UNITED STATES COMMISSION ON CIVIL RIGHTS
WASHINGTON, D.C. 20425

OFFICE OF STAFF DIRECTOR

February 13, 1992

Dianna B. Johnston
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Equal Employment Opportunity Commission
1801 L Street N.W.
Washington, D.C. 20507

RE: POLICY GUIDANCE ON APPLICATION OF DAMAGES PROVISIONS OF THE CIVIL RIGHTS ACT OF 1991 TO PENDING CHARGES AND PRE-ACT CONDUCT

Dear Ms. Johnston:

The United States Commission on Civil Rights (Commission) is an independent, bipartisan agency of the Federal Government established to review legal developments, and appraise Federal policies, involving discrimination or a denial of equal protection. In fulfilling this mission, the Commission holds hearings and submits reports containing findings and recommendations to the President and Congress.

In carrying out those statutory responsibilities, the Commission is vested with both the authority and duty to appraise the policies of any and all Federal entities relative to the Federal civil rights enforcement effort, and to monitor the effectiveness of agency programs in the enforcement of civil rights laws.

On December 27, 1991 the Equal Employment Opportunity Commission (EEOC), pursuant to Executive Order 12067, circulated to designated Federal agencies for their review, proposed policy guidance on the application of damages provisions of the Civil Rights Act of 1991 to pending charges and pre-Act conduct. The Commission, in response to that request, sought and was granted an extension of time from February 10 to February 13, 1992 in which to complete its review. It is, therefore, both in furtherance of its own statutory responsibility, and in response to the EEOC's request for review, that the United States Commission on Civil Rights submits the attached Memorandum of Law regarding the proposed policy guidance.

In summary, the Commission's legal analysis, for the reasons discussed more fully in the attached Memorandum of Law, concludes that the EEOC's policy guidance is erroneous in that it misconstrues time honored principles of statutory construction, overlooks significant judicial interpretation of statutory language similar to that in the 1991 Civil Rights Act, and fails

inexplicably to distinguish the Supreme Court cases of *Bradley v. School Board of Richmond* and *Bowen v. Georgetown University Hospital*. Furthermore, the EEOC, having acknowledged the existence of considerable judicial precedent supportive of the applicability of the damages provisions of the Act to pending charges and pre-Act conduct, and having failed to provide sufficient justification for not seeking to avail itself of those stronger remedies, would appear through the execution of such policy to fall far short of traditional standards of aggressive statutory enforcement required by its enabling legislation and Executive Order 12067. The EEOC, therefore, should rescind and restructure its proposed policy guidance in accordance with applicable judicial precedent.

Sincerely,

WILFREDO J. GONZALEZ
Staff Director

Enclosure

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N W
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[Corrected]

MEMORANDUM OF LAW ON THE EEOC'S POLICY GUIDANCE ON THE APPLICATION OF DAMAGES PROVISIONS OF THE CIVIL RIGHTS ACT OF 1991 TO PENDING CHARGES AND PRE-ACT CONDUCT

I. INTRODUCTION: SUMMARY OF EEOC POLICY GUIDANCE.

The EEOC's proposed "Policy Guidance on Application of Damages Provisions of the Civil Rights Act of 1991 to Pending Charges and Pre-Act Conduct" (EEOC Notice No. 915.002 or Notice) describes the issue addressed therein as "whether the compensatory and punitive damages provisions of the Civil Rights Act of 1991 apply to charges challenging conduct that occurred prior to the effective date of the Act." (In so defining the issue, the Notice does not distinguish between charges pending upon the date of enactment of the Civil Rights Act of 1991 (1991 Act or Act) and post-Act charges involving pre-Act conduct. Nor does the Notice discuss either generally or specifically application of the damages provisions to discrimination that began before and continued after the effective date of the 1991 Act, or whether damages in such cases would require proration.)

The Notice states the EEOC's conclusion that the damages provisions do not apply to charges challenging conduct that occurred prior to the effective date of the 1991 Act, but "are to be considered as a remedy in all cases involving intentional discriminatory conduct that

occurred on or after the Act's effective date, November 21, 1991." The Notice also states that "this policy guidance applies exclusively to Title VII."[1]

The Notice's terse discussion of the issue decided is set forth in two parts: the first addresses in four short paragraphs "Statutory Language and Legislative History;" and the second consists of six similarly brief paragraphs on "Judicial Precedents."[2]

The Notice finds that Section 402(a), which states that the 1991 Act takes "effect upon enactment," is "not clear."[3] Two provisions which explicitly require prospective application for specific portions of the 1991 Act, the Notice continues, "may create an inference that the remainder of the [1991] Act has retroactive effect."[4] *Bowen v. Georgetown University Hospital*,[5] the Notice argues, does not require that result.[6] In deriving this conclusion, no mention is made of the rule of statutory construction that a statute should not be construed in a way that renders other portions of the statute meaningless. The EEOC's conclusion effectively negates the significance of the 1991 Act's provisions requiring prospective application.

The discussion of the Supreme Court opinions in *Bowen* and *Bradley v. Richmond School Bd.*[7] is surprisingly brief. Reconciliation of these two key cases is a necessary step for resolving

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[1] Notice, at 2 n.5.

[2] Both the brevity and content of the EEOC's treatment of these considerations suggest that the agency did not give sufficient deliberation or weight to either time honored rules of statutory construction, judicial interpretations of similar statutory language, or judicial precedents distinguishing *Bradley* and *Bowen*.

[3] Notice, at 3.

[4] *Id.* at 4.

[5] 488 U.S. 204, 208 (1988).

[6] *Id.*

[7] 416 U.S. 696, 710-711 (1974).

the issues presented here. Unfortunately, the EEOC's policy guidance does not give a reasonable examination of the distinctions between the two cases, failing to adequately distinguish--as the courts have done--between the two cases.

The EEOC correctly notes that *Bradley* requires retroactive application unless manifest injustice would result. However, neither *Bradley*, nor its line of cases, is satisfactorily analyzed. Since a major conclusion of the Notice is that *Bowen* applies, we believe that it is essential for the full line of cases to be considered. The EEOC's erroneous resolution of the issue apparently resulted from a limited review of applicable law (as reflected in the Notice), the failure to review adequately the different types of cases, to explore the differences between substantive and remedial provisions, and generally to attempt to reconcile *Bradley* and *Bowen*. The sheer number of cases that have decided this issue of retroactivity is one indication that a more thorough review is required, as discussed extensively elsewhere in this memorandum.

Our review begins with a statement of the issue: whether the compensatory and punitive damages provisions of the Civil Rights Act of 1991[8] apply to pending charges or conduct occurring prior to the effective date of the 1991 Act's adoption.[9] In general, Section 102 of the

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[8] Pub. L. No. 102-166, 105 Stat. 1071(1991) (amending 42 U.S.C. §§1981, 1988, 2000e et. seq. (1988)) (hereinafter 1991 Act).

[9] At least one court has recognized the distinction between pending charges and conduct occurring prior to the effective date of the Act's adoption. In *Great American Tool and Mfg. Co. v. Adolph Coors Co.*, 1992 U.S. Dist. LEXIS 621, (D.C. Colo., January 16, 1992), the court noted that conduct occurring prior to the date of the 1991 Act, which was the subject of a suit filed after the 1991 Act's effective date, was entitled to be adjudicated under the new Act. The court distinguished its previous holding in *Hansel v. Public Service Co.*, 778 F. Supp. 1126 (D. Colo. 1991) 1991 U.S. Dist. LEXIS 17904 (D.C. Colo., Dec. 11, 1991) which would not apply the 1991 Act retroactively to a pending case. Since *Great American Tool* was filed on November 25, 1991, four days after President Bush signed the Act, the court reasoned that the claim was not pending at the time the Act became law and thus there is no issue of retroactive application. The significance of this case is that it demonstrates that pre-Act conduct may properly be subject to the 1991 Act.

1991 Act adds, under certain circumstances, compensatory and punitive damages to back pay and injunctive relief available to a complaining party.[10] Under the 1991 Act, victims of unlawful discrimination may recover compensatory and punitive damages if they prove that the defendant acted "with malice or reckless indifference to the federally protected rights of an aggrieved individual."[11]

Under prevailing law, these compensatory and punitive damages provisions are available to all charging parties who were subjected to intentional discrimination prior to the 1991 Act's effective date, regardless of whether their charges were pending at that time or subsequently filed.[12]

II. THE 1991 ACT REQUIRES APPLICATION OF THE DAMAGES PROVISIONS TO PRE-ACT CONDUCT, INCLUDING PENDING CASES.

The language of the 1991 Act, taken as a whole, demonstrates that Congress intended the compensatory and punitive damages provisions to apply to pre-Act conduct and to pending cases.

The proper interpretation of a statute was recently recited in *Ulmet v. United States*. The court noted that "'[t]he starting point for interpreting a statute is the language of the statute itself' and that, 'absent a clearly expressed legislative intention to the contrary, that language

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[10] 1991 Act, supra note 8, at § 102 (to be codified at 42 U.S.C. §1981a).

[11] *Id.* (to be codified at 42 U.S.C. § 1981A(b)(1)). Plaintiffs who seek compensatory and punitive damages under Title VII, as amended, are permitted a trial by jury. *Id.* § 1981A(c)(1).

[12] For the record, we note the distinction between pending cases, on one hand, and cases brought subsequent to the enactment of the statute. Both, of course, involve pre-Act conduct, but the courts can differ on the results. See note 9, *supra*.

must ordinarily be regarded as conclusive.'"[13] In a 1991 Act case, a district court stated that "[t]he court's first inquiry in determining whether [the 1991 Act] applies to pending cases is the legislative intent in enacting it."[14]

> To determine Congressional intent, a court must first look to the plain language of the statute. If the statute is silent, the court can apply general principles of statutory construction to determine if intent is implicit in the overall context of the statute.[15]

A. Judicial Construction of Similar "Effective Date" Legislation Requires Application of the Act's Damages Provisions to Pre-Act Conduct and Pending Claims.

Section 402(a) of the 1991 Act states: "Except as otherwise specifically provided, this Act... shall take effect upon enactment." The language of Section 402(a), however, is not original with the 1991 Act. In fact, the phrase, "shall take effect upon enactment," is found more than 415 times in the United States Code. The common language of Section 402(a), used extensively as it has been by Congress, has been applied to require application of the provisions to pre-Act conduct, including pending cases.

For instance, *In the Matter of Reynolds*,[16] the Ninth Circuit indicated that the congressional use of such language, properly interpreted, required application of a new statute to pending cases. At issue was an amendment that prohibited the discharge of child support

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[13] 822 F.2d 1079, 1082 (Fed. Cir. 1989), quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

[14] *Graham v. Bodine Electric Co.*, 1992 U.S. Dist. LEXIS 499 (N.D.Ill, Jan. 23, 1992), decided; Jan. 21, 1992, docketed).

[15] *Id.*

[16] 726 F.2d 1420 (9th Cir. 1984).

obligations in bankruptcy.[17] Prior to the amendment, such obligations could be discharged. The court held that:

> While not dispositive on the issue before us, the fact that Congress expressed its intention that the statute take effect upon enactment is some indication that it believed that application of its provisions was urgent. We certainly cannot construe this expression of congressional concern as a direction that the law should not be applied to pending matters.[18]

As virtually all the courts construing this language for the 1991 Act have stated, this section does not, *by itself*, establish whether the damages provisions should be applied to pre-Act conduct, including pending cases. However, as numerous courts have found, the provision, properly construed, requires retroactive application under the circumstances of the 1991 Act.[19]

Under the 1991 Act, a conclusion different from that of *Reynolds* is not realistic. The statute, by virtue of the fundamental significance which our society accords civil rights laws, combined with the extended delay in the passage of the 1991 Act, compels the conclusion that the passage of the statute was urgent and necessary. Pre-Act conduct, including pending cases, is appropriately covered by the 1991 Act.

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[17] *See* 11 U.S.C. § 523(a)(5)(A).

[18] 726 F. 2d at 1422.
The Ninth Circuit also stated that in order to avoid application of the statute, there must be at least "a fair indication that the statute, properly construed, has only prospective effect." *Campbell v. United States*, 809 F.2d 563, 572 (9th Cir. 1987).

[19] For such cases finding for retroactivity, see *Graham v. Bodine Electric Company* ("The plain language of the statute is not helpful in this case. Nowhere does the Act specifically provide for retroactive or proactive application. When the court looks to the overall context of the 1991 Act, it becomes clear that retroactivity is consistent with the language of the 1991 Act. Under general principles of statutory construction, a court must interpret a statute to give effect to every clause."); *Bristow v. Drake Street, Inc.*, 1992 U.S. Dist. LEXIS 499 (N.D. Ill., Jan 17, 1992) (the court found that the statutory language of the 1991 Act does not provide a clearly expressed congressional intent *against* retroactive application." (Emphasis added.) *Stender v. Lucky Stores, Inc.*, 1992 U.S. Dist. LEXIS 274 (N.D. Colo. Jan. 7, 1992) (the court's determination for retroactivity was premised, not on a clear reading of § 402(a) but on a statutory construction based on the existence of § 402(b) and the implication of retroactivity that arises from § 402(a)); *Mojica v. Gannett Co.*, 57 FEP Cases (BNA) 537 (N.D. Ill., Nov. 27, 1991) (§ 402(b) "supports retroactive enforcement . . ., but is not conclusive").

The retroactive application of the damages provisions of the 1991 Act is even clearer after reviewing the judicial holdings for the Civil Rights Restoration Act of 1987 (Restoration Act). The Restoration Act includes neither a specific effective date nor a statement of retroactivity.[20] With one exception, every court to consider the question has held that the Restoration Act applied to pending cases. For example, in *Lussier v. Dugger*, a case involving a handicapped employee, the Eleventh Circuit held that statutory changes which are "procedural or remedial in nature apply retroactively."[21]

Other statutes that did not have "effective on enactment" provisions were still held retroactive. For example, the amendments to the False Claims Act, discussed later, have been applied retroactively, even though the provision was not present. The 1991 Act with the incorporation of such a provision presents an even stronger case for application of its remedial provisions to pre-Act conduct.

In a more striking situation, the Fair Housing Amendments Act of 1988 (FHAA) did not take effect until six months after the enactment. Normally, this would preclude retroactivity.[22]

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[20] Pul. L. No. 100-259, 102 Stat. 28 (1987).

[21] 904 F.2d 661 (11th Cir. 1990) (handicapped employee's § 504 claim entitled to retroactive effect under 1987 Restoration Act).

Other cases decided under the Civil Rights Restoration Act of 1987, which overruled *Grove City College v. Bell*, 465 U.S. 555 (1984) are *Ayers v. Allain*, 893 F.2d 732 (5th Cir 1990), vacated on other grounds, 914 F.2d 676 (1990)(en banc), *cert. granted*, 111 S. Ct. 1579 (1991) (Mississippi State education officials were not in violation of Title VI since they met obligation to desegregate state universities) (Civil Rights Restoration Act of 1987 applies retroactively where "enacted to clarify *Grove City* Court's reading of" Title VI); *Leake v. Long Island Jewish Medical Center*, 695 F. Supp. 1414 (E.D.N.Y. 1988), *aff'd*, 869 F.2d 131 (2nd Cir. 1989) (per curiam) (handicapped employee entitled to proceed under Civil Rights Restoration Act of 1987, even though amendment became effective after suit filed); *Bonner v. Arizona Dep't of Corrections*, 714 F. Supp. 420, 422-23 (D.Ariz. 1989) (handicapped inmate entitled to sign language interpreter at all stages of prison disciplinary procedure) (Civil Rights Restoration Act of 1987 applies retroactively). *But see DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377 (10th Cir. 1990), cert. denied, 111 S. Ct. 799 (1991).

[22] *See, e.g., Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir. 1983), *cert. denied*, 464 U.S. 961 (1983) ("[i]t would seem anomalous for the legislature to defer the effective date of the [Copyright Act of 1978] if it intended the statute, when implemented, to govern retrospectively"); *Fitzgerald v. Century Park, Inc.*, 642

(continued...)

However, the FHAA, *after the Government argued for retroactivity,* has been held to apply to pre-act cases.[23]

B. Fundamental Rules of Statutory Construction Require the Interpretation that the 1991 Act Damages Provisions are Retroactive.

Time-honored principles of statutory construction control the interpretation of statutes on the question of retroactivity. It is undisputed that the construction of a statute requires it be undertaken so as to render each part thereof consistent with the whole.[24] A statutory interpretation should avoid rendering one section superfluous unless the statutory language renders it unavoidable.[25] This rule of internal consistency, not of conflicting interpretation, is a cardinal rule of statutory construction.

Two sections of the 1991 Act contain explicit language requiring prospective application of those provisions. Section 109 extends Title VII and the Americans With Disabilities Act to certain extraterritorial situations.[26] Section 109(c), however, clarifies that the scope of this coverage does not extend "to conduct occurring before the date of the enactment of this Act." In addition, Section 402(b) states that: "Notwithstanding any other provision of this Act, nothing

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[22](...continued)
F.2d 356, 359 (9th Cir. 1981) ("[i]t is unlikely that Congress would delay the effective date of amendments which are to be applied retroactively").

[23] *United States v. Rent America Inc.*, 734 F. Supp. 474 (S.D. Fla. 1990).

[24] *See, e.g., United States v. Menasche*, 348 U.S. 528, 538-39 (1955), quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882) ("It is our duty to give effect, if possible, to every clause and word of a statute" rather than to emasculate an entire section.).

[25] *Arcadia v. Ohio Power Co.*, 111 S.Ct. 415 (1990) (Scalia, J.), reh'g denied 111 S. Ct. 804 (1991). *See also Mackey v. Lanier Collections Agency & Serv. Inc.*, 486 U.S. 825, 837 (1988) (White, J.) (Court is hesitant to adopt an interpretation which renders superfluous another section of the same act).

[26] Pub. L. No. 101-336, 104 Stat. 327 (1990).

in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983." The latter section was intended solely to ensure that the Act would not be interpreted to allow further litigation in *Wards Cove Packing Co. v. Atonio*.[27]

These provisions, construed as they must be in a coordinated and harmonious way, necessitate the conclusion that other sections of the 1991 Act should be applied retroactively to pre-Act conduct, including pending cases. If Congress had intended the entire 1991 Act to apply only prospectively, Sections 109(c) and 402(b) need not have been added. In other words, interpreting the damage provisions to be prospective only makes the Sections 109(c)] and 402(b) superfluous--thus violating a cardinal rule of statutory construction.[28]

We observe the obvious--that Congress was, and is, aware of the general principles of statutory construction. With this awareness, the insertion of two distinct provisions requiring prospective application can be properly regarded to imply that the remainder of the 1991 Act is intended to be retroactive, at least to the extent that it satisfies the conditions of *Bradley* (discussed later).

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[27] 490 U.S. 642 (1989). *See* 137 Cong. Rec. S15953, S15963 (daily ed. Nov. 5, 1991) (Statements of Sen. Murkowski and Sen. Kennedy).

In *Khandelwal v. Compuadd Corp.*, 1992 U.S. Dist. LEXIS 448 (E.D. Va. January 15, 1992), the court noted:

> As everyone who has followed the enactment of this Act knows, § 402(b) was inserted solely to insure that the Act would not be interpreted to allow further litigation in *Wards Cove Packing Co. v. Atonio*, the only case satisfying this section's prerequisites.

See also Stender v. Lucky Stores, Inc., 1992 U.S. Dist. LEXIS 274 (N.D. Cal., January 7, 1992).

[28] *See Kungys v. United States*, 485 U.S. 759, 778 (1988) (Scalia, J.) (the cardinal rule of statutory construction is that no provision should be construed to be entirely redundant).

C. Consistency of Government Interpretation of Retroactivity Decisions in Remedial Provisions.

Regardless of the legislation involved, the Federal Government's application of a rule concerning retroactivity (more appropriately the application of such a rule to pre-Act conduct) should be applied consistently. The Federal Government has frequently adopted the view that remedial provisions of statutes should be retroactive. However, the Justice Department has also requested that the 1991 Act's provisions for compensatory and punitive damages be applied prospectively only. No sound reason exists for adopting an inconsistent stance for the damages provisions of the 1991 Act.

Recently, the Department of Justice successfully argued, in *United States v. Peppertree Apts.*,[29] that a statute permitting the Government to recover double damages was merely "remedial in nature" and, therefore, should be applied retroactively. In another case, *United States v. Rent America Corp.*,[30] the Department of Justice argued that statutory amendments to the Federal Fair Housing Act,[31] which provided for compensatory damages for economic loss and emotional distress, and punitive damages for deprivation of civil rights, should have retroactive application. Such extensive damages provisions were not statutorily available for alleged acts of discrimination prior to the effective date of the amendment.[32] Significantly, we

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[29] 942 F.2d 1555 (11th Cir. 1991) (involving the misuse of HUD funds).

[30] *Rent America Corp., supra* note 23.

[31] 42 U.S.C. § 3601 et seq.

[32] The defendants filed a motion to strike the Department's request for inclusion of these damages, maintaining that the damages were only prospective in application. The department responded that the amended act does "not increase the defendants' overall exposure for liability for monetary damages" and that, therefore, the defendants are not exposed to "any new substantive liability" for the first time. *See* Response of the United States to Defendants' Motion to Strike Claims for Damages and Penalties, No. 89-6188, p.3.

note that HUD issued regulations, relying on *Bradley*, to permit the remedial changes in the Fair Housing Amendments Act of 1988 to be applied retroactively to pending cases.[33]

The Government has argued for retroactivity of the 1986 amendments to the False Claims Act, which, among other things, permitted treble damages rather than the prior double damages.[34] The Government's retroactivity argument under the False Claims Act has been upheld in a substantial majority of the cases.[35] The retroactive application of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 also was argued successfully by the Government.[36]

Other statutes in which the Government has requested retroactive application include the Financial Institutions Reform, Recovery & Enforcement Act of 1989[37] and Section 2 of the Voting Rights Act.[38]

In contrast to these cases are the Department of Justice's arguments in *Van Meter v. Barr*, a 1991 Act case, which is presently before the District of Columbia Circuit. The Department of Justice's brief argued that the 1991 Act should not apply to pending cases.[39] *Van Meter* is an

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[33] 24 C.F.R. Ch. I, Subch. A.

[34] 31 U.S.C. §§ 3729-33.

[35] *See, e.g., United States v. O'Connell*, 890 F.2d 563 (1st Cir. 1989); *United States v. Singer Co.*, 889 F.2d 1327 (4th Cir. 1989). We note that the Government did fail in its bid for retroactivity in *United States v. Murphy*, 937 F.2d 1032 (6th Cir. 1991). The Government was relying, interestingly enough, on *Bradley*, which the EEOC now suggests is inapplicable. This fluctuation in the use of precedents should not be permitted.

[36] *See, e.g., United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).

[37] *See In re Resolution Trust Corp.*, 888 F.2d 57 (8th Cir. 1989).

[38] 42 U.S.C. § 1973. *See United States v. Marengo Cty. Comm'n*, 731 F.2d 1546 (11th Cir. 1984).

[39] Defendant's Memorandum in Opposition to Plaintiff's Motion to File Second Amended Complaint, Civ. Act No. 91-0027 (D.C. Cir. 1991).

example of inconsistent positions on retroactivity for remedial matters and illustrates the significance of the EEOC definitively evidencing in its policy guidance an aggressive and uniform approach for executive agencies with respect to damages, at least as it pertains to the 1991 Act.[40] Rather than adopting the inconsistent position of the Justice Department in *Van Meter*, the more viable stance is to require remedial provisions, such as the damages provisions of the 1991 Act, to be applied retroactively--unless, of course, a contrary statutory intent or legislative history can be shown or manifest injustice exists. As elsewhere demonstrated in this memorandum, such a contrary showing is unavailable.

D. The Legislative History is Inconclusive.

If the statutory language were ambiguous, it would be appropriate to consider the legislative history to determine the congressional intent. As indicated above, the statutory language, properly construed, requires that the damage remedies of the 1991 Act be applied to pre-Act conduct, including pending cases. Therefore, it is unnecessary to consider the legislative history. We do note, however, our agreement with the EEOC that the legislative history of the 1991 Act is inadequate to determine statutory intent.

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[40] In a recent 1991 Act case, *King v. Shelby Medical Center*, 1991 U.S. Dist. Lexis 18228 (N.D. Ala. Dec. 18, 1991), the court noted:

> Fresh from its victory in *Peppertree [Apts.]*, the same United States which there fought for and obtained retroactive application of a statute doubling the damages to be paid by a violator, filed a brief in *Van Meter v. Barr*, Civil Action No. 01-0027 (GAG), in the United States District Court for the District of Columbia, stating at considerable length the Department of Justice's position, entirely inconsistent with the exemplary victory it won in *Peppertree [Apts.]*, that no provision of the Civil Rights Act of 1991 applies to any case pending prior to November 21, 1991. The double damages recovered in *Peppertree [Apts.]* is the Siamese twin of the capped punitive damages allowed by the new Act. Why should one be retroactive and the other not?

Unfortunately, one cannot reach a definitive conclusion based on the obviously divided and partisan statements of the legislators. As one court noted, the:

> sampling of statements, as well as a review of the entire legislative history, confirms that Congress was anything but clear on whether the Act would apply to pending cases. * * * The [R]epublican senators lined up behind Senator Danforth, asserting that the Act was not intended to be retroactive. The [D]emocratic senators adopted the position of Senator Kennedy and asserted that the Act was indeed intended to be retroactive. In sum, the legislative history is both partisan and unclear. Judge Gesell in *Van Meter* aptly stated that "the congressional 'debates' were, with few exceptions, hardly more than a series of declarations and counter-declarations, which often addressed 'retroactivity' without defining that term or focusing on the crucial, separate problem at issue here of how the 1991 Act was supposed to affect federal employment cases pending before the Courts.[41]

III. *BRADLEY* REQUIRES APPLICATION OF THE 1991 ACT'S DAMAGES PROVISIONS TO PRE-ACT CONDUCT AND PENDING CLAIMS.

The most controversial aspect of the governing rules on retroactivity is the divergent approaches between two lines of Supreme Court cases. Many courts have successfully resolved this issue. The need to reconcile the Supreme Court decision of *Bradley v. Richmond School Bd.*[42] (along with its predecessor, *Thorpe v. Housing Authority*)[43] with *Bowen v. Georgetown University Hospital*[44] is apparent. In its simplest form, *Bradley* states that a court should "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."[45] As a result, a

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[41] *Khandelwal v. Compuadd Corp.*, 1992 U.S. Dist. LEXIS 448 (E.D. Va. January 15, 1992), citing *Van Meter v. Barr*, 245 Daily Lab. Rep. (BNA) No. 245, at D-1 (D.D.C. Dec. 18, 1991).

[42] 416 U.S. 696, 710-711 (1974).

[43] 393 U.S. 268 (1969).

[44] 488 U.S. 204, 208 (1988).

[45] 416 U.S. at 711.

presumption of retroactivity exists unless such a contrary showing or manifest injustice is shown. By contrast, *Bowen* counsels that a presumption against retroactivity is required, unless there is a clear statutory or legislative intent to the contrary. In a 1990 opinion, the Supreme Court recognized "the apparent tension between the[se] two lines of precedent governing retroactive application."[46] While these opinions establish strikingly different presumptions, they are not irreconcilable. The respective cases and their progeny demonstrate a clear distinction in the application of these authorities. Even if one were to assume that the 1991 Act language did not clarify the statutory intent, the caselaw (as discussed below) mandates that the provision of damages be applied to pending cases and pre-Act conduct.

A. *The Principal Cases.*

Bradley involved the propriety of an attorney's fee award in litigation over the desegregation of the Richmond, Virginia public school system. At the time the issue of the availability of attorney's fees was before the Court of Appeals, Congress enacted section 718 of the Education Amendments of 1972 (previously codified at 20 U.S.C. § 1617), and gave federal courts the authority to award a prevailing party a reasonable attorney's fee in a school desegregation case. The Court held that section 718 could be applied retroactively to services rendered prior to its enactment, "where the propriety of a fee award was pending resolution on appeal when the statute became law."[47] In *Thorpe*, a tenant in a federally-assisted housing project alleged her eviction was unconstitutionally based on the exercise of her First Amendment rights. At the time of the eviction the law did not require a landlord to state any reason for

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[46] *Kaiser Aluminum Chem. Corp. v. Bonjorno*, 110 S.Ct. 1570, 1576-77 (1990).

[47] 416 U.S. at 710.

eviction. No reason was given. While the case was pending, however, the Department of Housing and Urban Development (HUD) issued a directive requiring notice of the reasons for eviction and an opportunity to respond prior to eviction.[48] On appeal to the Supreme Court, the case was remanded for reconsideration in light of the new HUD directive. On remand, the lower court construed the directive not to apply when "[a]ll critical events" relevant to the eviction process occurred prior to its issuance. The Court reversed, citing the general rule, derived from the 1801 case of *United States v. The Schooner Peggy*,[49] that "an appellate court must apply the law in effect at the time it renders its decision."[50]

While in *Bradley*, the Supreme Court outlined the general rule regarding the issue of retroactivity of legislation in the absence of clear Congressional intent,[51] another line of cases holds that where Congress is silent, the presumption is for prospective application of the statute. This rule was announced in *Bowen v. Georgetown University Hospital*.[52]

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[48] *Id.* at 270-73.

[49] 5 U.S. (1 Cranch) 102, 110 (1801).

[50] 393 U.S. at 281.

[51] While the term "retroactive" is commonly used to refer to statutes that operate on pre-enactment transactions and pre-existing rights or obligations, a statute is not "retroactive" simply because facts from the pre-enactment period are implicated. The presumption against "retroactivity" has generally been applied only when application of the new law would affect rights or obligations existing prior to the change in law. *See Weaver v. Graham*, 450 U.S. 24, 29-30 (1981) and *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925).

[52] 488 U.S. 204 (1988); *See also United States v. Security Industrial Bank*, 459 U.S. 70 (1982), and *Greene v. United States*, 376 U.S. 149 (1964). Subsequently, in *Kaiser*, Justice Scalia criticized the Court for not resolving the "apparent tension." He advocated adherence to the "traditional presumption" against retroactive application of statutes, absent a clear legislative intent to the contrary. 110 S. Ct. at 1579, (Scalia, J., concurring). *See also* Smead, *The Rule Against Retroactive Legislation: A Basic Principle Of Jurisprudence*, 20 MINN. L. REV. 775 (1936).

B. Bowen *and* Bradley *are Distinguishable, with* Bradley *the Applicable Rule.*

It has been argued that the Court's holding in *Bradley* is inconsistent with *Bowen.* The presumption against retroactivity embraced in *Bowen* is certainly a feature of American jurisprudence.[53] This memorandum in no way diminishes the significance of *Bowen* as a Supreme Court precedent, but rather seeks to ascertain how the two opinions mesh. If the Supreme Court believed that the decisions were irreconcilably inconsistent, *Kaiser* was an appropriate opportunity to eliminate the dilemma. The Supreme Court did not take advantage of the opportunity despite the arguments of Justice Scalia. An incisive review of the facts and the holdings of the cases, as well as the considerable caselaw thereafter, demonstrates that the two cases are distinguishable. Moreover, the caselaw has consistently made a distinction between substantive changes, on the one hand, and procedural or remedial changes, on the other. It is significant that *Bowen* did not deem it necessary to mention *Bradley*--which the Court would have had to do if the Court believed that the cases were truly at loggerheads. Since the damages provisions of the 1991 Act are remedial, the *Bradley*, not *Bowen*, rule prevails.

The sheer number of cases that have permitted the application of statutes to pre-Act conduct is sizable.[54] By itself, this suggests that retroactivity is acceptable--at least under the

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[53] A "rule of construction is that legislation must be considered as addressed to the future, not the past." *Union Pacific R.R. Co. v. Laramie Stockyards Co.*, 231 U.S. 190, 199 (1913) (quoted in *Ralis v. RFE/RL Inc.*, 770 F.2d 1121, 1127-28 (D.C. Cir. 1985)). "The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other." 459 U.S. at 79-80.

[54] For a few cases, not listed elsewhere, see *Pension Benefit Guaranty Corp. v. Gray & Co.*, 467 U.S. 717, 81 L.Ed.2d 601 (1984) (applying liability provision retroactively); *Delmay v. Paine Webber*, 872 F.2d 356, 357 (11th Cir. 1989) (private dispute involving issues of national concern favors retroactivity); *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1425 (9th Cir. 1989), cert. denied, 110 S.Ct. 3217 (1990) (retroactive application of new law proper where the law does not change the lawfulness of prior conduct); *Scarboro v. First American National Bank*, 619 F.2d 621, 622 (6th Cir. 1980) (per curiam), cert. denied, 449 US 1014 (1980), ("a jury resolution" does not pose "any threat of 'injustice' to either party".); *United States v. Vanella*, 619 F.2d 384, 386 (5th Cir. 1980); *Koger v. Ball*, 497 F.2d 702 (4th Cir. 1974)

(continued...)

appropriate circumstances. The following circuit court decisions demonstrate when the issue of retroactivity for pre-Act conduct, including pending claims, is appropriate.

The First Circuit, in *Demars v. First Service Bank*, observed that a court had to determine which of the two presumptions applied to the circumstances of the case.[55] The touchstone, the court determined, for deciding the question of retroactivity is whether retroactive application of a newly announced principle would alter substantive rules of conduct and disappoint private expectations.[56] In *Demars*, *Bradley* was considered appropriate because no antecedent rights were interfered with, nor did the statute involve the regulation of human action.[57]

In the Second Circuit, no definitive decision distinguishing *Bradley* and *Bowen* exists. However, at least one case, decided after *Kaiser*, did use language consistent with *Bradley*.[58]

The Third Circuit has not attempted to distinguish *Bowen* and *Bradley*. Since *Bowen*, however, at least four cases have relied on *Bradley* in permitting retroactive effect for pre-act conduct.[59]

In the Fourth Circuit, the court determined that the result would be the same under *Bowen* or *Bradley*. It concluded that "under the *Bradley* approach . . . retroactivity is not warranted

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[54](...continued)
("Procedural statutes that affect remedies are generally applicable to cases pending at the time of enactment . . .").

[55] 907 F.2d 1237 (1st Cir. 1990)

[56] *Id.* at 1239-40.

[57] For another First Circuit case, see *C.E.K. Industrial Mechanical Contractors, Inc. v. N.L.R.B.*, 921 F.2d 350 (1st Cir. 1990) (*Bradley* manifest injustice exception applied, holding that manifest injustice would result from retroactive application of N.L.R.B.'s new repudiation policy).

[58] *Lehman v. Burnley* 866 F.2d 33 (2d Cir. 1989)

[59] *See U.S. Healthcare v. Blue Cross of Greater Philadelphia*, 898 F.2d 914 (3rd Cir. 1990); *Doe v. City of Butler, Pa.*, 892 F.2d 315 (3rd Cir. 1989); *Air-Shields, Inc. v. Fullam*, 891 F.2d 63 (3rd Cir. 1989); and *Hays and Co. v. Merrill Lynch*, 885 F.2d 1149 (3rd Cir. 1989).

[because] the amendment would result in manifest injustice by distorting the rights of the respective parties . . . ."[60]

The Fifth Circuit in *Griffon v. United States Dept. of Health and Human Services* refused the retroactive applications of a civil penalties provision which "enlarged the scope of substantive liability."[61] *Griffon* identified in the Supreme Court's precedents that amendments in *substantive* rules of law apply prospectively only, while changes in *procedure or remedy* are "usually held immediately applicable to pending cases, including those on appeal from a lower court."[62] In a 1989 case involving the Employees Liability Reform and Tort Compensation Act of 1988, the court applied *Bradley* without any mention of *Bowen.*[63] In *Walker v. U.S. Depart. of Housing and Urban Development*, the court noted that "statutes affecting *substantive* rights and liabilities are presumed to have only prospective effect"--the *Bowen* standard.[64]

In *United States v. Murphy,*[65] the Sixth Circuit evidenced how to reconcile *Bradley* and *Bowen* by applying the *Bradley* presumption to statutory provisions involving *procedural* or *remedial* rights. *Bowen*, on the other hand, (presuming prospective application), was applied to

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[60] *Leland v. Federal Insurance Administrator*, 934 F.2d 524 (4th Cir. 1991).

[61] 802 F.2d 146, 153-55 (5th Cir. 1986)

[62] *Id.* at 154 (emphasis added).

[63] *Lunsford v. Price*, 885 F.2d 236 (5th Cir. 1989).

[64] 912 F.2d 819, 831 (5th Cir. 1990) (emphasis added).

Sierra Medical Center v. Sullivan, 902 F.2d 388 (5th Cir. 1990) supports the substantive-remedial distinction because it refused retroactivity for a substantive change in regulations which would have required HHS to pay for prior Medicare services at a rate higher that it has previously agreed.

[65] 937 F.2d 1032.

statutory provisions implicating *"substantive* rights and liabilities."[66] The Sixth Circuit did not reject either case, but merely clarified the relevant distinction for application of the proper presumption. The distinction between procedural or remedial rights and substantive rights also "comports with [the] venerable rule of statutory construction, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect."[67] Interestingly, the Government, in supporting the application of retroactivity, did argue that the amendments in *Murphy* were merely remedial and do not affect substantive rights and liabilities.[68]

As noted elsewhere, the Seventh Circuit determined that *Bradley* is appropriate, indicating that, under the facts of the case, Bradley could negate any possible tension between *Bradley* and *Bowen* because the manifest injustice would prevent an injury to vested rights.[69]

In the Eighth Circuit, several cases have applied *Bradley* since *Kaiser*.[70]

On at least three instances since the decision in *Bowen*, the Ninth Circuit has applied a *Bradley* analysis, thus showing that the circuit understands that *Bowen* does not preclude the

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[66] *See United States v. Murphy*, 937 F.2d 1032, 1037 (6th Cir. 1991). *See also Boddie v. American Broadcasting Companies, Inc.*, 881 F.2d 267, 270 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 737 (1989).

In *Murphy*, the court also stated that:

> We bear in mind that *Bradley* has frequently been cited as controlling authority in this circuit. *E.g., Harper-Grace Hosps. v. Schweiker*, 691 F.2d 808, 811 (6th Cir. 1982); *Bush v. State Indus.*, 599 F.2d 780, 786 (6th Cir. 1979)....
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> However, *Boddie* and the recent Supreme Court cases convince us not only that *Bradley* is to be read narrowly, but also that the phrase "substantive rights and liabilities" is to be construed broadly in this context.

Id. at 1037-1038.

[67] *Bennett v. New Jersey*, 470 U.S. 632, 639 (1985); *accord United States v. Security Industrial Bank*, 459 U.S. 70 and *Greene v. United States*, 376 U.S. 149. *See* Note, 67 HARV. L. REV. 1087(1954); Comment, *Retroactive Expansion of State Court Jurisdiction Over Persons*, 63 COLUM. L. REV. 1105 (1963).

[68] *Murphy*, 937 F.2d at 1036.

[69] *FDIC v. Wright*, 942 F.2d 1089 (7th Cir. 1991).

[70] *E.g, FDIC v. Kasal*, 929 F.2d 487 (8th Cir. 1990).

Bradley presumption in the proper circumstances.[71] In a fourth decision, *Ayala-Chavez v. U.S. INS*, the court stated that it did not need to "reconcile an apparent conflict between" the two cases.[72]

The Tenth Circuit, in *Arnold v. Maynard*, noted that in a prior case "we pointed out that we were there concerned with a statute affecting substantive rights and liabilities. The presumption has always been *to the contrary* with respect to statutes that address matters of procedure and jurisdiction."[73]

Circuit decisions clearly show the vitality of the distinction between substantive rights and liabilities cases and other situations when applying new legislation to pre-act conduct. The cases, even after the *Kaiser* opinion, continued to cite *Bradley* and use its criteria. As is already clear, the imposition of damages under the 1991 Act is remedial. In a 1991 Act case, *Bristow v. Drake Street, Inc.*, the court recognized that substantive matters differ from procedure or remedies in their retroactive effect.[74] Noting that the rule favoring retroactivity could be defeated, if its application would deprive a person of a right that had matured or become unconditional, the court ruled that infringement of a vested right would not be applicable under the 1991 Act because

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[71] *See In Re Pacific Far East Lines*, 889 F.2d 242 (9th Cir. 1989); *Bryant v. Ford Motor Co.*, 886 F.2d 1526 (9th Cir. 1989); *Delta Computer v. Samsung Semiconductor*, 879 F.2d 662 (9th Cir. 1989).

[72] 945 F.2d 288, 295 n.1 (9th Cir. 1991).

[73] 942 F.2d 761, 762 n.2 (10th Cir. 1991). The court was referring to *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377 (10th Cir. 1990), in which it accepted the *Bowen* presumption.

[74] 1992 U.S. Dist. LEXIS 499 (N.D.Ill., January 17, 1992).

On procedural matters, see *Sawyer v. Taylor*, in which the court observed that the traditional rule seems to be that statutes concerning substance are to be interpreted as operating only prospectively while those concerning procedure should be construed as applying retroactively. 225 F.Supp. 555, 557 (D. Colo. 1963).

"there is no vested right in remedies."[75] Even though the amount of damages could be substantial in amount, it cannot be said that such liability clearly "creates a new liability in connection with a past transaction."[76] The quantity of damages does not create a new liability; it merely permits a pre-existing liability to be adjusted in an upward fashion. Consequently, the punitive and compensatory damage provisions of the 1991 Act are not substantive in nature and thus may be retroactively applied.

A civil rights violator has no "matured" or "vested" right in any remedy under Title VII that existed before the 1991 Act.[77] The absence of any substantive right in the remedial scheme prior to the 1991 Act also warranted the same conclusion for post-Act remedies. The revised remedies simply augmented the former. Consequently, retroactive application of the damages provisions of the 1991 Act could not be a manifest injustice since application affects only remedial issues and not a substantive one.[78]

C. Retroactive Application of the 1991 Act Does Not Result in Any Manifest Injustice.

Under *Bradley*, a statute is presumed to apply retroactively to a case unless contrary statutory intent or legislative history is shown or "manifest injustice" would result. Manifest

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[75] Bristow, *citing and quoting United States v. Ettrick Wood Products, Inc.*, 683 F. Supp. 1262, 1266 (W.D. Wis. 1988) (defendants had no vested right to double as opposed to treble damages and therefore False Claims Act amendments applied retroactively).

[76] *United States v. Murphy*, 937 F.2d 1032, 1038 (6th Cir. 1991).

[77] *Meller v. Heil Co.*, 745 F.2d 1297, 1304-05 (10th Cir. 1984), cert. denied, 104 S. Ct. 2390 (1984) (no impairment of vested rights when retroactively applied amendments increased allowable damages); *O'Hare v. General Marine Transportation Corp.*, 740 F.2d 160, 171 (2nd Cir. 1984), cert. denied, 105 S. Ct. 1181 (1985) (retroactively applied remedial scheme required, rather than simply allowed for, imposition of attorney's fees and an award of double interest payments to compensate ERISA fund for costs incurred in connection with delinquencies).

[78] *See also Mojica*, 57 FEP Cases (BNA) 537 ("the increased potential for damages . . . is not likely to have affected the conduct of the parties in committing any acts of discrimination that may have occurred.").

injustice is determined by the review of three factors: "1) the nature and identity of the parties; 2) the nature of the rights affected; and 3) the impact of the change in law on pre-existing rights."[79]

The first factor primarily concerns whether the matter is a private dispute between individuals or one involving national concerns and public entities. Retroactive application of a statute is favored when matters of "great national concern" hang in the balance.[80] A dispute between private parties, as would arise in a typical Title VII suit, would not prevent retroactive application of the damages provisions in question.[81] A suit between private parties may be imbued with matters of "substantial public concern."[82] It would be difficult to find a more significant situation than that presented by a major civil rights law, such as the 1991 Act, the object of which is "remedying race and sex discrimination and promoting equality."[83] Because the 1991 Act is a statute of great national concern and is not simply a dispute between private parties, no basis for a manifest injustice exemption exists under *Bradley*'s first factor.

Bradley's second factor would permit a finding of manifest injustice if the retroactive application of a change in law "would infringe upon or deprive a person of a right that had matured or become unconditional."[84] As noted in the Supreme Court case, *Bennett v. New*

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[79] 942 F.2d at 1096, quoting *In re Busick*, 831 F.2d 745, 748 (7th Cir. 1987).

[80] *Bradley*, 416 U.S. at 712.

[81] *Mojica v. Gannett Co.*, 57 FEP Cases (BNA) 537. In non-Title VII situations, see *Busick*, 831 F.2d at 748-49 (amendments to bankruptcy code applied retroactively in "routine private" dispute); *Delmay v. Paine Webber*, 872 F.2d 356, 357 (11th Cir. 1989) (private dispute involving issues of national concern favors retroactivity).

[82] *Mojica*, 57 FEP Cases (BNA) 537.

[83] *Stender v. Lucky Stores, Inc.*, 1992 U.S. Dist. LEXIS 274 (N.D.Cal., January 7, 1992).

[84] *Bradley*, 416 U.S. at 720.

Jersey, one would not apply a statutory change to a pending case if to do so would "'infringe upon or deprive a person of a right that had matured or become unconditional.'"[85] No such infringement exists in this situation because a defendant cannot claim a matured or unconditional right or vested claim in remedies.[86] Creation of a compensatory and punitive damages remedy under the 1991 Act merely augments the remedies available for "conduct previously proscribed by Title VII."[87]

In applying the new damages provisions to pre-Act conduct, an employer is not deprived of a right it possessed at the time the underlying discriminatory conduct took place. Employers were aware that employment discrimination is unlawful. Moreover, employers were aware that the law provided for certain penalties and damages that could be imposed based upon a finding of discrimination. The change under discussion, therefore, is not the existence of liability or the availability of damages, but rather the extent of damages. Since application of the 1991 Act to pre-Act conduct, including pending cases, creates no new or unanticipated obligations upon an

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[85] 470 U.S. 632, 639 (1985).

[86] *United States v. Ettrick Wood Products, Inc.*, 683 F. Supp. 1262, 1266 (W.D. Wis. 1988) (no vested right to double, rather than treble damages, thus False Claims Act amendments applied retroactively). As stated in *Bristow v. Drake Street, Inc.*, "[d]efendant has no 'matured' or 'vested' right in the Title VII remedial scheme that existed before passage of the 1991 Civil Rights Act." 1992 U.S. Dist. LEXIS 499 (N.D.Ill., January 17, 1992, Decided; January, 21, 1992, Docketed). *Cf. Meller v. Heil Co.*, 745 F.2d 1297, 1304-05 (10th Cir. 1984), *cert. denied*, 104 S. Ct. 2390 (1984) (no impairment of vested rights when retroactively applied amendments increased allowable damages); *O'Hare v. General Marine Transportation Corp.*, 740 F.2d 160, 171 (2nd Cir. 1984), *cert. denied*, 105 S. Ct. 1181 (1985) (retroactively applied remedial scheme required, rather than simply allowed for, imposition of attorney's fees and an award of double interest payments to compensate ERISA fund for costs incurred in connection with delinquencies).

[87] *Bristow v. Drake Street, Inc.*, 1992 U.S. Dist. LEXIS 499 (N.D.Ill., January 17, 1992.

employer-defendant,[88] it cannot be said that retroactive application of the damages provision to pre-Act conduct, including pending cases, would result in an injustice, manifest or otherwise.

The third factor under the manifest injustice exception reviews whether "new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard."[89] It is sufficient to state that no violation of this procedural factor is remotely involved in this discussion. A defendant has the same opportunity for notice and a hearing that would be available in any situation.

D. Protection afforded by Bradley *Covers the concerns of* Bowen.

In reviewing existing decisions, it is clear that district court decisions have differed over the application of *Bradley* and *Bowen* to the 1991 Act.[90] We are unaware of any circuit court

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[88] *See Mojica v. Gannett Co. Inc.*, 57 FEP Cases (BNA) 537. "[T]he increased potential for damages . . . is not likely to have affected the conduct of the parties in committing any acts of discrimination that may have occurred;" *United States v. Ettrick Wood Products, Inc.*, 683 F. Supp. 1262, 1266 (W.D. Wis. 1988) (defendants had no vested right to double as opposed to treble damages thus False Claims Act amendments applied retroactively), *accord United States v. Hill*, 676 F. Supp. 1158, 1170 (N.D. Fla. 1987).

[89] *Bradley*, 94 S. Ct. at 2021.

[90] Federal district courts have addressed the issue of retroactive application of the 1991 Act as follows:

District court cases that have held the 1991 Act should be applied retroactively are: *Stender v. Lucky Stores, Inc.*, 1992 U.S. Dist. LEXIS 274 (N.D.Cal., January 7, 1992); *King v. Shelby Medical Center*, 1991 U.S. Dist. Lexis 18228 (N.D. Ala. Dec. 18, 1991); *Thakkar v. Provident National Bank*, Case No. 90-3907 (E.D.Penn., December 17, 1991); *Davis v. Tri-State Mack Distributions Inc.*, 1991 Daily Lab. Rep. (BNA) No. 250, at A-5, Case No. LR-C-89-912 (E.D.Ark., December 16, 1991); *LaCour v. Harris County*, 57 FEP Cases (BNA) 622 (S.D. Tex. Dec. 6, 1991); *Mojica v. Gannett Co.*, 57 FEP Cases (BNA) 537 (N.D. Ill. Nov. 27, 1991); *Graham v. Bodine Electric Co.*, 1992 Dist. LEXIS 679 (N.D.Ill. January 23, 1992, Filed; January 24, 1992, Docketed); *Bristow v. Drake Street, Inc.*, 1992 U.S. Dist. LEXIS 499 (N.D.Ill., January 17, 1992, Decided; January, 21, 1992, Docketed).

Decisions that hold the Act should not be applied retroactively include: *Van Meter v. Barr*, 245 Daily Lab. Rep. (BNA) No. 245, at D-1 (D.D.C. Dec. 18, 1991); *Hansel v. Public Service Co.*, 1991 U.S. Dist. LEXIS 17904 (D. Colo. Dec. 11, 1991); *Alexandre v. AMP, Inc.*, 57 FEP Cases (BNA) 768 (W.D. Penn. Dec. 5, 1991); *James v. American International Recovery, Inc.*, 1991 U.S. Dist. Lexis 18408 (N.D. Ga. Dec. 3, 1991); *High v. Broadway Industries, Inc.*, 1992 U.S. Dist. LEXIS 446; 57 Fair Empl. Prac. Cas. (BNA) 1159, (W.D. Missouri, January 7, 1992); *Khandelwal v. Compuadd Corp.*, 1992 U.S. Dist. LEXIS 448 (E.D. Va. January 15, 1992); *Sorlucco v. New York City Police Dept.*, 1991 WL 3369 (S.D.N.Y., January 7, 1992); *Mitchell v. Secretary Of Commerce*, 1992 U.S. Dist. LEXIS 147 (D.D.C. January 10, 1992); *Johnson v. Rice*, 1992 U.S. Dist. LEXIS 830 (S.D.Ohio, January 24, 1992).

At least one court has recognized the distinction between pending charges and post-Act charges involving conduct occurring prior to the effective date of the Act's adoption in applying the retroactive

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decision determining the applicability of the damages provisions of the 1991 Act to pre-Act conduct. However, in reviewing 1991 Act cases and similar decisions, it is clear that the danger of retroactive application that *Bowen* recognized and guarded against--interfering with substantive rights and liabilities--is protected by *Bradley* under the manifest injustice exception. As one court noted:

> Despite the existence of an alternative line of precedent, we believe there is no prejudice in applying only Bradley and its progeny to the facts in this case. Any tension between the two lines of precedent is negated because, under Bradley, a statute will not be deemed to apply retroactively if it would threaten manifest injustice by disrupting vested rights.[91]

Already, two cases have applied this rule to the 1991 Act.[92] Since two of the elements of manifest injustice are based on the nature of the rights affected and the impact of the change in law on pre-existing rights, the manifest injustice exception is sufficiently broad to preclude retroactive application of a statute that would adversely implicate a substantive right, but not so broad that procedural rights would not be retroactively applied.

Bradley expressly acknowledged a limitation on its retroactive principle. It noted that "[t]he Court has refused to apply an intervening change to a pending action where it has

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[90](...continued)
rule. See *Great American Tool and Mfg. Company, v. Adolph Coors Company, Inc.*, 1992 U.S. Dist. LEXIS 621, (D.C. Colo., January 16, 1992)(conduct occurring prior to the date of the 1991 Act, in case that was filed after the Act's effective date, was entitled to be adjudicated under the new Act). The judge in *Great American Tool* had previously denied retroactivity to a pending claim.

Although the Commission has not been able to obtain copies of *La Cour, Thakkar, James, and Alexandre* to verify the decisions, we note that one or more court opinions have noted that the decisions have been resolved as noted above. We further note that one court indicated that *LaCour* simply ordered that the 1991 Act be applied retroactively without stating a basis for that conclusion. *See* 1992 U.S. Dist. LEXIS 448. *Great American Tool and Mfg. Company,* noted above, would deny retroactive application to pending cases, while extending the benefits of the 1991 Act to cases submitted after enactment, which cases involved pre-Act conduct. [90]

[91] *FDIC v. Wright*, 942 F.2d 1089, at 1095 n.6 (7th Cir. 1991).

[92] *See also Graham v. Bodine Electric Co.*, 1992 Dist. LEXIS 679 (N.D.Ill. January 23, 1992, Filed; January 24, 1992, Docketed); *Mojica v. Gannett Co.*, 57 FEP Cases (BNA) 537 (N.D. Ill. Nov. 27, 1991).

concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional."[93] This limitation simply restates the rule of statutory interpretation which declares that a statute affecting substantive rights and liabilities is presumed to have only prospective effect.[94]

It is precisely because *Bradley* provides a workable rule with respect to retroactive application of a statute affecting remedial rights and also provides protection against the admitted dangers of retroactive application to substantive rights (via its manifest injustice exception), that it, and not *Bowen*, states the better and more complete rule. Consequently, the *Bradley* presumption for application of the law to pre-existing or pre-act claims is controlling in the context of the Civil Rights Act of 1991.

IV. WHERE LOWER COURTS ARE SPLIT ON RETROACTIVE APPLICATION OF CIVIL RIGHTS LAWS, THE EEOC'S CONGRESSIONAL MANDATE TO ENFORCE THE LAW CREATES A PRESUMPTION IN FAVOR OF RETROACTIVE APPLICATION.

Having considered that principles of statutory construction, the significance of the "take effect on enactment" provision, the presumption in favor of retroactivity in *Bradley*, and the distinction between *Bradley* and *Bowen*, the need for definitive leadership in enforcement of the broad purposes of Title VII, including the amendments provided by the 1991 Act, is apparent. The Equal Employment Opportunity Commission (EEOC) is the paramount governmental agency charged with responsibility for enforcing Title VII. Executive Order 12067, section 1-201

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[93] 416 U.S. at 720.

[94] *See Bennett v. New Jersey*, 470 U.S. 632, 639-40 (1985).

requires the EEOC "to provide leadership and coordination to the efforts of Federal departments and agencies to enforce all Federal statutes." Section 1-301(a) elaborates further by declaring that the EEOC is responsible for "developing uniform standards, guidelines, and policies defining the nature of employment discrimination . . . ."

The heavy mantle of leading the executive branch in the vigorous enforcement of Title VII falls upon the EEOC. In discharging this function, the EEOC's notice 915.002, "EEOC's Policy Guidance on Application of the Damages Provisions of the Civil Rights Act of 1991," which is at issue here, recognizes and admits that some authority exists for both prospective and retroactive application of the 1991 Act's damages provisions. The EEOC, however, comes down on the side of this dispute with the opinion that pending charges and pre-Act conduct will not trigger those damages provisions.

It seems inconceivable that the EEOC, after recognizing that legal authorities and lower courts are split on retroactive application of civil rights laws, would elect to consider the path of less protection. The broad purpose of the 1991 Act is to secure its new remedies to persons suffering discrimination. Having been delegated the responsibility of providing "leadership and coordination to the efforts of Federal departments" and for "developing uniform standards," the EEOC must formulate strong policies that will deter civil rights violators. On an issue having as much judicial support as we have cited herein, the EEOC would indeed be remiss in not seeking the remedies provided by the 1991 Act wherever otherwise available in cases involving pre-Act conduct.

Perhaps most significantly, from the standpoint of case law development, the EEOC's position does nothing to lend uniformity to the decisions. It simply declares the view that it will

take in litigating pending cases. In those districts and circuits that have already adopted the retroactive rule, the EEOC will be placed in the difficult situation of pleading a legal view that has been rejected. This difficulty, combined with contrary case law development, will diffuse and blunt the statutory object of uniform and aggressive enforcement of civil rights measures, that the EEOC was created to effect.

V. CONCLUSION

The United States Commission on Civil Rights is a Federal agency charged with the responsibility of reviewing legal developments on civil rights, as well as appraising Federal laws and policies involving discrimination or the denial of equal protection. This memorandum has been prepared under this responsibility.

In light of the foregoing analysis, it is incumbent upon the EEOC to reconsider both the law and its statutory responsibilities in furthering the purposes of the damages provisions of the Civil Rights Act of 1991 by recognizing their application to pending charges and pre-Act conduct. The 1991 Act's language demonstrates that its damages provisions are applicable to pre-Act conduct, including pending cases. The clear guidelines on the application of such remedial provisions, as enunciated by the Supreme Court and lower courts, require reversal of the EEOC's position on this matter. It is appropriate to note the well stated rule observed by the district court in *Saltarikos v. Charter Manufacturing Co.*:

> [T]he purpose of the [1991] law is to broaden the rights of persons claiming that they have been the victims of discrimination. It makes no sense to broaden those rights on the one hand and then deny the wider effect of the law to people who

have pending cases or have been the victims of discriminatory conduct prior to November 21, 1991.[95]

[95] No. 88-C-1328 (E.D.Wis., January 8, 1992),. Slip op., p. 2.