Executive order or section 503 requirements,²¹⁴ OFCCP must attempt to conciliate the matter.²¹⁵ If conciliation fails, OFCCP may, as noted, institute enforcement proceedings.²¹⁶ An order for cancellation of contracts or debarment cannot be issued without affording the contractor an opportunity for a hearing.²¹⁷

Administrative enforcement of the Executive order is the responsibility of the Solicitor of Labor, who litigates the case before an administrative law judge (ALJ). The ALJ recommends a decision to the Secretary of Labor, who makes the final decision if the case falls under Executive Order 11246.²¹⁸ The Deputy Under Secretary for Employment Standards has jurisdiction in cases brought under section 503 of the Rehabilitation Act.²¹⁹ A rarely used provision of the regulations provides for the Director's discre-

tionary referral of a case to the Department of Justice for immediate judicial enforcement.²²⁰

Once cases are referred for enforcement, OFCCP has no involvement in actual litigation.²²¹ Cases can be settled any time after the issuance of a complaint.²²² When an ALJ determines that the Executive order or section 503 has been violated, the ALJ submits a recommended administrative order to the Secretary or Deputy Under Secretary. The recommended order can request relief, such as backpay, and/or sanctions.²²³ The Secretary of Labor or Deputy Under Secretary issues the final administrative order.²²⁴ Failure to comply with an administrative order can result in immediate cancellation of contracts and/or debarment.²²⁵ However, the losing party can appeal the decision in Federal court.

Between 1980 and 1986, various enforcement statistics declined sharply. Some such data show upward trends in 1987, however. Thirteen contractors were ordered debarred, for example, between FY 77 and FY 80, compared to four between FY 81 and FY 85.²²⁶ OFCCP requests for Solicitor filings of administrative complaints fell from 173 in FY 80 to 25 in FY 85.²²⁷ In addition, the number of conciliation agreements negotiated as a percentage of cases with violations has decreased from 46 in FY 80 to 33 in FY 85.²²⁸ Further, figures for backpay

²¹¹ OFCCP v. Western Electric Co., No. 80-OFCCP-29, Plaintiff's Brief in Support of its Exceptions to the Administrative Law Judge's Order of Mar. 4, 1981.

²¹² The case was remanded to the Office of Administrative Law Judges for continuation of the ALJ hearing on the merits. OFCCP v. Western Electric Co., No. 80-OFCCP-29, DOL, Deputy Under Secretary for Employment Standards, Remand Decision and Order, filed Apr. 24, 1985; OFCCP staff interview, Aug. 18, 1986.

²¹³ OFCCP Response to Commission Request for Information (undated); DOL July Comments, Commission Equal Employment Enforcement Study, p. 3.

²¹⁴ A noncompliance determination can be based, for example, on the results of a compliance review or complaint investigation, a contractor's refusal to submit an AAP or to allow an onsite review, or a contractor's refusal to supply records. In the latter two cases, OFCCP can initiate enforcement proceedings directly. 41 C.F.R. 60-1.26 (1986).

²¹⁵ 41 C.F.R. 60-1.20(b) and 1.24(e)(2) (1985). This may involve contractor letters of commitment in the case of minor violations, such as errors in preparing affirmative action plans, or conciliation agreements in the case of more significant violations, such as a finding of discrimination. Meisinger Testimony in 1984 OFCCP Oversight Hearings, p. 64.

²¹⁶ See text accompanying notes 23-24, this chap.

²¹⁷ 41 C.F.R. 60-1.26(a)(2) (1986).

²¹⁸ *Id.*, 60-1.26(c).

²¹⁹ 41 C.F.R. 60-741.29(b)(3) (1986). Complaints may be issued

by the Solicitor, Associate Solicitor for Labor Relations and Civil Rights, Regional Solicitors, and the Regional Attorney. 41 C.F.R. 741.29(c) (1986).

²²⁰ 41 C.F.R. 60-1.26(a)(2) (1986).

²²¹ Henry Interview. OFCCP is involved if the attorneys need more information or technical assistance, such as statistical analyses, testing experts, or summary employment reports. Briefs containing major policy issues and settlement offers also are coordinated with OFCCP by the Solicitor's Office. DOL July Comments, Commission Equal Employment Enforcement Study, p. 3.

²²² 41 C.F.R. 60-30.13 (1986).

²²³ 41 C.F.R. 60-30.27 (1986).

²²⁴ *Id.*, 60-30.30 and 741.29(b)(3).

²²⁵ *Id.*, 60-30.30.

²²⁶ DOL 1984 Response, V-5. Bureau of National Affairs, *Daily Labor Report*, Dec. 18, 1980, p. A-3, and Aug. 29, 1985, p. A-8.

²²⁷ OFCCP, "Fourth Quarter Review and Analysis Feedback Reports": FY 1980, pp. 46, 48; FY 1985, p. 144. During the first half of FY 87, however, those referrals increased to 44. Meisinger 1987 Testimony, p. 7.

²²⁸ OFCCP, "Fourth Quarter Review and Analysis Feedback Reports": FY 1980, pp. 46, 48; FY 1985, p. 58. The number of conciliation agreements reached in FY 85 was 1,139, compared to 743 in FY 80. OFCCP, "Fourth Quarter Review and Analysis Feedback Reports": FY 1980, Attachment, "Compliance Actions"; FY 1985, p. 58.

settlements fell from \$9.3 million in FY 80 to just under \$1.9 million in FY 85.²²⁹ It is not entirely clear why the amount of backpay awards has decreased when it has increased at EEOC and DOJ.²³⁰ OFCCP says the total amount of financial settlements may be a more significant indicator of enforcement. Those figures also have declined, however, except for one year, from \$16.2 million in FY 80 to \$7.6 million in FY 85.²³¹ Finally, affected class cases completed appear to have declined sharply.²³²

According to some critics, these data, along with the agency's proposed changes in its affirmative action regulations, reflect an excessive OFCCP focus on reducing the adversarial nature of the program and a substantially weakened enforcement effort.²³³ OFCCP maintains, however, that enforcement has not diminished. The most recent Director said that being less adversarial does not mean that OFCCP will not pursue enforcement action if a contractor is in noncompliance and refuses to conciliate a resolution.²³⁴ He stressed, however, the need to end the unnecessarily confrontational approach he believes OFCCP had taken in recent years.²³⁵ Secretary Brock recently defended OFCCP's enforcement effort and maintained "there's always an effort to beef it up." He also said that DOL's commitment to an effective Executive order enforcement effort "is strong."²³⁶

Debarment means enforcement "failure," rather than success, according to the Deputy Under Secre-

tary for Employment Standards, and debarment does nothing to create job opportunities for minorities and women.²³⁷ Former OFCCP staff added that the decline in recommendations for administrative enforcement requests may reflect the fact that a considerable number of previous requests were inappropriate or inadequate.²³⁸ Staff of the Solicitor's Office report an improvement in the quality of cases referred by OFCCP for administrative enforcement. In FY 84, for example, 55 percent of OFCCP requests were accepted by the Solicitor's Office as litigation worthy, compared to only 30 percent in FY 80.²³⁹

OFCCP also contends that conciliation agreements in the past were frequently used to correct minor violations when letters of commitment should have been involved instead.²⁴⁰ In FY 80, 56 percent of cases with violations were closed with letters of commitment. That figure rose to 70 percent in FY 83 and was 63 percent in FY 84 and 60 percent in FY 85.²⁴¹ OFCCP points out that letters of commitment are just as effective in correcting violations as conciliation agreements.²⁴²

In 1983 the OFCCP Director established a policy that the assistant regional administrator (ARA) attempt to conciliate with the chief executive officer or top corporate officials of a contractor before the contractor is recommended for administrative enforcement. The ARA's attempt to conciliate would supplement the area office director's conciliation efforts. The Director believed the ARA might be

²²⁹ Keiter Testimony. According to DOL, backpay settlements rose to \$2.6 million in the first half of FY 87. Meisinger 1987 Testimony, p. 6.

²³⁰ One OFCCP official said that before 1984, OFCCP did not define backpay and other settlements as it does now, and staff were counting backpay differently. Further, OFCCP did not keep records of how much backpay was actually paid by contractors. OFCCP staff interview, Aug. 18, 1986. Former Director Bergman said that 1977-80 backpay statistics were largely attributable to only a few settlements involving applicant cases. "The meter runs faster. . . when a person isn't working, has not been hired because of discrimination, than cases of failure to promote." Since hiring had declined because of an economic recession when she took over OFCCP Director, "[t]here were no significant applicant discrimination cases" and, therefore, backpay cannot be used as a "barometer" for enforcement activity. Ellen Shong Bergman, testimony, 1984 OFCCP Oversight Hearing, p. 131.

²³¹ OFCCP, FY 80-85 Quarterly Review and Feedback Reports.

²³² Some 391 affected class cases were completed in FY 80, compared to 46 in FY 86. OFCCP stopped reporting affected class case data in FY 83. OFCCP data cited in Kreiter Testimony; Meisinger 1987 Testimony, p. 5. Forty-four class action cases were reported as of the first half of FY 87. Meisinger 1987 Testimony, p. 6. DOL maintains the pre-1983 data are unreliable

because they "included any case in which a class was suspected, even if, after investigation, no class was found, or the contractor successfully rebutted" (emphasis in original). Since 1984, OFCCP records only affected class cases substantiated, according to DOL, of which there were 188 between FY 84 and FY 86. Meisinger 1987 Testimony, p. 6.

²³³ See e.g., Lynn C. Burbridge, *The Impact of Changes in Policy on the Federal Equal Employment Opportunity Effort* (Urban Institute, 1984), pp. 48-61; Du Rivage, *The OFCCP Under the Reagan Administration: Affirmative Action In Retreat*, 36 Lab. L.J. 360 (1985); Kreiter Testimony; 1987 Congressional Committee Staff Summary of Findings.

²³⁴ Joseph Cooper, Director, OFCCP, interview, Aug. 18, 1986 (hereafter cited as Cooper 1986 Interview).

²³⁵ Ibid.

²³⁶ *Daily Labor Report*, Apr. 7, 1987, p. A-1.

²³⁷ Meisinger July 1985 Interview.

²³⁸ Fox Interview.

²³⁹ Ibid.

²⁴⁰ OFCCP staff interview, Aug. 18, 1986.

²⁴¹ DOL 1984 Response, IV-2; OFCCP, "Fourth Quarter Review and Analysis Feedback Reports": FY 1984, p. 2; FY 1985, p. 2.

²⁴² OFCCP staff interview, Aug. 18, 1986.

successful in conciliating the issues where the area office had not.²⁴³

OFCCP has cited the protracted enforcement process as another reason why it places greater emphasis on settlement so as to avoid that process.²⁴⁴

DOL hearing procedures are, in fact, time consuming and slow, often delaying enforcement of Executive order requirements and relief for victims of discrimination for years.²⁴⁵

As of June 30, 1986, 102 cases referred by OFCCP were pending assignment to an ALJ.²⁴⁶ The prominent *Harris Trust* case has been tied up in the administrative process for 10 years.²⁴⁷ In that case an administrative complaint was issued in 1977 charging that the bank had discriminatorily excluded women and minorities from managerial jobs in violation of the Executive order. In January 1981 the ALJ agreed the bank had discriminated and recommended that it be ordered to give \$12.2 million in backpay to 1,837 victims.²⁴⁸ The ALJ also recommended that the bank be barred from operating as a Federal depository for its refusal to release two affected class analyses of its work force. Both the Solicitor's Office and the bank filed exceptions to the recommended order.²⁴⁹ The Secretary ruled on the ALJ's exclusion of the bank's statistical case as a sanction for its failure to comply with the ALJ's discovery orders.²⁵⁰ The Secretary held that Harris' refusal to submit the studies during discovery did not justify debarment, since the studies were prepared in anticipation of litigation and as such are

immune from discovery under the Federal Rules of Civil Procedure.²⁵¹ The Secretary remanded the case to permit the ALJ to hear statistical evidence that he had improperly excluded.²⁵² In December 1986 the ALJ rejected the bank's new statistical evidence and upheld the previous decision finding the bank guilty of pervasive job discrimination.²⁵³

Another case involving Honeywell Corporation has also been in the administrative process since May 1977 when an administrative complaint was issued against the company. This case has been pending before the Secretary since 1983.²⁵⁴ In late 1982, OFCCP recommended debarment of Honeywell, urging immediate sanctions against the company. DOL indicated, however, that the company would obtain conditional reinstatement if it brought itself into compliance and agreed to be bound by the final determination regarding backpay.²⁵⁵ The case is important for several reasons. The ALJ and the Solicitor disagree as to whether immediate sanctions are appropriate.²⁵⁶ The ALJ said in his recommended decision and order that imposition of sanctions should be held in abeyance until the identity of individual women, who allegedly had been denied better paying jobs based on their sex, and the amount of backpay owed them could be determined at a subsequent hearing. The Solicitor argued, on the other hand, that immediate sanctions were appropriate to "prevent Honeywell from continuing to

²⁴³ OFCCP, Order No. 630a8, Mar. 11, 1983; OFCCP Staff 1986 Interview.

²⁴⁴ Bergman Interview.

²⁴⁵ The discovery process required by OFCCP's administrative hearing procedures often delays cases for years. In addition, contractors can file for injunctions that delay enforcement action. One group has claimed that "most ALJ's are not well-versed in EEO law; when a substantial case load develops the supply of ALJ's will be insufficient; . . . [and] dependence on the calendar of the ALJ's to schedule a hearing works against expeditious handling of cases." Women Employed, *The Status of Equal Employment Opportunities, An Assessment of Federal Government Agency Performance—OFCCP and EEOC* (1980), p. 17. There is an expedited hearing process that may be used when a contractor does violate a conciliation agreement, has not adopted or implemented an acceptable affirmative action plan, has refused to provide access to or to supply records, or has refused to permit an onsite review. 41 C.F.R. §60-30.31-37.

²⁴⁶ OFCCP, FY 86 Third Quarter Review and Analysis Feedback Report.

²⁴⁷ Henry Telephone Interview; Bureau of National Affairs, *Daily Labor Report*, May 30, 1983, p. A-1.

²⁴⁸ *Ibid.*, p. A-1.

²⁴⁹ *Ibid.* The Solicitor questioned the ALJ's estimate of the amount of backpay due. *Ibid.*

²⁵⁰ U.S. Dept. of Labor v. Harris Trust and Savings Bank, No. 78-OFCCP-2, Decision and Order (U.S. Secretary of Labor, decided May 17, 1983), reprinted in Bureau of National Affairs, *Daily Labor Report*, May 20, 1983, p. D-1. In the course of discovery, the Solicitor requested two studies of the bank's work force, one conducted by the bank and the other contracted out by the bank. The Solicitor believed that the studies would support OFCCP's case against the bank.

²⁵¹ Secretary's Decision and Order, May 17, 1983.

²⁵² *Ibid.*

²⁵³ U.S. Department of Labor v. Harris Trust and Savings Bank, C.A. 78-OFCCP-2, Recommended Decision on Remand: Liability, Dec. 22, 1986. DOL is supporting a class remedy (formula relief) in this case and received a "favorable ruling" on this remedy in June 1987. DOL July Comments, Commission Equal Employment Enforcement Study, p. 2. The Solicitor "presently has at least two other major cases in which we are seeking formula relief in the course of settlement negotiations," which are "ongoing." *Ibid.*

²⁵⁴ Henry Telephone Interview; Bureau of National Affairs, *Daily Labor Report*, Mar. 30, 1983, pp. A2-A3.

²⁵⁵ United States v. Honeywell, 77-OFCCP-3 (Nov. 1, 1982); Bureau of National Affairs, *Daily Labor Report*, Nov. 18, 1982, p. A-1.

²⁵⁶ *Ibid.*

violate the executive order while reaping the benefits of its government contracts."²⁵⁷

The ALJ also found that although Honeywell's practices had a disparate impact on female employees, the company's policies were part of a bona fide seniority system and therefore not unlawful under Executive Order 11246. The Solicitor argued that Honeywell's initial assignment was not part of its seniority system and that initial assignment was at the sole discretion of the company. Therefore, he contended the ALJ should have found Honeywell's practices in violation of the Executive order.²⁵⁸

Since 1981, DOL has upheld OFCCP affirmative action requirements in various cases. For example, in late 1984 the Under Secretary issued a Decision and Order upholding the requirement to establish goals and timetables in a case involving a Texas bank that had challenged it.²⁵⁹ The bank had refused to submit its affirmative action plan for review, claiming that application of the Executive order to its operations was unconstitutional because goals and timetables require racial preferences in violation of Title VII and the Constitution.²⁶⁰ The Under Secretary rejected this argument, stating that the bank misunderstood "the nature of affirmative action goals and timetables which are distinct from quotas or ratios imposed after a finding of past discrimination." The Under Secretary, quoting extensively from a March 23, 1973, joint affirmative action statement of the Departments of Justice and Labor, EEOC, and the then Civil Service Commission, found that the bank had violated its obligations and ordered that the bank submit its program for review within 30 days.²⁶¹

In another case, *Star Machinery*, the Secretary upheld²⁶² a 1974 OFCCP regulation concerning the aggregation of contracts.²⁶³ The issue was whether

each call or order on an open purchase agreement was, in effect, a new separate contract (Star Machinery's position) or whether the value of the open-ended supply contract was to be determined by the total of all orders against it (OFCCP's position).²⁶⁴ In the latter case, the written affirmative action plan requirement would be triggered if the total figure was \$50,000 or more.

The ALJ agreed with Star and recommended that OFCCP's complaint be dismissed. He concluded that the relevant regulation required a contract of \$50,000 or more, that Star's blanket purchase agreement was not itself a contract, and that none of the individual orders in question reached a sum of \$50,000.²⁶⁵ OFCCP did not appeal the decision,²⁶⁶ but the Secretary pursued the case and reversed the ALJ, holding that a blanket purchase agreement whose individual orders totaled \$50,000 annually constituted a contract under OFCCP's regulation.²⁶⁷ The Secretary said he would not debar the company, since Star had contested in good faith its coverage under the order. He ruled that the company would be considered covered by the Executive order requirements only as of the date of his order. He ordered Star to submit its affirmative action plan within 120 days or face debarment.²⁶⁸

An OFCCP initiative to permit some major corporations (including American Telephone and Telegraph, Hewlett-Packard, International Business Machines, and General Motors) largely to monitor themselves has added to the view of some that OFCCP enforcement has declined. The National Self-Monitoring and Reporting System (subsequently called the National Reporting System) was established in 1982 as a resource management tool for OFCCP.²⁶⁹

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ OFCCP v. National Bank of Commerce of San Antonio, No. 77-OFCCP-2 (Dec. 11, 1984) Decision and Order of the Under Secretary of Labor, as cited in OFCCP Order No. 970a9 (Mar. 21, 1985).

²⁶⁰ The bank sought an injunction against the enforcement of the Executive order but was forced to exhaust its "administrative remedies" by the Fifth Circuit. See *Nat'l Bank of Commerce of San Antonio v. Marshall*, 628 F.2d 474 (5th Cir. 1980), cert. denied, 454 U.S. 1053 (1981).

²⁶¹ Ibid. The bank has since submitted its plan for review. OFCCP identified several deficiencies, but they were resolved through technical assistance from OFCCP. OFCCP staff interview, Aug. 18, 1986.

²⁶² OFCCP v. Star Machinery, No. 83-OFCCP-4 (Sept. 21, 1983) (Secretary Decision and Order).

²⁶³ 41 C.F.R. 60-1.40 and 2.1 (1986).

²⁶⁴ OFCCP v. Star Machinery, Secretary Decision and Order; OFCCP letter to Star Machinery Co., Nov. 26, 1982, as cited in OFCCP Order No. 950b2, (Aug. 10, 1983) (OFCCP v. Star Machinery Company, ALJ Recommended Decision).

²⁶⁵ OFCCP v. Star Machinery Co., No. 83-OFCCP-4 (ALJ Recommended Decision) (Aug. 10, 1983), as attached to OFCCP Order No. 950b2 (Aug. 30, 1983).

²⁶⁶ Order 950b2.

²⁶⁷ OFCCP v. Star Machinery Co., No. 83-OFCCP-4, Decision and Order (Secretary of Labor decided Sept. 21, 1983), reprinted in Bureau of National Affairs, *Daily Labor Report*, Sept. 28, 1983, p. E-1.

²⁶⁸ *Id.* and Henry Telephone Interview.

²⁶⁹ Under this system certain large companies would voluntarily provide OFCCP with national data on their equal employment activities. Compliance reviews would be limited and used only as a final step in resolving disagreements arising from OFCCP

It provoked sharp criticism (and a congressional hearing) concerning, among other things, reporting requirements for companies participating²⁷⁰ and failure to first develop standards and consult with EEOC.²⁷¹ The Chairman of the Subcommittee on Employment Opportunities of the House Committee on Education and Labor Committee said that the program "raises a question whether or not we would be as well off without them [OFCCP] as we would with them on the wrong side protecting and actually advancing discrimination in the work force."²⁷²

Former OFCCP Director Bergman noted that relatively few large corporations were likely to participate and that the program was fully consistent with agency regulations.²⁷³ Further negotiations for such plans were suspended, however, pending review.²⁷⁴ Then-OFCCP Director Cooper stated that the program is "still on hold."²⁷⁵ Given the concerns raised about the program and the credibility issue OFCCP had faced with it and its enforcement record generally, OFCCP would be wise to publish for public comment the guidelines or criteria for this program and should make public the content of plans negotiated subsequently with individual companies.

Finally with regard to enforcement, as noted, OFCCP recently lifted requirements imposed several years ago that regional office staff submit enforcement cases and conciliation agreements to the national office for review. Regions now can resume referral of most cases directly to regional solicitors, expediting the enforcement process, and conciliation agreements can be executed on a "more timely" basis.²⁷⁶

Coordination

Executive Order 12067 requires OFCCP to consult with EEOC "during the development of any proposed rules, regulations, policies, procedures or orders concerning equal employment opportunity."²⁷⁷ Coordination between the two agencies under this requirement has not been smooth. For

review of data. Such agreements would free compliance staff to focus on contractors not reviewed in the past or which "have had the greatest problems." Susan R. Meisinger, Acting Director, OFCCP, testimony in 1984 *OFCCP Oversight Hearings*, p. 50.

²⁷⁰ See, e.g., testimony by civil rights groups that the national employment data to be provided OFCCP would not reveal possible discrimination at specific facilities in 1984 *OFCCP Oversight Hearings*, pp. 105-13.

²⁷¹ 1984 *Oversight Hearings*, p. 107.

²⁷² *Ibid.*, p. 115 (comments of Rep. Augustus Hawkins).

²⁷³ *Ibid.*, p. 126 (statement of Ellen Shong Bergman).

example, in 1981, EEOC complained in connection with one of OFCCP's regulatory reform proposals that:

Contrary to the mandates of Executive Order 12067, EEOC coordination regulations, . . . and customary practice, the Department did not consult with the Commission "during the course of development" of this. As a result, our staff was unable to provide comment and analysis at the stage of development when such comment and analysis would have been most helpful to Department of Labor staff. Undoubtedly, had we been allowed to review earlier drafts. . . many of the differences which appear to exist between our two agencies would have been resolved by now. Similarly, early consultation would have facilitated our response to the request for comments and obviated the need for us to request an extension of the review period to analyze this lengthy and complex proposal. While we have expedited our review process and held a special meeting of the Commission to prepare these comments in the rigid time frames set by your staff, we hope that in the future the more collegial and efficient practice of early and full consultation will once again become the rule.²⁷⁸

Nearly 2 years later EEOC again complained that:

Although the Commission commented at great length before publication of OFCCP's August 1981 and April 1982 notices of proposed rulemaking, OFCCP without explanation or consultation apparently has rejected many of our recommendations. The unfortunate result is that issues that could and should have been resolved by our staffs needlessly have been raised to higher levels of authority. We continue to hope that in the future the more collegial and efficient practice of early and full consultation will once again become the standard mode of operation between our agencies.²⁷⁹

At the same time EEOC questioned OFCCP's use of "its internal directives system, without consultation with EEOC or notification to the public, to implement in advance certain policy changes proposed in the present final draft regulations." It called for the written directive of March 10, 1983, to be withdrawn "until it can be corrected and coordinated."²⁸⁰ EEOC also cited the oral directive concerning setting goals higher than availability as "incon-

²⁷⁴ Meisinger July 1985 Interview.

²⁷⁵ Cooper 1986 Interview.

²⁷⁶ Meisinger 1987 Testimony, p. 12.

²⁷⁷ Exec. Order No. 12,067, 3 C.F.R. (1979), reprinted in 42 U.S.C. 2000e app. at 32-33 (1982 & Supp. I 1983).

²⁷⁸ Bielan Letter to Shong, p. D-4.

²⁷⁹ Clarence Thomas, Chairman, EEOC, letter to Robert Collyer, Deputy Under Secretary of Labor, DOL, Apr. 19, 1983, p. 4.

²⁸⁰ *Ibid.*

sistent with OFCCP's own compliance manual and with this Commission's policy and practice." It called upon OFCCP to issue a directive returning its policy to "what it was. . ." or "after coordination, publish the new policy for notice and comment."²⁸¹

EEOC later reported that meetings with DOL staff, including the Deputy Under Secretary for Employment Standards, were "very open and productive" and that many EEOC concerns "have been resolved or are nearing resolution."²⁸² The agency ultimately voted to support the proposed final revised OFCCP regulations.

A former OFCCP staff member said that coordination between OFCCP and EEOC has always been a problem. In the past, she said, there were instances of both agencies simultaneously investigating the same employers. Further, the meaning of "coordination" under Executive Order 12067 is interpreted differently by the two agencies and also the Justice Department, which undercuts the intended significance of the order. "Some" tension between EEOC and OFCCP has existed since 1981, according to former OFCCP staff, who said it may stem, in part, from the likelihood that EEOC does not understand Executive Order 11246 very well.²⁸³ Perhaps symptomatic of this feeling was the position expressed in 1983 by the Deputy Under Secretary for Employment Standards over the roles of OFCCP and EEOC in coordinating the former's regulatory proposals:

On the affirmative action side, we feel that since we are sort of the lead in that regard with our particular program, a unique program, that. . . [EEOC] should lean in our direction and understand our views and why we are making the changes we are proposing to streamline the program to make it more effective and really increase our presence in the contractor community.²⁸⁴

²⁸¹ Ibid., p. 5.

²⁸² Clarence Thomas, Chairman, EEOC, testimony in *Oversight Hearings on Affirmative Action Regulations*, p. 524. DOL told EEOC, for example, that it had amended some proposals to assure consistency with Title VII standards. It also said OFCCP had not implemented through policy directives any provision that requires implementation by regulation. Robert B. Collyer, Deputy Under Secretary of Labor for Employment Standards, letter to Clarence Thomas, Chairman, EEOC, July 7, 1983, published in Bureau of National Affairs, *Daily Labor Report*, July 22, 1983, pp. E-1, E-6.

²⁸³ Dominguez Telephone Interview.

²⁸⁴ Collyer Testimony in *Oversight Hearings on Affirmative Action Regulations*, p. 511.

²⁸⁵ Bergman Interview. She also said reported problems of duplication of work by OFCCP and EEOC are "exaggerated"

Former OFCCP Director Bergman said coordination with EEOC was, in fact, an "enormous problem" for her. She had differences with EEOC over some "turf" areas, such as the National Self-Monitoring Reporting System, and believes there is a need to "rethink" coordination under Executive Order 12067.²⁸⁵

More recently, strains between EEOC and OFCCP have subsided because of the lack of further OFCCP regulatory action and further policy directives but also, according to EEOC staff, because of effective communication between EEOC and senior OFCCP officials. Coordination with EEOC over policy issues may also have been, as was the case for several years with contractors and internally, a "communication" problem.²⁸⁶

Technical Assistance

OFCCP has increased its emphasis on voluntary compliance, consistent with its objective of minimizing unnecessary confrontation between OFCCP and contractors.²⁸⁷ OFCCP staff had increased the percentage of their enforcement time devoted to providing technical assistance to contractors outside the compliance review or complaint investigation process from 1.2 percent in FY 82 to 4.4 percent as of the third quarter of FY 84.²⁸⁸

In the past, OFCCP engaged in more structured types of technical assistance, such as sending staff to Federal contractor seminars held around the country to give practical advice on the day-to-day problems faced by contractors.²⁸⁹ This type of structured technical assistance has decreased since FY 80 primarily because of reductions in travel budgets, staffing, and other office resources.²⁹⁰ OFCCP now is more involved in informal technical

and noted that OFCCP always consults with EEOC before conducting a compliance review of a contractor who may already be involved in an EEOC investigation. Ibid.

²⁸⁶ Dominguez Telephone Interview. The agency generally did not get its "message through" concerning its civil rights commitments and intentions during the period 1981-83. Ibid.

²⁸⁷ U.S. Commission on Civil Rights, "Federal Technical Assistance Effort to Promote Voluntary Compliance with Civil Rights," unpublished report (November 1983), OFCCP app. D (hereafter cited as Federal Technical Assistance Efforts), p. 2.

²⁸⁸ DOL 1984 Response, VI-1(a).

²⁸⁹ Ibid., p. 2. A book entitled, *The OFCCP Speaks*, which explained affirmative action requirements and the compliance review process for Federal contractors, was used extensively during the contractor seminars.

²⁹⁰ Ibid.

assistance conducted on a daily basis and coordinated to meet the specific needs of contractors.²⁹¹

OFCCP also seeks to facilitate voluntary compliance through an exchange of information and ideas among representatives of industry, civil rights groups, and the Federal Government. Under this approach, OFCCP encourages formation of liaison groups to stimulate an exchange of information and ideas on how to resolve the problems that contractors experience with regard to equal employment requirements.²⁹² To date, over 200 groups have been formed, representing a broad spectrum of parties, including employers, women's groups, apprenticeship and training groups, handicapped persons, academics, representatives of specific industries or worker skills, and State agencies, as well as cross-sectional groups of these interests by geographic area.²⁹³

OFCCP has expanded the original concept for liaison groups.²⁹⁴ Initially, the groups served primarily as an information conduit and focused on single issues. Once the issue was resolved, many groups became inactive.²⁹⁵ OFCCP now attempts to build up existing groups, to develop new ones, and to assist them to identify two or three objectives to be accomplished over a longer period of time.²⁹⁶

OFCCP reports several tangible results of the liaison group activity. For example, some groups have started training programs, such as literacy training at the elementary school level, handicapped programs, and training in the computer science field for children of protected classes.²⁹⁷ Some contractors have provided OFCCP with useful monographs describing industry or area employment profiles and/or employment problems unique to an industry.²⁹⁸

Then-OFCCP Director Cooper believed that OFCCP's outreach activities have increased compliance by contractors.²⁹⁹ The primary reason, he suggested, is that OFCCP and contractors are communicating. In addition, minorities were not

entering fields such as engineering and chemistry. Cooper believed that with the liaison groups OFCCP is encouraging contractors to go into the elementary schools and inform minorities about the advantage of working in these fields and to begin early to take courses in science and mathematics.³⁰⁰

Another aspect of OFCCP's voluntary compliance program is the Exemplary Voluntary Efforts awards (EVE).³⁰¹ OFCCP defines an exemplary contractor as:

A contractor or establishment(s) of a contractor that sets itself apart from similarly situated contractors by voluntarily making innovative good faith affirmative efforts directed at the full utilization of minorities, women, handicapped individuals, disabled veterans and veterans of the Vietnam era, in their internal work force, in industry, in the educational systems or in the community in general. Further, there must be no findings, nor unresolved findings of discrimination.³⁰²

Examples of potentially laudable efforts include: (1) providing speakers to inner-city public high schools to describe the world of work and preparation needed for employment with a company in various occupations and professions; (2) assisting undergraduate students with financial costs and providing them work experience; (3) targeting academically gifted minorities and women from low-income backgrounds and assisting students in college programs; (4) generating youth motivation and youth summer work programs; (5) assisting organizations in the training and retraining of unemployed minority, female, and handicapped persons; (6) providing career options for current female and minority employees who may be dead ended; and (7) delivering specialized training programs for hard-core unemployed, nontraditional jobs for women, and technical skills for Vietnam-era and disabled veterans.³⁰³

In 1983, OFCCP honored five contractors and one trade association with EVE awards for such activities.³⁰⁴ In 1986, 11 such awards were given.³⁰⁵

²⁹¹ Ibid., p. 3.

²⁹² Ibid., p. 4. See also Bergman Interview; Collyer Senate Testimony, pp. 22-25.

²⁹³ Cooper 1986 Interview and DOL 1984 Response, VI-1(a).

²⁹⁴ Cooper 1986 Interview.

²⁹⁵ Ibid.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ DOL 1984 Response, VI-1(a).

²⁹⁹ Cooper 1986 Interview.

³⁰⁰ Ibid.

³⁰¹ OFCCP Notice No. 360a1, Dec. 5, 1984 (hereafter cited as OFCCP Notice 360a1.)

³⁰² DOL 1984 Response, VI-2(a).

³⁰³ OFCCP Notice 360a1 (attachment).

³⁰⁴ DOL 1984 Response, VI-2(b). These contractors included: E.I. du Pont de Nemours and Company, for increasing the availability of minority-group members in the field of engineering, removing artificial barriers to the employment of the handicapped, preventing sexual harassment, and demonstrating commitment to the principles of affirmative action and equal employment opportunity; Merck & Co., Inc., for implementing a unique corporate communication program designed to provide affirma-

OFCCP believes its EVE award program "encourages contractors to voluntarily undertake innovative initiatives in outreach, recruitment, and training, resulting in a significant increase of covered group

tive action training to each of Merck's approximately 16,000 domestic employees at 61 plants, including professionals, production workers, managers, and secretaries; and Bess Kaiser Medical Center for the "innovative" ways it has institutionalized its affirmative action program for mentally and physically handicapped employees, including highly effective methods of monitoring results. Awards also were given to Control Data Corporation, Banco Popular, and Edison Electric Institute for various achievements. Ibid.

³⁰⁵ DOL, ESA, "Brock Awards Exemplary Federal Contractors for Affirmative Action Initiatives," *News*, July 8, 1986. These companies included: BankAmerica Corporation for early identification of women for career growth with targets for promotion of women to senior vice president levels; Digital Equipment Corporation for a partnership with Oxford, Massachusetts, public schools in a dropout prevention program focusing on technology for disaffected youth; General Mills, Inc., for improving employment opportunities for handicapped individuals through awareness programs and for support of outreach and rehabilitation

members throughout the work force."³⁰⁶ These programs have been well-received by contractors.³⁰⁷

The Commission agrees they are a valuable part of the contract compliance program.

efforts; Jenkins and Boller Company, Inc., for support of career education in apprenticeship occupations and for prevocational training programs. Other recipients included Johnson & Johnson, NCNB-Bankers Trust of South Carolina, Philip Morris, USA (Louisville Plant Operations), Pratt & Whitney, United Technologies Corporation, R & S Construction Company, Raytheon Company, and Warner-Lambert Company. Ibid.

³⁰⁶ DOL 1984 Response, VI-2(d). Supervisors and other company personnel receive special training in the requirements of the Executive order, section 503, and the veterans program, and a reaffirmation of equal employment opportunity policy is promoted by top management. Ibid. Contractors receive no other benefits from the program except public recognition. Ibid., VI-2(c).

³⁰⁷ The liaison groups should continue "indefinitely," according to one contractor, and another told Commission staff their benefit lies in their "breaking down barriers" and promoting better communication. EEAC Group Interview, Dec. 7, 1984.

5. Conclusion

Since 1981 the Federal laws and Executive orders enacted in past decades to assure equal employment opportunity for all Americans have remained in place unchanged. Neither the President nor the Congress has created major new ones. Similarly, major Federal regulations detailing equal employment obligations under these laws have not been revised, nor have new ones been promulgated. Further, there has been no structural change (like the 1978 reorganization) that affects the responsibilities of the major equal employment agencies, which continue to be the Equal Employment Opportunity Commission (EEOC), the Employment Litigation Section of the Justice Department's (DOJ) Civil Rights Division, and the Office of Federal Contract Compliance Programs (OFCCP) at the Labor Department (DOL).

During the same period, the Supreme Court of the United States has continued to issue decisions (i.e., *Connecticut v. Teal*,¹ *Wygant v. Jackson School Board*,² and *Johnson v. Transportation Agency, Santa Clara County, California*,³) interpreting statutory and constitutional rights under equal employment laws, and clarifying in particular the legality of remedial affirmative action goals and quotas. The Court's decisions in *Hishon v. King & Spalding*,⁴

Meritor Savings Bank v. Vinson,⁵ and *Johnson* reflect a clear advance since 1981 in the reach of equal employment law with regard to women.

Today, as in 1981, "employers are subject to a charge of discrimination in virtually every employment decision they make."⁶ In fact, Americans have filed employment discrimination complaints in record numbers.⁷

Top officials at EEOC, DOJ, and DOL since 1981 tend to agree that employment discrimination in various forms remains a national problem, although, as the EEOC Chairman in particular has noted, equal employment enforcement cannot be expected to remedy lack of skills and education that lead to disparities in employment and income status. These agency officials also agree that employment discrimination today involves highly complex and technical questions. As a result, increasing reliance upon computers and statisticians, labor market economists, and other such experts has become a feature of their enforcement activities.

The information provided earlier in this report bears on both the matter of continuity and change in policy and program, as well as on strengths and weaknesses, at these key equal employment enforcement agencies during the past 6 years. As will be

¹ 457 U.S. 442 (1981).

² 106 S. Ct. 3019 (1986).

³ 108 S. Ct. 1442 (1987).

⁴ 467 U.S. 69 (1984).

⁵ 106 S. Ct. 2399 (1986).

⁶ Bryner, *Congress, Courts, and Agencies: Equal Employment and the Limits of Policy Implementation*, 96 Pol. Sci. Quarterly 411, 412 (1981) (hereafter cited as Bryner, *Limits of Policy Implementation*).

⁷ In 1985 over 8,000 employment discrimination cases were filed in Federal district courts, compared to just over 5,000 in 1980. *Report of the Proceedings of the Judicial Conference of the United States Held in Washington, D.C., March 6 and 7, 1985 and September 17 and 18, 1985—Annual Report of the Director of the Administrative Office of the United States Courts, 1985* (Washington, D.C.: 1985), p. 151, table 25.

recalled, the Commission on Civil Rights and others repeatedly have criticized Federal enforcement of equal employment requirements over the years: in its 1977 report, the Commission noted that, despite increased activity and concern by new Carter administration enforcement officials, the dismal past picture of individual agency and collective shortcomings had not "markedly changed."⁸

In light of the exceptionally bitter and divisive climate that has surrounded the affirmative action issue, in particular, and more broadly, expressed doubts by some about the commitment of the current administration to enforce Federal equal employment laws, what is striking is the extent to which fundamental continuity, rather than change, characterizes equal employment policies and operations during the past 6 years.⁹ In the area of policy, for example, data indicate that the agencies have continued to espouse and pursue class action, as well as individual, cases. The agencies also have continued to develop cases using statistics and established theories of discrimination, notwithstanding critical comments to the contrary by some officials and defendant employers. Inherited Title VII¹⁰ policies generally have not been altered, even when, as in the case of EEOC's Uniform Guidelines on Employee Selection Procedures¹¹ and sex harassment guide-

lines,¹² such policies specifically were targeted for likely revision by the administration.¹³

Perhaps even more notable is the fact that in mid-1987, as in early 1981, OFCCP continues to require goals and timetables, as well as backpay, of Federal contractors, under Executive Order 11246,¹⁴ and EEOC continues to require Federal agencies to use such affirmative action measures. In short, the evidence provided in this report points to a far greater degree of "business as usual" than one might expect, given the public statements of some officials and, more especially, those of their critics.¹⁵

The major change in Federal equal employment enforcement policy that has taken place is reflected in these agencies' approach to remedying job discrimination. As discussed in this report, the preference for victim-specific remedies, a departure from Federal policy that had evolved during preceding years, has been inconsistently applied by these agencies and in the wake of recent Supreme Court decisions, particularly *Johnson*, is undergoing reconsideration.¹⁶

With regard to strengths and improvements in the Federal equal employment enforcement effort, EEOC's shifts toward a more stern enforcement posture could give the agency potentially the strongest credibility it has enjoyed since it was established

⁸ U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1977, To Eliminate Employment Discrimination: A Sequel* (1977), pp. 329, 322. See also Leadership Conference on Civil Rights, *The Carter Administration and Civil Rights, An Assessment of the First Year* (1978), p. iii, which concluded that: "After a year, the Carter Administration's record on civil rights enforcement is mixed. Enforcement in some areas has improved. But progress has been slow and in some cases nonexistent." This general conclusion covered equal employment enforcement, as well as enforcement of civil rights laws in education, housing, and other areas.

⁹ There were expectations of major changes when the current administration took office in 1981. Some had predicted, for example, that OFCCP would give up its backpay authority. Daniel Leach, former Vice Chairman, Equal Employment Opportunity Commission (EEOC), interview cited in Bureau of National Affairs, *Daily Labor Report*, Oct. 3, 1981, p. C-4.

¹⁰ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 258 (1964) (codified as amended at 42 U.S.C. §2000e-4(a) (1982)).

¹¹ 29 C.F.R. §1607.1-16 (1986).

¹² 29 C.F.R. §1604.11 (1986).

¹³ See the discussion in chap. 2, text accompanying notes 168-169.

¹⁴ Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 Comp.) reprinted in 42 U.S.C. §2000e, app. at 28-31 (1982 & Supp. I 1983).

¹⁵ This is not to say, of course, that other important changes have not been attempted. As discussed, OFCCP sought to relax its affirmative action requirements for Federal contractors, and EEOC initiated a review of the Uniform Guidelines. Opposition by some Members of Congress and civil rights groups, and lack of support by business leaders, thus far have apparently blocked

changes in those areas, and differences at the Cabinet level have prevented more fundamental possible changes in the Executive order program. Political opposition in various communities also defeated DOJ's initiative to strip existing consent decrees of preferential goals or quotas provisions. According to one employer, "we have not seen any change in the EEOC's approach to discrimination charges, and we continue to be reviewed for compliance with E.O. 11246 by the OFCCP." Richard L. Drach, affirmative action consultant, E.I. du Pont de Nemours Co., quoted in Bureau of National Affairs, *Affirmative Action Today: A Legal and Practical Analysis* (1986), p. 91. The consensus of major employers who met with Commission staff in late 1984 was that there had been no discernible backtracking or rollback in equal employment enforcement since 1981, although one contractor representative said that administration "rhetoric" had conveyed a negative impression of what generally was an effective enforcement program. Group interview with employer members, Equal Employment Advisory Council, Dec. 7, 1984.

¹⁶ For Commission views on this policy change, "Statement of the United States Commission on Civil Rights Concerning the Detroit Police Department's Racial Promotion Quota," Jan. 17, 1984, in U.S. Commission on Civil Rights, *Toward An Understanding of Stotts* (1985), p. 55, where a Commission majority supported "the principle of nondiscrimination" but opposed "preferential treatment based on race, color, gender, national origin, or religion in favor of nonvictims of discrimination at the expense of innocent individuals." For the views of individual members of the Commission on the *Johnson* decision and its implications, see the Commission's forthcoming publication *Toward an Understanding of Johnson*.

over two decades ago. The commitment to more extended investigations, full relief, litigation in the event of unsuccessful conciliation, more effective subpoena procedures, and also the new right to appeal no-cause determinations is a bold effort, responsive to past concerns about EEOC's image and performance, to strengthen the agency's enforcement effectiveness. It also is a commitment to the individual who comes to EEOC with a discrimination charge that his or her charge will receive the attention and treatment, at every stage of the process, that many, including this Commission, have found to be lacking throughout EEOC's history. This is a very significant and encouraging development, the effective implementation of which could finally make meaningful the assurances our equal employment laws provide each individual in our society.

In addition, the agencies should be lauded for taking many steps consistent with recommendations by the Civil Rights Commission, the General Accounting Office, and also civil rights groups and employers. For example, as noted, DOJ has broadened its litigation effort to include more suits on behalf of women, Hispanics, and American Indians. EEOC has issued sensible new policy concerning comparable worth and has reformed its financial management system and handling of Federal sector complaint hearings and appeals. OFCCP has acted to synchronize its backpay policy with that of Title VII, providing the kind of policy consistency the Commission has called for. The increased emphasis at OFCCP on technical assistance and communication with contractors is another positive step that seems to have reduced the unduly arbitrary and adversarial approach that sometimes characterized its past dealings with contractors. EEOC also has stressed greater agency outreach to citizens, such as Hispanics, who may have relatively little knowledge of their equal employment opportunity rights, and also smaller employers, who may not fully realize their equal employment opportunity obligations.

Finally, with regard to strengths, all three agencies have placed heavy emphasis on improved productivity and management. They have, in fact, achieved important productivity gains at a time of resource constraints. EEOC and DOJ, as noted, have achieved record levels of litigation and mone-

tary relief for victims of discrimination. EEOC is settling more discrimination charges on their merits, and its traditionally low rate of successful conciliation is now rising. OFCCP has completed a record number of compliance reviews and, probably more important, achieved a major increase in first-time reviews. Further, backlogs of complaints and right-to-sue notices at these agencies have been brought under control. These are very welcome developments and particularly notable in the face of budget pressures.

On the other hand, weaknesses emerge clearly from the information provided earlier in this report. Some of them, such as the sluggish systemic program at EEOC and questionable monitoring of cases at EEOC and DOJ, are not new but have been raised repeatedly in the past. Resource inadequacies also are an old problem that the administration and the Congress must confront at a time of serious national budget deficit.

In addition, the dilemma of quantity versus quality is a theme that runs throughout this review of EEOC, DOJ, and OFCCP activities since 1981. The quantitative increases cited above are not necessarily matched by qualitative gains, despite the agencies' determined efforts toward that end. Greater productivity demands on staff at EEOC and OFCCP may well have undermined the quality of work, a problem that, as noted, had been cited with regard to the previous administration.¹⁷ Some staff naturally will pursue "easier" cases, and shun the more difficult ones, under pressure to increase productivity. Further, downgrading of equal opportunity specialist positions at EEOC and OFCCP may be required from the standpoint of proper management, but it would be unrealistic not to assume that this step will have, at least temporarily, adverse effects on staff morale and the quality of their work.

The agencies have acknowledged such concerns and are working to cope with them. Their ability to do so is limited, however. As noted, for example, EEOC has chosen to conduct more extended charge investigations even when charges continue to increase. If the objective of improved quality of investigations is to be achieved under this circumstance, without leading to a major new backlog of charges awaiting action, additional resources must be forthcoming from Congress.

pressuring for "premature disposition" of cases to meet production goals.

¹⁷ See the previous discussion in chap. 2, text accompanying n.45, concerning the 1981 finding by the Office of Personnel Management that EEOC needed to discourage managers from

There are other fundamental shortcomings in Federal equal employment enforcement since 1981. The area of policy certainly is among these. The widely perceived need for reform of some EEOC and OFCCP equal employment regulations and programs, such as the Federal sector discrimination complaint process, has not been met, for example.¹⁸ For a variety of reasons, including differences of opinion between the agencies, old and defective or unnecessarily burdensome rules and interpretations under all the major laws, such as Title VII,¹⁹ the Equal Pay Act,²⁰ the Age Discrimination in Employment Act,²¹ and Executive Order 11246, remain in effect. This regulatory "gridlock," as one observer aptly has termed it, reflects a major defect in Federal equal employment enforcement since 1981.²²

This regulatory issue is, however, symptomatic of a larger and longstanding problem, namely, serious conflict and inconsistency in Federal equal employment policy. In 1977 the Commission recalled that these agencies had:

disagreed with one another on matters of substantive policy, as is illustrated by their disputes over uniform appropriate Federal positions on such issues as employee selection guidelines and pension benefits.

There also remained disagreement among the agencies as to the meaning of discrimination and how discrimination, once identified, should be remedied.²³

The Commission concluded that plans afoot in late 1977 did "not add up to a comprehensive or coordinated program for improving the Federal effort to end discrimination."²⁴ It called for uniform guidance to employers on equal employment opportunity matters, consistency in the Federal approach to investigating and remedying employment discrimination, and a final authority on executive branch implementation of equal employment opportunity. The Commission said: "Where differences exist among Federal agencies, the Government must have the capacity to reach a prompt resolution of the

issue. The Federal Government should begin immediately to speak with one voice on equal employment opportunity matters."²⁵

Here again the Commission must repeat itself. Despite the Carter administration's Executive Order 12067²⁶ and consolidation of equal employment enforcement functions in fewer agencies, the historic problem of conflict and inconsistency pervades the chapters of this report. The current administration's failure to develop a coherent enforcement approach at EEOC, DOJ, and OFCCP, particularly with regard to remedying discrimination, and with respect to the issue of affirmative action generally, has been so severe as to draw critical attention by the courts.

Another problem related to policy concerns the manner in which policy communications, whether "changes" or "clarifications," have been conveyed to staff at EEOC and OFCCP. As this report has shown, whatever the intentions behind them, certain OFCCP directives, oral and written, and guidance to EEOC field staff on discrimination remedies from headquarters staff, rather than from the EEOC Chairman, caused confusion among staff and employers and led to criticism by others concerning their legality. The National Reporting System at OFCCP also appears to have contributed to a perception of secret maneuverings designed to circumvent the law. As noted, OFCCP has recently acted to repair the damage from its previous "podium policy," but both agencies probably acted unwisely to the detriment of both their public credibility and their interest in internal efficiency.

In the introduction to this report, the Commission noted the limitations on the scope and purpose of this project. Many of the issues and developments discussed in this report warrant further, more intensive examination. Many undoubtedly deserve to be the subject of separate, distinct reports. For example, the various legal cases discussed in this report can be, and have been elsewhere, examined at much greater length. EEOC's age discrimination and State

of Recent EEOC Developments on Corporate Employers," at Bureau of National Affairs and Industrial Relations Research Association Conference on "EEO and Affirmative Action," Washington, D.C., June 5, 1986, p. 2.

²³ *Sequel*, p. 331.

²⁴ *Ibid.*, p. 332.

²⁵ *Ibid.*, pp. 334-35.

²⁶ Exec. Order No. 12,067, 3 C.F.R. 206 (1979), reprinted in 42 U.S.C. §2000e app. at 668-69 (Supp. V 1981).

¹⁸ The Commission, therefore, unfortunately must repeat its 1977 conclusion that "Federal employees are faced with little more protection against employment discrimination than would be employees in the private sector if their own employers were the final authority on the lawfulness of their employment practices." *Sequel*, p. 331.

¹⁹ 42 U.S.C. §2000e-20003-17 (1982).

²⁰ 42 U.S.C. §206(d) (1982).

²¹ 29 U.S.C. §§621-634 (1982).

²² Jeffrey A. Norris, McGuinness and Williams, speech, "Impact

and local programs could be the subjects of separate studies, as could OFCCP's veterans and handicap programs. The process by which the Solicitor's office at the Labor Department enforces Executive Order 11246 is yet another subject ripe for intensive review. In addition, not enough is yet known about the empirical results thus far of affirmative recruitment, as opposed to goals and timetables, in increasing the employment of minorities and women. GAO research now underway concerning EEOC charge processing should soon shed light on how that task is actually being implemented at various field offices.

As this report indicates, however, important questions still need answers. For example, how can the policy coordination problem finally be resolved? Does Executive Order 12067 require amendment or abolition? Is further consolidation (i.e., merging OFCCP into EEOC) the answer? Should Title VII be strengthened, as the EEOC Chairman has suggested, by providing civil penalties against discriminatory employers? Congress and the administration should address anew such fundamental questions. Meanwhile, the Supreme Court undoubtedly will continue to examine how remedial justice can best be assured to victims of job discrimination consistent with the fundamental tenets of the laws and Constitution of this Nation.

As for the Commission on Civil Rights, this report should be construed only as its most recent word on these important matters, not the last. The Commission views its independent monitoring role as vital and will, as appropriate, address further various matters discussed in this report.²⁷

Another point should also be made. As noted in the introduction, extensive interviewing of Federal officials and other interested individuals was a key methodological tool for obtaining understanding and

insight into the purposes and rationale behind the programs and policies pursued since 1981. In the Commission's view, the commitment, dedication, and hard work of many officials cited in this study deserve recognition. Commission staff have been struck by their recognition of past criticisms, their frequent candor in acknowledging current weaknesses, and their determination to advance the effectiveness, as they see it, of the agencies they lead. The pressures and problems they have faced with regard to resources and policy differences, for example, have compounded what always have been difficult challenges. These individuals share the Commission's view that the Federal Government has a continuing, fundamental obligation to assure every American equal opportunity in the workplace. They also share the frustration and concern that many, including this Commission, feel that the effort to guarantee this right remains far from perfect.

The current administration can do much in its remaining months to strengthen its record in enforcing equal employment requirements and leave a legacy of accomplishment for the next administration to build upon. Regulatory reform should be one priority. EEOC's transition to a more effective enforcement agency must continue. Promising new leadership at the Labor Department can provide vigor and follow through in improving OFCCP operations and credibility as an enforcement agency. Top agency officials, and the President,²⁸ can and should more effectively convey to the public their objectives and commitments with respect to Federal equal employment enforcement. If civil rights and women's rights representatives and employers join in fresh thinking and dialogue about basically old problems, new gains in improving this enforcement effort are sure to follow.

²⁷ At its June 1987 meeting, the Commission determined new reports on Federal civil rights enforcement to be among its top priorities in FY 88 and 89.

²⁸ See U.S. Commission on Civil Rights, *The Federal Civil Rights*

Effort—1974, vol. VII, *To Preserve, Protect and Defend the Constitution* (1977), pp. 1-3, on the importance of Presidential leadership in civil rights enforcement.

Statement of Chairman Clarence M. Pendleton, Jr.

I endorse this report without reservation and believe it reflects new heights in Commission research and reporting in the critical area of Federal civil rights enforcement. It covers a wealth of program and policy matters at these three Federal agencies in extraordinary detail, providing rich insights into the rationale for and results of agency activities since 1981. It may well be unprecedented at the Commission for its factual accuracy, and it never "reaches" for conclusions that are not clearly substantiated. The report is also unique in terms of its extraordinary range of sources, including top agency heads during both the current and preceding administrations, as well as employers. Further, it is remarkably balanced and objective, clearly faulting, as well as commending, these agencies, or the administration generally, in a fully justified manner.

In the past the Commission has been criticized for "Ivory Tower" preaching and predictable, unconstructive rhetoric: this report, by contrast, is pragmatic and potentially highly useful in identifying and resolving various specific problems, some of which are longstanding. It also should be of great value to the agencies involved, congressional oversight and appropriations committees, interested public groups, and to the Commission itself as a new, comprehen-

sive data and information base from which to monitor and enhance the future performance of this enforcement effort. Finally, I am very gratified at the timeliness of this study, which is available for review by new officials responsible for the contract compliance program at the Labor Department and several new Commissioners at EEOC, who only recently have been installed.

I must note that this project was nearly killed last year when Congress drastically cut the budget of the Civil Rights Commission, the latest in the assaults on this agency throughout its history. Congress so acted regardless of the fact that this study, and others, were approaching completion. This year, the Commission's 30th anniversary, the House of Representatives again voted to kill the Commission, and as of this writing the Commission faces extinction.

I am proud of this Commission study, a landmark of its kind, and I consider it a tragedy that many in Congress no longer believe such reports are necessary to help assure this nation's guarantee of equal employment opportunity for all.

The Commission is indebted to James B. Corey, Office of General Counsel/Civil Rights Evaluation, without whose exemplary dedication and skill this project would not have been completed.

Statement of Vice Chairman Murray Friedman

As one who recalls very clearly the enormous struggle involved in enacting our Federal civil rights laws, I consider effective enforcement of those laws vital. Monitoring of this enforcement effort by the Commission also must remain one of its top priorities.

I, therefore, welcome this new Commission monitoring report, which dissects the process by which Federal agencies enforce equal employment laws and Executive orders and comments on the nature and progress of that effort during the past 6 years. The report reflects meticulous, painstaking scholarship and objectivity. Although it is lengthy, detailed, heavily footnoted, and often deals with quite technical matters, the range of information offered permits a full view of the inner workings of the three agencies assessed. I found the report not only extremely illuminating and insightful but also even exciting at times, despite its dispassionate nature.

I share fully the premise underlying this study with respect to the need for continuing strengthening of Federal enforcement of equal employment requirements. I welcome particularly the reference in the conclusion of the study to the question of amending Title VII of the Civil Rights Act of 1964 to provide for sanctions, such as fines and even jail terms, for employers found guilty of discrimination. This issue should be pursued.

As pleased as I am with this Commission report, I also am gratified that the Commission plans to prepare subsequent monitoring reports covering other Federal civil rights agencies during the next 2 years. This kind of Commission research must continue. I deplore deeply the drastic cuts in the budget the Commission received from the Congress that will render difficult and, indeed, even destroy our ability to perform such useful work.

Statement of Commissioner William B. Allen

Lay aside public perceptions of an administration working hand in glove to gut previously constructed civil rights remedies. Now we have the evidence both that a basic continuity has characterized Federal equal employment enforcement since 1981 and that the definitive administration voice on the subject has not departed substantially from the line previously established. The Commission acted wisely, and *unanimously*, in ordering up a "clearinghouse" report that would set the facts forth to enable independent, objective judgements to be formed. As was the case with the Commission's 1983 clearinghouse monitoring report, *Federal Civil Rights Commitments: An Assessment of Enforcement Resources and Performance*, and as generally is the custom with clearinghouse reports, this study was not expected to contain formal, enumerated findings and recommendations.

One of the concerns that the report raises to my mind is the utter necessity of further work in this area. It is clear that both for statutory and administrative reasons, a deep and pervasive confusion

characterizes Federal equal employment enforcement. The evidence palpably shouts at the observer, hard as it is to believe, that the United States has failed heretofore to develop a coordinated enforcement policy in the area of civil rights. Accordingly, I believe that it is urgent that attention be turned to the development of a *Model Civil Rights Enforcement Code*. I also believe that the Commission on Civil Rights is the one agency best suited to take the lead in such an endeavor (having the broadest mandate), through working closely with the other agencies involved.

This work may now begin in earnest, assuming that political obstructions to progress in civil rights can be ended. For this we owe thanks to the efforts of the staff of the Commission which, despite being severely constrained and working in an atmosphere of crisis, has produced for us a foundation raised on primary sources and firsthand agency accounts as well as the views of employers and representatives of civil rights groups which deal directly with the Federal Government.

Statement of Commissioners Mary Frances Berry, Francis S. Guess, and Blandina Cardenas Ramirez

We dissented from the majority's approval of this report for several reasons. First, the report is disappointing because it is based largely on second-hand accounts or uncorroborated statements by the administrators responsible for the programs under review. Second, it draws the surprising conclusion, which is at odds with public information on the subject, that the equal employment law enforcement

policies of the Reagan Administration do not represent major changes from those of previous administrations.

Most significantly, the report does not fulfill an important Commission function in that it makes no recommendations concerning improvements in the Federal agencies' EEO enforcement performance.

Appendix A

Comments

Equal Employment Opportunity Commission



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

The Honorable Clarence M. Pendleton, Jr.
Chairman
U.S. Commission on Civil Rights
1121 Vermont Ave., N.W.
Washington, DC 20425

Dear Chairman Pendleton:

Thank you for forwarding a copy of the draft EEOC chapter from the Commission's study of federal equal employment enforcement. I appreciate the fact that you have incorporated so many of the changes we suggested in the first draft presented to us.

Upon reading the new draft, I feel compelled to make my case to you and your fellow Commissioners regarding the policymaking that has taken place at EEOC in recent years. While isolated mentions are scattered throughout the report concerning EEOC policy decisions, no cohesive point is made of the series of Commission policies that go right to the very nature of how this Commission enforces the law.

In adopting our policies on Enforcement, Investigative Compliance, Remedies and Relief and No Cause Appeals, this Commission declared its intent to pursue quality investigation of charges, to make victims whole and to ensure that injustices are corrected and not repeated.

The Commission on Civil Rights' report would appear to interpret these acts as management adjustments. I believe they are major policymaking decisions that have had a significant impact on the effectiveness of EEOC. I would suggest that these actions be given a stronger presence in your report.

Thank you again for the opportunity to comment on a report that is certainly reflective of your and the Commission staff's hard work and dedication.

Sincerely,

Clarence Thomas
Chairman

Following are the specific suggested changes discussed by Deborah Graham and Mike Freeman in the 4/27/87 meeting at EEOC headquarters. These are in addition to the changes suggested verbally at that meeting. Two more items will be forwarded on the morning of May 5, a paragraph on EEOC field reorganization in response to the charge intake criticism on page 32 and a clarification on the page 92 assertion claiming a drop in class action suits.

Goals and timetables

Pursuant to our discussion on the relative weight accorded to the goals and timetables issue within the report, no relevant cases approved by the Commission during the eight-month period (Oct. 1985-July 1986) in which goals and timetables were an "issue."

FY 1986 Office of Management annual report

Per your request a copy is attached.

Pp. 2 and 33--regarding lack of Commission policymaking

The Commission's decision on comparable worth was just one of 16 decisions issued in 1985 dealing with discrimination charges that had no clear precedent to follow. Other Commission decisions covered religious accommodation, foreign corporations doing business in the United States and sexual harassment.

The Commission issued guidance to its field offices through policy statements and compliance manual revisions and additions. On Aug. 4, 1986, the Commission determined an employer must show a legitimate nondiscriminatory reason for the denial of employment opportunity because of an individual's accent or manner of speaking.

The Commission followed its "Speak English only" policy with a statement released Feb. 26, 1987, saying employers trying to comply with the Immigration Reform and Control Act still have obligations under Title VII of the Civil Rights Act to refrain from national origin discrimination.

On Feb. 2, 1987, the Commission determined that polygraph examinations may be used by an employer, as long as the tests are not administered disparately with regard to race, sex, national origin or age. In a notice issued to its field offices, the Commission said it "is not aware of any conclusive evidence that there are significant differences in performance on polygraph exams based on race, sex, national origin or age."

page two

Guidelines on age harassment were issued to EEOC field offices in the spring of 1987. The Commission recognized that, like sexual or racial harassment, harassment because of one's age is an illegal activity under the Age Discrimination in Employment Act.

In an opinion letter written April 7, the Commission determined that appointed state and local judges were not employees within the meaning of the Age Discrimination in Employment Act. The issue arose when Congress amended ADEA, lifting the age 70 cap. Retirement policies for state and local judges vary from state to state. EEOC indicated it would handle charges of discrimination on a case-by-case basis.

(We also maintain, as we did in the 4/27/87 meeting, that the Commission's policies on Investigative Compliance, Remedies and Relief, Enforcement and No Cause Appeals are also examples of critical policymaking)

Page 3--"No Cause" findings have increased dramatically..."

While no cause findings increased, so did successful conciliations. Successful conciliations increased by 32.9 percent from FY 1985 to FY 1986. With EEOC's emphasis on fully investigating charges, resolutions on the merits have increased from 38 percent in FY 1982 to 62.5 percent in FY 1986.

Page 3--"Further, the systemic charge program still has not advanced significantly"

Since the beginning of fiscal year 1986, Systemic Litigation Services has expanded its litigation efforts and, in fact, more than doubled its docket of cases. When the program was reorganized (to be handled exclusively by the Office of General Counsel) in September 1985, SLS had eight active cases. There are now 19 cases in active litigation. As of March 1987, there were 94 active investigations against respondents with new charges being filed regularly.

Page 3--"Monitoring of case filings remains inadequate..."

The Commission has a formal monitoring program, with monitoring being a part of written audit guidelines for field legal units. The agency monitors its field offices as to their monitoring effectiveness. Since 1983, the systemic program has updated approximately 40 major settlements, leading to six enforcement actions with two to three others expected to be filed this fiscal year.

Page 9--organizational chart

See new organizational chart attached.

page three

Page 10--office descriptions

The Offices of Communications and Congressional Affairs have been merged with the following new description:

The Office of Communications and Legislative Affairs serves as the agency's primary communications link with the news media, Congress, the general public, ~~constituency~~ and constituency organizations. The Office coordinates the agency's public affairs activities.

The Office of Program Research has been abolished and its functions transferred to the Office of General Counsel.

Page 24, footnote 59--Ron Passero quotation

Mr. Passero said he made no mention of or reference to any of the information included in the footnote. Mr. Passero said he will be glad to talk to a Civil Rights Commission interviewer at any time, but that the quote attributed to him and the information contained therein are both incorrect.

Page 32--training

The following paragraph should be added to the section on training:

The Commission is conducting a major training effort in June 1987 that will be attended by every EEOC investigator, investigator supervisor and compliance manager in the field. The series of three one-week training courses will be conducted at a central facility. Training will be devoted entirely to the conduct of on-site investigations, including the interviewing of charging parties, neutral witnesses and respondents, the gathering and analysis of evidence and general case development. The workshops will require the active participation of the attendees and will include videotaped role-plays with one-on-one feedback provided by an instructor. The training conference will be attended by over 1,400 EEOC employees and it is anticipated that over \$1 million will be spent on the program. (Information provided by Pamela Talkin, EEOC Chief of Staff)

Pp.49-50--pension accrual

On page 49, line 7, change March 1985 to June 1984. The first EEOC vote to rescind the existing interpretation was on June 26, 1984.

On page 50, line 6, following "dragged on without resolution for seven years," change the rest of the paragraph to read, "Congress enacted legislation in October 1986 prohibiting reduction or discontinuation of benefit accruals or continued allocations to an employee's account under defined benefit or contributions plans on account of a specified age. The

page four

Commission voted to rescind its regulatory process in November, opting instead to devote its resources to developing regulations implementing the new statute.

In footnote 129, change to read: In February, 1987, a Federal district court criticized EEOC for its 'slothful delay' in resolving this issue and ordered the agency to issue a final rule within 80 days of the order requiring employer pension contributions. While the order is under appeal, EEOC proceeded to publish a notice of proposed rulemaking in the April 2, 1987 Federal Register.

Page 52--handicap guidelines

EEOC has taken the following steps concerning guidelines regarding handicapped individuals. The Office of Coordination is developing a definition of what constitutes a "handicapped individual." The Office of Management, in February 1987, circulated a management directive on reasonable accommodation. EEOC is working with OPM on developing regulations for reassignment of handicapped employees. EEOC is also developing a memorandum to all federal agencies addressing the issue of temporary disabilities.

Page 75--"The type of relief to be sought...has not yet been determined"

Delete the sentence and insert the following: EEOC staff was instructed in July 1985 that the Supreme Court had clarified the status of law respecting the permissibility of the use of goals and timetables. The staff was told to adhere to the Commission policy on remedies and relief, that "a full remedy must be sought..." in all cases. The three Supreme Court decisions are to provide the parameters for the use of goals and timetables.

In accordance, change footnote 215 to read: Memorandum to all EEOC District Directors and Regional Attorneys from Johnny H. Butler, Acting General Counsel and James H. Troy, Director of Program Operations, July 25, 1987.

Page 81--ORA case inventory.

Add the following sentence: In FY 1985, the United States Postal Service (USPS) accounted for 49.8 percent of ORA case receipts. Of the 3,836 cases filed, 1,911 were filed by the postal service.

Page 91--GM settlement

Add: Of 900 outstanding charges at the date of settlement, less than 10 have yet to be resolved.

page five

Page 93--"EPA case filings have also declined substantially"

"..., although it should be noted that charges filed under EPA were down from 1,875 in FY 1985 to 1,269 in FY 1986."

Page 98--coordination

Add the following to the section on coordination: In FY 1986, the Office of Review and Appeals (ORA) concluded after three years of consultation with agency EEO policymakers and field office practitioners, federal union officials and federal employees that effective resolution of the problems impairing settlement of employee-management disputes could best be accomplished through the joined efforts of the federal dispute resolution (FDR) agencies. Overlapping of FDR agency processes, significant increases in the filing of duplicate complaints and the escalating costs associated with these problems were impacting on the total enforcement community. This situation led EEOC to conceive a broad-based strategy to address these problems, the focal point of which was a national conference program dedicated to improving federal dispute resolution.

EEOC designed a comprehensive dispute resolution training and technical information program involving EEOC's sister enforcement agencies in its finalization, coordination and implementation. Additionally, these agencies (MSPB, FLRA, OPM, OSC and NLRB) cooperated on the development of an all-inclusive guidebook on federal dispute resolution systems. The publication describes and consolidates all of the dispute settlement mechanisms available to federal employees.

A third FDR conference is in its initial planning stage. Also, several new projects are being planned to further address the problems hindering the effective operation of dispute resolution processes. In this regard and in addition to its sister FDR agencies, the Commission will be reaching out to 22 other federal agencies and inviting them to join this concerted effort to make the government's dispute resolution program more effective in operation and reasonable in cost.

Page 112--Satellite program

EEOC also plans, for the fall of 1987, a nationwide satellite teleconference. Small business and labor groups, as well as the general public, are being invited to attend the teleconference in one of the 50 planned host cities. The seminar is aimed at providing participants basic training in EEO laws.

ADDENDUM TO EEOC SUGGESTED CHANGES

P. 32--criticism of charge intake

A field reorganization plan that will improve the quality of charge intake will become effective upon approval by Senate and House appropriations subcommittees. Under the plan, professional investigators will handle the full range of operations in rapid charge and extended charge work. This will answer concerns about the level of professional know-how at the intake stage.

P. 92--alleged decline in class cases

Since FY 1980 figures for class suits are projected, not actual, figures, we would recommend their deletion from the report. However, if the projected figures are used, then all figures from FY 1980 through FY 1986 should be included. See attached chart.

P. 3--Correction

On page two of the last set of proposed changes, in the section on systemic charge program, strike the word "exclusively" in line 4.

P. 52--Correction

On page four of the last set of proposed changes, in the section on handicap guidelines, change Office of Coordination to Office of Legal Counsel.

P. 81--Correction

On page four of the last set of proposed changes, in the section on ORA case inventory, change "were filed by" to "involved."

Number of Suits Filed, by Type of Litigation
by Fiscal Year, FY 1979 - FY 1985

Cases Filed - (Class and Individual)

<u>YEAR</u>	<u>TOTAL FILED</u>	<u>CLASS</u>	<u>INDIVIDUAL</u>
FY 1979*	245	154 (63%)	91 (37%)
FY 1980*	326	218 (67%)	108 (33%)
FY 1981**	368	166 (45%)	202 (55%)
FY 1982	164	69 (42%)	95 (58%)
FY 1983	136	75 (55%)	61 (45%)
FY 1984	222	112 (51%)	110 (49%)
FY 1985	286	155 (54%)	131 (46%)

* These numbers are projections, based on type of recommendations received by the Office of General Counsel. Complete data on the type of cases filed were not maintained by the Office of General Counsel prior to FY 1982.

** These numbers are projections, based on a sample of the filing during FY 1981.

Source: Administrative and Technical Services Staff
Office of General Counsel
January 1986

Appendix B

Comments

Employment Litigation Section

Civil Rights Division

Department of Justice



U.S. Department of Justice

WBR:DLR:gtb
DJ 170-012

Washington, D.C. 20530

JUN 22 1987

Susan J. Prado
Acting Staff Director
United States Commission on Civil Rights
1121 Vermont Avenue, N.W.
Washington, D.C. 20425

Dear Ms. Prado:

Thank you for your letters of May 18 and June 4 and the opportunity to comment on the chapter discussing the role of this Department in the draft of your report on Federal enforcement of equal employment opportunity requirements since 1981.

In our view, the draft report accurately reflects the continuity of this Division's efforts to enforce Federal equal employment opportunity laws, while recognizing the major policy change, adopted in 1981 and thereafter, opposing the use of quotas or other numerical devices which grant preferences based upon race, sex or national origin in hiring, promotion, demotion and other employment decisions. We also find that the draft chapter goes to considerable lengths to provide a balanced perspective.

In the text of this letter, we address a major concern we have with the draft report. In the attachment to this letter we address four more technical matters.

In the introduction and summary (p.1) of the chapter, the draft report states that this Division's reliance on statistics "has drawn sharp criticism from some defendant employers, and some inconsistency appears between DOJ's practices in this regard and DOJ public statements."

The only support for this statement that we have found in the body of report is that prior to trial, counsel for the defendant in United States v. Pasadena I.S.D. criticized the Division's reliance on statistics (p. 35). In a note, however, the draft recognizes that our evidence at trial included not only statistical analyses, but also the testimony of fifty-two witnesses, including thirty rejected black teacher applicants; and that the advisory jury found the employer had engaged in purposeful racial discrimination. The draft however fails to

note that the Judge in that case accepted the jury's finding, and ruled that twenty-nine of the thirty black applicant witnesses had been subject to discriminatory treatment; that the Judge entered a comprehensive decree, based upon his findings; and that defendants thereafter agreed to pay \$537,000 in back pay, and did not prosecute an appeal.

More fundamentally, the draft report does not state why the use of statistics to prove liability for past conduct is inconsistent with a policy of opposing racial preferences in hiring, promotion, etc., for future conduct. We can find no inconsistency. Statistics as a reference point for reporting the results of past transactions suggests no prospective action tied to numbers. It is rather but another way to look at the employment decisions already made. Statistics serves as a means of stating certain facts of record that exist or existed, without resort to projections or "guesstimates" of what a workforce might look like statistically in the future.

Thus, it is settled law that a gross disparity between the racial composition of the qualified and interested labor market and the work force of a particular employer gives rise to an inference of purposeful discrimination. Teamsters v. United States, 431 U.S. 324 (1977); Hazelwood School District v. United States, 433 U.S. 299 (1977). Accord: Bazemore and United States v. Friday, ___ U.S. ___, 106 S.Ct. 3000 (July 1, 1986). While our practice (as illustrated in the Pasadena case above) has been to supplement the inference arising from statistics with testimony and other evidence, we could not properly enforce the law if we failed to analyze and utilize relevant statistics which tend to show past discriminatory practices. Even so, the use of such analyses to prove past discriminatory practices does not compel future racial preferences, nor is such use in any way inconsistent with opposition to such preferences in court ordered remedies and voluntary "affirmative action" plans.

We would appreciate your consideration of the matter discussed above and the technical points raised in the attachment hereto.

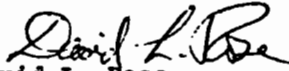
Your letter of May 18 asks about an apparent discrepancy between statistics in the draft report and those set forth in our report on Enforcing the Law. The only difference we have found is that your report states that forty-nine cases were filed between "late January 1981 and the end of 1984." There were forty-nine cases filed from January 1981 through the end of 1984 (as Enforcing the Law states), but one of those (United States v. Commercial Lovelace), S.D. Ohio, C2-81-28) was filed

on January 12, 1981, and perhaps should not be included in the count of the draft report. Please feel free to call the undersigned (633-3831) if you have any questions about this matter.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By:


David L. Rose
Chief
Employment Litigation Section

Attachment to the Letter of the Civil Rights Division
Re: DOJ Chapter of Draft Report on Federal Enforcement
of Equal Employment Opportunity Requirements

-Additional Comments-

1. p. 5 of the draft states that under the 1977 regulations of DOL, DOJ may initiate suits "against Federal contractors without a referral." As the regulation itself states, and footnote 10 of the draft recognizes, however, the regulations authorize DOJ to initiate investigations and suits only with the approval of the Director of OFCCP. We do not understand the significance of the phrase "without a referral;" and suggest that it be deleted, and the phrase "with the approval of the Director of OFCCP" be substituted for it; and that footnote 10 be appended to the next sentence.
2. p. 17 of the draft states "DOJ no longer includes numerical goals (except in recruitment) or quotas in the relief it has sought". The parenthetical clause in the quoted material should be deleted, since DOJ has not sought numerical goals in recruitment at least since early 1982.

3. p. 21: The government was a party to the Local 28, Sheet Metal Workers case and the Paradise case, and therefore was a party in those two cases, rather than as amicus. The last sentence of the first paragraph should therefore be amended to state "DOJ filed briefs as a party or as amicus in all of these cases."

4. p. 38: The sentence quoted from the Fairfax County decree reflects the defendants' intentions. While the term "relevant labor market" properly defined includes reference to qualifications and interest, the quoted sentence is ambiguous. DOJ decrees subsequent to early 1982 however have made it clear that the qualified and available labor force is the appropriate standard for comparison, rather than simple undifferentiated labor force or population. The Division has and continues to oppose proportional representation, but continues to believe that the qualified and interested labor market is a relevant basis for measuring equal employment opportunity.

Appendix C

Comments

Office of Federal Contract Compliance Programs

Employment Standards Administration

Department of Labor

U.S. Department of Labor

Deputy Under Secretary for
Employment Standards
Washington, D.C. 20210



JUN 23 1987

Ms. Susan J. Prado
Acting Staff Director
U.S. Commission on Civil Rights
Washington, D.C. 20425

Dear Ms. Prado:

This is in response to your request for comments on your report on Federal enforcement of equal employment requirements since 1981. We have prepared comments on the first 40 pages of the chapter of the report dealing with the Office of Federal Contract Compliance Programs (OFCCP). We have received the rest of the chapter and will be providing our comments shortly. Our comments are divided into two categories: A. General Comments; B. Specific Comments.

A. General Comments

The most noticeable thing about the report is that it is quite dated. There are frequent cites to former Deputy Under Secretary for Employment Standards Robert B. Collyer. Mr. Collyer left the Department of Labor in 1983. Also, many policies and procedures are attributed to former OFCCP Director Ellen Shong Bergman, who also left in 1983. Since the main text generally does not include dates, a reader could easily receive the impression that the statements and policies attributed to these and other former officials are still in effect. To offset this problem, and for general chronological clarity, we recommend that the main text, where possible, include the year a statement was made or an event occurred. See specific comments for pages 13 through 16 below.

Related to the dated nature of the material is the absence of recent developments. For example, in the discussion of the debate over affirmative action beginning on page 35, there is no mention of recent Supreme Court decisions which we believe have resolved most legal issues concerning the Executive Order program. See particularly Johnson v. Transportation Agency, 43 FEP Cases 411 (US Sup Ct, 1987).

Similarly, there is little reference to recent OFCCP initiatives in the area of policy guidance, training and/or management systems. For example, in the policy area, OFCCP has issued a large number of directives on such matters as systemic employment discrimination, formula relief, continuing violations, etc. In

training, a ten course basic curriculum is under development. In the management area, there has been a significant redelegation of authority to the field. For example, Conciliation Agreements are no longer automatically sent to the National Office for review. Also, most enforcement recommendations are now sent directly to the Regional Solicitors.

So that you have an update on these recent developments, I have enclosed a copy of my testimony delivered on June 4, 1987 before the House Labor Subcommittee on Employment Opportunities.

B. Specific Comments

<u>Page</u>	<u>Comment</u>
3	In footnote 9, following "Executive Order 11.375, 3 C.F.R." insert 684; and following "Executive Order 11.478, 3 C.F.R." insert 803.
4	<p>In the second sentence we recommend that you clarify coverage of Revised Order No. 4 by inserting: "That order applies to contractors employing 50 or more persons and holding a Federal contract or subcontract of \$50,000 or more." Then begin the following sentence with "It requires such contractors..."</p> <p>Since current policy is that goals be expressed in percentage terms, in the sentence beginning "If there is underutilization..." delete the word "numerical."</p> <p>The revision of Order No. 4 to add women was issued in 1971 only, so at the end of the first sentence in footnote 10, delete the words "and 1972."</p>
5	<p>In the second sentence, the reference to OFCCP's responsibilities under the Vietnam Era Veterans' Readjustment Assistance Act should be to 38 U.S.C. 2012 rather than to Section 402. This will prevent any confusion that might arise between the text and footnote 15.</p> <p>Beginning with the third sentence of footnote 13, we suggest the following clarification. "Goals and time-tables are set on the basis of a percentage of hours worked in the contractor's aggregate work force for each trade. For minorities, goals are based on labor data for the geographic area where the contract is to be performed; for women, a single national goal is in effect (currently 6.9 percent)."</p>

<u>Page</u>	<u>Comment</u>
6	<p>The first paragraph on this page may be out of place. Statements concerning coverage of the Executive Order more properly should appear at the end of page 3 where that subject is discussed.</p> <p>In the first sentence of the third paragraph, insert the word "through" following the phrase "... compliance reviews and" This will clarify that OFCCP does not routinely schedule complaint investigations.</p>
8	<p>To clarify that individual Executive Order complaints are normally referred to EEOC, and that OFCCP investigates all veterans' complaints, revise the third paragraph to read: "Individual complaints are normally referred to EEOC, but OFCCP normally investigates class discrimination complaints." Then, in the next sentence, insert "or veterans' status" following "... a handicapping condition."</p>
9	<p>Chart A was missing from our copy (a current ESA Organization chart is enclosed).</p>
10	<p>The OFCCP organization chart has been superseded by the enclosed chart. Since the enclosed chart may be further revised, please check with us before you issue the report in final.</p>
11	<p>Since only about 78 percent of OFCCP staff is in area offices, rather than 90 percent, the figure in the last sentence needs correction to 78 percent.</p> <p>Footnote 27 is too broad in stating which Conciliation Agreements (CAs) and proposed sanction actions must currently come into the National Office (NO). As a result of delegations of authority earlier this year, only those CAs involving large settlements or novel issues, and only those enforcement cases involving novel issues, must be sent to the NO.</p>
13	<p>In order to make it clear that the criticisms cited on this page are not current, we recommend that their dates be added. Specifically, at the end of the phrase introducing the indented quote, add "as of 1965." In the sentence immediately following this quote, add "in 1965" after "Executive Order 11246."</p>

<u>Page</u>	<u>Comment</u>
14	We recommend adding "In 1975" at the beginning of the first full sentence which starts "The General Accounting Office...."
15	We recommend adding "voiced in the early 1980s" after "Executive Order 11246" in the first sentence on the page.
16	We recommend adding "in 1981" after the initial phrase "For example," in footnote 39.
17	We recommend rephrasing the first sentence on this page. It sounds like an over generalization to state that "DOL officials who took office in 1981 believed" Surely all officials did not hold the same belief. Also, on the third line, change "have" to "had."
20	In footnote 49, it should be made clear that the staff reductions were proposed.
21,22, 23	We have corrected the figures in the charts on pages 22 and 23, and have enclosed replacements. The concomitant changes need to be made in the first paragraph on page 21.
25	In next to the last line of the main text, "Center administration" should be changed to "Carter Administration."
26	This page contains a discussion of a Department of Labor Inspector General's report. The date of the report should be cited. In footnote 63, "Program Coordination" should be changed to "Enforcement Coordination."
27	Footnote 69 discusses OIG recommendations. It should be noted that OFCCP has redelegated to the field responsibility for most Conciliation Agreements and enforcement cases. The only Conciliation Agreements that are routinely submitted to the National Office are those involving 50 or more discriminatees, \$100,000 or more in financial settlements, or novel issues (OFCCP Directive No. 650c8, December 19, 1986). The only enforcement cases that must be submitted to the National Office for review are those involving novel issues (OFCCP Directive No. 650c9, February 24, 1987).

<u>Page</u>	<u>Comment</u>
31	Under "Staff Training," most staff transferred to OFCCP in 1978 rather than 1979.
32	It should be stated in footnote 84 that after the managers and support staff were trained at the March 10, 1983 conference, they in turn trained their own respective staffs.
33	We recommend expanding the coverage of new training. See the enclosed testimony for a complete description.
34	Footnote 89 concerns the lack of information about construction contractors. OFCCP has remedied the problems with identification of construction contractors. Since November 1986 OFCCP has been distributing monthly reports to each area office on all on-going public construction projects in the office's geographic area. Also, OFCCP has revised the construction contractor selection system. See my enclosed testimony for a detailed description.
36	Footnote 92, which discusses U.S. Supreme Court decisions, is badly out of date. It should be updated to reflect recent cases.

Thank you for the opportunity to review this portion of the draft report. I hope you find our comments helpful. Please feel free to contact OFCCP if you have any questions.

Sincerely,



Susan R. Meisinger
Deputy Under Secretary

Enclosures

CORRECTED TO REFLECT OFFICIAL ESA BUDGET DATA

TABLE ____

OFCCP Budget Totals, FY '80-'88
(in thousands of dollars)

<u>Fiscal Year</u>	<u>Appropriation a/ (Annualized)</u>
1980	\$53,053
1981	49,680
1982	43,150
1983	43,815
1984	46,333
1985	46,630
1986	45,639 <u>b/</u>
1987	47,191 (amended request)
1988 (Request)	51,186

a/ Figures represent what OFCCP could have spent during a whole fiscal year under each spending ceiling.

b/ The Balanced Budget and Emergency Deficit Control (Gramm-Rudman-Hollings) Act of 1985 reduced OFCCP's FY 86 appropriation by \$1,962,000. (This reduction is not reflected in the above figure.)

SOURCE: Office of Federal Contract Compliance Programs,
U.S. Department of Labor.

-23-

CORRECTED TO REFLECT OFFICIAL ESA DATA

TABLE ____

OFCCP Full-Time, Permanent Staff Positions, FY '80-'88

<u>Fiscal Year</u>	<u>Authorized a/</u>	<u>Actual b/</u>
1980	1,482	1,304
1981	1,482	1,211
1982	1,008	988
1983	979	971
1984	979	997
1985	964	986
1986	935	860
1987	910	840 <u>c/</u>
1988 (Request)	860	

a/ Number of full-time permanent staff permitted under Congressional budget measures.

b/ Number of full-time, permanent staff actually employed by OFCCP. Except as noted, figures are for the end of the fiscal year.

c/ As of April 30, 1987

SOURCE: Office of Federal Contract Compliance Programs,
U.S. Department of Labor.

STATEMENT OF DEPUTY UNDER SECRETARY OF LABOR MEISINGER ON OFCCP
ENFORCEMENT BEFORE HOUSE LABOR SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES
(TEXT)

We welcome this opportunity to come before you today to discuss the Office of Federal Contract Compliance Programs (OFCCP).

The Employment Standards Administration's Office of Federal Contract Compliance Programs (OFCCP) is responsible for enforcing Executive Order 11246, as amended, which prohibits employment discrimination by Federal contractors on the basis of race, color, religion, sex, or national origin. The Executive Order — along with the applicable sections of the Rehabilitation Act of 1973, as amended, and the Vietnam Era Veterans Readjustment Assistance Act of 1974, as amended — also requires that companies doing business with the Federal Government take affirmative action in employment.

As you know, affirmative action has been the subject of considerable discussion over the last several years. This discussion occurred as the legal status and limits of affirmative action were being defined by the courts. Secretary Brock's views on affirmative action and the need to effectively enforce the Executive Order are well known to the Committee.

While court consideration of affirmative action was taking place, the Department of Labor continued to fully implement and enforce its regulations — both as they apply to nondiscrimination and to affirmative action — under the Executive Order, the Rehabilitation Act and the Vietnam Era Veterans Readjustment Assistance Act.

Over the last several months, we have taken a wide range of initiatives — in policy direction, in training and in management — to strengthen our performance. I will discuss our specific initiatives later, but would first like to share with you some of the progress we have made over the last several years, as well as the tangible results of our more recent initiatives that we are now seeing in performance data.

One of our prime objectives over the last several years has been to expand OFCCP's presence in the contractor community. We believe that the achievement of a nondiscriminatory workplace for all Americans is closely linked to the number of contractors we are able to review or otherwise reach, in order to enhance the work opportunities of minorities, women, individuals with handicaps and veterans.

To this end, we view the steady increase in the number of compliance reviews, in the number of employees covered by such reviews, and in technical assistance provided, as important indicators of program impact — an impact that has been broadened despite budgetary restraints.

Specifically, in FY 1980, OFCCP completed 2,632 compliance reviews. In FY 1981 and 1982, that number rose to over 3,000, in FY 1983, to over 4,000; and has been above 5,000 ever since. We anticipate that we will exceed the 5000 level this fiscal year and in FY 1988.

This steady increase in reviews has had a corresponding effect on the number of employees we have covered by reviews. In FY 1981, approximately 2 million workers (2,006,229) were employed in contractor establishments reviewed. In FY 1986, approximately 3 million workers (2,900,957) were employed in reviewed establishments.

Additionally, far more of these persons were in establishments reviewed for the first time. Specifically, the percentage of first-time reviews totaled 61% of all reviews conducted in FY 1986.

During this period of expanded activity, the proportion of reviews in which violations were found and corrected has remained fairly stable — at a rate of 62% to 71% — which is an important indicator that quality was maintained. Since reviews were increasing, what this

means, of course, is that the number of violations found and corrected has substantially increased — in fact, more than doubled — from 1,311 contractors with violations in FY 1980, to 3,487 in FY 1986.

Similarly, since the rate of Conciliation Agreements and Letters of Commitment used to resolve these violations has also remained fairly stable, the number of such agreements has grown. The number of Conciliation Agreements — which are used to resolve the most serious violations — has also almost doubled, going from 743 in FY 1980 to 1,342 in FY 1986.

Each corrected violation helps — either directly or indirectly — to improve employment opportunities for those protected group persons employed by or seeking employment with the contractors involved.

In the other major area of OFCCP compliance activity — complaint investigations — in FY 1980, we had an inventory of 3,813 complaints. Each complaint represents at least one person who believed he or she had been the victim of discrimination and was entitled to a reasonably timely OFCCP investigation. This is particularly true for persons filing under the Handicap and Veterans programs whose only recourse is usually OFCCP. As these complaints aged, they became increasingly difficult to investigate, as records and memories of events became stale.

To correct this situation, a major effort was made to reduce the backlog of aging cases. We are succeeding in that task. By FY 1982, the inventory was down to 2,058, and at the end of FY 1986, it was at 746. Our objective is to reduce the complaint inventory to 550 by the end of this fiscal year and to maintain that level — which represents a normal current pipeline. We are proud of this achievement. We can now routinely provide both timely and efficient investigation — while facts are still fresh — to those who believe their rights have been violated.

We are also proud of our efforts to expand OFCCP's impact by reaching contractors we are unable to review. Our efforts to help establish voluntary associations of contractors or other interest groups to serve as Liaison Groups with OFCCP, and in providing technical assistance have greatly increased the number of employers who are knowledgeable about their nondiscrimination and affirmative action obligations. We have been able to do this with a very modest outlay of time — for example, less than 6% (5.8%) of total enforcement staff hours were devoted to technical assistance in FY 1986. We believe this time is an investment in outreach and in forestalling problems before they develop — an objective that benefits contractors which we would not otherwise reach and their employees.

In addition, our recognition of certain contractors through the Exemplary Voluntary Efforts (EVE) awards for particularly vigorous, imaginative and effective affirmative action measures, has helped to educate the contractor community at large by providing some examples of programs they also can implement — to the benefit of themselves and their employees. We believe these efforts to obtain voluntary compliance go hand-in-hand with vigorous enforcement of the Executive Order and our Handicapped and Veterans Programs.

I would like to share with you the most recent information on OFCCP's enforcement activity. We have just completed analysis of our performance data for the first two quarters of this fiscal year, and see a number of important upward trends.

During the first two quarters of this fiscal year, the number of AFFECTED CLASS findings (45) already approaches the number of such findings during all of fiscal

year 1986 (46). Here, I would like to stress that these data represent findings *i.e.*, those cases in which systemic discrimination was substantiated, not merely suspected.

In contrast, pre-1983 data on affected classes included any case in which a class was suspected, even if, after investigation, no class was found, or the contractor successfully rebutted. In 1984, when we implemented our current automated Compliance Review Information System (CRIS), we continued to collect affected class data under the heading of systemic discrimination — but included only those cases substantiated. Although this automatically caused an apparent decline in such cases reported, we believe it is considerably more accurate. Under this tighter standard, there were 188 class cases substantiated from FY 1984 through 1986, and, as noted earlier — the trend is upward for this fiscal year.

Another upward trend is in the area of BACK PAY and total financial settlements. Back pay settlements for the first two quarters of this fiscal year (\$2,592,785) are already 136% of the amount of such settlements in all of FY 1986 (\$1,911,145). Similarly, total financial settlements for the first two quarters of this fiscal year — which in addition to back pay include other case benefits, such as front pay, and other financial outlays, such as new training costs — are already about 81% (\$7,933,340) of total settlements for FY 1986 (\$9,802,926).

Furthermore, the gain in total financial settlements so far this year is not due to the impact of a few large cases — a factor that has accounted for much of the variation in monies over the last seven years. Financial settlements this year all have been individually under 1 million dollars, showing that the upward trend is broadly based.

We, of course, will also seek large settlements, where appropriate. We have a number of cases currently in the hearing process before administrative law judges in which large settlements are possible. For example, in the *Harris Bank* case, where we recently received a favorable decision on liability from an administrative law judge, we are seeking formula relief for a large class of women and minorities.

We also have an increased number of cases in the pipeline for enforcement. More specifically, during the first two quarters of this fiscal year, we have referred 44 cases to the Office of the Solicitor for enforcement. This is already double the 22 such cases referred in fiscal year 1986.

We are encouraged by these indicators that our efforts at program improvement are showing results, and we expect these trends to continue.

In this context, I would like to describe some of the actions we have taken in the past few months and actions that we plan to take to further strengthen enforcement of the Executive Order. These actions include (1) providing clear policy direction to ensure fair and active enforcement, (2) providing training for our enforcement staff — both basic training for our new employees and specialized technical training in systemic investigation, (3) expediting the enforcement process by reducing layers of review, and (4) providing adequate management tools, systems and controls.

In the area of POLICY DIRECTION:

Since December, we have issued fifteen written policy directives. Some of these concern general program matters — such as the use of medical releases in section 503 cases — but several concern class-based discrimination issues. Copies of these directives will be submitted for the record, if you desire.

Among the more important items, in February we issued a directive on the Development, Proof and Remedy of Discrimination Cases. This directive reflects current Title VII case law, and replaces a 1983 directive on a

similar subject. Among the topics addressed are: analysis of subjective employment systems; levels of statistical significance required in class cases; liability periods; and remedies.

Several other directives on related discrimination matters have been issued, including directives concerning Continuing Violations, Union Participation When Retroactive Seniority is a Remedy, Calculation of Interest on Back Pay, and Formula Relief. In the area of Formula Relief, the directive addresses both the judiciary recognized circumstances when such relief is appropriate and the most generally accepted methods for calculating such relief as developed by the courts.

Currently we are also rewriting the Federal Contract Compliance Manual to reflect the many policy and procedural changes that have occurred since its issuance in early 1979. Working with the Solicitor's Office, we have placed first priority on the revision of Chapter 7 — which is the portion of the Manual dealing with the Identification and Resolution of Affected Class Problems. We expect to issue this revised chapter, along with an appendix providing guidance on statistical calculations, in the near future. Our second priority will be revision of the chapter on Resolution of Noncompliance, which covers matters relating to enforcement.

To ensure that these and other policy initiatives are, in fact, fully understood and fully implemented, we have made a major commitment to TRAINING.

In December, we developed a comprehensive OFCCP training plan, with emphasis on class-based discrimination issues. This plan includes a total of ten courses which are either in place or under development.

The first phase of this plan was completed in February with the training of all field staff in legal theories of systemic discrimination. A follow-up course on Employment Discrimination Investigative Skills will be taken by all field staff by the end of this fiscal year. This course emphasizes the practical application of legal theory to specific review situations.

Among other courses to be provided this fiscal year are a fully revised basic Equal Opportunity Specialist (EOS) training program, and training for field managers.

The EOS course consists of sixteen modules covering both affirmative action and discrimination issues. It addresses the Handicapped and Veterans programs as well as the Executive Order, and provides basic instruction on compliance investigations as well as compliance reviews.

The field manager training will center around a resource handbook we are developing on the operational responsibilities of first-line OFCCP field supervisors. All first-line supervisors will be trained on the use of this handbook by December 1987.

We are also now determining OFCCP's role in enforcement of the Immigration Reform and Control Act and will be providing training in this new program area during the summer. Additional training will be given this fiscal year in some specific project areas — such as microcomputers — which I will discuss more fully later.

In fiscal year 1988, we will add to these courses, additional courses in construction and particular investigative skills. In the construction area, the course will cover OFCCP policy and procedures on construction industry reviews, and will be issued as supplementary modules to the basic desk audit course. The investigative skills course will cover such matters as techniques in data display, as well as interviewing and conducting opening and exit conferences with contractor officials.

In the long run, we plan to incorporate these and other courses in an "Academy" whose curriculum will include a full course of continuing study — at basic, intermediate and advanced levels — for compliance officers and the managers of OFCCP.

Another related project aimed at improving the quality and uniformity of compliance reviews is the revision of OFCCP's *Standard Compliance Review Report*. This Report guides the investigative process at both the desk audit and on site stages of nonconstruction contractor reviews.

The revisions, which we will soon field test, provide detailed guidance — consistent with our training and policy efforts — on the investigation of systemic discrimination. It also increases attention to Handicapped and Veterans issues, and streamlines analysis of goals and employment activity by focusing attention on major problem areas.

This field test includes a companion training manual which provides examples of the application of the report to a wide variety of affirmative action and discrimination problems that may be encountered in a compliance review. Following any further revisions as a result of the field test, this training manual will be issued along with the report.

As we have been able to provide more written policy guidance and training to the field, we have *DELEGATED* more final decision making authority to field managers, thus eliminating several layers of review. A reduction in the layers of review was one of the major recommendations made in the Department of Labor's Inspector General's report on OFCCP. In implementing this recommendation, we have focused particular attention on those delegations which will streamline the enforcement process, and have taken the following steps to date.

First, we have delegated to the regions the authority to refer *enforcement cases* directly to Regional Solicitors. This will both expedite the processing of enforcement cases and encourage a closer working relationship between OFCCP field staff and the Regional Solicitor offices.

Second, we removed the requirement for National Office review of most *Conciliation Agreements*. Conciliation Agreements are used to resolve serious violations which a contractor agrees to settle short of formal enforcement. This change should result in the more timely execution of these Agreements.

Finally, we have delegated to regional managers the authority to *extend timeframes* for compliance reviews, based on their assessment of factors which warrant extended investigation — such as potential discrimination issues.

These delegations which move increased responsibility for final decisionmaking to the field and significantly reduce layers of review, will permit us to streamline National and Regional Office operations. As noted in our FY 1988 budget submission, we are planning to reduce National and Regional Office overhead by 50 full-time equivalent positions. There will be no reduction in enforcement personnel. The National Office will increasingly focus on those training, policy and oversight functions which are essential for these delegations to be effective.

In the area of *OVERSIGHT*, we have taken several steps to ensure increased and effective monitoring of case quality. For example, fiscal year we have increased the number of National Office *Accountability Reviews* of the regions, and next fiscal year we will review all regions.

These Accountability Reviews have a dual focus: (1) an indepth audit of completed cases to identify quality problems, thereby identify areas where increased guidance or training is needed, and (2) an assessment of managerial effectiveness. The greater frequency of Accountability Reviews will allow for more follow-up audits to ensure that problems identified in case quality and management are, in fact, being corrected. Additionally, when the National Office operations desk officers visit the

regions, they will provide a follow-up to ensure correction of quality and management problems.

As our audit schedule increases, we recognize that we have to provide the regions with the tools for effective management of their case loads. We, therefore, have taken several initiatives to improve the *MANAGEMENT TOOLS AND SYSTEMS* available to OFCCP field staff.

Beginning in 1984 we introduced new automated systems to track the progress and results of both compliance reviews and complaint investigations. During the initial implementation phase of these systems — the Compliance Review Information System (CRIS) and the Complaint Administration System (CAS) respectively — data input and report generation were centralized. As of September 1986, however, we completed the transfer of both systems to the regions. This provides the regions with the tools to implement improved case management systems tailored to particular regional problems.

We have also improved our *contractor selection* systems, both for supply and service and for construction contractors. We have modified the supply and service selection system to focus more on contractors who have not previously been reviewed. As a result, OFCCP has conducted a higher percentage of first-time reviews than at any previous time.

In the construction area — which was another major focus of the Inspector General's report mentioned earlier — we have made substantial improvements in both the data base for selecting construction contractors for review and in guidance on the selection process itself.

In the former area, since November 1986, OFCCP has been distributing monthly reports to each area office on all ongoing public construction projects in the office's geographic area. Because these reports are based on construction permit data rather than on agency notices, they give a substantially more complete basis for selecting construction contractors for review.

To guide that selection process, we have recently issued a directive establishing a revised construction contractor selection system. This system considers such factors as the size of the on site construction workforce, probable hiring opportunities, previous review history and utilization of minorities and women. It directs specific attention to obtaining information on major subcontractors, requires documentation of the reason for selection for review, and provides guidance on the coordination of compliance activities with Federal and State Departments of Transportation.

Another area where there is a clear need that we are addressing is for improved data processing capability in field offices — for administrative purposes, but more importantly, for more efficient and sophisticated analysis of contractor data during compliance reviews.

During the last fiscal year, we began equipping field offices with micro-computers, and during this year and next we plan to have micro-computers in every field office. In preparation, we have held a number of training sessions designed to develop regional "experts" in micro-computer use. The most recent session was in January, when one or two persons from each region were trained on the management of micro-computer systems. Before the end of this fiscal year we will be providing comprehensive training to representatives from each area and field office.

The initial regional training sessions have yielded some important dividends in inter-regional exchange of information on new computer applications and programs — a trend we expect to continue.

One example of this is the development of a program to handle the mathematical portions of the desk audit phase of the revised Standard Compliance Review Report (SCRR). This program, which includes automatic statistical calculations, will be field-tested simultaneously with the field test of the SCRR. Its use will im-

prove the sophistication, speed and accuracy of desk audit analysis of contractor data. This program shall be in place by the time the equipment is available to each office later this year.

During FY 1988, we will be studying further data processing initiatives. For example, once the micro-computers are in place in field offices, management information data might be transferred electronically between the regional and national offices. This will facilitate a wider sharing of information among field offices.

Additionally, we hope to secure upgraded computer equipment for regional offices to permit local storage and retrieval of such large data sets as the contractor selection system and census information.

Another project underway, which we expect to complete in FY 1988, is a detailed cross-referencing of all policy material — from policy directives and memoranda, through Solicitor's opinions and Administrative Law Judge decisions. This program, which is similar to systems used for legal research, will permit field staff to query their micro-computers on any given issue and receive a listing of all applicable guidance issued.

During this entire implementation period, we will continue to provide training, and continue the development of "regional experts" to serve as local computer resource persons for field staff.

We hope that one effect of delegating more authority to the field, reducing layers of review, and providing the field with improved management tools, will be improved morale. As you know, OFCCP has just been through a difficult period with the implementation of the GS-360 classification standards for Equal Opportunity Specialists.

OPM published these GS-360 standards in 1980, in order to standardize the classification of a large number of EOS-type positions within many Federal agencies, and directed that all such positions be reclassified under the new standards. Application of these standards to OFCCP EOS's showed that 75% of GS-12 positions were, in fact, supportable at that grade level — but that 25% of GS-12 jobs should be at the GS-11 level.

We were faced, then, with a decision on how to reduce the number of EOS 12's by 25% with the least amount of adverse impact on those affected and on morale. We considered and discarded a grade RIF, which would have not only affected 25% of the 12's but would also have had a ripple effect on persons in lower-graded jobs.

Instead, we decided to accomplish the reduction through attrition and transfer wherever possible.

As a result of this strategy, approximately 14%, rather than 25% of EOS 12's were affected. All were offered the opportunity to transfer at the 12 level to an area

or field office where their grade could be supported, or alternatively, to remain at their present office in a GS-11 position. In the end, twenty-nine (29) elected downgrades rather than transfer.

Even following this GS-360 standards implementation, 40% of all EOS positions remain at the 12 level. We have done some studies in connection with human resources planning, and have found that the combination of normal attrition and probable retirements at the GS-12 level and above will, in the next two to four years, create a good number of promotional opportunities for those now at the GS-11 grade level.

As a final part of our overall management review, and in response to the Committee's comments, the Department has looked at OFCCP ORGANIZATIONALLY. As he informed the Committee by letter dated February 9, 1987, the Secretary concluded that OFCCP's problems have not been primarily structural, and, therefore, would not be resolved by a separation from ESA. In fact, they might be exacerbated to some extent by such a transfer. For example, such a separation would necessitate reductions in force, downgrades and involuntary transfers at a time when OFCCP field staff is only now adjusting to the implementation of the GS-360 series classification standards. Any such change would also require OFCCP to develop a number of basic support services currently provided by ESA, and not included in OFCCP's budget and staffing resources.

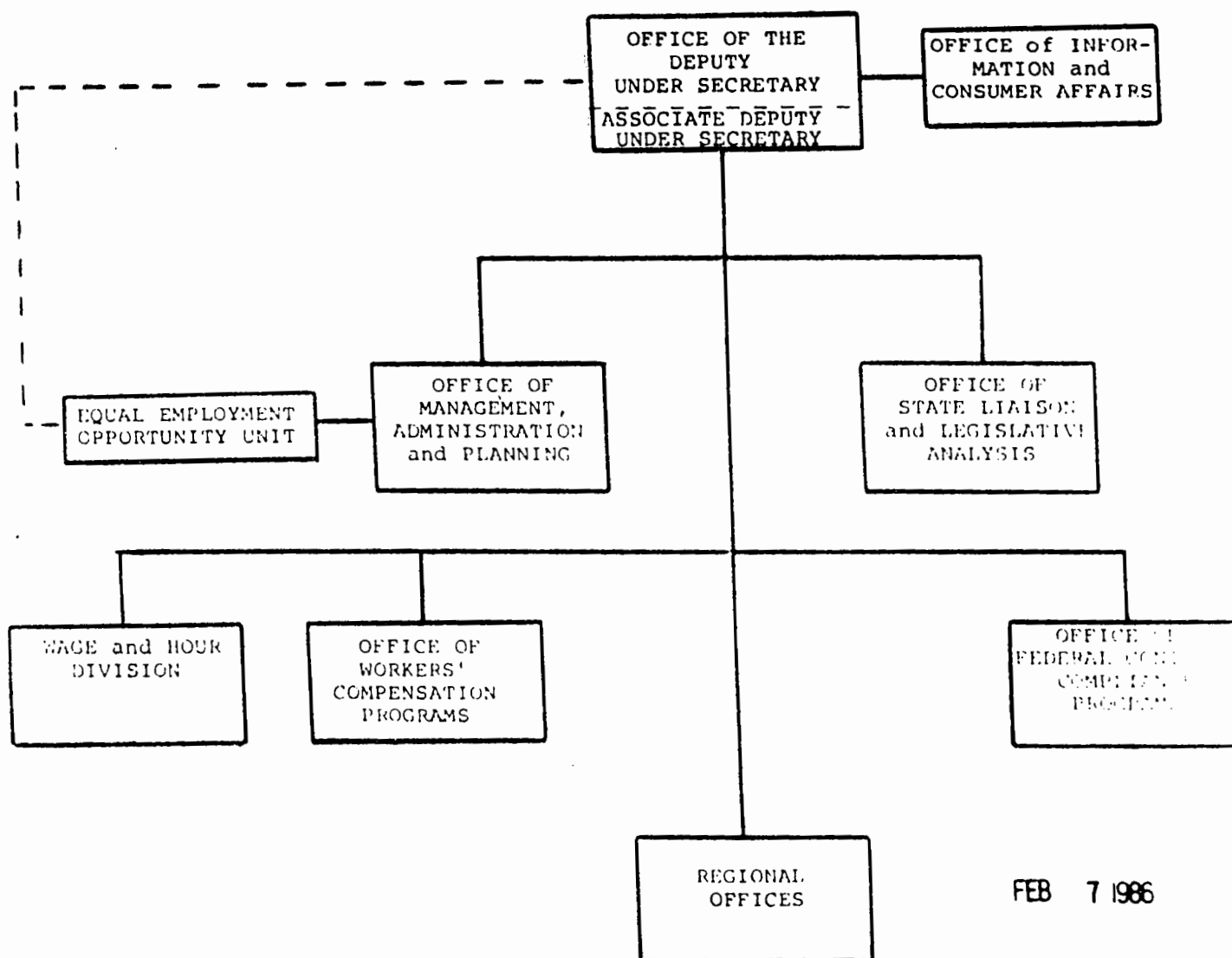
In all, a reorganization would take at least 6 to 18 months to complete — a period during which both time and attention would be diverted from the wide range of program initiatives we have discussed today. We believe our first priority should be continuing to strengthen the OFCCP program and that the best opportunity to do so is through full implementation of the initiatives we have begun — in new policy directives, better training of enforcement staff, and more streamlined management. As discussed earlier, we are now seeing results of our efforts in the data for the first two quarters of this fiscal year, and we intend to maintain the momentum established.

In closing, I think the Committee members are aware of the strong commitment that Secretary Brock has shown in supporting the affirmative action role of OFCCP. His own statements in this regard are the best evidence of this. I share that view completely, and I believe that we have done everything we could to maintain the principal thrust of OFCCP while an earnest and intense review of this aspect of Government's role was ongoing.

I think OFCCP has emerged as a stronger institution, and with our current initiatives, it will be better than it has ever been.

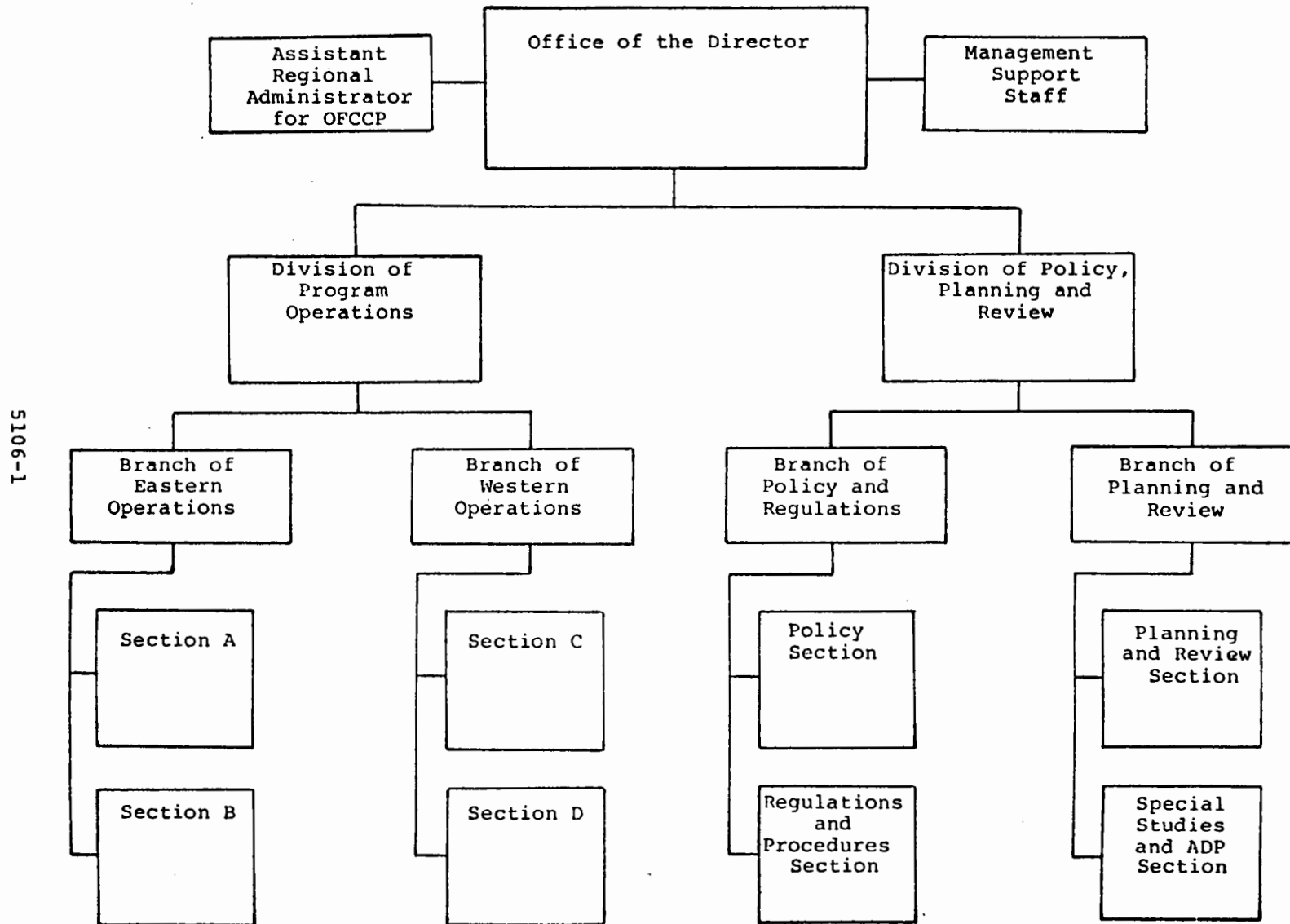
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EMPLOYMENT STANDARDS ADMINISTRATION, DOL

OFFICE of FEDERAL CONTRACT COMPLIANCE PROGRAMS

PROPOSED ULTIMATE STRUCTURE

U.S. Department of Labor

Deputy Under Secretary for
Employment Standards
Washington, D.C. 20210



JUL 7 1987

Ms. Susan J. Prado
Acting Staff Director
U.S. Commission on
Civil Rights
Washington, D.C. 20425

Dear Ms. Prado:

This is in response to your letter of June 12, 1987. You asked that we review and comment on the remainder of the draft chapter on the Office of Federal Contract Compliance Programs (OFCCP) for your report on Federal enforcement of equal employment requirements since 1981. You also asked that we provide you with copies of any recent correspondence with the House Education and Labor Committee concerning the Committee staff's report on OFCCP and the related hearings held on June 3 and 4, 1987. At the present time, there has been no official response to that report.

We have completed and forwarded to you under separate cover our comments on the first 40 pages of the chapter.

As a general comment, we note that the remaining part of the chapter is also dated. There are frequent cites to statements by former Deputy Under Secretary for Employment Standards Robert B. Collyer and similar cites to former OFCCP Director Ellen Shong Bergman. We are concerned about the possible effect of the use of such material upon readers who are not aware that these statements of policy, in many instances, are no longer operative. Our concern similarly extends to the use in the chapter of any statements that are not reflective of our current efforts at policy implementation. For example, there are portions of the document which refer to the agency's practices related to formula relief, quality vs. quantity and the relationship of the program plan to our compliance activities. All of these topics have current policy as well as operational initiatives that are at variance with the more dated material used in the Commission's chapter.

Formula Relief

On page 41 a reference is made to a narrowing of basic OFCCP policy. As an example, a quote by former Deputy Under Secretary Collyer is included on the requirement that victims be identified before the award of remedies. OFCCP has revised this policy, along with many others, to reflect current Title VII law. On January 15, 1987, we issued OFCCP Directive 660c7 on formula

relief. This directive permits the use of class wide relief in situations where it is impractical or impossible to identify individual victims of discrimination. In addition, the Department has taken vigorous approaches to class remedies in specific cases, such as our March 19, 1987 brief seeking remedies in U.S. Department of Labor v. Harris Trust and Savings Bank, 78-OFCCP-2. On June 3, 1987, we received a favorable ruling on formula relief in this case (these updates on Harris should be added to page 80). The Office of the Solicitor presently has at least two other major cases in which we are seeking formula relief in the course of settlement negotiations. These negotiations have been ongoing for some time, and predate the directive.

Regulatory Reform

The statement is made on page 42 that, "OFCCP has failed to achieve one of its top priorities during the Reagan administration (sic.), regulatory reform, largely because of the policy conflict over goals and timetables requirements." Let me first note that the Reagan Administration has not ended, so there is still time to achieve this goal. Further, the debate over goals and affirmative action was largely settled by the U.S. Supreme Court decision in Johnson v. Transportation Agency. Goals are now recognized as a legal part of voluntary affirmative action. Finally, OFCCP is in the process of revising its regulations. A staff proposal has been prepared on new regulations and forwarded to the Department policy makers. On page 47, footnote 124, the referenced regulatory change to the definition section of OFCCP's handicapped rules has been enacted.

Quality vs. Quantity

Starting on page 62 there is a general discussion of the effects of alleged time pressures on the quality of compliance reviews. The general allegation is that OFCCP pressures its EOSs to produce an ever larger number of reviews with a concomitant decrease in quality. OFCCP has been aware of this allegation and is taking steps to correct such misunderstandings.

EOS performance standards do not have a production quota; they require quality and timeliness based on reasonable requests for extensions to the regulatory 60 day review timeframe. The average number of reviews per EOS per year is 11, or less than one per month. We have consistently told our managers that quality is as important as quantity, and that EOSs are to be evaluated accordingly. Currently, EOSs average 132 hours per review, significantly less than the 149 allocated. Even so, EOSs are expected to conduct less than one review a month under the current program plan - not an undue burden.

Complaint Processing

On page 68 the statement is made that our complaint inventory had been reduced to 550 by FY '85. The correct figure is 753. Footnote 199 on the same page should be changed accordingly. Since we were not at the 550 level, it is not one to which we seek to return but rather a future objective.

On page 69, in the first sentence of the second paragraph the number of complaints received in FY '80 should be changed from 2,750 to 2,646.

On page 70, you may wish to indicate that the rate of findings of violations as a result of complaint investigations during the first two quarters of this fiscal year has already increased to 14 percent.

On page 72, you may wish to note that all of the complaints which were pending the Western Electric case were resolved by the end of FY '86.

Attorney - Client Relationship

On page 73, the first sentence of the last paragraph, states that, "Once cases are referred for enforcement, OFCCP has no further involvement with them." It is true that OFCCP does not get involved in the actual litigation of the case, but briefs containing major policy issues, settlement offers, and other matters are coordinated with OFCCP by the Solicitor's Office. Therefore, it is not true that OFCCP has no further involvement once a case is referred for enforcement.

Enforcement Statistics

Starting on page 74 there is a description of what is termed "sharp declines in various enforcement statistics since 1980." However, OFCCP has actually increased the number of cases in the pipeline for enforcement. More specifically, so far this fiscal year (through May 28, 1987), we have referred 44 cases to the Office of the Solicitor for enforcement. This already exceeds the number of such cases (35) referred in fiscal year 1986. The point is that while there may have been a falling off in the number of enforcement cases, the trend is now upwards.

Like the number of enforcement cases, back pay awards are increasing. Please see the copy of the testimony enclosed with our response to the first part of the chapter.

-4-

On page 89, footnote 282 expresses uncertainty about an OFCCP directive. If the reference here is to Directive No. 640a1, "Interim Description of the Required Ingredients of Discrimination Cases," later renumbered 760a1, that directive was revoked January 20, 1987. It was replaced by Directive 640a5 entitled "Development, Proof and Remedy of Discrimination Cases," which was issued February 23, 1987.

Program Goals

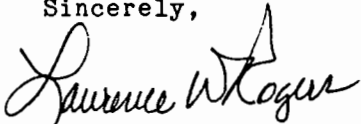
On page 97 under the heading "SUMMARY," three OFCCP priorities are cited. To be more precise, there are 15 goals or objectives proposed for 1989. I have enclosed a copy of our proposed goals and objectives for FY 1989

On page 98 there is a reference to affirmative action regulations under the Joint Training Partnership Act being stalled pending resolution of a policy dispute within the Administration. Staff have drafted proposed regulations which have been forwarded to the Department for policy review and comment.

On the same page there is a reference to limits being placed on our training programs. OFCCP has undertaken a new major training effort. Again, please see the statement previously submitted for a description of our training goals and accomplishments.

Thank you for the opportunity to review the draft report. Please feel free to contact OFCCP if you have any questions.

Sincerely,



Larry Rogers
Associate Deputy Under Secretary

Enclosure

EMPLOYMENT STANDARDS ADMINISTRATION
Federal Contractor EEO Standards Enforcement
Office of Federal Contract Compliance Programs

FY 1989 PROGRAM GOALS AND OBJECTIVES

To fulfill its mission of assuring equal opportunity by Federal contractors and increasing job opportunities for program beneficiaries, the OFCCP has established the following principal objectives:

1. Prompt resolution of individual and group complaints;
2. The seeking of appropriate remedies for victims of discriminatory treatment;
3. Use of objective selection procedures to schedule contractor establishments for compliance review;
4. Coordination of programs, both inside and outside of the Department, linking recruiting and training with job opportunities;
5. Promotion of voluntary compliance and affirmative action through self-direction and a broad network of public contacts and technical assistance to employers, employer's groups, liaison groups of interested parties, and the public;
6. Implementation of regulatory reforms of the Federal Contract Compliance Programs which includes raising the coverage threshold for contractors' written affirmative action plans, eliminating pre-contract-award compliance reviews, and permitting conclusion of more compliance reviews without an onsite visit where compliance is conclusively indicated;
7. Refinement of existing systems and implementation of new computerized systems to enhance efficiency and quality of the Agency's performance as well as its service to the public;
8. Implementation of the program's Human Resource Plan that will ensure (1) efforts to acquire qualified staff for the continuation of effective implementation of OFCCP's policies; (2) enable OFCCP to maintain the expected mandatory quality of compliance activities; and (3) assure implementation of program's objectives for equal employment opportunities for Hispanics and women;

9. Continued revision of training programs to address the needs of field staff for technical training, thereby increasing the quality of compliance activities;
10. Continued development and implementation of additional guidance on proving and remedying systemic discrimination;
11. Maintenance of improved case management standards and procedures to ensure the development of efficient, high quality compliance actions in a timely manner;
12. Continuation of quality control audit procedures to ensure consistent application of established policies and procedures throughout the program;
13. Continued reduction of the recordkeeping and paperwork required of contractors and the Federal Government;
14. Enforcement of the Employer Sanctions provisions of the Immigration Reform and Control Act of 1986; and
15. Continued implementation of the Administration's Productivity Plan (Executive Order 12552) to achieve a 20% productivity increase by FY 1992.

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