

U.S. Commission on Civil Rights

Office of Civil Rights Evaluation

Redefining Rights in America

The Civil Rights Record of the
George W. Bush Administration, 2001–2004

Draft Report for Commissioners' Review

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U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. 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, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, 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, disability, 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, disability, or national origin.
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Executive Summary

Civil rights problems remain entrenched in American society, the stubborn result of unequal treatment over time. Discrimination in housing, employment, and the voting booth, unequal educational opportunity, and other problems still stand between some Americans and true equality. Presidential leadership is necessary to break down obstacles and realize the promise of civil rights.

The U.S. Commission on Civil Rights (Commission) examined the George W. Bush administration's commitment to that end. What follows are the results of the Commission's examination, expressed in terms of:

- (1) whether civil rights enforcement is a presidential priority;
- (2) federal efforts to eradicate entrenched discrimination;
- (3) expanding and protecting rights for disadvantaged groups; and
- (4) promoting access to federal programs and services for traditionally underserved populations.

This report finds that President Bush has neither exhibited leadership on pressing civil rights issues, nor taken actions that matched his words. The report reaches this conclusion after analyzing and summarizing numerous documents, including historical literature, reports, scholarly articles, presidential and administration statements, executive orders, policy briefs, documents of Cabinet-level agencies, federal budgets and other data.

Priority of Civil Rights

Through public statements and actions, by establishing a diverse executive branch that affirms civil rights, and by funding enforcement, an administration can express its commitment to equal opportunity. This report finds that President Bush has not defined a clear agenda nor made civil rights a priority.

Statements and Action: Public statements are a means by which Presidents draw the country's attention to important matters. However, President Bush seldom speaks about civil rights, and when he does, it is to carry out official duties, not to promote initiatives or plans for improving opportunity. Even when he publicly discusses existing barriers to equality and efforts to overcome them, the administration's words and deeds often conflict.

Federal Diversity and Support for Civil Rights: Although not to the extent of the previous administration, President Bush has assembled a commendably diverse Cabinet and moderately diverse judiciary. However, many of his nominees and appointees do not support civil rights protections. The effect may be eventual weakening of civil rights laws.

Civil Rights Funding: Requests for funding is one means by which Presidents make their priorities known. In his first three years in office, the net increase in President Bush's requests for civil rights enforcement agencies was less than those of the previous two administrations. After accounting for inflation, the President's requests for the six major civil rights programs (Departments of Education, Labor, Justice, Health and Human Services, and Housing and Urban Development, and the Equal Employment Opportunity Commission) amount to a loss of spending power for 2004 and 2005.

Eradicating Entrenched Discrimination

While judicial and legislative achievements of the 1960s and 1970s largely broke down the system of segregation and legal bases for discrimination, the effects persist and hamper equal opportunity in education, employment, housing, public accommodations, and the ability to vote. President Bush has implemented policies that have retreated from long-established civil rights promises in each of these areas.

Voting Rights: Despite promising to unite the nation and improve its election system, the President failed to act swiftly toward election reform.

- He did not provide leadership to ensure timely passage and swift implementation of the Help America Vote Act (HAVA) of 2002. Thus, Congress did not appropriate funds for election reform until almost two years into his presidency.
- The administration seated the federal election reform oversight board 11 months behind schedule, resulting in delayed fund distribution to states. Consequently, states did not have the equipment, infrastructure, or guidance they needed to meet HAVA's deadlines, including implementation of statewide voter registration databases, development of voter complaint procedures, and installation of new voting equipment.

As a result of the President's inaction, little will change before the 2004 elections, and the problems that linger, unless resolved, will most likely disenfranchise some eligible voters.

Equal Educational Opportunity: Early in his administration, the President widely promoted an education reform proposal, the No Child Left Behind Act (NCLB), and garnered bipartisan support. Despite its worthy goals, however, NCLB has flaws that will inhibit equal educational opportunity and limit its ability to close the achievement gap.

- NCLB does not sufficiently address unequal education, a major barrier to closing the achievement gap between minority and white students.
- NCLB defers to states responsibility for defining achievement and adopting assessment measures. Educators fear that, unless there are safeguards in place, states will attach high stakes to tests, punishing students for the system's failure to teach.
- Students, especially those who are minority, limited English proficient, low income, or have a disability, disproportionately attend schools that do not have the resources to provide necessary learning tools and, thus, are more likely to be identified as low performers and subject to sanctions.
- The lowest performing schools are also the poorest, amplifying the need for sufficient resources. However, President Bush has not aggressively pushed for increased funding, leaving NCLB underfunded every year except its first.

Affirmative Action: The President's stance on affirmative action is equivocal at best. President Bush has tried to please both supporters and opponents, a tactic that has resulted in a misleading and vague position. He has not exhibited strong leadership on this issue where leadership is vital.

- In 2001, the administration asked the Supreme Court to dismiss a case challenging a Department of Transportation program for disadvantaged businesses. In announcing and

discussing the case, it was clear that the administration was not basing its position on support for affirmative action, but procedural technicalities with the case.

- The administration later filed briefs with the Supreme Court challenging programs that allow race to be considered as one factor among many in college admissions decisions, discrediting existing case law and arguing erroneously that this practice amounted to a quota.
- Instead of promoting affirmative action in federal contracting and education, the administration promotes “race neutral alternatives,” even though in some situations they are not applicable and in others not overly effective at maintaining diversity.
- President Bush frequently speaks about the importance of diversity and exhibits such a standard within his own Cabinet. However, his actions with respect to affirmative action are not in line with that professed commitment as he has undercut programs designed to achieve diversity.

Fair Housing: Policies instituted under the Bush administration have diminished housing opportunities for poor, disproportionately minority families.

- The President shifted resources away from rent assistance for the poor and toward home purchasing programs for minorities. Although a worthwhile effort, the President’s A Home of Your Own program is hampered by insufficient funding to relieve the chronic affordable housing crisis.
- The President outlined a plan to eliminate billions of dollars from programs to help low-income and disabled persons pay for housing through rent vouchers, including the Section 8 Housing Choice Voucher Program, and HOPE VI, which rebuilds distressed communities.

Environmental Justice: The Environmental Protection Agency (EPA) under this administration, despite some attempts, has not always been successful in advancing the cause of environmental justice.

- Although it developed an action plan for ensuring environmental justice goals are met, the agency has not developed measures of accountability and progress.
- EPA has taken few actions to ensure that minority and low-income persons are not disparately affected by environmental contamination and has failed to develop a standard for assessing how exposure to hazards affects public health.
- EPA has de-emphasized the significance of minority and low-income populations in its environmental justice efforts.
- The administration has developed environmental proposals without adequate participation from minority populations, and has thus failed to consider the civil rights consequences of its actions.

Racial Profiling: Early in his term, President Bush promised to end racial profiling. Although he has not completely fulfilled that promise, he issued guidelines to prohibit racial profiling in federal law enforcement, an action unprecedented among U.S. Presidents. President Bush took other actions, however, that had negative effects.

- The administration responded to the September 11, 2001, terrorist attacks by instituting regulations that facilitate profiling rather than prevent it. Immigrants and visitors from Arab and

Middle Eastern countries were subjected to increased scrutiny, including interviews, registration, and in some cases removal.

- Early on, some federal agencies denounced profiling in the performance of their agents' routine duties, but the administration did not introduce governmentwide policies complete or comprehensive enough to have measurable positive effects after September 11.
- Commendably, two years later, the Department of Justice (DOJ) issued guidelines that prohibit federal agents from making enforcement decisions based on race or ethnicity. However, the guidelines contain a broad and loosely defined exception that permits race targeting if law enforcement alleges that individuals are suspected of posing a national security threat. This exception allows profiling in certain undefined circumstances and potentially gives cover to abusers.

Hate Crimes: The administration paid little attention to hate crimes until after September 11. Since then, the President's words and actions have conveyed mixed messages.

- Immediately after the attacks, the administration declared that acts of violence and discrimination against Arab Americans, Muslims, and those perceived to be of Middle Eastern descent would not be tolerated. The executive branch launched a coordinated campaign to prevent hate crimes against such individuals.
- The administration did not sustain its strong rhetoric after September 11. Neither did President Bush support passage of the Local Law Enforcement Act, a proposal that would protect gay men and lesbians, and persons with disabilities from hate crimes.
- President Bush has further stated that "all violent crimes are crimes of hate," a view which does not acknowledge the bias associated with such acts.

Disadvantaged Groups in America

African American rights dominated the pre-1970s struggles for equality, but they shared a common goal with other minority groups and women who sought comparable solutions to discriminatory treatment. Although the country has made progress, its struggle toward equal rights for all remains elusive.

Immigrants: This report examines three administration immigration proposals or policies. All lack strong civil rights protections for immigrants.

- President Bush has made encouraging comments about the extension of rights to immigrant workers, but has not followed through with action. For example, he initially considered granting amnesty to approximately 3 million undocumented Mexican immigrants in 2001, but subsequently terminated his efforts. In January 2004, the President again proposed a temporary worker program for undocumented immigrants but has not pushed for its passage.
- President Bush has endorsed policies that allow discrimination against certain groups in the processing of asylum requests. For instance, on the unproven claim that Haitian refugees may threaten national security, President Bush granted authority to federal agents to hold them in detention indefinitely without bond until their cases are heard by an asylum court. The United States does not apply such policy to any other immigrant group.

- Following the terrorist attacks, the administration instituted policies that singled out immigrants from Middle Eastern and Muslim countries. The DOJ allowed local law enforcement to contact and question visitors, citizens, and other residents. It also detained witnesses on minor violations, held many in secret in harsh conditions, and did not inform them of charges against them. The administration limited available channels for legal entry and began requiring individuals from selected countries to register and submit fingerprints and photographs upon arrival.

Native Americans: President Bush has acknowledged the great debt America owes to Native Americans. However, his words have not been matched with action. Commission reports document that the President has not effectively used the stature of his office to speak out on ending discrimination against Native Americans. Nor has he engaged in a consistent effort to alleviate their problems. He has not applied resources to improving conditions or adequately funded programs that serve Native peoples. For example:

- President Bush has not requested sufficient funding for tribal colleges and universities, has proposed terminating \$1.5 billion in funding for education programs that benefit Native Americans, and has not provided adequate resources to meet NCLB goals that apply to Indian Country.
- For 2004, the administration requested \$3.6 billion for the Indian Health Service, the primary provider of Native American health care. This falls far short of the \$19.4 billion in unmet health needs in Native communities.
- President Bush's budget requests for housing programs have not approached the \$1 billion required to meet the demand, and consequently, Native Americans have an immediate need for 210,000 housing units.
- In 2003, President Bush terminated funding for critical law enforcement programs, including the Tribal Drug Court Program. Experts agree that problems with the criminal justice system in Indian Country are serious and understated.

Persons with Disabilities: President Bush has demonstrated a commitment to improving the lives of individuals with disabilities, a goal he outlined during his campaign. Although too soon to measure the ultimate impact of the administration's efforts, the disability rights community has embraced them.

- The administration implemented the New Freedom Initiative (NFI) to integrate disabled individuals into the labor force and abolish hurdles to full participation in community programs and services.
- President Bush directed several agencies to assist states in expanding community-based services for individuals with disabilities, and introduced a Web site to make information more readily available.
- In his 2004 budget, the President proposed \$2.1 billion in NFI funding over a five-year period.
- President Bush also created the President's Commission on Excellence in Special Education (PCESE) to gather data on and examine special education programs. It offered recommendations for the reauthorization of the Individuals with Disabilities Education Act (IDEA), many of which were similar to those the Commission made in 2002. However, while PCESE supported a limited

amount for IDEA, the Commission noted the need for full and immediate funding. Congress has yet to finalize IDEA's reauthorization. In the meantime, President Bush has the opportunity to demand congressional action and demonstrate his commitment to individuals with disabilities.

Women: President Bush's record on women's issues is mixed. Economic gains for which he has paved the way are overshadowed by other actions that have set back women's rights. For example:

- The Bush administration closed the White House Office for Women's Initiatives and Outreach and attempted to close the Women's Bureau at the Department of Labor (DOL). It retreated amid objections from women's groups.
- The administration withdrew Department of Education guidance on sexual harassment in schools from the Internet and ended distribution of information on workplace rights of women.
- President Bush attempted to redirect Title IX enforcement, but ceased his effort after overwhelming public expressions of support for the law.
- The administration commendably launched a plan to improve women's access to capital by creating a Web site for women entrepreneurs and holding related conferences, but at the same time abolished DOL's Equal Pay Initiative.

Gay Men and Lesbians: President Bush appointed some gay rights supporters to Cabinet and administration positions. However, other actions he and his administration have taken have almost completely eclipsed the efforts he made. For example:

- In 2003, Attorney General John Ashcroft did not allow a Gay Pride Month celebration at DOJ, even though it had been an established program at the agency. He relented after protestations, but did not permit the use of agency funds, even though they are used for other heritage and history commemorations.
- President Bush opposes the Employment Non-Discrimination Act and Hate Crimes Prevention Act, both of which include protections for gay individuals.
- In 2004, the Office of Special Counsel removed documents pertaining to sexual orientation discrimination in the federal government from its Web site. Only after the action was publicized did the administration direct that the materials be re-posted.
- President Bush has stated unequivocal support for a constitutional amendment banning same-sex marriages. If passed, the amendment would be the first in U.S. history to limit rather than preserve and expand the rights of a group.

Promoting Access to Federal Programs

By continuously improving access to federal programs, an administration can promote equal opportunity and reduce economic and social disparities. President Bush has made efforts to improve access, but as with past administrations, equal access remains elusive and requires greater federal investment.

Language Minorities: President Bush has indicated a commitment to improving access to federal programs for limited English proficient (LEP) individuals. Among the administration's actions:

- DOJ issued a memorandum to federal agencies stating the Bush administration was committed to implementing a Clinton executive order to improve LEP access.
- The administration created the Federal LEP Interagency Working Group to improve efficiency and effectiveness of Title VI and executive order implementation, as well as the HERE Hispanic Initiative Grant Award to provide English instruction for immigrant workers and new American citizens.
- However, the administration has not required agencies to develop output measures or other assessments to evaluate progress. No procedures exist to assess whether federal programs and services are becoming more accessible to language minorities, hampering Title VI enforcement.

Underserved Minority Groups: President Bush extended several initiatives of earlier administrations designed to improve access for specific minority groups. Some assess a population's general needs and develop solutions while others focus on a specific purpose. The administration modified each in some way. For example:

- President Bush extended the work of the President's Advisory Commission on Asian Americans and Pacific Islanders (PACAAPI) until July 7, 2003. Before the group's work could be completed, President Bush let the initiative's renewal lapse. Almost a year later and after pleas from Congress and civil rights groups, he renewed it. However, the administration moved the initiative from the Department of Health and Human Services to the Department of Commerce and, without input from affected communities, changed its focus from broad appeal to a narrow one of economic and small business development. Advocacy groups criticized the changes, stating that they narrowed the mission and would result in neglect of pressing health problems.
- In 2001, the President also renewed the White House Initiative on Educational Excellence for Hispanic Americans. He created an advisory commission and charged it with developing a multiyear action plan to close the achievement gap. The administration has developed a Web site to help parents and students make college decisions, and increased funding for Hispanic serving institutions. Overall, it developed many plans but undertook few actions and offers minimal demonstrable outcomes.
- In 2002, President Bush reestablished the President's Board of Advisors on Historically Black Colleges and Universities (HBCUs) and extended the White House Initiative on HBCUs, a program to increase the participation of these institutions in federal grants and contracts. The board recommended that 27 participating agencies designate 10 percent of all money spent on higher education to HBCUs; only the Department of Education has met the goal. The board also is more than two years behind schedule in releasing annual performance reports, rendering a governmentwide evaluation of HBCU programs difficult.

Funding for Religious Groups: When President Bush took office, he expanded the ability of religious groups to receive federal funds through the Faith-Based and Community Initiatives. Although the initiative constitutes a retreat from civil rights, President Bush has consistently presented it as an extension of civil rights to religious groups.

- He advanced the plan as a flagship initiative, mentioning it in more than 350 speeches, issuing executive orders, directing federal agencies to revise regulations, and working with Congress to pass and strengthen related legislation.

- President Bush does not speak about civil rights initiatives often, but when he does he promotes the faith-based program more than any other. He has presented the initiative as an end to discrimination against religious organizations, using terms such as “remove barriers,” “equal access,” and “equal treatment,” which convey that such programs have civil rights relevance. In reality, the program does not remove barriers to discrimination. On the contrary, it allows religious organizations that receive public funds to discriminate against individuals based on religion in employment.

Chapter 1: Introduction: The George W. Bush Promise to America

While many of our citizens prosper, others doubt the promise, even the justice, of our own country. The ambitions of some Americans are limited by failing schools and hidden prejudice and the circumstances of their birth. And sometimes our differences run so deep, it seems we share a continent, but not a country.

We do not accept this, and we will not allow it. Our unity, our union, is the serious work of leaders and citizens in every generation. And this is my solemn pledge: I will work to build a single nation of justice and opportunity. . . .

America has never been united by blood or birth or soil. We are bound by ideals that move us beyond our backgrounds, lift us above our interests and teach us what it means to be citizens. Every child must be taught these principles. Every citizen must uphold them. And every immigrant, by embracing these ideals, makes our country more, not less, American.¹

– President George W. Bush, January 2001

President George W. Bush’s address on January 20, 2001, gave civil rights watchers hope that his administration would protect each American’s right to equal education, housing, employment, and justice. After all, his presidency was already marked by a close and controversial election that dominated the news and refocused national attention on voting rights. The nation watched with anticipation to determine whether the new President would fulfill his promise to reform education, immigration, and election policies, and promote unity and opportunity.

Within nine months, however, the America to which President Bush referred in his inaugural speech would forever and fundamentally change. Whereas few Americans had paid attention to the nation’s security level and most gave scant thought to shielding themselves and their families from terrorism, all of that changed on September 11, 2001. New words soon entered the popular lexicon, such as “emergency readiness,” “shelter-in-place,” “homeland security,” and “national terrorism threat level.” Overnight, combating terrorism became America’s most important policy objective. Events called for, and the administration responded with, policy action that anticipated terrorism. Those new policy actions affected prevailing antidiscrimination laws and as such demanded commitment to civil rights protections.

Presidents have great power to direct national policy output, set priorities, and lead change. As such, they are entrusted with responsibility to make progress toward and uphold the most basic principle upon which civil rights laws were passed—equality. With this report, the U.S. Commission on Civil Rights (Commission) examines the Bush administration’s statements and actions to determine whether it has promoted or prioritized civil rights. This report measures President Bush’s civil rights record; it does not assess his actions with regard to foreign or domestic policy priorities that do not have direct civil rights implications.

¹ President George W. Bush, Inaugural Address, Jan. 20, 2001, <<http://www.whitehouse.gov/news/print/inaugural-address.html>>.

PRESIDENTIAL POWER OVER CIVIL RIGHTS OUTCOMES

Whether Presidents are main characters or minor players on the national policy stage depends on myriad factors. Some say that even though they occupy the power seat, Presidents are too dependent on Congress and the courts to influence policy significantly. Others conclude that Presidents are not minor players and point to vast differences in their accomplishments as evidence. Although legislatively dependent on Congress, the President has powerful tools that he can use to shape civil rights policy and influence public opinion, including judicial nominations and political appointments, executive orders, budget proposals, administrative policies, and the authority of the office.² In addition, the federal agencies under his management can be, and are, means to promote and implement policies. Presidential effectiveness depends on how an administration funds and utilizes government offices that write regulations and implement operating policies to carry out legislative, executive, and judicial edicts.³

This report examines how the Bush administration has applied such tools to forming and promoting a civil rights agenda. It assesses public statements and actions as measures of presidential commitment. It posits whether or not statements and public actions have produced outcomes and, if so, what the results were.

A few Presidents made significant policy advances, even with judicial and legislative dissonance at times, and left strong civil rights legacies. Others have, in promoting personal ideologies, effectively blocked civil rights progress. After the Civil War, Reconstruction governments passed laws to open economic and political opportunities to black Americans. But any advances that black people had made vanished as local laws separated the races for most of the century that followed. By 1877, local “Whites Only” laws segregated the nation’s transportation, schools, restaurants, and public accommodations.⁴ By the late 1800s, blacks sued unsuccessfully to stop separate seating in railroad cars, disenfranchisement, and segregation in schools and restaurants. In its *Plessey v. Ferguson* decision in 1896, the Supreme Court ruled “separate but equal” accommodations constitutional.⁵

Little changed in the decades that followed, until the Franklin D. Roosevelt administration, which was active in civil rights. Its policies had strong—positive and negative—outcomes. In the 1930s, President Roosevelt opened federal jobs to blacks and appointed Supreme Court justices who favored rights for black Americans. His administration renewed hope among African Americans that the federal government might be their ally, a sentiment that had not been felt since the Civil War.⁶ However, the Roosevelt administration also engineered and executed Japanese American internment during World War II, one of the most egregious civil rights injustices in the nation’s history.

² Lance T. LeLoup and Steven A. Shull, *The Presidency and Congress: Collaboration and Combat in National Policymaking* (New York: Pearson Education, 2003), p. 139 (hereafter cited as LeLoup and Shull, *The Presidency and Congress*).

³ Hugh Davis Graham, *Civil Rights and the Presidency* (New York: Oxford University Press, 1992) p. 8.

⁴ LeLoup and Shull, *The Presidency and Congress*, p. 131.

⁵ *Plessey v. Ferguson*, 163 U.S. 537 (1896).

⁶ See Nancy J. Weiss, *Farwell to the Party of Lincoln: Black Politics in the Age of FDR* (Princeton, NJ: Princeton University Press, 1983).

After World War II the movement toward equality began to gain momentum, marked by a few significant events. In 1945, President Harry S. Truman desegregated the military. Though proactive, his decision was connected to not a social or legal responsibility, but a personal sense of honor. Neither his advisors nor his electoral base were pushing him to act. He possessed neither an electoral mandate nor a reputation for strong leadership. However, revolted by reports that decorated black war veterans had been dragged, in uniform, from buses in the South and beaten within hours of being discharged, Truman called on his advisors and Cabinet officers to desegregate the military.⁷ While he failed to garner congressional support for anti-lynching laws, he used his executive order powers to induce an end to discriminatory federal government hiring practices.

Nine years later, during the presidency of Dwight Eisenhower, the Supreme Court overturned the 58-year-old precedent of school segregation in the *Brown v. Board of Education* decision.⁸ *Brown* brought an onslaught of litigation about which President Eisenhower had to decide if and how to react. Nothing in his agenda suggested he favored rapid or forceful public school integration or a fervent desire to remedy racial injustice. He acted foremost on a duty to enforce law and order when he sent troops to escort black students into a Little Rock, Arkansas, high school.⁹ Although cautious on civil rights matters, President Eisenhower created the Civil Rights Commission and requested the abolishment of poll taxes and literacy tests designed to limit minority voting.¹⁰

President John F. Kennedy proceeded incrementally on most civil rights issues, straddling all sides until or even in the hope that other actions, such as court rulings, would bring them to a close. A turning point came in 1962 when a black student attempted to enroll at the University of Mississippi. After a night of violence, President Kennedy sent troops to enforce the law. The event left little doubt in segregationists' minds as to the administration's civil rights position. Its later reactions to church fire bombings and introduction of a civil rights bill in Congress were stronger and swifter.¹¹ The change in strategy signaled the administration's desire to recast the President's actions in Mississippi as victorious and farsighted, not reactionary.¹² President Kennedy was also the first to use the term "affirmative action" in a racial context, and he established a Committee on Equal Employment Opportunity, the predecessor to the Equal Employment Opportunity Commission, to implement nondiscriminatory policies in federal jobs and contracting.¹³

Amid unprecedented social unrest during the Kennedy and Lyndon Johnson administrations, Congress passed new civil rights laws. President Kennedy declared civil rights a moral issue and

⁷ Ronald D. Sylvia, "Presidential Decision Making and Leadership in the Civil Rights Era," *Presidential Studies Quarterly*, vol. 24, no. 3 (summer 1995), p. 396 (hereafter cited as Sylvia, "Presidential Decision Making").

⁸ *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁹ Sylvia, "Presidential Decision Making," p. 399.

¹⁰ LeLoup and Shull, *The Presidency and Congress*, p. 133.

¹¹ Sylvia, "Presidential Decision Making," pp. 401–02.

¹² *Ibid.*, pp. 402–03.

¹³ Establishing the President's Committee on Equal Employment Opportunity, Exec. Order No. 10,925, 3 C.F.R. 448 (1959–1963). The Equal Employment Opportunity Commission was established in the Civil Rights Act of 1964.

proposed comprehensive legislation, although it faced fierce opposition in Congress and failed to gain momentum. Immediately following President Kennedy's assassination, President Johnson, a Southerner, became an unlikely champion for civil rights, skillfully urging Congress to honor President Kennedy's memory with the passage of civil rights legislation.¹⁴ In 1964, President Johnson signed the Civil Rights Act, which, among other things, outlawed segregation in education and public accommodations; in 1965 he signed the Voting Rights Act, which would become the primary tool for ensuring equality in the voting booth.¹⁵ President Johnson became a fervent civil rights supporter and was recognized as an ally by leaders of the movement.¹⁶

President Richard Nixon's record on civil rights is mixed. He was the first President to implement federal policies to encourage minority hiring. In 1969, his administration developed the Philadelphia Plan, which required federal contractors to set specific minority hiring goals.¹⁷ In 1970 and 1971, federal courts upheld the plan. However, in his desire to court the Southern electorate, President Nixon announced his opposition to busing and made two controversial nominations to the Supreme Court, one of whom was vocally opposed to desegregation and had, at an earlier point in his career, professed a belief in white supremacy.¹⁸

Until this point, civil rights policy had largely centered on blacks. In the early 1970s, however, more groups began seeking protection, including Hispanics, Native Americans, Asian Pacific Americans, individuals with disabilities, and gay men and lesbians.¹⁹ The century-old struggle for women's equality also gained resonance against political and social resistance. The Equal Rights Amendment (ERA), which would have guaranteed employment, economic, and other rights for women, failed to gain state ratification and was a setback for civil rights policy- and lawmaking. President Gerald Ford was not assertive either legislatively or administratively with respect to civil rights and thus did little to advance equality for any protected groups.²⁰

Although President Jimmy Carter was a civil rights advocate who appointed blacks and women to judicial and executive branch positions, he was not active or effective in the legislative arena.²¹ For example, he espoused support for the ERA, but was unable to garner broad

¹⁴ U.S. Equal Employment Opportunity Commission, "Pre-1965: Events Leading to the Creation of EEOC," <<http://www.eeoc.gov/abouteeoc/35th/pre1965/index.html>> (last accessed Aug. 11, 2004).

¹⁵ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (2000)); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-1 (2000)).

¹⁶ LeLoup and Shull, *The Presidency and Congress*, p. 133, citing Eric F. Goldman, *The Tragedy of Lyndon Johnson* (New York: Knopf, 1969), p. 515.

¹⁷ The White House, "Affirmative Action Review," <<http://clinton5.nara.gov/textonly/WH/EOP/OP/html/aa/aa-index.html>> (last accessed June 21, 2004); Borgna Brunner, "Timeline of Affirmative Action Milestones," <<http://www.infoplease.com/spot/affirmativetimeline1.html>> (last accessed June 21, 2004).

¹⁸ LeLoup and Shull, *The Presidency and Congress*, p. 135; John Anthony Maltese, "Confirmation Gridlock: The Federal Judicial Appointments Process Under Bill Clinton and George W. Bush," *Journal of Appellate Practice and Process*, vol. 5 (spring 2003), p. 8, citing a statement by G. Harold Carswell who was nominated in 1970. The other Nixon nominee criticized by civil rights groups was Clement Haynsworth (1969).

¹⁹ LeLoup and Shull, *The Presidency and Congress*, p. 134.

²⁰ *Ibid.*, p. 140.

²¹ *Ibid.*, pp. 135, 140.

endorsement of the measure. He relied instead on executive orders to make his policy positions known, such as an order to promote leadership in and consolidate federal fair housing programs and another to increase the participation of Historically Black Colleges and Universities in federally sponsored programs.²² President Carter also used executive orders to broaden EEOC's mandate to include federal equal employment opportunity, equal pay, and age discrimination functions.²³

Conversely, the Ronald Reagan administration, owing to the President's own ideology, actively pursued a narrow civil rights agenda, effectively nullifying earlier efforts. Through public statements, President Reagan expressed a belief that many programs, such as affirmative action and antidiscrimination laws, divided the United States along racial lines. He believed that affirmative action itself constituted discrimination.²⁴ As a result, his administration ended programs that had promoted minority advancement, including those applying to government contractors, and brought several legal challenges to affirmative action. President Reagan also opposed busing public school children to achieve racial integration. He appointed three of the sitting Supreme Court justices, including the first woman to serve. Some of his nominations were controversial, however; for example, in 1987, the Senate refused to confirm a Reagan nominee, by the widest margin in history, in part because of the nominee's position on equal rights for minorities and women.²⁵ He was also the first President to openly oppose the Equal Rights Amendment.

President George H.W. Bush upheld many Reagan policies. He made few public statements about civil rights, and did so only after intense political pressure. His greatest civil rights achievements were successfully pursuing passage of the Americans with Disabilities Act of 1990, a landmark legislative effort to protect the rights of persons with disabilities, and issuing disability-related executive orders.²⁶ His overall civil rights leadership, on issues other than disability, has been characterized as weak and reactive.²⁷ For example, experts conclude that he

²² Steven A. Shull, *American Civil Rights Policy from Truman to Clinton: The Role of Presidential Leadership* (Armonk, NY: M.E. Sharpe, 1999), pp. 39, 123 (hereafter cited as Shull, *American Civil Rights Policy*). See also Leadership and Coordination of House in Federal Programs, Exec. Order No. 12,259, 46 Fed. Reg. 1,253 (Jan. 6, 1981); and Historically Black Colleges and Universities, Exec. Order No. 12,232, 45 Fed. Reg. 53,437 (Aug. 12, 1980). President Reagan revoked this order when he signed Executive Order 12,320 on Sept. 15, 1981. Exec. Order No. 12,320, 3 C.F.R. 176 (1982).

²³ See Transfer of Certain Equal Employment Enforcement Functions, Exec. Order No. 12,106, 44 Fed. Reg. 1,053 (Jan. 3, 1979); and Transfer of Certain Equal Pay and Age Discrimination in Employment Enforcement Functions, Exec. Order No. 12,144, 3 C.F.R. 404 (1980).

²⁴ Neal Devins, "Affirmative Action After Reagan," *Texas Law Review*, vol. 68 (December 1989), p. 353.

²⁵ Michael J. Gerhardt, "Toward a Comprehensive Understanding of the Federal Appointments Process," *Harvard Journal of Law and Public Policy*, vol. 21 (spring 1998), p. 467; Ann E. Freedman and Sylvia A. Law, "Thomas I. Emerson: A Pioneer for Women's Equality," *Case Western Reserve Law Review*, vol. 38 (1987/1988), p. 539.

²⁶ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (2000)). See, e.g., Interagency Committee on Handicapped Employees, Exec. Order No. 12,672, 3 C.F.R. 273 (1989); and Noncompetitive Conversion of Personal Assistants to Employees with Disabilities, Exec. Order No. 12,685, 3 C.F.R. 232 (1990).

²⁷ Neal Devins, "Reagan Redux: Civil Rights Under Bush," *Notre Dame Law Review*, vol. 68 (1993), pp. 956-57; Shull, *American Civil Rights Policy*, pp. 118-19.

signed the Civil Rights Act of 1991 reluctantly and under political pressure, and only after much compromise.²⁸

In campaign statements, President William J. Clinton expressed a desire to fundamentally improve race relations. He appointed a presidential advisory board that held a series of meetings aimed at understanding racial tensions. President Clinton also upheld his campaign promise to put in place government leadership that “looks like America,” by assembling the most racially, ethnically, and gender diverse administration in history. He defended affirmative action, calling it “a moral imperative, a constitutional mandate and a legal necessity.”²⁹ President Clinton also increased enforcement of fair housing laws. Although he was the first President to back measures to end bias against gay men and lesbians in the federal workplace and the military, he eventually adopted a compromise position.³⁰ By voicing strong and frequent support for equal opportunity and including minority groups in the policymaking process, President Clinton made many rhetorical inroads into civil rights and improved dialogue on race relations. However, his administration’s statements were not always matched by enforcement action, and its potentially innovative policies were at times tempered by ineffective implementation.³¹

George W. Bush entered the presidency at a time of promise for civil rights. The foundation that had been established in administrations since the 1930s provided a base for future progress. Has President Bush built upon existing civil rights laws and policies? What have been his administration’s civil rights priorities? What statements and actions has President Bush put forth to promote civil rights, and what have been the results? This report will examine these questions.

SCOPE AND METHODOLOGY

With this report, the Commission examines the Bush administration’s statements and actions with respect to civil rights and the quest for equality. Chapter 2 covers the administration’s commitment to civil rights based on public messages and actions to promote civil rights, including its political appointments and judicial nominations, and funding for enforcement. Traditionally, civil rights advances have grown out of policy that furthers equal educational opportunity, affirmative action, housing, immigration, and voting rights. Chapter 3 examines the administration’s progress on these fronts among others. As civil rights have evolved, other groups have become involved in the fight for equality. Chapter 4 examines the policies and initiatives that have either moved those groups, including immigrants, Native Americans, persons with disabilities, women, and gay men and lesbians, toward or away from equality. Chapter 5 assesses the administration’s actions toward new or inherited other programs designed to promote access to federal services for individuals traditionally neglected. Finally, the

²⁸ Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 2 U.S.C. §§ 1201–1224, 29 U.S.C. § 626, 42 U.S.C. §§ 1981, 1988, 2000e to 2000e-16 (2000)). See LeLoup and Shull, *The Presidency and Congress*, p. 149–52.

²⁹ President William J. Clinton, remarks on affirmative action, July 20, 1995, as excerpted in “Give All Americans a Chance . . .” *Washington Post*, July 20, 1995, p. A12.

³⁰ LeLoup and Shull, *The Presidency and Congress*, p. 147.

³¹ U.S. Commission on Civil Rights, *A Bridge to One America: The Civil Rights Performance of the Clinton Administration*, April 2001, p. 4 (hereafter cited as USCCR, *A Bridge to One America*);

Commission assesses whether the administration's efforts, cumulatively, have advanced or retarded civil rights.

The Commission reviewed public statements and documents, policy briefs, budget data, and executive orders. In addition, staff analyzed the policies that executive Cabinet agencies implemented. To the extent clarification was needed, staff contacted agencies. Staff also conducted an extensive literature review, with special emphasis on reports, studies, statements, and publications offered from scholars, political analysts, government sources, experts on presidential leadership, and affected communities. Staff consulted historical documents to establish context for understanding modern-day antidiscrimination targets.

This evaluation does not comprehensively review all administration policies or initiatives, but selects based on applicability to civil rights and prominence within the administration's overall agenda. The Commission considered several factors when making its selection: whether a policy or initiative involved a matter of longstanding civil rights interest; whether it was based on a campaign promise; whether it stemmed from events demanding immediate attention; and whether it grew from a new opportunity or the President's own ideology. It is beyond the scope of this evaluation to assess the outcomes of individual civil rights initiatives. Because many are still in the planning stages, it would be premature to measure effectiveness. Rather, this review regards the administration's overall agenda and its potential to advance civil rights. As with past administrations, historical retrospective will provide the keenest insight to President Bush's civil rights legacy.

SUMMARY FINDINGS

Several themes emerge from this study. Specifically, this examination will show that the administration's statements frequently do not match its actions. Its civil rights promises often suffer for lack of funding and ineffective implementation. To his credit, President Bush has not dismantled some good programs that previous administrations had implemented. However, he has also not comprehensively advanced them or demanded accountability for their outcomes. And finally, through the views of his executive and judicial appointments and his own professed priorities, President Bush redefines civil rights, at times by promoting unrelated initiatives under a civil rights banner.

Chapter 2: The Administration's Commitment to Civil Rights: Rhetoric, Action, and Initiative

This chapter assesses whether the administration has clarified and articulated its commitment to civil rights and equal opportunity, and whether it has aggressively secured resources for civil rights promotion and enforcement. The Commission examined the President's public statements, political appointments and judicial nominations, and funding requests as a measure of leadership, commitment, and goals.

STATEMENTS AND ACTION: THE PRIORITY OF CIVIL RIGHTS

Presidents play a crucial role in shaping civil rights policy through their messages because only with presidential support are major and lasting policy changes likely. . . . Some presidential communications, especially in an emotionally charged policy area such as civil rights, may be more symbolic than substantive. Yet even symbolism can have important policy consequences by focusing public attention on the problem.¹

Strong leadership requires ideological commitment and assertiveness.² The President has the power to call public attention to social matters and shape public dialogue, which in turn influence policy development. Presidential rhetoric not only informs the public of the administration's goals and agenda, but precedes presidential action. It is critical, then, to judge a President's commitment both on statements and actions. History reveals that the two are not always consistent.

For example, President Reagan expressed support for the broad principles of civil rights early in his administration, but acted to the contrary when he later moved away from programs supporting equality.³ President George H.W. Bush, trying to soften the image of his party, called for a "kinder and gentler America." But, in policy, he opposed the passage of an equal rights amendment for women and programs to redress past discrimination against African Americans and Native Americans.⁴ While President Clinton espoused strong support for civil rights, at times he did not follow up with action.⁵ For example, although he spoke frequently about the persistence of discrimination and the need for affirmative action programs, his administration failed to actively pursue affirmative action cases and Title VI violations in court.⁶ In each of these instances, presidential actions did not match rhetoric; thus, a comprehensive analysis must consider both.

¹ Steven A. Shull, *American Civil Rights Policy from Truman to Clinton: The Role of Presidential Leadership* (Armonk, NY: M.E. Sharpe, 1999), p. 58 (hereafter cited as Shull, *American Civil Rights Policy*).

² See *Ibid.*, p. 9.

³ *Ibid.*, p. 59.

⁴ *Ibid.*, pp. 63–64.

⁵ See U.S. Commission on Civil Rights, *A Bridge to One America: The Civil Rights Performance of the Clinton Administration*, April 2001 (hereafter cited as USCCR, *A Bridge to One America*).

⁶ *Ibid.*, pp. 25, 70. Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin in programs and activities receiving federal financial assistance. See 42 U.S.C. § 2000d (2000).

Commission staff found that 153 of President Bush's public statements between January 2001 and December 2003 included the phrases "civil rights," "diversity," or "discrimination."⁷ Given the thousands of presidential records (including public statements, proclamations, speeches, etc.), released during this period, this indicates that President Bush rarely uses these terms. When he does, it is most often in reference to heritage and history celebrations and holidays, such as African American History Month, Hispanic Heritage Month, Asian Pacific American Heritage Month, and the Martin Luther King Jr. holiday.⁸ In addition, a significant portion of his statements referred to civil rights in the historical context or in reference to his nominations for civil rights positions (discussed below). As such, the vast majority derive from official duties, and not action-oriented proposals for improving or advancing civil rights. The dearth of substantive presidential statements reveals that civil rights is not a priority for this administration.

Presidential Initiatives

Of the 153 statements, only 27 (or 17 percent) outline plans of action or concrete initiatives (see table 2.1). The Faith-Based and Community Initiatives is the one most frequently promoted by the President, and in fact, accounts for more than half of the references (15 of 27). In discussing it, President Bush promotes an end to what he describes as discrimination in the distribution of federal funds (see chapter 5). In one statement promoting the administration's efforts, the President said, "My Administration has been working to ensure that faith-inspired organizations do not face discrimination simply because of their religious orientation."⁹ The President often expresses interest in religious matters; however, his consistent use of terms such as "funding discrimination" to describe this program seems designed to attach civil rights relevance to a completely unrelated effort. In fact, the faith-based initiative's only civil rights significance may be that it actually allows employment discrimination. As will be discussed in chapter 5, this initiative reflects the President's desire to recast civil rights in a manner that suits his narrow agenda and, as such, has been highly controversial.¹⁰

The Commission found no reference to presidential statements on the President's Commission on Excellence in Special Education, Women's Entrepreneurship in the 21st Century, or the President's Commission on Asian Americans and Pacific Islanders (see chapters 4 and 5). Thus,

⁷ Staff used the U.S. Government Printing Office's online resource, Weekly Compilation of Presidential Documents, which can be found at <<http://www.gpoaccess.gov>>. The weekly compilation is issued every Monday and contains statements, messages, and other materials released by the White House during the preceding week. These search terms were chosen because they represent common civil rights sentiment and are general enough to encompass a variety of civil rights contexts.

⁸ Other proclamations include: Thomas Jefferson Day, National Volunteer Week, Loyalty Day, National Day of Prayer, the Anniversary of the Americans with Disabilities Act, Citizenship Day and Constitution Week, White Cane Safety Day, National American Indian Heritage Month, Women's Equality Day, National Birmingham Pledge Week, Irish American Heritage Month, World AIDS Day, Observances of Ramadan and Eid al-Fitr, Religious Freedom Day, National Fair Housing Month, Jewish Heritage Week, Cinco de Mayo, the Centennial of Korean Immigration to the United States, German American Day, and Black Music Month.

⁹ President George W. Bush, "Proclamation 7640: Religious Freedom Day, 2003," Jan. 15, 2003.

¹⁰ Lance T. LeLoup and Steven A. Shull, *The Presidency and Congress: Collaboration and Combat in National Policymaking* (New York: Pearson Education, 2003), pp. 137–38.

the President may not view these initiatives as important or relevant to his civil rights agenda. If measured by public statements, these projects are left to administrative channels to promote, develop, and implement. Various agencies are responsible for carrying out the administration's initiatives, but without direction or clear expression of priority, their progress is limited.

Table 2.1. Content of Presidential Speeches, Statements, and Other Documents, 2001–2003

	2001	2002	2003
Proclamations/heritage celebrations/holidays	15	14	16
"Civil rights" in a historical or general context	6	5	5
Support of "diversity," generally	7	9	7
Opposition to "discrimination," generally	4	2	1
Nominations to civil rights positions/judicial nominees	5	6	4
Substantive discussions/policy proposals:			
Faith-Based and Community Initiatives	6	3	6
Community Based Alternatives for Individuals with Disabilities	1		
President's Commission on Election Reform	1		
No Child Left Behind Act		3	2
Interagency Disability Web Site		1	
Teaching American History and Civil Education Initiatives		1	
Welfare Reform Reauthorization		1	
Head Start			1
Fair and Accurate Credit Transactions Act of 2003			1
Miscellaneous references	6	7	1
Comments not related to civil rights in the U.S.	4	2	6
Total*	55	54	50

*Note that the totals add up to more than the number of documents (153) because some have more than one reference.

Source: USCCR analysis of document search retrieved from U.S. General Printing Office, "Weekly Compilation of Presidential Documents," <<http://www.gpoaccess.gov>>.

Education reform was one of the most visible efforts on the President's domestic agenda during his campaign and early in his tenure. The No Child Left Behind Act (NCLB) gained bipartisan support and was noteworthy in its acknowledgement that an achievement gap exists between minority and nonminority students (discussed in chapter 3). In promoting NCLB, the President stated, "Equal education is one of the most pressing civil rights of our day,"¹¹ and described education as "the next frontier of civil rights."¹² However, as will be demonstrated, the administration has not fought sufficiently to make sure the act was funded or provided the

¹¹ President George W. Bush, remarks to the National Urban League Conference, Pittsburgh, PA, July 28, 2003.

¹² President George W. Bush, remarks at ceremony honoring presidential scholars, Washington, D.C., June 25, 2001.

guidance necessary for successful implementation. Moreover, education experts fear that the school sanctions associated with failure to comply with NCLB will have a disparate impact on minority students. Students in the lowest performing schools, which are primarily in low-income and minority communities, will not have the same opportunities to succeed. Those schools will be under the greatest pressure to improve, increasing the risk of student punishment for the system's failures. Thus, this public call for equal education for all was not matched by action.

Defining Civil Rights Through Diversity

The President uses the term “diversity” frequently, usually in a general way referring to American ideals and not specific programs.¹³ He also does so to the exclusion of discussions on civil rights, as if the former is a substitute for the latter. For example, during an Asian Pacific American Heritage Month proclamation, he noted: “Diversity represents one of our greatest strengths, and we must strive to ensure that all Americans have the opportunity to reach their full potential.”¹⁴ Likewise, in announcing the African American History Month Celebration in 2003, President Bush stated, “By promoting diversity, understanding, and opportunity, we will continue our efforts to build a society where every person, of every race, can realize the promise of America.”¹⁵

This statement, although in isolation a seemingly bold expression of support for equal opportunity, was made the same month the administration filed a brief opposing university policies that allow race to be considered as one factor to promote diversity in college admissions (see chapter 3). Specifically, the President characterized University of Michigan admissions policies as “clearly unconstitutional means to achieve diversity” and called for “race-neutral” policies despite overwhelming evidence that such methods do not result in diversity.¹⁶ President Bush verbalized his position that such policies violate the Constitution, but for political reasons, he at the same time professed support for diversity.

In a less publicized, but related action, the Bush administration has stopped making available to researchers and the public statistical information on the race, ethnicity, gender, and job

¹³ For the purpose of this report, the term “diversity” is defined as a pool of characteristics, including but not limited to race, ethnicity, gender, age, religion, life experience, beliefs, etc. It is most frequently used in the context of the workforce and higher education. While there is no legal standard or requirement for diversity, the Supreme Court has found it to be a “compelling government interest.” See *Grutter v. Bollinger*, et al., 539 U.S. 306 (2003).

¹⁴ President George W. Bush, “Proclamation 7434, Asian/Pacific American Heritage Month,” May 7, 2001.

¹⁵ President George W. Bush, “Proclamation 7645: National African American History Month, 2003,” Jan. 31, 2003.

¹⁶ President George W. Bush, remarks following a meeting with economists and an exchange with reporters, Washington, D.C., Jan. 21, 2003. For analysis of race-neutral alternatives to admissions see U.S. Commission on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education*, staff report, November 2002; The Civil Rights Project, Harvard University, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, February 2003; The Civil Rights Project, Harvard University, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida*, February 2003; Marta Tienda et al., *Closing the Gap? Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action*, January 2003; and Tomàs Rivera Policy Institute, *The Reality of Race Neutral Admissions for Minority Students at the University of California: Turning the Tide or Turning Them Away?* March 2003.

classification of employees at the nation's largest companies.¹⁷ The Equal Employment Opportunity Commission (EEOC) had made such data available for more than 30 years, and it was used by government agencies conducting compliance reviews and complaint investigations, plaintiffs in discrimination suits, and employers seeking to develop diverse workforces.¹⁸ It has also served as a starting point for uncovering patterns of employment discrimination. Without it, workplace equality cannot be widely and uniformly measured, nor can employers appropriately gauge their outreach efforts. By withholding the data, EEOC and the administration have minimized its significance and compromised the most comprehensive indicator of national workforce diversity.

Thus, the President has made conflicting statements, and his espoused support for diversity contradicts the administration's actions. To speak about the importance of diversity without acknowledging the role of affirmative action or the need for comprehensive data is to disregard the remaining vestiges of discrimination. Moreover, the President seems to deliberately, and in a highly disciplined manner, alter public discourse by expressing diversity and civil rights as interchangeable concepts. He talks about diversity to the exclusion of enforcement or ways to strengthen protections. Although a worthwhile goal, diversity does not necessarily translate into support for civil rights, as illustrated by the staffing of this administration (discussed below). By conflating the terms, the President minimizes the persistence of discrimination and the remaining barriers to equal opportunity, which are at the center of civil rights.

Inclusive Outreach and Dialogue

Historically, civil rights policy has drawn momentum from external actors, including grassroots and religious activists, lawmakers, academicians, and advocacy groups. The Commission thus identified as a key indicator of the administration's commitment its willingness to develop a strategy in collaboration with civil rights leaders and representatives from affected communities. Rarely during his first three years in office did President Bush speak at meetings of civil rights organizations.¹⁹ As a candidate in 2000, President Bush gave a speech at the NAACP's national convention, but during his first three years in office, did not attend the group's meetings or call its leaders to the White House to confer with him. Nor has he engaged the NAACP in policy conversations, breaking a tradition that began under President Warren G. Harding and had been carried on by 11 consecutive Presidents beginning with Franklin D. Roosevelt and ending with Clinton.²⁰ The NAACP president has requested several White House meetings, but the President

¹⁷ Private companies with 100 or more employees and government contractors with 50 or more employees must file Standard form 100 (or EEO-1) with the EEOC no later than September 30 of each year, as required by section 709(c) of Title VII of the Civil Rights Act of 1964. See U.S. Equal Employment Opportunity Commission, "2004 EEO-1 Survey," <<http://www.eeoc.gov/eo1survey/index.html>> (last accessed July 19, 2004).

¹⁸ Joseph Sellers, partner, Cohen, Milstein, Hausfeld, & Toll, LLP, statement before the U.S. Commission on Civil Rights, Washington, D.C., Dec. 12, 2003, transcript, pp. 73–75; see also Alfred Blumrosen, Thomas A. Cowan Professor of Law Emeritus, and Ruth Blumrosen, adjunct professor of law, Rutgers University, statements before the U.S. Commission on Civil Rights, Washington, D.C., Dec. 12, 2003, transcript pp. 115–20.

¹⁹ Among those he did address are the Urban League, a caucus of Hispanic leaders, a group of women business owners, the American Jewish Committee, and the Hispano Chamber of Commerce of Albuquerque.

²⁰ Deb Reichmann, "President is not Targeting Liberal Blacks, Say Political Analysts," *Ethnic Newswatch*, Aug. 13, 2004, p. 1 (hereafter cited as Reichmann, "President is not Targeting Liberal Blacks"); "NAACP Leaders Blast

has not obliged.²¹ President Bush and several top advisors also declined to attend annual conferences of the National Council of La Raza, a Hispanic civil rights advocacy group.²²

Likewise, President Bush has not brought together a broad coalition of notable or acknowledged civil rights groups or leaders to the White House to advise him on policy, despite the effective use of this strategy by former administrations. For instance, the chair of the Leadership Conference on Civil Rights Compliance and Enforcement Committee and executive director of the National Asian Pacific American Legal Consortium noted that minority groups have had difficulty gaining access to the Bush White House.²³ The Congressional Black Caucus met with President Bush shortly after he took office, but was denied numerous subsequent requests for meetings.²⁴ Not only would such meetings represent gestures of cooperation and support, but also would demonstrate that the President values advice from various constituencies.

In short, the President does not present a focused civil rights agenda, and his public statements offer a limited expression of commitment. He does not speak frequently about civil rights policies, and usually when he does, it is in reference to his faith-based initiative, which chapter 5 will demonstrate actually erodes such rights. He seems to place no value on including civil rights leaders in policy discussions or soliciting input from anyone other than his own close circles, and even then only those who share his views. For example, when asked during a press conference why he had not accepted invitations to meet with NAACP leaders and how he would respond to criticisms that his record on civil rights is weak, President Bush replied: "There I was, sitting around the table with foreign leaders, looking at Colin Powell and Condi Rice," referencing two African American members of his Cabinet.²⁵ This reply not only misses the point about the importance of collaboration, but assumes that accomplishments such as Cabinet diversity, although important, are a substitute for a comprehensive civil rights agenda. Ironically, the President offers these two individuals as evidence of his commitment to civil rights, but as will be discussed, he does not hold their civil rights opinions, such as their stance on affirmative action, in high regard.

Bush, Three Democrats for Missing Candidate Forum," *The Bulletin's Frontrunner*, July 15, 2003; "Bush and the NAACP," *Ethnic Newswatch*, vol. 86, no. 29, p. 4A.

²¹ Reichmann, "President is not Targeting Liberal Blacks"; NAACP, "NAACP Leaders Challenge the President and Congress to Seek Common Ground at the 92nd Annual NAACP Meeting," press release, Feb. 17, 2001.

²² Armando Villafranca, "Hispanic Leader Bashes Bush; Advocate: He's Losing Our Vote," *Houston Chronicle*, July 15, 2003, p. A13.

²³ Wayne Washington and Susan Milligan, "Minorities Say Bush is Falling Short; Diverse Staff Not Seen as Enough," *Boston Globe*, July 6, 2003, citing Karen K. Narasaki, president and executive director, National Asian Pacific American Legal Consortium and chair of the Leadership Conference on Civil Rights Compliance and Enforcement Committee.

²⁴ Deb Reichmann, "NAACP Still Seeking Meeting with Bush," Associated Press, July 27, 2003. President Bush met with members of the Congressional Black Caucus in February 2004 to discuss the volatile political situation in Haiti. See The White House, "Digest of Other White House Announcements," vol. 40, no. 9 (Mar. 1, 2004), <<http://frwebgate6.access.gpo.gov>>.

²⁵ President George W. Bush, The President's News Conference, July 8, 2002. The President was referring to Secretary of State Colin Powell and National Security Advisor Condoleezza Rice, two prominent African Americans in his administration.

DIVERSITY IN THE FEDERAL GOVERNMENT

The federal government employs more than 2.7 million people, 2.6 million of whom work in the executive branch.²⁶ The federal obligation to diversity is important for many reasons, perhaps foremost to serve as a model for private employers and because of the effect it can have on the workforce due to the number of people it employs. As for federal managers and executives, according to the U.S. General Accounting Office (GAO):

Diversity can bring a wider variety of perspectives and approaches to bear on policy development and implementation, strategic planning, problem solving, and decision making and can be an organizational strength that contributes to achieving results.²⁷

Federal managers and executives must maintain a commitment to the civil rights of both government employees and the public they serve.

The importance that the administration places on diversity in the career civil service ranks, those who carry out the government's mission, also is critical. Career federal workers fulfill the objectives of the agencies they serve and, in many ways, are the implementers of the administration's policies and operators of federal programs. Regulations that agencies offer for public comment before finalization and internal procedures that they write are critical to policy continuity and its aggregated impact.²⁸ Furthermore, offices that enforce statutory provisions like Titles VI and VII of the Civil Rights Act of 1964 must be expert in and committed to civil rights laws.²⁹ Thus, the Commission examined federal workforce diversity, both in absolute terms as well as in relation to prior administrations.

The following discussion will document that, in terms of numbers, the federal workforce is diverse; it looks more like America than ever before. However, in the career service, plurality fades as a function of level, resulting in disproportionately low minority and female representation among supervisors, managers, and executives. Although President Bush has commendably diversified his Cabinet, his success with respect to high-level appointments has focused on racial, ethnic, and gender diversity, not necessarily civil rights commitment. The same can be said of his judicial nominations.

Judicial Nominations

For more than 50 years, federal courts have been instrumental in eliminating segregation, protecting rights, and prosecuting discrimination. Through judicial nominations, a President can

²⁶ Figure is as of Sept. 30, 2002, the most recent available. U.S. Office of Personnel Management, *The Fact Book 2003 Edition: Federal Civilian Workforce Statistics*, p. 8 (hereafter cited as OPM, *The Fact Book*).

²⁷ U.S. General Accounting Office, *Senior Executive Service: Enhanced Agency Efforts Needed to Improve Diversity as the Senior Corps Turns Over*, January 2003, p. 1 (hereafter cited as GAO, *Senior Executive Service*). Effective July 7, 2004, the U.S. General Accounting Office changed its name to the U.S. Government Accountability Office. The former is used in this report because it is the name under which the references cited were published.

²⁸ Hugh Davis Graham, *Civil Rights and the Presidency* (New York: Oxford University Press, 1992), p. 8 (hereafter cited as Graham, *Civil Rights and the Presidency*).

²⁹ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (2000)).

influence public policy and national affairs for years after leaving office.³⁰ Thus, a President's selection of nominees who will uphold and strengthen civil rights protections is critical. In that regard, many view judicial diversity as necessary because it increases support for enforcement of civil rights laws. According to one legal scholar, "diversity on the bench is key to promoting the sort of mutual understanding that produces the best results in civil rights cases."³¹ Moreover, because they lack sufficient voting power to influence the legislative and executive branches, racial, religious, and other minorities must often rely on the judiciary to protect their interests.³² Diversity on the bench, coupled with a judicial commitment to civil rights, is one way to ensure that their interests and rights are protected.

Historically, however, the federal court system has not reflected the growing diversity of the nation. President Carter made the first real effort to end discrimination that had resulted in homogenization of the bench; he nominated 41 women (15.7 percent) and 55 African Americans to the federal judiciary.³³ Only 8.3 percent of President Reagan's nominations were women, and he appointed fewer African Americans than any President since the Eisenhower administration.³⁴ President Bush Sr. nominated more female district court judges than any of his predecessors, 18.7 percent. With respect to racial and ethnic diversity, President Bush Sr. exceeded President Reagan, but not President Carter.³⁵ President Clinton made history by appointing more female and minority judges to the lower courts than any other President, a distinction his presidency still holds. During his first term, 30 percent of his appointees were women, and 28 percent were minorities.³⁶ By the end of his term, the number of female and minority judges had nearly doubled.³⁷

President Bush has demonstrated a commitment to parity beyond any other President of his party, although not nearly as strong as his predecessor. In announcing his first 11 judicial nominees in May 2001, President Bush emphasized that "they come from diverse backgrounds, and will bring a wide range of experience to the bench."³⁸ Of his first 11 nominees, six (54.5 percent) were either people of color or women.³⁹ However, this diverse record slowed with subsequent nominations. Of the 174 Bush nominations confirmed by July 2004 for whom biographical information is available, 20.7 percent are women and 19.0 percent are minorities.

³⁰ Elliot E. Slotnick, "Federal Judicial Selection in the New Millennium: Prologue," *University of California–Davis Law Review*, vol. 36 (February 2003), p. 589.

³¹ Theresa M. Beiner, "What Will Diversity on the Bench Mean for Justice?" *Michigan Journal of Gender and Law*, vol. 6 (1999), p. 113 (hereafter cited as Beiner, "Diversity on the Bench").

³² Fay Clayton and Elyssa Balingit Winslow, Lawyers' Committee for Civil Rights Under Law, "The Role of the Senate in Judicial Nominations: Evaluating Judicial Philosophy and Ideology," June 2003, p. 2.

³³ Beiner, "Diversity on the Bench."

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ USCCR, *A Bridge to One America*, pp. 22–23.

³⁸ The White House, "Remarks by the President During Federal Judicial Appointees Announcement," May 9, 2001, <<http://www.whitehouse.gov/news/releases/2001/05/20010509-3.html>>.

³⁹ Wayne Washington, "Bush Nominates 11 to Serve on Federal Bench; Names Include a Clinton Choice for Fourth Circuit," *Boston Globe*, May 10, 2001, p. A3.

Of those, 8.0 percent are African American and 10.3 percent are Hispanic. Only one Asian Pacific American, but no Native American, has been nominated and confirmed during this administration.⁴⁰ Moreover, as the following examples illustrate, race and gender alone do not guarantee support for civil rights. Some of President Bush's nonminority nominees hold views that would limit the scope and strength of civil rights laws, as do some of his minority and female nominees.

Changing the Nomination Process

President Bush's first action on judicial nominations was to change the selection process. In March 2001, the administration terminated the longstanding relationship between the American Bar Association (ABA) and the White House Counsel's Office. For 50 years, ABA had advised Presidents on the qualifications of judicial nominees for service.⁴¹ White House Counsel Albert Gonzales wrote to ABA's president informing her that the administration did not wish to grant a "quasi-official role to a group such as the ABA that takes public positions on divisive political, legal and social issues that come before the courts."⁴² In a news conference following the White House announcement, the ABA president expressed concern that "the role of politics may be taking the place of professionalism in choosing judges."⁴³ Some newspapers and civil rights advocacy groups voiced opposition to the decision and said that removing ABA could have a negative effect on civil rights law enforcement.⁴⁴

The Bush administration's move to eliminate ABA's role presaged fierce partisan rancor over the President's nominees. One commentator cites the President's campaign promise to effect an ideological transformation of the federal judiciary as the reason for increased politicization.⁴⁵ The judicial nomination process has historically been subject to political connection and ideological compatibility to the party in power. However, critics attribute the recent contentiousness to nominees' views, which they consider so far out of the mainstream that they would eviscerate enforcement of federal civil rights laws.⁴⁶

⁴⁰ Calculations are based on data obtained from the Federal Judicial Center, *History of the Federal Judiciary*, <<http://www.fjc.gov/history/home.nsf>>. As of July, 14, 2004, 198 judges had been confirmed, but biographical data was pending for 24.

⁴¹ Neil Lewis, "White House Ends Bar Association's Role in Screening Federal Judges," *New York Times*, Mar. 22, 2001, p. A13.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Institute for Democracy Studies, "Institute for Democracy Studies Sounds Alarm on Bush's ABA Decision," *PR Newswire*, Mar. 23, 2001; People for the American Way, "President Bush, the Senate and the Federal Judiciary: Unprecedented Situation Calls for Unprecedented Solution," Fall 2001, <<http://www.pfaw.org/pfaw/general/default.aspx?oid=644>>; "Blocking Judicial Ideologues," *New York Times*, Apr. 27, 2001, p. A24; "Bush Invites Partisanship on Judicial Selections," *Virginian-Pilot*, Mar. 26, 2001, p. B12.

⁴⁵ Jeffrey Toobin, "Advice and Dissent; The Fight Over the President's Judicial Nominations," *New Yorker*, May 26, 2003, p. 42.

⁴⁶ Leadership Conference on Civil Rights, "What's at Stake—Bush's Nominations to the U.S. Court of Appeals," Mar. 12, 2003, <<http://www.civilrights.org/issues/nominations/details.cfm?id=11607>>.

Nominees Whose Civil Rights Records Have Been Challenged

Because federal judges have the power to interpret and establish precedent upon which future case law can be based, and because they serve life terms, their civil rights views are critical. Civil rights organizations and leadership have objected to and launched campaigns against several of President Bush's nominees, claiming that the administration is trying to pack the judiciary with anti-civil rights ideologues.⁴⁷ Supporters of the President's nominations, on the other hand, assert that their views have been misrepresented and accuse opponents of racializing the process and using the religious beliefs of nominees against them.⁴⁸ They also argue that the failure to approve some of President Bush's nominees reflects the growing partisanship in Congress and election year politicking. However, as the following discussion will illustrate, the Senate has rejected only those with the most controversial civil rights records.

Charles Pickering Sr. for Fifth Circuit U.S. Court of Appeals

On January 7, 2003, President Bush renominated Charles Pickering Sr. for a U.S. Appeals Court post, after the Senate Judiciary Committee voted him down the previous year.⁴⁹ Of particular concern to civil rights advocates was a 1994 case in which Pickering actively sought a reduced sentence for a man convicted of cross burning, a widely used hate group intimidation tactic. At one point Pickering referred to the act as a "youthful prank," diminishing its symbolic representation of race baiting and hatred.⁵⁰ Pickering took the further step of contacting a friend at the Department of Justice during the trial to try to get the offender's sentence reduced, a move considered unethical by several legal experts.⁵¹

Pickering has also argued for a more narrow application of the Voting Rights Act and suggested that, generally, discrimination cases have no bases. He has also been criticized for his votes in the Mississippi legislature, early in his career, to support funding for an organization established to resist court-ordered desegregation after the 1954 *Brown v. Board of Education* decision.⁵² Many civil rights organizations, including every chapter of the NAACP in Mississippi, the national NAACP, and the Magnolia Bar Association (Mississippi's African American bar association) opposed his confirmation. However, some also praised the nomination, including Charles Evers, the brother of slain civil rights leader Medgar Evers, who said that Pickering has

⁴⁷ Ori Nir, "Groups Aim to Torpedo President's Judge Pick; Pryor Opposed on Church-State," *Ethnic Newswatch*, vol. CVI, no. 31 (May 16, 2003), p. 1 (hereafter cited as Nir, "Groups Aim to Torpedo President's Judge Pick").

⁴⁸ Rep. John Cornyn (R-TX), "Restoring Our Broken Judicial Confirmation Process," *Texas Review of Law and Politics*, vol. 8 (Fall 2003), pp. 3-4 (hereafter cited as Cornyn, "Restoring Our Broken Judicial Confirmation Process").

⁴⁹ Joan Biskupic, "President Repeats Choice for Judge Job," *USA Today*, Jan. 8, 2003, p. 3A.

⁵⁰ R. Jeffrey Smith, "Judge's Fate Could Turn On 1994 Case; Pickering Fought to Reduce Sentence for Cross-Burning," *Washington Post*, May 27, 2003, p. A1.

⁵¹ Jennifer A. Dlouhy, "GOP to Use Pickering Debate to Criticize Democrats," *CQ Today*, Oct. 27, 2003, p. 13 (hereafter cited as Dlouhy, "GOP to Use Pickering"); Alliance for Justice, "Judicial Selection in the First Two Years of the George W. Bush Administration," spring 2003, <<http://www.allianceforjustice.org>>, p. 26.

⁵² Dlouhy, "GOP to Use Pickering"; Jennifer A. Dlouhy, "Wavering Democratic Senators Urged to Block Pickering," *CQ Today*, Oct. 30, 2003, p. 16.

an “admirable record on civil rights issues.”⁵³ Supporters also argue that, as a federal district court judge, Pickering was lenient in cases involving drug offenders who were black, and note that in 1966 he testified against a Ku Klux Klan member charged with murdering civil rights leader Vernon Dahmer.⁵⁴ But civil rights advocates and some members of Congress are convinced that Pickering would continue to narrow civil rights laws if given the opportunity to serve on the appellate court.

On October 2, 2003, Pickering was approved by the Senate Judiciary Committee—all 10 Republicans voted in favor and nine Democrats voted against—but Democrats stalled with a filibuster in the Senate.⁵⁵ On January 16, 2004, President Bush bypassed Senate approval and used his recess appointment powers to seat Pickering. Because it was a recess appointment, Pickering will serve until January 2005, when a new session of Congress begins, rather than for a life term, as is generally the case with judicial appointments.⁵⁶

The President’s action drew immediate fury from civil rights leaders, and many organizations viewed it as an affront.⁵⁷ Members of the Congressional Black Caucus characterized the timing of the President’s appointment, made one day after he had visited the memorial site of Dr. Martin Luther King Jr. with the slain leader’s widow, as “a disgrace to the memory of Dr. King” and reflecting “utter disdain for civil rights.”⁵⁸ Representative Elijah Cummings stated that the recess

⁵³ Cornyn, “Restoring Our Broken Judicial Confirmation Process,” p. 33.

⁵⁴ Dlouhy, “GOP to Use Pickering”; Nat Hentoff, “The Real Judge Charles Pickering; As Shown By Mike Wallace,” *Washington Times*, Apr. 26, 2004, p. A21.

⁵⁵ Helen Dewar, “Panel Backs Pickering for Appellate Bench,” *Washington Post*, Oct. 3, 2003, p. A21; Charles Hurt, “GOP Plans to Push on Bush Court Nominations,” *Washington Times*, Oct. 12, 2003, p. A3 (hereafter cited as Hurt, “GOP Plans to Push on Bush”); Ritu Kelotra, “Confirmation of Pickering Defeated,” Oct. 31, 2003, <http://www.civilrights.org/tools/printer_friendly.cfm?id=17087&print=true>; Nick Anderson, “Senators Pull an All-Nighter Over Judicial Confirmations; The GOP Plans to Protest the Use of Filibusters to Stall 4 Nominees. Democrats Point to 168 Bush Picks Who Were Confirmed,” *Los Angeles Times*, Nov. 13, 2003, p. 21 (hereafter cited as Anderson, “Senators Pull an All-Nighter”).

⁵⁶ Jennifer A. Dlouhy, “Pickering Court Appointment May Presage Even More Divisiveness on Nominations,” *CQ Today*, Jan. 20, 2004, p. 15; Stephen Henderson, “President Installs Controversial Judge,” *Miami Herald*, Jan. 17, 2004, p. A3.

⁵⁷ President George W. Bush, statement regarding the recess appointment of Charles Pickering, Jan. 16, 2004, <<http://www.whitehouse.gov/news/releases/2004/01/20040116-19.html>> (last accessed Jan. 23, 2004); Mike Allen and Helen Dewar, “Bush Bypasses Senate On Judge,” *Washington Post*, Jan. 17, 2004, p. A1 (hereafter cited as Allen, “Bush Bypasses Senate”); “End Run for Mr. Pickering,” *Washington Post*, Jan. 17, 2004, p. A24; “Poor Judicial Choice,” *Miami Herald*, Jan. 20, 2004, p. A16; Charles Hurt, “Bush Names Judge Despite Filibuster,” *Washington Times*, Jan. 17, 2004, p. A1 (hereafter cited as Hurt, “Bush Names Judge”); Ritu Kelotra, “President Invites Judges Controversy as New Session Begins,” *saveourcourts.org*, Jan. 21, 2004, <http://saveourcourts.civilrights.org/research_center/details.cfm?id=17961> (last accessed Jan. 22, 2004) (hereafter cited as Kelotra, “President Invites Controversy”); Paul Krugman, “Going for Broke,” *New York Times*, Jan. 20, 2004, p. A19; Neal Lewis, “Bush Seats Judge After Long Fight,” *New York Times*, Jan. 17, 2004, p. A1; Paul Schwartzman and Jonathan Finer, “Clark Vows to Protect Black Electorate,” *Washington Post*, Jan. 20, 2004, p. A8.

⁵⁸ James Wright, “Pickering Appointment Angers CBC,” *The Baltimore Afro-American*, vol. 112, no. 24, p. 1 (Jan. 30, 2004) (hereafter cited as Wright, “Pickering Appointment Angers CBC”). See also Kelotra, “President Invites Controversy”; Julian Bond, chairman, NAACP, statement before the Campaign for America’s Future, “Take Back America” Conference, June 2, 2004, as published by Federal News Service; J. Zamgba Browne, “Rev. Jackson: To Honor Dr. King, Bush Appoints Anti-Black Pickering to Federal Judgeship?” *Ethnic Newswatch*, vol. 95, no. 4, p. 3 (Jan. 28, 2003), quoting the Reverend Jesse Jackson and Senator Hillary Rodham Clinton.

appointment was “yet one more attempt by the Bush administration to turn back the clock on the rights and freedoms that countless Americans marched and died for over the last 40 years.”⁵⁹ Other commentators contend that the President’s decision to appoint Pickering above all other pending nominations, despite that African Americans had reason to oppose it more than any other, was intended to send a political and philosophical message about his disregard for civil rights.⁶⁰

William H. Pryor Jr. for 11th Circuit U.S. Court of Appeals

After President Bush nominated Alabama Attorney General William Pryor for the 11th Circuit Court of Appeals on April 9, 2003, several civil rights groups quickly announced their disagreement.⁶¹ Their opposition was based on Pryor’s legal view, which critics perceive to be so narrow as to severely hamper federal enforcement of civil rights laws. During his tenure as Alabama’s attorney general, Pryor used litigation, amicus curiae briefs, and public speeches as tools to advocate limiting protections against discrimination.⁶² Civil rights advocates note that, in the past, Pryor advocated the repeal or modification of a provision of the Voting Rights Act, urged the Supreme Court to bar state employees from suing for damages under the Americans with Disabilities Act, filed a brief opposing the Violence Against Women Act, and described the Court’s decision to order the Virginia Military Institution to cease discrimination against women as “political correctness for decisionmaking.”⁶³

Religious organizations argue that Pryor has a troubling record on issues of religious freedom, supports prayer in school, and has used his public office to advance the concept of America as a Christian nation, excluding those of other faiths.⁶⁴ Other commentators have pointed to Pryor’s record as evidence of “extremism and disdain for the legal rights of many Americans” rendering

⁵⁹ Rep. Elijah E. Cummings, chair, Congressional Black Caucus, “Statement of CBC Chairman Elijah Cummings on the Misguided Recess Appointment of Charles Pickering to the Federal Bench,” Jan. 16, 2004 <<http://www.house.gov/cummings/cbc/cbcpress/2004jan16b.htm>> (last accessed July 13, 2004).

⁶⁰ Wright, “Pickering Appointment Angers CBC,” quoting Sherrilyn Ifill, associate professor, University of Maryland School of Law.

⁶¹ The White House, “Presidential Nomination William H. Pryor,” Apr. 9, 2002, <<http://www.whitehouse.gov/news/nominations/>> (last accessed Sept. 24, 2004); “Coalition Declares Nominee William Pryor Unfit for Seat on 11th Circuit Court of Appeals,” *U.S. Newswire*, June 9, 2003; Jonathan Ringel, “11th Circuit Nominee Draws Instant Criticism,” *The Legal Intelligencer*, vol. 228, no. 71 (Apr. 14, 2003), p. 4 (hereafter cited as Ringel, “11th Circuit Nominee Draws Instant Criticism”); Bill Rankin, “Pryor, Another Contentious Bush Nominee, Faces Hearing,” *Atlanta Journal-Constitution*, June 11, 2003, p. 3A.

⁶² Leadership Conference on Civil Rights, “In Eleven-Day Recess, President Sidesteps Confirmation Process Again,” Feb. 24, 2004, <http://saveourcourts.civilrights.org/research_center/details.cfm?id=18633> (last accessed May 10, 2004) (hereafter cited as LCCR, “President Sidesteps Confirmation Process Again”). See also Nir, “Groups Aim to Torpedo President’s Judge Pick.”

⁶³ People for the American Way, “Report of People for the American Way in Opposition to the Confirmation of William H. Pryor Jr. to the United States Court of Appeals for the Eleventh Circuit,” June 10, 2003, p. 21; Rhonda Cook, “Black Leaders in State Divided Over Bill Pryor,” *Atlanta Journal-Constitution*, July 31, 2003, p. 8A; Mary Orndorff, “Pryor’s Record on Race a Bipartisan Topic,” *Birmingham News*, June 16, 2003.

⁶⁴ Interfaith Alliance, “Alabama Attorney General Bill Pryor Poses Threat to Religious Liberty,” *U.S. Newswire*, July 23, 2003; “Two Jewish Groups Oppose Pryor for 11th Circuit,” Associated Press State and Local Wire, May 17, 2003; Ringel, “11th Circuit Nominee Draws Instant Criticism.”

him unsuited for service as a federal judge.⁶⁵ Senate aides from both parties said that Pryor has “perhaps the most controversial views of any nominee who has come up for confirmation during Bush’s presidency.”⁶⁶

The Senate Judiciary Committee approved Pryor on July 23, 2003, but again, the confirmation was held up in the Senate.⁶⁷ In February 2004, however, President Bush sidestepped the nomination process again and placed Pryor on the bench using a recess appointment.⁶⁸ Once again, the President ignored opposition from civil rights groups. Even conservative supporters of President Bush viewed the recess appointment as an administration effort to appease them for his inaction in other areas, such as same-sex marriage and an illegal immigrant amnesty proposal (both are discussed in greater detail in chapter 4).⁶⁹

Priscilla Owen for Fifth Circuit U.S. Court of Appeals

President Bush first nominated Texas Supreme Court Justice Priscilla Owen during the 107th Congress. She received a hearing before the Senate Judiciary Committee, which eventually declined her nomination.⁷⁰ In early January 2003, a coalition of civil rights groups wrote a letter to President Bush, urging him not to renominate Justice Owen, in part because her opinions “reveal a troubling hostility to discrimination and employee rights.”⁷¹ Another observer noted that “her judicial record suggests strongly that she lacks a commitment to equal access to justice for all.”⁷²

One civil rights group cited a case in which her narrow interpretation of a statute permitted age discrimination, despite the fact that the majority of the Texas Supreme Court found the statute “unambiguous” in banning age discrimination.⁷³ Commentators note that, even on the conservative Texas Supreme Court, Owen is far to the right of mainstream. White House Counsel Alberto Gonzales, a former state supreme court associate, once described Owen’s

⁶⁵ “Beyond the Pale,” *New York Times*, June 23, 2003, p. A20; see also Jannell McGrew, “Civil Rights Veterans Denounce Pryor,” *Montgomery (Alabama) Advertiser*, May 7, 2003, p. A1.

⁶⁶ Mike Allen, “Judicial Nominee Admits Mistake,” *Washington Post*, June 12, 2003, p. A37. See also Jeremy Leaming, “Pryor’s Problems: Federal Appeals Court Nominee with Record of Hostility to Church-State Separation Becomes Mired in Senate Debate,” *Church and State*, vol. 56, no. 8 (Sept. 1, 2003), p. 10.

⁶⁷ Hurt, “GOP Plans to Push on Bush.”

⁶⁸ LCCR, “President Sidesteps Confirmation Process Again.”

⁶⁹ William Douglas, “Bush Appoints Opposed Judge,” *Miami Herald*, Feb. 21, 2004, quoting Paul Weyrich, chair, Free Congress Foundation.

⁷⁰ Chuck Lindell, “Senators Reject Owen for Appeals Court Seat,” *Austin American-Statesman*, Sept. 6, 2002, p. A1.

⁷¹ Texas Ad Hoc Coalition on Judicial Nominees, “Open Letter to President Bush re: Justice Owen,” Jan. 2, 2003, <http://www.tpj.org/press_releases/owen_bushletter.html>; see also Jonathan Groner, “Committee Rejects 5th Circuit Hopeful,” *The Legal Intelligencer*, vol. 226, no. 48 (Sept. 6, 2002), p. 4.

⁷² Alliance for Justice, “Texas Supreme Court Justice Priscilla Owen Nominee to the U.S. Court of Appeals for the Fifth Circuit,” n.d., p. 1 (hereafter cited as Alliance for Justice, “Priscilla Owen Nominee”); see also Kevin Herrera, “Black Congress, NAACP Pass Judgment on Judicial Appointments,” *Ethnic Newswatch*, vol. 67, no. 24 (Sept. 11, 2002), p. 9.

⁷³ People for the American Way, “Why the Senate Judiciary Committee Was Right to Reject the Confirmation of Priscilla Owen to the United States Court of Appeals for the Fifth Circuit,” Jan. 23, 2003, p. 11.

attempt to legislate from the bench in a case involving reproductive rights as “an unconscionable act of judicial activism.”⁷⁴

Nearly 40 organizations, including the NAACP, the Mexican American Legal Defense and Educational Fund, the National Women’s Law Center, the National Council of Jewish Women, and the National Employment Lawyers Association, oppose Owen’s nomination.⁷⁵ Despite these objections, President Bush renominated her. In April 2003, the Senate Judiciary Committee approved Owen, but she has yet to receive a vote before the full Senate.⁷⁶

Jeffrey Sutton for Sixth Circuit U.S. Court of Appeals

The Senate confirmed Jeffrey Sutton to the Sixth Circuit Court of Appeals over the protestations of more than 70 national groups and 375 regional, state, and local organizations, including the NAACP, the National Organization on Disability, among other disability rights groups, and environmental justice organizations.⁷⁷ These groups expressed concern that Sutton’s legal views would curtail Congress’ ability to enforce federal protections against discrimination.⁷⁸ He has argued against allowing private individuals to sue to enforce the disparate impact regulations of Title VI of the Civil Rights Act of 1964, and for placing limitations on the ability of state employees who are victims of age discrimination to recover damages.⁷⁹

Disability rights groups objected to comments Sutton made about the Americans with Disabilities Act (ADA), which, in an oral argument before the Supreme Court, he stated was essentially not needed because there are state laws that protect the rights of persons with disabilities. He argued furthermore that ADA prohibitions should not apply to state governments despite overwhelming evidence of discrimination by state actors.⁸⁰ Advocates for the disabled further contended that Sutton attempted to dismantle core protections for persons with disabilities and “would make a mockery of many of the critical rights for which individuals with disabilities have fought so hard.”⁸¹ Likewise, environmental justice groups claimed that Sutton is

⁷⁴ Alliance for Justice, “Priscilla Owen Nominee,” p. 17, citing *In re Jane Doe 1 (II)*, 19 S.W.3d 365 (Tex. 2000).

⁷⁵ See, e.g., NAACP, “NAACP Supports Senate Rejection of Owen Nomination,” press release, Sept. 5, 2002, <<http://www.naacp.org/news/releases/owensreject090502.shtml>> (last accessed June 24, 2004).

⁷⁶ “Democrats Block 2nd Bush Court Nominee,” *Los Angeles Times*, May 2, 2003, part I, p. 22.

⁷⁷ See, e.g., Eve Hill, director, Western Law Center for Disability Rights, “Sutton Nomination Threatens to Wall Out People with Disabilities,” Nov. 13, 2001, <<http://www.nod.org/content.cfm?id=636>>; and “NAACP Slams Bush Administration Policies,” *NAACP News*, Feb. 15, 2003, <<http://www.naacp.org/news/releases/bushpolicies021503.shtml>> (last accessed May 11, 2004).

⁷⁸ Kenneth Jost, “Should the Senate Confirm Bush’s Nominees?” *CQ Researcher*, July 27, 2001, p. 2; Elliot M. Minberg, “Federal Judicial Nominations and Confirmations During the Last Two Years of the Clinton Administration,” chapter 3 in Dianne M. Piché, William L. Taylor, and Robin A. Reed, eds., *Rights at Risk: Equality in an Age of Terrorism* (Washington, D.C.: Citizens’ Commission on Civil Rights, 2002) p. 30.

⁷⁹ Wade Henderson, executive director, and Dorothy I. Height, chairperson, Leadership Conference on Civil Rights, letter to Senator Orrin G. Hatch, chair, Senate Judiciary Committee, Feb. 11, 2003, re: opposition to the confirmation of Jeffrey Sutton.

⁸⁰ *University of Alabama v. Garrett*, 531 U.S. 356 (2001), oral argument transcript at 13, 24.

⁸¹ The Judge David L. Bazelon Center for Mental Health Law, “Jeffrey Sutton: Taking Aim at the Rights of Persons with Disabilities,” fact sheet, July 23, 2001, <<http://saveourcourts.civilrights.org/nominees/details.cfm?id=4379>> (last accessed May 11, 2004).

a leading advocate for limiting private causes of action against states for claims of environmental injustices.⁸²

Carolyn Kuhl for Ninth Circuit U.S. Court of Appeals

Another nomination that evoked criticism in the civil rights context is that of California State Judge Carolyn Kuhl for the Ninth Circuit U.S. Court of Appeals. Objections to Kuhl's nomination stem primarily from her tenure as deputy solicitor general in the Reagan administration, during which she persuaded the attorney general to argue in favor of granting tax-exempt status to Bob Jones University, an institution that sanctioned and practiced racial discrimination.⁸³ In addition, she co-authored an amicus brief asserting a position that would have made it more difficult for women to prove sexual harassment in the workplace,⁸⁴ and she attempted to restrict the remedies that courts can order in employment discrimination cases.⁸⁵ For these reasons, among others, Kuhl's views on civil rights and equal opportunity have been described as "outside the mainstream."⁸⁶ Kuhl's nomination has yet to be voted upon on the Senate floor.⁸⁷

Miguel Estrada for D.C. Circuit U.S. Court of Appeals

The nomination of Miguel Estrada to the D.C. Circuit Court of Appeals also was controversial. Although his Hispanic heritage made him appealing to many who favor racial and ethnic diversity on the bench, and even his critics acknowledged his stellar academic and professional credentials, uncertainty about his ideology divided the Hispanic legal community.⁸⁸ Estrada did not reveal his views on landmark Supreme Court decisions, and the White House refused to answer questions about his judicial philosophy or release memos he wrote during his tenure in the solicitor general's office in the Bush Sr. administration.⁸⁹ The Hispanic National Bar Association and the League of United Latin American Citizens both called upon the Senate to

⁸² Community Rights Counsel, "Jeffrey Sutton: A Threat to the Constitution and Fundamental Environmental Protections," Apr. 2, 2003, <<http://saveourcourts.civilrights.org/nominees/details.cfm?id=14657>> (last accessed May 11, 2004).

⁸³ Wade Henderson, executive director, and Dorothy I. Height, chairperson, Leadership Conference on Civil Rights, letter to Senator Orrin G. Hatch, chair, Senate Judiciary Committee, Mar. 31, 2003, re: opposition to the confirmation of Carolyn Kuhl (hereafter cited as Henderson and Height letter), citing *Bob Jones University v. United States*, 461 U.S. 574 (1983); see also Susan Milligan, "GOP Leader's Woes Wound His Party, Apology Doesn't Silence Critics," *Boston Globe*, Dec. 15, 2002, p. A18.

⁸⁴ *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

⁸⁵ *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986).

⁸⁶ Henderson and Height letter, p. 2.

⁸⁷ Helen Dewar, "Action on Energy, Medicare Critical to GOP Scorecard," *Washington Post*, Oct. 27, 2003, p. A17; Anderson, "Senators Pull an All-Nighter."

⁸⁸ Alliance for Justice, "Judicial Selection in the First Two Years," p. 32; Tony Mauro, "Hispanic Groups Divided Over Estrada Nomination," *Legal Times*, Sept. 23, 2002, p. 1.

⁸⁹ Julie Hirschfeld Davis, "Estrada Withdraws as Nominee for Bench," *Baltimore Sun*, Sept. 5, 2003, p. 1A; The White House, "President's Statement on Miguel Estrada," Sept. 4, 2003, <<http://www.whitehouse.gov/news/releases/2003/09/print/20030904-2.html>>; Hurt, "GOP Plans to Push on Bush."

confirm Estrada,⁹⁰ while 15 past presidents of the Hispanic National Bar Association, the Puerto Rican Legal Defense and Educational Fund, numerous other Hispanic groups, and the Leadership Conference on Civil Rights opposed the nomination.⁹¹

One conservative advocacy group supporting President Bush's judicial nominations conducted a survey of Hispanics that demonstrated the importance they place on seeing their ethnicity represented in the federal courts. The survey found that 94 percent of respondents believe it is important that Hispanics are represented on the bench, and 80 percent believe it is important to the Hispanic community that Estrada be confirmed by the Senate.⁹² However, Estrada withdrew his nomination on September 4, 2003, after waiting more than two years for confirmation.

Janice Rogers Brown for D.C. Circuit U.S. Court of Appeals

Despite opposition from nearly 80 national organizations and more than 200 law professors and legal academicians, President Bush nominated Janice Rogers Brown for a seat on the U.S. Court of Appeals for the D.C. Circuit in July 2003.⁹³ As a judge on the California Supreme Court, Brown consistently demonstrated hostility to affirmative action, civil rights, and the rights of disabled individuals, workers, prisoners, and women, according to the Leadership Conference on Civil Rights.⁹⁴ In an affirmative action case in California, a fellow Republican-appointed justice, despite concurring with the result of the case, described her view as "a serious distortion of

⁹⁰ League of Latin American Citizens, "LULAC Urges Senate to Confirm Miguel Estrada," Feb. 11, 2003, <<http://www.lulac.org/Issues/Releases/Estrada.html>>.

⁹¹ Leadership Conference on Civil Rights, "Diverse Group of Latino Leaders Unite Against Estrada Nomination," Mar. 4, 2003, <<http://www.civilrights.org/issues/nominations/details.cfm?id=11490>>; Leadership Conference on Civil Rights, "LCCR Letter to Senate Judiciary Committee Opposing Estrada Nomination," Jan. 28, 2003, <<http://www.civilrights.org/issues/nominations/details.cfm?id=11154>> (hereafter cited as LCCR, "Letter to Senate Judiciary Committee"). Much of LCCR's opposition to Estrada is based on the fact that he defended anti-loitering statutes, which have been shown to have a disproportionately negative impact on African Americans and Latinos. State and federal courts across the country have struck down anti-loitering statutes as unconstitutional in part because they inhibit expression in violation of the First Amendment. LCCR, "Letter to Senate Judiciary Committee." Since that letter was written, the U.S. Supreme Court unanimously ruled that anti-loitering policies are not facially invalid under the First Amendment. *Virginia v. Hicks*, 539 U.S. 113 (2003).

⁹² Committee for Justice, "2003 Survey of Hispanic Adults," June 11, 2003, <http://www.committeeforjustice.org/contents/reading/survey_topline_061103.pdf>. It should be noted that 64.6 percent of respondents were not aware that President Bush was the first President to appoint a Hispanic to the D.C. Circuit Court of Appeals and that Estrada had not yet been confirmed. *Ibid.*

⁹³ "African-American Leaders Voice Opposition to Janice Rogers Brown," *saveourcourts.org*, Nov. 5, 2003, <<http://saveourcourts.civilrights.org/nominees/details.cfm?id=17140>> (last accessed June 24, 2004) (hereafter cited as "African-American Leaders Voice Opposition"); NAACP, "NAACP Calls for Senate Opposition on Confirmation of Janice Rogers Brown to D.C. Court of Appeals," press release, Nov. 5, 2003, <<http://www.naacp.org/news/releases/SenOpposBrown110503.shtml>> (last accessed June 24, 2004); Anderson, "Senators Pull an All-Nighter."

⁹⁴ National Women's Law Center, "Janice Rogers Brown: A Troubling Record on Issues of Critical Importance to Women," October 2003; Michelle Woolley, "Civil Rights Coalition Expresses Great Disappointment in Committee Vote to Approve Brown Confirmation," Nov. 6, 2003, <http://www.civilrights.org/tools/printer_friendly.html?id=17172&print=true> (hereafter cited as Woolley, "Civil Rights Coalition"); "African-American Leaders Voice Opposition"; Anderson, "Senators Pull an All-Nighter."

history.”⁹⁵ In that case, not only did Brown issue a lengthy opinion opposing affirmative action programs, but she also strongly condemned Supreme Court decisions that had upheld such programs in the public sector, even in limited circumstances.⁹⁶

Several of Brown’s statements disclosed during her confirmation hearing led one former supporter, a University of California law professor emeritus, to rescind his support.⁹⁷ Brown was criticized for engaging in “government-bashing” and presenting “extreme and outdated ideological positions” that are “outside the mainstream of today’s constitutional law.”⁹⁸ In one speech, criticizing government programs, she stated that the federal government is “the opiate of the masses [and a drug for] multinational corporations and single moms, for regulated industries and Midwestern farmers and militant senior citizens.”⁹⁹ The Senate Judiciary Committee approved Judge Brown and forwarded her nomination, but it has not come up for a full vote.¹⁰⁰

Political Appointments

An important indicator of a President’s agenda is the commitment to civil rights and level of diversity among those he can personally select and appoint to positions of power, including White House aides, Cabinet secretaries, attorneys general and their deputies, and the many lower-level advisory appointees.¹⁰¹ In all, the President relies on nearly 4,000 political appointees—roughly 500 of whom are in top positions—to develop and promote policies and ensure that they are carried out by career government staff.¹⁰² A diverse administration signals to the public that the federal government is open to the aspirations, and concerned with the well-being, of all people. Although political theorists disagree on why diversity is desirable in a democratic society, they generally agree that in order to become fully democratic, a society that has historically denied rights to certain groups must demonstrate a commitment to including

⁹⁵ Richard L. Abel, visiting professor of law, New York University Law School, et al., letter to Senator Orrin Hatch, chair, and Senator Patrick Leahy, ranking member, Senate Judiciary Committee, Oct. 21, 2003, re: opposition to the confirmation of Janice Rogers Brown (hereafter cited as Abel et al., letter opposing Brown), citing *Hi-Voltage Wire Works v. City of San Jose*, 12 P.3d 1095 (Cal. 2000) (George, C.J. concurring).

⁹⁶ Abel et al., letter opposing Brown.

⁹⁷ Ritu Kelotra, “Opposition to Judicial Nominee Grows: Legal Expert Rescinds Endorsement,” Oct. 29, 2003, <http://saveourcourts.civilrights.org/tools/printer_friendly.cfm?id=17033&print=true>.

⁹⁸ *Ibid.*

⁹⁹ Abel et al., letter opposing Brown, citing Janice Rogers Brown, “Fifty Ways to Lose Your Freedom,” speech before the Institute for Justice, Aug. 12, 2000.

¹⁰⁰ Karen MacPherson, “They Could Have Danced All Night; They Talked Instead,” *Pittsburgh Post-Gazette*, Nov. 13, 2003, p. A-1; Woolley, “Civil Rights Coalition.”

¹⁰¹ Graham, *Civil Rights and the Presidency*, p. 8.

¹⁰² This number does not include the roughly 2,800 career senior executive appointments in the federal government. Political appointments include Presidential Appointments with Senate Confirmation (PAS), which includes Cabinet secretaries, ambassadors, and other high-level positions; Presidential Appointments (PA) who serve on boards and commissions and as White House staff; non-career Senior Executive Service (SES); and Schedule C Excepted Appointments who hold midlevel positions and serve in policy-related positions or as assistants to other appointees. U.S. Senate, Committee on Government Affairs, *United States Government Policy and Supporting Positions*, 106th Cong., 2d Sess., Nov. 8, 2000, appendix 1 (hereafter cited as U.S. Senate, *Policy and Supporting Positions*). See also Brookings Institution, Presidential Appointee Initiative, “Staffing a New Administration: A Guide to Personnel Appointments in a Presidential Transition,” November 2000.

those groups in political life.¹⁰³ The rhetoric and actions of the Clinton and Bush Sr. administrations indicate that in the last decade, political leaders have taken this ideal to heart. As the current administration has demonstrated, however, diversity does not guarantee support for civil rights.

Historically, progress toward a diverse Cabinet has been slow. President Roosevelt appointed the first female Cabinet member, and President Johnson appointed the first black Cabinet secretary. However, it was not until the Carter administration that women and minorities were appointed to high-ranking federal posts in significant numbers.¹⁰⁴ President Reagan appointed proportionately fewer women and minorities than his predecessor. President George H.W. Bush reversed this setback; 13 percent of his senior political appointees were black, and 19 percent of appointments requiring Senate confirmation were women.¹⁰⁵

Other minority groups were largely unrepresented until the Clinton administration. During the presidential campaign in 1992, then-Governor Clinton uttered the now famous phrase “I will give you an administration that looks like America” and followed through on his promise.¹⁰⁶ President Clinton appointed the first Asian American to a Cabinet position, as well as many others to high-level offices. In addition, over his two terms in office, President Clinton appointed six Hispanics to Cabinet positions and numerous Native Americans to high-ranking posts.¹⁰⁷ At the end of his second term, according to one account, most Americans believed that Presidents should seek this type of diversity.¹⁰⁸

In his run for President in 2000, then-Governor Bush also pledged to appoint a diverse Cabinet. Once elected, he demonstrated that this commitment was more than rhetorical, although as will be discussed below, the benefits of his Cabinet’s diversity are mitigated by the anti-civil rights views of some of his selections. Among his first Cabinet appointments, President Bush selected women, African Americans, Asian Americans, a Hispanic American, and an Arab American, leading one commentator to note that his Cabinet “basically matched the racial and gender mix of President Clinton’s first Cabinet in 1993, which at the time was hailed as groundbreakingly diverse.”¹⁰⁹

In some areas, President Bush broke new ground. He appointed Colin Powell as secretary of state and Condoleezza Rice as national security advisor, and in doing so, placed African Americans in prominent international policymaking posts for the first time.¹¹⁰ His selection of Elaine Chao as secretary of labor marked the first time an Asian American woman was

¹⁰³ Suzanne Dovi, “Preferable Descriptive Representatives: Will Just Any Woman, Black, or Latino Do?” *American Political Science Review*, vol. 96, no. 4 (December 2002), p. 729.

¹⁰⁴ Shull, *American Civil Rights Policy*, pp. 124–25.

¹⁰⁵ *Ibid.*, p. 127.

¹⁰⁶ Chris Black, “Clinton: America Needs a ‘Mother’s Love,’” *Boston Globe*, May 11, 1992, p. 8.

¹⁰⁷ USCCR, *A Bridge to One America*, pp. 20–21.

¹⁰⁸ See USCCR, *A Bridge to One America*, p. 20; “Deconstructing Diversity; ‘Looking Like America,’” *Pittsburgh Post-Gazette*, Jan. 8, 2001, p. A8.

¹⁰⁹ Raja Mishra, “Bush Puts 4 in Top Domestic Positions,” *Boston Globe*, Dec. 30, 2000, p. A1.

¹¹⁰ *Ibid.*; “Bush’s Diverse Cabinet Is Good First Step for GOP,” *Atlanta Journal-Constitution*, Dec. 28, 2000, p. 20A (hereafter cited as “Cabinet Is Good First Step”).

appointed to the Cabinet.¹¹¹ Likewise, Norman Mineta, the first Asian American to hold a Cabinet position when he served as secretary of commerce under President Clinton, was reappointed by President Bush as secretary of transportation, making him the first transportation secretary ever to have held two different Cabinet positions.¹¹² The appointment of Mel Martinez, a Cuban immigrant, to the position of secretary of housing and urban development was also significant. One Asian American publication was so impressed with President Bush's diverse Cabinet selections that it "heartily commended" him "for shattering the glass ceiling for women and people of color who seek to serve their government at its highest level."¹¹³ Another commentator echoed former President Clinton in assessing the Bush Cabinet: "President-elect George W. Bush is putting together a Cabinet that looks like America."¹¹⁴

Sub-Cabinet Appointments

Beyond Cabinet-level positions, approximately 1,200 presidential appointments require Senate confirmation (known as PAS appointees).¹¹⁵ Overall, the number of President Bush's nominations of women and African Americans to these high-level positions has not equaled that of the previous administration.¹¹⁶ President Bush joins President Reagan as the only Presidents since the Johnson administration to appoint fewer women than their predecessors.¹¹⁷ Of his first 264 political nominations requiring Senate confirmation, 26 percent were women. This is markedly lower than President Clinton's first 512 PAS appointments, 37 percent of whom were women. President Bush continued to select women at approximately the same level through his first 448 nominees. Of those 448, 115 (nearly 26 percent) were women.¹¹⁸

Similarly, while President Bush has appointed several African Americans to prominent posts in the administration, his overall appointment rate of African Americans is less than that of President Clinton. Fifteen percent of President Clinton's PAS appointees were African American compared with 9 percent of President Bush's PAS appointees.¹¹⁹ Conducting a detailed analysis for all categories of appointments is not possible owing to variable agency reporting

¹¹¹ The White House, "Secretary of Labor Elaine L. Chao," <<http://www.whitehouse.gov/government/chao-bio.html>>.

¹¹² The White House, "Secretary of Transportation Norman Y. Mineta," <<http://www.whitehouse.gov/government/mineta-bio.html>>

¹¹³ "President Bush's Pride," *AsianWeek*, January–February 2001, <http://www.asianweek.com/2001_01_26/opinion2_leadedit.html>.

¹¹⁴ "Cabinet Is Good First Step."

¹¹⁵ U.S. Senate, *Policy and Supporting Positions* (also known as the Plum Book).

¹¹⁶ Marie Tessier, "Women's Appointments Plummet Under Bush," *Women's Enews*, July 1, 2001, <<http://www.womensenews.org/article.cfm/dyn/aid/600/context/archive>> (last accessed July 9, 2004) (hereafter cited as Tessier, "Women's Appointments Plummet").

¹¹⁷ Ibid.

¹¹⁸ "Women Still Lacking in Positions of Power," *University of Maine News*, Feb. 10, 2003, <<http://www.umaine.edu/news/021703/Women%20Still%20Lacking%20in%20Positions%20of%20Power.htm>>.

¹¹⁹ Ibid.

requirements.¹²⁰ The Office of Personnel Management (OPM) only retains data on about half of the 1,203 PAS appointees governmentwide.¹²¹ In addition, some appointees serve terms that cross administrations. For these and other reasons, monitors, such as the Commission, cannot draw conclusions about the demographics (race, gender, etc.) of all presidential appointees.

Diversity vs. Support for Civil Rights

While the numbers of women and minorities at high levels are impressive, having a diverse administration does not guarantee that civil rights will be vigorously defended or that appropriate new goals will be set. Civil rights advocates have criticized President Bush for the views of some of his appointees and nominees. One commentator castigated the administration for stacking its staff with “veteran opponents of diversity” who will put their agendas into practice in the federal government.¹²²

In one of the first controversial selections of his presidency, President Bush nominated John Ashcroft for attorney general. Within a matter of weeks, many civil rights groups—including the NAACP, People for the American Way, the Alliance for Justice, and the National Organization for Women—announced their opposition.¹²³ The National Urban League cited Ashcroft’s opposition to voluntary busing for school desegregation, affirmative action, and gay rights—he opposed legislation that would recognize violence on the basis of sexual orientation as a hate crime—as reasons to question his commitment to civil rights. The organization expressed concern that he would “utilize his discretion to deploy or withhold departmental resources in ways that will undermine fundamental civil rights.”¹²⁴

Defenders of the Ashcroft nomination accused his opponents of “racial fear mongering” and “playing the religion card.”¹²⁵ In defense of Ashcroft’s political record, they noted that he was the first governor of Missouri to appoint an African American to the state appellate court, and nominated many other black judges during his tenure, and that he voted against a state school busing plan only because it was too costly and controversial.¹²⁶ The Senate ultimately confirmed Ashcroft by a 58–42 vote, although at the time, the divisive confirmation process was viewed by some commentators as a partisan testing ground for future judicial nomination battles, especially that of potential Supreme Court selections.¹²⁷ Moreover, the fears of civil rights groups have

¹²⁰ For example, some agencies, such as the CIA, FBI, Secret Service, White House, Transportation Security Administration, Federal Aviation Administration, and the Foreign Service, are exempt from regulations requiring federal agencies to file personnel information with OPM.

¹²¹ The various types of appointments can be found in U.S. Senate, *Policy and Supporting Positions*.

¹²² Lee Cokorinos, director of research, Institute for Democracy Studies, “Unfinished Business: The Continuing Assault on Diversity,” *IDS Insights*, vol. 3, no. 1 (May 2002), p. 9.

¹²³ David Johnston, “Coalition Says It Will Fight Confirmation Of Ashcroft,” *Washington Post*, Jan. 9, 2001, p. A16.

¹²⁴ National Urban League, “Reject the Nomination of John Ashcroft,” press release, Jan. 29, 2001.

¹²⁵ Matthew Brooks and Set Leibson, “Subverting Civil Rights; the Left Plays Race and Religion Cards,” *Washington Times*, Mar. 1, 2001, p. A19.

¹²⁶ Diana West, “Battering Practice; Ashcroft Fight a Model for Nominees to Come,” *Washington Times*, Feb. 2, 2001, p. A17; Thomas Sowell, “Shrill Sound of Payoffs,” *Washington Times*, Jan. 22, 2001, p. A15.

¹²⁷ Toni Locy, “Senate Confirms Ashcroft,” *USA Today*, Feb. 2, 2003, p. 1A; Robert A. Jordan, “Ashcroft Fray Just a Front on a Larger Battlefield with Bush,” *Boston Globe*, Feb. 4, 2001, p. E4; Jill Lawrence, “42 Votes Said More

been validated. Under Attorney General Ashcroft, the Department of Justice's enforcement of civil rights has become less vigorous, indeed almost passive, and the pursuit of civil rights cases has waned significantly.¹²⁸

The nomination, and subsequent appointment, of Daniel Pipes to the board of the United States Institute for Peace also drew attention from the civil rights community.¹²⁹ The Council on American-Islamic Relations called on Bush to rescind Pipes' nomination because he had once claimed that 10 to 15 percent of Muslims are "potential killers."¹³⁰ The resulting maelstrom among Muslim groups prompted one newspaper to call the Pipes nomination "salt in the wound" of American Muslims' concerns about the protection of their civil rights, and to oppose the nomination.¹³¹

Other selections have also drawn criticism from affected communities, particularly unfriendly nominations to key civil rights enforcement positions. Secretary of Education Rod Paige has vocally opposed affirmative action and has not demonstrated the necessary leadership in implementing the administration's sweeping education reform agenda (see chapter 3). For example, he has ignored concerns about the disparate effects reform will have on children of color and students with special needs. The former assistant secretary for civil rights at the Department of Education, Gerald A. Reynolds, also opposes affirmative action and was criticized for his support of English-only laws and opposition to bilingual education.¹³² Despite this, President Bush made him responsible for formulating policy on affirmative action, supervising desegregation, monitoring compliance with civil rights laws, and ensuring equal educational opportunities for children with disabilities and limited English proficiency.¹³³

Likewise, the former assistant secretary for civil rights at the Department of Justice, Ralph Boyd Jr., was criticized for what some perceived as abandoning longstanding discrimination suits, suppressing dissent among long-time department attorneys, and retreating from pattern or practice discrimination cases, which have the greatest potential to foster broad institutional

Than 'No' Democrats Send Message to Bush, and to Their Base," *USA Today*, Feb. 2, 2001, p. 6A; "The Ashcroft Fight is Just a Warm-Up," *Boston Herald*, Jan. 31, 2001, p. 22.

¹²⁸ Shannon McCaffrey, "Justice Department's Civil Rights Division Retreating from Activist Roots," Knight Ridder Newspapers, Nov. 20, 2003 (hereafter cited as McCaffrey, "DOJ Retreating from Activist Roots"); Vanessa Blum, "Infighting Haunts DOJ Civil Rights Division," *Fulton County Daily Report*, Sept. 23, 2003 (hereafter cited as Blum, "Infighting Haunts DOJ").

¹²⁹ "Bush Asked to Rescind Nomination of 'Islamophobe,' Says CAIR; Nominee Says 10 to 15 Percent of Muslims are 'Potential Killers'," *U.S. Newswire*, Apr. 3, 2003 (hereafter cited as "Bush Asked to Rescind Nomination"); "Fueling a Culture Clash," *Washington Post*, Apr. 19, 2003 (hereafter cited as "Fueling a Culture Clash"; The White House, "Presidential Nomination," n.d., <<http://www.whitehouse.gov/news/nominations/984.html>>; Daniel Pipes was appointed to the Board of Directors, United States Institute of Peace and is the director, Middle East Forum, Philadelphia, PA. See United States Institute of Peace, "About Us," *Board of Directors*, n.d., <<http://www.usip.org/aboutus/board.html>>.

¹³⁰ "Bush Asked to Rescind Nomination."

¹³¹ "Fueling a Culture Clash."

¹³² Mexican American Legal Defense and Educational Fund, "President Bush Ignores Concerns of Latinos in Civil Rights Appointment," press release, Mar. 29, 2004.

¹³³ Richard Morgan, "Civil Rights Panel Blasts Bush Administration," *Chronicle of Higher Education*, Mar. 1, 2002, p. 25.

reform.¹³⁴ These examples offer evidence that the President has not assembled an administration committed to civil rights enforcement. Instead, he has placed into high positions individuals who, although racially and ethnically diverse, share his narrow interpretation of civil rights.

The Federal Workforce

As the chief executive of the federal government, the President has the authority and the responsibility to hold agencies accountable for diversity within their workforces. Presidents can wield more power in the recruitment and retention of federal employees than they traditionally have. By requiring aggressive recruiting, incorporating diversity goals in executive succession planning, monitoring selections, and holding executives accountable, the administration can create a workforce that looks like America.¹³⁵

According to the most recent data, the federal workforce is 55.4 percent men and 44.6 percent women, figures that have remained relatively unchanged over a decade.¹³⁶ Minorities comprise 30.7 percent of the federal workforce: 16.9 percent black, 6.9 percent Hispanic, 4.8 percent Asian American and Pacific Islander, and 2.2 American Indian or Alaska Native. Seven percent of the federal workforce has a disability. Even though minorities and women are concentrated at lower levels, these figures reflect a slowly moving trend toward federal diversity over the last 10 years.¹³⁷

Hispanic Underrepresentation

The low number of Hispanic employees in the federal government is noteworthy. Hispanics represent roughly 13 percent of the U.S. population, but only 6.9 percent of the federal workforce.¹³⁸ Hispanic women are even more underrepresented, comprising only 2.9 percent of all federal employees. Secretary of Labor Elaine Chao has recognized the relatively low employment rate of Hispanics and publicly committed to increasing their presence in the federal workforce. In remarks in early 2002, Secretary Chao affirmed the Department of Labor's commitment to OPM's Hispanic Employment Initiatives, which were launched in 1997.¹³⁹

¹³⁴ McCaffrey, "DOJ Retreating from Activist Roots"; Blum, "Infighting Haunts DOJ." Ralph Boyd Jr. left his position as assistant attorney general for civil rights in August 2003 and was replaced by R. Alexander Acosta.

¹³⁵ GAO, *Senior Executive Service*, p. 5.

¹³⁶ U.S. Office of Personnel Management, *Federal Civilian Workforce Statistics: Demographic Profile of the Federal Workforce as of September 2002*, June 2003, table 1-1, p. 7 (hereafter cited as OPM, *Demographic Profile*). At the time this report was drafted, the numbers for 2003 and 2004 were not yet available.

¹³⁷ *Ibid.*, p. 7. Figures include only Executive Branch, non-Postal employees.

¹³⁸ U.S. Census Bureau, "The Hispanic Population in the United States: March 2002," June 2003, <<http://www.census.gov/prod/2003pubs/p20-545.pdf>>.

¹³⁹ U.S. Department of State, International Information Programs, "Secretary of Labor Elaine L. Chao Remarks to the National Association of Hispanic Federal Executives," Jan. 24, 2002, <<http://usinfo.state.gov/usa/race/diversity/s012402>>; U.S. Office of Personnel Management, "Hispanic Employment Initiatives," September 1997, <<http://www.opm.gov/pressrel/html/9point.htm>>.

Employees with Disabilities

While the federal government continues to be a significant employer of individuals with disabilities, its commitment seems to have waned since 1994. Disabled employees make up 7 percent of the federal workforce, with the severely disabled accounting for 1.1 percent.¹⁴⁰ While overall the employment rate of persons with disabilities in the federal government has remained virtually unchanged for the last decade, employment of persons with severe disabilities has declined by nearly 20 percent.¹⁴¹ The rate of employment of persons with disabilities remains significantly lower than the percentage of the working age (21 to 64) population that is disabled, which stands at 13.9 percent.¹⁴²

Minority and Female Underrepresentation at High Civil Service Levels

Although progress has been made over the last 10 years, diversity has not yet extended to the highest levels of the civil service.¹⁴³ For instance, minorities fill only 13.6 percent of senior pay level positions, an increase from 8.1 percent in 1992, but still disproportionately low given that they make up roughly 30 percent of the U.S. population. Minority employment at the GS 14 and 15 levels (the highest rank of government employee other than senior executive) has increased 6.1 percent since 1992, but minorities still fill only 18 percent of these positions. Minority employment in midlevel GS 9 to 11 positions increased 6.3 percent to a total of 30.3 percent, a figure that is proportionate to overall federal workforce and population estimates. Minorities remain concentrated at the lowest levels, comprising 43.1 percent of GS 1 to 4 (the lowest paying, lowest rank) positions and 40.1 percent of GS 5 to 8 positions. Looking at the data disaggregated by racial and ethnic categories reveals the same trend for every group except Asian Americans and Pacific Islanders, who are somewhat concentrated in GS 12–15 positions, but not among senior pay levels. Specifically, for example, Asian Americans and Pacific Islanders represent only 1.7 percent of the Senior Executive Service.¹⁴⁴ Hispanics remain significantly underrepresented at every level (see table 2.2).

¹⁴⁰ OPM, *The Fact Book*, p. 42.

¹⁴¹ U.S. Equal Employment Opportunity Commission, "Employment of Minorities, Women, and People with Disabilities," part I in *Annual Report on the Federal Work Force, Fiscal Year 2002*, <<http://www.eeoc.gov/federal/fsp2002/index.html>> (last accessed July 27, 2004).

¹⁴² Data compiled from U.S. Census Bureau, "Census 2000 Supplementary Survey Summary Tables," 2000, <<http://factfinder.census.gov>>. The federal government now employs more than 100,000 employees with some type of disability. Section 501 of the Rehabilitation Act established the Federal Government as a model employer for people with disabilities, and President Clinton instituted policies that promote accessibility, hiring, and promotion of federal employees with a disability. National Council on Disability, "Investing in Independence: Transition Recommendations for President George W. Bush," January 2001, <<http://www.ncd.gov/newsroom/publications/bush.html>>.

¹⁴³ The General Service (GS) Schedule is based on grade levels from 1 to 15, with 15 being the highest. Senior pay levels include executive positions ranking higher than the GS 15 level, including Senior Executive Service (SES), Executive Level, Senior Foreign Service, Administrative Law Judges, Foreign Service Chiefs of Mission, and Scientific and Professional posts.

¹⁴⁴ GAO, *Senior Executive Service*, table 1, p. 8.

Similarly, women remain underrepresented at the highest levels, making up only 29.5 percent of GS 14 and 15 and 38 percent of GS 12 and 13 employees.¹⁴⁵ They continue to hold a disproportionate share of low-level clerical and technical positions in the government and are underrepresented in some large agencies, including the Departments of Defense, Justice, Energy, and Transportation.¹⁴⁶ Moreover, women represent only 24.7 percent of employees at all senior pay levels and 25.5 percent of the Senior Executive Service.¹⁴⁷

Table 2.2. Minority and Nonminority Federal Employment by Grade Level, 1992 and 2002

Grade level		Nonminority	Total Minority	Black	Hispanic	Asian/ Pacific Islander	American Indian/ Alaska Native
GS 1–4	1992	56.8	43.2	28.5	7.2	3.7	3.9
	2002	56.9	43.1	24.6	8.6	5.5	4.3
GS 5–8	1992	65.4	34.6	23.3	6.1	3.0	2.2
	2002	59.9	40.1	24.6	8.6	4.1	2.8
GS 9–11	1992	76.0	24.0	13.2	5.7	3.5	1.5
	2002	69.7	30.3	16.3	7.8	4.2	2.0
GS 12–13	1992	82.5	17.5	9.3	3.7	3.6	0.9
	2002	76.0	24.0	12.9	5.1	4.9	1.1
GS 14–15	1992	88.1	11.9	5.5	2.5	3.1	0.7
	2002	82.0	18.0	8.4	3.7	5.0	0.9
Senior Pay Level*	1992	91.9	8.1	4.5	1.9	1.2	0.6
	2002	86.4	13.6	6.8	3.3	2.7	0.8

* The senior pay level consists of employees earning salaries above the GS-15 level, including the Executive Level, Senior Executive Service, Senior Foreign Service, Administrative Law Judges, Foreign Service Chiefs of Mission, and Scientific and Professional posts. Source: U.S. Office of Personnel Management (OPM), *Federal Civilian Workforce Statistics: Demographic Profile of the Federal Workforce as of September 2002*, June 2003, table 1-5, p. 11. Data is compiled using OPM's Central Personnel Data File (CPDF).

FUNDING CIVIL RIGHTS ENFORCEMENT

The President and Congress work in tandem to propose and approve budgets for federal agencies.¹⁴⁸ The long process begins with the President requesting funding based on needs assessments from each agency. Taken together, the annual presidential requests are a barometer for an administration's priorities and reflect its key programs and objectives. Civil rights enforcement is part of the federal budget, and funding is a measure of the President's

¹⁴⁵ Compiled from OPM, *Demographic Profile*, table 1-5, p. 11 and OPM, *The Fact Book*, p. 52.

¹⁴⁶ OPM, *The Fact Book*, pp. 50, 54.

¹⁴⁷ OPM, *Demographic Profile*, tables 1-5 and 1-7; OPM, *The Fact Book*, p. 74.

¹⁴⁸ Throughout this report, where funding is discussed, all referenced figures are expressed in fiscal years, which for the federal government begin October 1 and end September 30.

commitment to social justice, equality, and eradicating discrimination.¹⁴⁹ Moreover, budgets are a way for the President to engage in policymaking and set priorities with relatively little personal involvement.¹⁵⁰

Civil rights enforcement budgets have for years suffered from neglect. The Commission has long tracked presidential and congressional funding levels for the federal government's six major civil rights programs, including those at the Departments of Justice (DOJ), Education (DOEd), Health and Human Service (HHS), Labor (DOL), and Housing and Urban Development (HUD), and the Equal Employment Opportunity Commission (EEOC).¹⁵¹ In its reports, the Commission has repeatedly found that inadequate resources have weakened enforcement of civil rights laws. As the following will demonstrate, President Bush has earned a mixed record on civil rights funding: while his requests have generally increased from year to year, funding growth in his first three years in office was slower than during the past two administrations.¹⁵²

President Bush made his first budget submission for fiscal year 2002. In it, he requested modest increases for four of the six civil rights enforcement offices.¹⁵³ This request was offset by a proposal to significantly reduce funding for EEOC. Thus, the request represented a net increase of only \$700,000 for all six agencies (see table 2.3). After accounting for inflation and the cost of living increases incurred by the agencies, this amounted to a decrease in spending power (see table 2.4).

The President reversed this decline in requests in 2003, however, and sought appropriation increases for each agency. This resulted in the largest total request increase of this administration to date, \$37.5 million.¹⁵⁴ Even after controlling for inflation, the request remains \$23.2 million more than the 2002 request and \$13.1 million over President Clinton's 2000 request. For 2004 and 2005, President Bush requested increased funding for four of the six civil rights programs. He requested decreases for HUD each year, and for DOJ in 2005 (see table 2.3). The requested increases for the six agencies combined over the last two years are so small that, after adjusting for inflation, they amount to a decrease in spending power (see table 2.4).

¹⁴⁹ Nancy Kreiter, "The Adverse Consequences of a New Federal Direction," chap. 12 in Dianne M. Piché, William L. Taylor, and Robin A. Reed, eds., *Rights at Risk: Equality in an Age of Terrorism* (Washington, D.C.: Citizens' Commission on Civil Rights, 2002).

¹⁵⁰ Shull, *American Civil Rights Policy*, pp. 104–05.

¹⁵¹ The Commission's first funding report was published in 1981. Several reports have been issued subsequently. Since fiscal year 2000, the Commission has examined civil rights enforcement funding annually. *See, e.g.*, U.S. Commission on Civil Rights (USCCR), *Funding Federal Civil Rights Enforcement*, June 1995; USCCR, *Funding Federal Civil Rights Enforcement: 2000 and Beyond*, February 2001; USCCR, *Funding Federal Civil Rights Enforcement: 2000–2003*, April 2002 (hereafter cited as USCCR, *Civil Rights Funding: 2000–2003*); and USCCR, *Funding Federal Civil Rights Enforcement: 2004*, June 2003 (hereafter cited as USCCR, *Civil Rights Funding: 2004*).

¹⁵² *See* USCCR, *Civil Rights Funding: 2004*.

¹⁵³ Because the federal fiscal year begins in October and the budget process works a year in advance, during the first term in office, a President inherits the existing budget. The President's first request is actually for his second fiscal year in office.

¹⁵⁴ USCCR, *Civil Rights Funding: 2000–2003*, p. 2.

Table 2.3. Presidential Requests for Funding of Civil Rights Offices at Six Federal Agencies, Fiscal Years 2000–2005 (in millions of actual dollars)

	2000	2001	2002	2003	2004	2005
DOEd	73.3	76.0	79.9	86.3	91.3	92.8
EEOC	312.0	322.0	310.0	323.5	335.0	350.8
DOL*	76.4	76.3	76.0	77.5	80.0	82.0
DOJ	82.2	97.9	101.0	105.1	109.7	109.1
HHS	22.2	27.0	32.0	32.3	34.3	35.4
HUD**	97.8	105.0	106.0	117.7	102.0	95.4
Total	663.9	704.2	704.9	742.4	752.3	765.5

Numbers are rounded

*Represents funding for the Office of Federal Contract Compliance Programs (OFCCP). FY 2005 figure is an estimate.

** Includes funding for the Office of Fair Housing and Equal Opportunity (FHEO), the Fair Housing and Assistance Program (FHAP), and the Fair Housing Initiatives Program (FHIP).

Source: U.S. Commission on Civil Rights, *Funding Federal Civil Rights Enforcement: 2004*, June 2003.

Table 2.4. Presidential Requests for Civil Rights Funding (2001–2005) in Constant 2001 Dollars

	Actual dollars	Constant 2001 dollars
2001	704,216,000	704,216,000
2002	704,914,000	694,137,275
2003	742,318,000	717,309,307
2004	752,225,000	713,547,847
2005	765,453,000	712,895,466

Includes total funding for the six agencies reviewed annually by the Commission. To adjust for inflation, Office of Management and Budget deflators are used. FY 2001 is held as the baseline year to enable comparison with the previous administration.

Sources: U.S. Commission on Civil Rights, *Funding Civil Rights Enforcement: 2004*, June 2003; Office of Management and Budget, *Budget of the United States: Historical Tables, Fiscal Year 2004*, table 1.3, p. 26.

In his first three years in office, the net increase in President Bush's requests was significantly less than those of the previous two administrations, despite no indication that enforcement responsibilities were also scaled back. There was no visible decrease in workload, and a complaint backlog persists at many agencies.¹⁵⁵ The only civil rights agencies for which President Bush requested increased funding at higher rates than the previous administration are DOEd and HHS (see table 2.5).

¹⁵⁵ Also note that because two of the Presidents in this comparison served two terms, or a full eight years (Reagan and Clinton), it would not be appropriate to compare budget fluctuations over the course of their entire administrations. For workload data, see USCCR, *Civil Rights Funding: 2004*.

Table 2.5. Net Change in Presidential Requests for Civil Rights Funding, First Three Years in Office (calculated using actual dollars)

	Reagan (1982–84)	Bush Sr. (1990–92)	Clinton (1994–96)	Bush (2002–04)
DOEd	(14.9%)	24.0%	11.0%	14.2%
EEOC	10.6%	11.4%	14.1%	8.1%
DOL*	(1.9%)	4.6%	15.2%	5.3%
DOJ	5.0%	54.8%	10.7%	8.6%
HHS	6.0%	4.4%	(3.8%)	7.0%
HUD**	1.2%	(0.2%)	29.4%	(3.8%)
Total net change	3.0%	13.4%	14.9%	6.7%

*Represents funding for the Office of Federal Contract Compliance Programs (OFCCP).

** Includes funding for the Office of Fair Housing and Equal Opportunity (FHEO), the Fair Housing and Assistance Program (FHAP), and the Fair Housing Initiatives Program (FHIP), except under the Reagan administration because FHIP was not funded until 1990.

Sources: U.S. Commission on Civil Rights, *Funding Federal Civil Rights Enforcement*, clearinghouse publication 98, June 1995; U.S. Commission on Civil Rights, *Funding Federal Civil Rights Enforcement: 2004*, June 2003.

A President's requests during his first year in office, when compared with the last request of the previous administration, can reveal priority shifts. Presidents Reagan and Clinton each requested less civil rights enforcement funds their first year in office than the preceding administration. President Bush Sr. requested the largest first-year increase, 6 percent over President Reagan's last request, with significant increases in funding for DOEd and DOJ. The current President's first budget request was 0.1 percent above President Clinton's last request, amounting to \$10 million less in spending power (see tables 2.4 and 2.6).

Table 2.6. Change from Previous Administration's Final Request for Civil Rights Funding

	Carter–Reagan (1981–82)	Reagan–Bush Sr. (1989–90)	Bush Sr.–Clinton (1993–94)	Clinton–Bush (2001–02)
DOEd	5.3%	9.3%	(7.9%)	5.2%
EEOC	(3.0%)	(3.0%)	(3.3%)	(3.7%)
DOL*	(12.2%)	1.8%	(4.7%)	(0.4%)
DOJ	20.4%	23.6%	0.7%	3.1%
HHS	(15.6%)	6.9%	(5.0%)	18.5%
HUD**	(1.9%)	39.1%	11.9%	0.9%
Total change between requests	(3.0%)	6.0%	(0.3%)	0.1%
Change from actual appropriation	1.4%	7.8%	6.5%	4.7%

*Represents funding for the Office of Federal Contract Compliance Programs (OFCCP).

** Includes funding for the Office of Fair Housing and Equal Opportunity (FHEO), the Fair Housing and Assistance Program (FHAP), and the Fair Housing Initiatives Program (FHIP), except under the Carter and Reagan administrations because FHIP was not funded until 1990.

Sources: U.S. Commission on Civil Rights, *Funding Federal Civil Rights Enforcement*, clearinghouse publication 98, June 1995; U.S. Commission on Civil Rights, *Funding Federal Civil Rights Enforcement: 2004*, June 2003.

Comparing the difference between an administration's first request and the actual appropriations for the previous year, a different picture emerges. Each of the past four Presidents requested more in his first request than was appropriated for the year he took office, although the requested increases range from 1.4 percent under President Reagan to 7.8 percent under President Bush Sr.

(see table 2.6). The current administration requested the second lowest increase, 4.7 percent more than the 2001 appropriation.

Where President Bush has asked for modest funding increases for civil rights enforcement, Congress has not honored his requests. As with his predecessors, President Bush's requests have not been sufficient to make up for years of fiscal starvation, as the Commission has documented. In fact, for each of the budgets passed since President Bush has been in office, Congress has appropriated less funds than requested (see table 2.7). In 2003, despite the President's request for a large increase, Congress actually appropriated less funds than in 2002. In 2004, Congress appropriated more than it did in 2003, but significantly less than requested in either 2003 or 2004. (At the time this report was drafted, the 2005 budget had not been passed.) While the President cannot control the actions of Congress, he can make his priorities known and make public statements to support areas he deems most important. He can also send a message by using veto power for appropriation legislation that does not meet his approval.¹⁵⁶ Like his predecessors, President Bush has not done a good job of supporting civil rights through his budget requests.

Table 2.7. Presidential Requests for Funding Compared with Congressional Appropriations, 2002–04 (in actual dollars)

	2002		2003		2004	
	Request	Appropriation	Request	Appropriation	Request	Appropriation
DOEd	79,934,000	79,660,000	86,276,000	85,715,000	91,275,000	88,305,000
EEOC	310,000,000	310,406,000	323,516,000	308,822,000	335,000,000	328,400,000
DOL*	76,000,000	77,701,000	77,500,000	78,000,033	80,000,000	79,441,513
DOJ	101,000,000	100,642,000	105,099,000	104,400,000	109,700,000	108,842,000
HHS	32,000,000	31,095,000	32,260,000	33,038,000	34,250,000	33,902,000
HUD**	105,980,000	103,671,000	117,667,000	91,699,000	102,000,000	96,000,000
Total	704,914,000	703,175,000	742,318,000	701,674,033	752,225,000	734,890,513

*Represents funding for the Office of Federal Contract Compliance Programs (OFCCP).

** Includes funding for the Office of Fair Housing and Equal Opportunity (FHEO), the Fair Housing and Assistance Program (FHAP), and the Fair Housing Initiatives Program (FHIP).

Source: U.S. Commission on Civil Rights, *Funding Federal Civil Rights Enforcement: 2004*, June 2003.

Moreover, as will be noted in a following discussion, civil rights violations multiplied in the period following the terrorist attacks of September 11, measurably increasing the need for strong enforcement. However, the Bush administration failed to adequately increase funding for the agencies to investigate and resolve new violations. In fact, between 2002 and 2004, the President requested smaller funding increases for the Department of Justice Civil Rights Division—the agency charged with investigating hate crimes, racial profiling, and law enforcement violations—than each of the previous two administrations, and has requested a decrease for 2005 (see table 2.5).

Annual funding requests are a measure of an administration's sustained commitment to civil rights. As reported consistently by the Commission, the current administration had opportunities

¹⁵⁶ For an overview of the budget process, see Congressional Research Service, "The Congressional Appropriation Process: An Introduction," Aug. 3, 1999.

to establish a strong record on funding by requesting and fighting for significant increases for civil rights offices throughout the government, but did not.¹⁵⁷

¹⁵⁷ See USCCR, *Civil Rights Funding: 2000–2003*; USCCR, *Civil Rights Funding: 2004*.

Chapter 3: The Bush Agenda and America's Entrenched Discrimination Problems

Freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, do as you desire, choose the leaders you please.

You do not take a person who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "You are free to compete with all the others," and still justly believe you have been completely fair.¹

While the weight of judicial and legislative achievements in the 1960s and 1970s broke down a system of segregation—and legal bases for disenfranchisement and denial of equal education, employment, housing, contracting opportunities, and access to public accommodations—its influence remained and discrimination persisted.² It was imperative that federal reform efforts turn to and remain focused on remedies to open jobs and income opportunities and compensate for lingering effects of historical discrimination. While courts have generally approved such policies, opponents have challenged group claims to employment, education contracts, and compensatory justice as preferential treatment.³ What follows exemplifies the President's actions that have either built upon or retreated from fundamental civil rights policy, specifically voting rights, equal education, affirmative action, fair housing, environmental equity, and the administration of justice.

VOTING RIGHTS

Choosing one's leaders by ballot is a right of great importance in America. While eligibility requirements for exercising that right have varied during the country's existence, the fact that all who meet the criteria are entitled to use the franchise is a basic premise upon which American government rests. The nexus between suffrage and political power accounts for some of the vigor with which many, over the nation's history, have sought to deny the vote.

¹ President Lyndon B. Johnson, "Howard University Commencement Address," June 4, 1965, <http://www.pbs.org/wbgh/amex/presidents/36_1_johnson/psources/ra_howard.html> (last accessed May 24, 2004).

² The legislative achievements of the 1960s and 1970s were many and included the Civil Rights Act of 1964. Title VII of the act prohibits employment discrimination based on race, color, sex, national origin, or religion; Title II ended discrimination in public accommodations; Title VI prohibits discrimination in federally funded programs; Title VIII prohibits housing discrimination. *See generally* 42 U.S.C. §§ 2000a–h (2000). The 1964 act paved the way for the Voting Rights Act of 1965, which enfranchised mass Southern blacks, and ironically even more Southern whites. *See* 42 U.S.C. §§ 1971, 1973–1973bb-1 (2000). Subsequent legislation, such as Title IX of the Education Amendments of 1972, prohibited gender discrimination in public schools and colleges. *See* 20 U.S.C. §§ 1681–1688 (2000). The judiciary also played a crucial role, especially in mandating and supervising school desegregation programs. *See* Graham, *Civil Rights and the Presidency*, p. 86.

³ Hugh Davis Graham, *Civil Rights and the Presidency* (New York: Oxford University Press, 1992), p. 6 (hereafter cited as Graham, *Civil Rights and the Presidency*.)

A History of Disenfranchisement

By 1835, any Southern state that once permitted free blacks to vote had disenfranchised them.⁴ Even the Civil War, some 30 years later, did not end disenfranchisement for former slaves. Confederate states, under rule of the same men who governed during secession, continued to oppress blacks and had no interest in giving them the right to vote. The Reconstruction program took power away from Southern governments and gave it to military leaders who within a year registered more than 700,000 black voters.⁵ Congress, unhappy with the temporary arrangement, proposed the 15th Amendment, which became ratified as part of the Constitution in 1870, and declared that the right to vote “shall not be denied . . . on account of race, color, or previous condition of servitude.”⁶

For a brief time after Reconstruction, the number of African American registered voters in the South exceeded that of whites. This success was short-lived, however, as the Compromise of 1877, to resolve a disputed election, ended the few political gains that blacks had made.⁷ Southern and border states began immediately to erode guarantees of the 15th Amendment and passed myriad laws to eliminate the possibility of blacks tipping the balance of power through bloc voting.⁸ They adopted diverse practices and techniques to disenfranchise blacks, most of which centered on two important weapons: intimidation and arbitrary powers of local voter registrars.⁹ By the beginning of the 20th century, the hard-won suffrage rights of blacks had

⁴ John Hope Franklin, *Reconstruction: After the Civil War* (Chicago: University of Chicago Press, 1961), p. 80 (hereafter cited as Franklin, *Reconstruction*).

⁵ U.S. Commission on Civil Rights, *Political Participation*, 1968, p. 1 (hereafter cited as USCCR, *Political Participation*).

⁶ U.S. CONST. amend XV. Section 1 reads: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” Section 2 reads: “The Congress shall have power to enforce this article by appropriate legislation.” See Franklin, *Reconstruction*, pp. 83–84.

⁷ C. Vann Woodward, *Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction* (Garden City, NY: Doubleday & Co., Inc., 1956), pp. 1–22; see also “Compromise of 1877,” *The Great American History Fact-Finder*, Houghton Mifflin College Division, <http://college.hmco.com/history/readerscomp/gahff/html/ff_042100_compromiseo3.htm> (last accessed June 22, 2004). In order to settle the contested 1876 election, a bargain was struck that also ended Reconstruction. Democrat Samuel J. Tilden led Republican Rutherford B. Hayes in popular votes, and in the electoral college. However, fraud, violence, corruption, and other problems left 20 electoral votes in dispute. Outgoing President Garfield appointed a 15-member electoral commission of 10 congressmen and five Supreme Court justices, divided by party, with one independent. The independent disqualified himself and was replaced by a Republican, thus the body gave Hayes all 20 votes and prompted a Democratic filibuster. Representatives then negotiated a compromise in which the South would accept Hayes’s election, back Republican James A. Garfield for House Speaker, and protect black rights; Republicans would provide federal aid for internal improvements, patronage, and home rule. But Garfield was defeated for Speaker, the government did not subsidize improvements, and Hayes dispensed patronage, followed existing policy, and removed federal troops from the South. The Southern Republican governments collapsed, leading to the Democratic South and violence and discrimination toward blacks.

⁸ V. Wharton, *The Negro in Mississippi* (New York, NY: Harper Torchbook, 1965), pp. 157–66.

⁹ Harrell R. Rodgers Jr. and Charles S. Bullock III, *Law and Social Change: Civil Rights Laws and Their Consequences* (New York: McGraw-Hill, Inc., 1972), p. 18 (hereafter cited as Rodgers and Bullock, *Law and Social Change*).

practically been nullified. Making matters worse, Congress and the courts remained virtually silent during the ensuing decades.

In 1954, Lyndon B. Johnson became majority leader of the Senate and eventually led the floor fights over the 1957 and 1960 Civil Rights Acts.¹⁰ The 1957 act allowed civil and criminal penalties for obstructing voters, allowed the Department of Justice (DOJ) to intervene, and enabled blacks to circumvent state voting officials. Facing a Southern filibuster, Johnson compromised and allowed trial by jury rather than a federal judge for voting obstructionists. But 1950s America knew it was unlikely that Southern jury would convict a white person for disenfranchising blacks. The 1960 act allowed federal judges to register eligible blacks who had been rejected by local officials and gave federal prosecutors access to voting records.

In January 1964, poll taxes were finally banished under the 24th Amendment. That year, President Johnson signed the Civil Rights Act of 1964, Title I of which forbade rejection of voting applicants for insignificant errors on registration forms and established that anyone who had a sixth-grade education was to be presumed literate.¹¹ However, these laws fell short of their promises because states continued to circumvent them and case-by-case litigation caused inherent delays.¹² When Johnson took the extra step to propose the 1965 Voting Rights Act (VRA) in a speech to Congress, he did so against a backdrop of key desegregation policies and civil unrest.¹³

The act ensured that the same literacy standards would apply to whites and blacks and reduced acceptable suffrage requirements to age, residence, and criminal record. The Supreme Court later decided that literacy tests were unconstitutional.¹⁴ The VRA authorized federal voting examiners to bypass prosecution of individual complaints and, as a result, eliminate systemic discrimination. The VRA also gave DOJ authority to send poll watchers to counties that had experienced problems. The agency sent 50 attorneys to patrol the South during the 1966 general elections, and altogether, some 600 federal officials to enforce VRA.¹⁵

The Supreme Court subsequently ruled that establishing a violation of VRA required proof of intentional discrimination.¹⁶ Congress, understanding that the nearly impossible burden of

¹⁰ Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 638 (codified as amended at 42 U.S.C. § 1975 (2000)); Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified as amended at 42 U.S.C. §§ 1971, 1974–1974e, 1975d (2000)).

¹¹ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1971, 1975a–1975d, 2000a–2000h-6 (2000)).

¹² U.S. Commission on Civil Rights, *The Voting Rights Act*, 1965, p. 8.

¹³ Ronald D. Sylvia, “Presidential Decision Making and Leadership in the Civil Rights Era,” *Presidential Studies Quarterly*, vol. 24, no. 3 (summer 1995), pp. 403–05. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973–1973bb-1 (2000)).

¹⁴ The Voting Rights Act of 1965 (amended in 1970, 1975, and 1982) banned literacy tests as a requirement of voting. The Supreme Court in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), upheld the constitutionality of the VRA and this specific provision.

¹⁵ USCCR, *Political Participation*, p. 157.

¹⁶ In *Mobile v. Bolden*, 446 U.S. 55 (1980), the U.S. Supreme Court determined that proof of discriminatory intent was required pursuant to the 14th and 15th Amendments and Section 2 of the Voting Rights Act. Congress subsequently rejected the *Mobile* decision and superceded it by statute.

proving discriminatory intent would preclude the elimination of seeming neutral policies that had the effect of disenfranchising, passed the VRA Amendments of 1982.¹⁷ The amendments reversed the Supreme Court and clarified that discrimination could be established by showing intentional discrimination or that the totality of circumstances results in a violation of VRA.¹⁸

Democracy Damaged: Modern-Day Disenfranchisement

In 2000, the presidential election and its aftermath turned international attention to the application of America's election laws and policies. The outcome of the election was undecided for weeks as several hundred votes separated then-Governor Bush from then-Vice President Al Gore in official Florida vote tallies.¹⁹ Confusing ballot designs, registration problems, and computer malfunctions made the effort of recounting votes frustrating and controversial. Election officials' treatment of absentee and military ballots, and registered voters turned away at the polls, magnified the controversy. The Supreme Court intervened and ceased the recount process, effectively awarding the presidency to Governor Bush.²⁰ The election proved that the nation had far to go to protect voting rights for all.

Nationwide, an estimated 4 million to 6 million votes for President and 3.5 million Senate and gubernatorial votes were lost, half because of registration list errors, and 1.5 million because of equipment problems.²¹ For example, officials in Florida removed names of thousands of voters from registration rolls before the election on grounds that they were convicted felons. Few actually were; most were Floridians who had similar names. After the election, state officials ordered the names replaced on the rolls, but affected Floridians had already been barred from voting.²² Overall, disenfranchisement in Florida fell most harshly on black voters who, statewide, based on county-level statistical estimates, were nearly 10 times more likely than nonblack voters to have their ballots rejected.²³

Other votes were lost to long lines and polls inaccessible to disabled voters. Disparate state policies regarding ex-felon rights, and the effect on African Americans who are disproportionately represented in the penal system, became apparent. In 2000, all but two states denied prisoners the right to vote; 29 states prohibited individuals on probation; 32 states

¹⁷ Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1973, 1973b, 1973aa-1a, 1973aa-6 (2000)).

¹⁸ U.S. Commission on Civil Rights, *Voting Irregularities in Florida During the 2000 Presidential Election*, June 2001, p. xi (hereafter cited as USCCR, *Voting Irregularities*).

¹⁹ "The Vote in Florida," *New York Times*, Nov. 18, 2000, p. A1. Gore won the popular vote, however, neither he nor Bush could have won the presidency without Florida's 25 electoral votes.

²⁰ Brian Kim, "Recent Development: Help America Vote Act," *Harvard Journal on Legislation*, Summer 2003 (hereafter cited as Kim, "Recent Development"). Georgia, Idaho, Illinois, South Carolina, and Wyoming had higher rates of uncounted ballots than Florida, but did not represent as many electoral votes.

²¹ Kim, "Recent Development," p. 3, citing California Institute of Technology/Massachusetts Institute of Technology Voting Technology Project, *Voting: What Is, What Could Be*, 2001, p. 30, <http://www.vote.caltech.edu/Reports/july01/July01_VTP_%20Voting_Report_Entire.pdf>.

²² USCCR, *Voting Irregularities*, pp. 109–10.

²³ *Ibid.*, p. xii.

prohibited parolees; and 14 states prohibited some, if not all, ex-felons from voting. Those that permit re-enfranchisement often impose a morass of laws and procedures for doing so.²⁴

The Commission, after an extensive public investigation into allegations of voting irregularities, issued two reports documenting its findings and making recommendations applicable to Florida and the nation.²⁵ In testimony before the Senate Committee on Rules and Administration, the Commission urged Congress to: (1) consider its recommendations; and (2) legislatively articulate the duties of federal and state governments to promote the exercise of the right to vote.²⁶ The Commission's comprehensive list of recommendations for federal election reform were designed specifically to protect the right to vote and have votes counted. The reports offered advice for holding officials more accountable and rendering systems that register voters and record their intent more procedurally sound. Key recommendations included developing national equipment and procedural standards, requiring provisional ballots, providing access for individuals with disabilities and limited English proficiency, reinstating voting rights for felons, and improving poll worker training and voter education.

Has President Bush Helped Repair Democracy?

When he took office, President Bush promised to unite the nation and to reform its election system. Almost two years passed before he did so by signing a national reform bill, the Help America Vote Act (HAVA) of 2002.²⁷ Upon signing HAVA into law, President Bush said:

When problems arise in the administration of elections we have a responsibility to fix them. Every registered voter deserves to have confidence that the system is fair and elections are honest, that every vote is recorded, and that the rules are consistently applied.²⁸

Funding Delays

As noted in the preceding chapter, funding is an important part of presidential policymaking and also an indicator of government commitment to civil rights.²⁹ However, prior to signing HAVA in October 2002, the administration had requested no money in its budget proposals for election

²⁴ U.S. Commission on Civil Rights, *Election Reform: An Analysis of Proposals and the Commission's Recommendations for Improving America's Election System*, November 2001, pp. 56–57.

²⁵ *Ibid.*; USCCR *Voting Irregularities*.

²⁶ Mary Frances Berry, chairperson, U.S. Commission on Civil Rights, testimony before the Committee on Rules and Administration, United States Senate, June 27, 2001.

²⁷ Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified at 42 U.S.C.S. §§ 15301–15545 (2004)).

²⁸ President George W. Bush, remarks at signing of H.R. 3295, Help America Vote Act of 2002, Washington, D.C., Oct. 29, 2002.

²⁹ Steven A. Shull, *American Civil Rights Policy From Truman To Clinton: The Role of Presidential Leadership* (Armonk, NY: M.E. Sharpe, 1999), p. 104 (hereafter cited as Shull, *American Civil Rights Policy*).

reform.³⁰ Worse, the President remained virtually silent about election reform when Congress became bogged down over the bill's provisions and did not demand swift resolution. HAVA promised \$3.86 billion in federal aid to states for improving elections, set deadlines (most of which have been missed), and established standards for rendering voting equipment, registration lists, and general election administration apt.³¹ For example, the law required that, by January 2004, all states offer provisional ballots to voters, verify identities of first-time voters who register by mail, post voting information at polling places, and establish effective voter complaint procedures.³² Most states passed legislation to enable those actions but, because of delayed funding, still lack the supporting infrastructure, equipment, and momentum that implementation requires.³³

Infrastructure Problems

Much of the delay in HAVA implementation owes to the fact that an oversight board, the Election Assistance Commission (EAC), responsible for the law's execution was seated 11 months behind schedule. The President made no public statements during this time to push Congress to act any faster. Beset by this and other problems, 41 states asked the federal government to waive the 2004 deadline for new equipment and statewide registration rolls, and 24 states requested extensions for equipment replacement. Now, most states are not required to make these reforms until 2006.³⁴ Accessibility standards for individuals with disabilities must be in place by January 1, 2007.

Encouraged by the prospect of federal funding, some states purchased new technology.³⁵ However, studies are proving that without appropriate safeguards and guidelines, some electronic systems can be rendered insecure and vulnerable to break-ins.³⁶ Foremost, technology experts assert that voting equipment that does not offer printed proof of a vote leaves room to escape from accountability.³⁷ In the 2000 elections, most Americans could not ascertain whether

³⁰ U.S. Office of Management and Budget, *Budget of the U.S. Government: Appendix, Fiscal Year 2005*, p. 1115. Neither was any additional money committed to the Federal Elections Commission for reform during the time before Congress passed HAVA.

³¹ 42 U.S.C.S. § 15407 (2004); *see also* HAVA § 257(a).

³² 42 U.S.C.S. §§ 15482, 15483, 15512 (2004); *see also* HAVA §§ 302(b), 303(b)(2), 402(a).

³³ *See, e.g.*, Election Reform Information Project, *Election Reform 2004, What's Changed, What Hasn't, and Why*, January 2004, <<http://www.electionline.org>>.

³⁴ Election Reform Information Project, *Primary Education: Election Reform and the Presidential Race*, January 2004, <<http://www.electionline.org>>.

³⁵ *See* National Conference of State Legislatures, "Voting in America: Final Report of the NCSL Elections Reform Task Force," 2001, <http://www.ncsl.org/programs/press/2001/electref0801.htm#_Toc522012609> (last accessed May 11, 2004); "Voting Machines Firms Smile," *cnnmoney*, Nov. 16, 2000, <<http://money.cnn.com/2000/11/16/companies/voting/>> (last accessed Mar. 10, 2004).

³⁶ Tadayoshi Kohno, Adam Stubblefield, Aviel D. Rubin, and Dan S. Wallach, "Analysis of an Electronic Voting System," Johns Hopkins University Information Security Institute, technical report TR-2003-19, July 23, 2003, p. 3.

³⁷ David Jefferson et al., "A Security Analysis of the Secure Electronic Registration and Voting Experiment (SERVE)," Jan. 21, 2004, p. 2, <<http://www.servesecurityreport.org/paper.pdf>> (last accessed June 15, 2004). The authors are members of SPRG (the Security Peer Review Group), a panel of experts in computerized election security, assembled by the Department of Defense Federal Voting Assistance Program to identify potential

problems were more the fault of flawed equipment, missteps by poll workers and election officials, or a lack of voter education. Because EAC, and hence its technology panel, were seated late, national equipment standards were not developed in a timely manner, and states were not provided guidance as they purchased equipment.

Voter Intimidation

New evidence suggests that minority vote suppression continues to be a problem. For example, Native Americans have lodged complaints that they must brace themselves for registrars who mock their names as a form of intimidation. In 2002, poll watchers in the midterm Senate race in Arkansas photographed black voters as an intimidation tactic. A Texas prosecutor in this, an election year, threatened to arrest students at historically black Prairie View A&M if they tried to vote using campus addresses.³⁸

Thus, the potential is real for significant lingering problems that will continue to restrict the right to vote. Avoiding disenfranchisement requires effort and leadership by the Bush administration, particularly DOJ, which has authority to enforce HAVA and other voting rights law. The administration was passive; its failure to fight for reform funding during its first two years and absence of leadership in actions and public statements suggest indifference to its duty to protect voting rights and are counter to the President's own promise to do so. For laws are of no use if they do not secure rights of the people they were enacted to protect. History offers myriad examples of using equipment, people, and processes to manipulate elections and disenfranchise voters. If measured by the pace at which it enacted and funded HAVA, or is promoting implementation, the administration appears unmotivated by political pressure, sense of duty, morality, law, or personal agenda to ensure that America has robust, well-designed election systems to preserve the vote, the bedrock of the nation's democracy.

EQUAL EDUCATIONAL OPPORTUNITY

If we want to eliminate poverty and the "underclass" in American society, we need to ensure that every child has equal educational opportunity. The academic achievement gap is the most important civil rights issue of the new century.³⁹

In the first half of the 20th century, education reflected the reality that America was a racially segregated society. After World War II, the NAACP and other organizations began to challenge segregation and the inequality it bred.⁴⁰ These efforts led to the seminal civil rights case of *Brown v. Board of Education*, in which the Supreme Court invalidated segregation and required

vulnerabilities in the system that might lead to cyber-attack, evaluate the degrees of risk they represent to the integrity of an election, and to make recommendations about how to mitigate or eliminate those risks.

³⁸ Adam Cohen, "Bad New Days for Voting Rights," *New York Times*, Apr. 18, 2004.

³⁹ Jack L. Nelson, Stuart B. Palonsky, and Mary Rose McCarthy, *Critical Issues in Education: Dialogues and Dialectics*, Fifth Edition (New York, NY: McGraw Hill, 2004), p. 105 (hereafter cited as Nelson et al., *Critical Issues in Education*).

⁴⁰ *Ibid.*, p. 104.

integration of public schools.⁴¹ In doing so, the Court set in motion a wave of initiatives to equalize educational opportunities.

In the 50 years since, however, the courts have placed more emphasis on desegregation than funding equity or the adequacy of education, resulting in a sustained academic achievement divide between students of color and white students.⁴² Furthermore, research demonstrates that desegregation efforts resulting from *Brown* largely failed; schools remain segregated by race, ethnicity, and income level, largely due to persistent housing segregation (discussed later in the chapter). Numerous other factors contribute to the persistence of segregation, among them: (1) federal policy that has not aggressively attacked segregation; and (2) noncompliance with and disregard for antidiscrimination laws and desegregation policies that had good intentions.⁴³ Policies that further equal educational opportunity are, therefore, as important today as during the era of forced segregation.⁴⁴ Yet, school reform efforts, including the most recent, have largely ignored the concentration of poverty, and its correlative racial segregation, in public schools and the effect it has on resources and student achievement.⁴⁵

The Commission has studied education extensively over decades, and found generally that minority children do not have the same educational opportunities as their white peers, creating a dual system of education that remains segregated both within and between schools and results in disparate levels of academic achievement.⁴⁶ Poor and minority children are more likely to attend inadequately staffed, ill-equipped, overcrowded, and underfunded schools, a situation that engenders low achievement and college attendance rates.⁴⁷

⁴¹ *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

⁴² Lisa R. Fine, Tina P. Hsu, Kristin G. King, and Joshua D. Janow, Lawyers' Committee for Civil Rights Under Law, "Education: Federal Rights and Racial Equity, Adequacy, and Standards in K-12 Education," June 2003, p. 3.

⁴³ Rodgers and Bullock, *Law and Social Change*, p. 4.

⁴⁴ Nelson et al., *Critical Issues in Education*, pp. 105-07. See also Richard Thompson Ford, "Symposium: Brown at Fifty: Brown's Ghost," *Harvard Law Review*, vol. 117 (March 2004), p. 1305 (hereafter cited as Ford, "Brown at Fifty").

⁴⁵ Richard D. Kahlenberg, senior fellow, The Century Foundation, "Can Separate Be Equal? The Overlooked Flaw at the Center of No Child Left Behind," 2004, pp. 2-3, <http://www.tcf.org/Publications/Education/kahlenberg_separaterc.pdf> (last accessed June 8, 2004) (hereafter cited as Kahlenberg, "Can Separate Be Equal?"). See also Myron Orfield, Anne Discher, and Tom Luce, "Economic and Racial Segregation in Greater Miami's Elementary Schools: Trends Shaping Metropolitan Growth," *Brookings Institution Survey Series*, August 2003.

⁴⁶ See, e.g., U.S. Commission on Civil Rights, *Equal Education Opportunity Project Series*, vols. I-V, December 1996-July 2000. The Commission issued a five-volume series on educational opportunities for minority, limited English, disabled, and female students.

⁴⁷ See Ford, "Brown at Fifty," p. 1309; Sheryll D. Cashin, "American Public Schools Fifty Years After Brown: A Separate and Unequal Reality," *Howard Law Journal*, vol. 47 (Winter 2004), p. 341. The effect of poverty on the ability to learn and access to a quality education are well documented. The poverty rate for school-aged children was nearly the same in 2001 as in 1976 (roughly 17 percent), and black and Hispanic children remain more likely than white children to be impoverished. See U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 2003*, June 2003, p. 19 (hereafter cited as NCES, *The Condition of Education 2003*). See also U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics, 2002*, table 133; and U.S. Department of Education, National Center for Education Statistics, *Educational Achievement and Black-White Inequality*, July 2001.

No Child Left Behind

If any context invited an integration of civil, political, economic, and social rights, it would be education, where each student should not only be seen as a child like any other child, but also as a potential voter, juror, employer, taxpayer, and friend or neighbor.⁴⁸

One of the most important fights of the civil rights movement was to define education as a fundamental right in the United States for all students, including minorities, women, and those with disabilities. Today, education is understood as the cornerstone of opportunity and a means to economic self-sufficiency, an understanding that transcends party lines. Even so, public education has frequently been the focus of reform, and the disagreement over methods for achieving educational equity has been divisive.

President Bush, upon taking office, initiated the most sweeping public education changes in decades. The stated intent of the No Child Left Behind Act of 2001 (NCLB) is to foster greater educational accountability at all levels by improving school performance and, thereby, student performance.⁴⁹ The plan gained widespread bipartisan support, and on January 8, 2002, President Bush signed NCLB into law. Its stated purpose, briefly, is to:

- increase accountability for student achievement;
- allow school choice for students attending failing schools;
- allow more flexibility for how federal education dollars are spent; and
- place a stronger emphasis on skilled teaching.

To promote accountability, NCLB requires states to administer regular standardized testing and establish annual statewide progress goals. Furthermore, NCLB expects that all students will achieve academic proficiency, or subject area competence, by 2014.⁵⁰ To accomplish this, states must test students in reading and math in grades 3–8 and at least once in high school. Every other year, states must administer the National Assessment of Education Progress exam to a sample of fourth- and eighth-grade students.⁵¹ Beginning in the 2007–08 school year, states must administer science tests at least once in elementary, middle, and high school. The act requires

⁴⁸ Martha Minor, “Just Education: An Essay for Frank Michelman,” *Tulsa Law Review*, vol. 39 (spring 2004), p. 449–50.

⁴⁹ To Close the Achievement Gap with Accountability, Flexibility, and Choice so that No Child is Left Behind, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.). NCLB is a reauthorization of the Elementary and Secondary Education Act (ESEA).

⁵⁰ U.S. Department of Education, “No Child Left Behind Standards and Assessments, Non-Regulatory Draft Guidance,” Mar. 10, 2003 (hereafter cited as DOE, “NCLB Non-Regulatory Draft Guidance”); Anjetta McQueen, “Provisions of the Education Overhaul Law,” *CQ Weekly*, Jan. 26, 2003, p. 262 (hereafter cited as McQueen, “Education Overhaul Law”); Center on Education Policy, “A New Federal Role in Education,” September 2002. Proficiency is defined by predetermined achievement levels and standards of performance based on grade level and expected knowledge of each subject. Levels of proficiency are: basic, proficient, and advanced. For NCLB purposes, states determine what constitutes proficiency. See NCES, *The Condition of Education, 2003*, pp. 195–96.

⁵¹ U.S. Department of Education, “The No Child Left Behind Act of 2001, Executive Summary,” July 11, 2002, <<http://www.ed.gov/offices/OESE/esea/exec-sum.html>>.

that assessment results and state progress objectives be broken down and reported by income, race, ethnicity, gender, disability, and limited English proficiency.

Districts and schools failing to make adequate yearly progress must improve or face corrective action and restructuring measures, including staff reassignment and curriculum replacement. NCLB allows parents to transfer their children out of schools that fail for two consecutive years and into better schools within the district. Students who attend schools that fail to meet standards for three consecutive years become eligible for supplemental educational services, such as academic instruction, tutoring, and after-school programs.⁵² After five years of failure, a school can be taken under state control or closed and reopened as a charter school.⁵³

Some education and civil rights experts, while agreeing that NCLB is an impressive pursuit, have expressed reservations about its implementation, specifically the school choice provisions and reliance on standardized tests, and the impact they will have on minority and disabled students. Some fear that the sanctions outlined above, if not met with adequate resources, will punish minority students who disproportionately attend consistently low-performing schools and are under the most pressure to improve. Moreover, because NCLB only permits transfers within school districts, those with many schools identified as needing improvement will be unable to offer alternative choices.⁵⁴ Where limited choices are available, students left behind in failing schools will be worse off as resources are redistributed to cover transportation costs for transferring students.⁵⁵ Proponents of NCLB's school choice provision, however, assert that it provides opportunity to continue desegregation efforts and empowers parents, giving them a more definitive benchmark by which to ascertain school quality.⁵⁶

Others note that reliance on testing is both the greatest strength and greatest weakness of NCLB.⁵⁷ Those who support testing as an accountability tool state that it will improve classroom instruction and illuminate problems that can otherwise go undetected. In addition, testing advocates claim that poor and minority students stand to benefit the most from testing because it will render it impossible to ignore achievement gaps.⁵⁸ Conversely, however, many educators are concerned that states will use tests not only as an accountability measure, but as a means to

⁵² Ibid.

⁵³ Citizens' Commission on Civil Rights, *Analysis of President George W. Bush's Education Plan*, Mar. 1, 2001, p. 5; McQueen, "Education Overhaul Law."

⁵⁴ Andrew Rudalevige, "No Child Left Behind: Forging a Congressional Compromise," in Paul E. Peterson and Martin R. West, eds., *No Child Left Behind?* (Washington, D.C.: The Brookings Institute, 2003), p. 23.

⁵⁵ Monty Neil, executive director, National Center for Fair & Open Testing, "Leaving Children Behind: How No Child Left Behind Will Fail Our Children," *Phi Delta Kappan*, November 2003, p. 226.

⁵⁶ William L. Taylor, "What are the Likely Impacts of the Accountability Movement on Minority Children? Title I as an Instrument for Achieving Desegregation and Equal Educational Opportunity," *North Carolina Law Review*, vol. 81 (May 2003), p. 1751; Lisa R. Fine, Tina P. Hsu, Kristin G. King, and Joshua D. Janow, "Education: Federal Rights and Racial Equity, Adequacy, and Standards in K-12 Education," (Washington, D.C.: Lawyers' Committee for Civil Rights Under Law, June 2003), p. 15.

⁵⁷ David Nash, "Improving No Child Left Behind: Achieving Excellence and Equity in Partnership with the States," *Rutgers Law Review*, vol. 55 (fall 2002), p. 240 (hereafter cited as Nash, "Improving No Child Left Behind").

⁵⁸ Erin Kucerik, "The No Child Left Behind Act of 2001: Will it Live Up to Its Promise?" *Georgetown Journal on Poverty Law and Policy*, vol. 9 (summer 2002), pp. 481, 484.

determine grade promotion or graduation, creating high-stakes for students and exacerbating the achievement gap.

NCLB's Effect on Poor, Minority, and Disabled Students

The Bush administration has correctly identified equal educational opportunity as a civil right and a necessity.⁵⁹ The new law acknowledges the achievement gap between minority and nonminority students and states closing it as a main goal. However, because NCLB does not establish guidelines for how tests should be used as an accountability measure or prohibit states from attaching individual high stakes to scores, there is concern that some states may use results to punish rather than support students and reform schools. Where this is the case, NCLB will not resolve the core problem of unequal educational opportunities, but will instead mask disparities, or worse, limit opportunities for underachieving students.

Emphasis on testing will only promote reform if the right safeguards are in place. NCLB relies on the capacity of states to develop valid and reliable assessment tools and may force them to administer less rigorous tests to avoid penalties associated with being labeled “failing.”⁶⁰ In a briefing on educational accountability and NCLB implementation, the Commission heard numerous statements from education experts about the dangers of overreliance on tests and the consequences of test results for students.⁶¹ For students who do not pass annual assessment tests, the stakes can be very high, resulting in grade retention, dropping out, and eventually failure to pursue higher education.⁶² Testing also presents high stakes for schools, as low passing rates can affect funding. This in turn carries implications for students who may be at risk of losing much-needed, and often insufficient, resources.

Because they lack exposure to supplemental and collateral educational opportunities, minority, limited English proficient, and low-income students, as well as those with disabilities, rely more heavily on school for learning than children in high socioeconomic classifications. These students also more frequently attend poor schools that do not have the resources to provide necessary learning tools and, thus, are more likely to be punished (for example, through grade retention) for the school system's failure to prepare them. Consequently, high-stakes testing has a disparate impact on the most vulnerable students, and data show that as standards get more stringent, the disparities get larger.⁶³ Moreover, retaining students in grade for failing tests does

⁵⁹ See, e.g., President George W. Bush, remarks to the National Urban League Conference, Pittsburgh, PA, July 28, 2003; President George W. Bush, remarks at ceremony honoring presidential scholars, Washington, D.C., June 25, 2001.

⁶⁰ Nash, “Improving No Child Left Behind,” p. 241.

⁶¹ U.S. Commission on Civil Rights, briefing on education accountability, Charlotte, NC, Feb. 6, 2003.

⁶² Paul T. O’Neill, “High Stakes Testing Law and Litigation,” *Brigham Young University Education and Law Journal*, 2003, p. 624.

⁶³ Jay Heubert, associate professor of education, Teachers College, Columbia University, statement before the U.S. Commission on Civil Rights, briefing on education accountability, Charlotte, NC, Feb. 6, 2003, transcript pp. 238–43 (hereafter cited as Education Accountability Briefing Transcript). High-stakes testing generally refers to standardized tests that are used to determine a student’s promotion from one grade to the next and/or graduation.

not necessarily help them gain proficiency or close the achievement gap.⁶⁴ Thus, educators and civil rights advocates fear that the high stakes will most negatively affect children in poor, underfunded, urban public schools that are largely populated by minority and limited English students.⁶⁵

Educators also find problems with using graduation rates to measure a school's success and pinpoint accountability. Dropout and graduation rate measurements are inconsistent across states, and there is evidence that some states disguise problems by falsifying completion rates, particularly as they relate to minority students.⁶⁶ For example, the New York City school system reportedly "pushed out" failing students and then categorized them as having transferred to other school settings, without tracking the students or identifying those settings.⁶⁷ Disproportionately low minority graduation rates expose a school's achievement gap, giving it incentive to hide or reclassify dropouts. According to the Urban Institute:

Policies that tempt schools to hide unpleasant truths for fear of being labeled a failure and losing federal support are sure to be counter-productive. And policies that inhibit innovation and transparency will only hinder real progress in determining what works.⁶⁸

Students with Disabilities

NCLB brought hope that accountability standards would finally include students with disabilities, and the possibility that they would benefit from improved assessments and accommodations. According to Department of Education (DOEd) guidelines, students with disabilities must participate in assessment testing; a student's Individualized Education Program team determines what, if any, accommodations are necessary. If a school determines that a student cannot participate in regular testing with accommodation, he or she can be tested using an alternate format, but not at a lower grade level.⁶⁹ Students with disabilities may transfer out of a low-performing school, but districts may limit their choices to schools that can match their abilities and needs.⁷⁰

Originally, NCLB held all students with disabilities to the same 100 percent proficiency goal in reading and math as students without disabilities. In December 2003, DOEd issued regulations allowing some flexibility for students with significant cognitive disabilities. While these students must be tested to gauge their progress, school districts can use alternative achievement standards

⁶⁴ Sheria Reid, director, North Carolina Justice and Community Development Center, Education and Law Project, statement, Education Accountability Briefing Transcript, pp. 251–52.

⁶⁵ League of United Latin American Citizens, "LULAC National Education Agenda: Challenges and Policy Recommendations 2002–2003," June 2002, p. 2 (hereafter cited as LULAC, "National Education Agenda").

⁶⁶ Carmel Martin, chief counsel to Senator Jeff Bingaman (D-NM), statement at the Urban Institute's First Tuesday Forum, May 6, 2003, "No Child Left Behind: High States for High School Graduation."

⁶⁷ Tamar Lewin and Jennifer Medina, "To Cut Failure Rate, Schools Shed Students," *New York Times*, Aug. 13, 2003; Greg Toppo, "Sloppy Records Suggested in Texas Case," *USA Today*, Sept. 4, 2003.

⁶⁸ Jane Hannaway and Christopher B. Swanson, the Urban Institute, "Encouragement, Not Sanctions, on Education," Apr. 15, 2003, <<http://www.urban.org/urlprint.cfm?ID=8347>>.

⁶⁹ DOEd, "NCLB Non-Regulatory Draft Guidance," pp. 17–18.

⁷⁰ Erik W. Robelen, "Department Releases Guidelines on Choice," *Education Week*, Dec. 11, 2002.

to determine proficiency as long as the number of those proficient scores does not exceed 1 percent of all students tested.⁷¹ If schools can demonstrate that they have a larger population of students with severe cognitive disorders, the 1 percent limit will be relaxed.

Many special education advocates place value on progress assessments to foster accountability and stress appropriate implementation.⁷² Testing students with disabilities at their assigned grade level, particularly if no accommodations are allowed, often does not accurately measure ability. The National Education Association recommends that students with disabilities be tested at their known grade level, and that the results be used to establish progress benchmarks.⁷³ Others, such as the National Center on Education Outcomes, believe that the way to ensure equality is to improve instruction and curriculum. They favor teaching at higher levels rather than testing at lower levels to assess all students or to improve performance rates.⁷⁴

Students with Limited English Proficiency

Prior to NCLB's passage, students with limited English proficiency (LEP) were either left out of standardized assessments altogether or forced to undergo testing for which they were ill-equipped or improperly accommodated. One NCLB stated goal is to help limited English students attain proficiency and academic achievement simultaneously. The law sets strict limits on how long students may receive language support. Initially, NCLB required all LEP students to be included in state assessment systems immediately upon enrollment. During the first three years of attendance, schools were allowed to give students linguistic accommodations or assessment in native languages. After three consecutive years, schools had to test in English for reading and language arts.⁷⁵ Schools could grant, upon approval of the state education agency, two-year waivers on a case-by-case basis.⁷⁶

States, local education agencies, and schools were required to hold LEP students to the same academic content and achievement standards established for all students, but NCLB ended the requirement that schools spend 75 percent of federal bilingual education funds on programs that provide instruction in a child's native language.⁷⁷ Dissonance exists about how much time

⁷¹ U.S. Department of Education, "New No Child Left Behind Provision Gives Schools Increased Flexibility While Ensuring All Children Count, Including those with Disabilities," press release, Dec. 9, 2003.

⁷² Rachel Quenemoen, senior research fellow, National Center on Education Outcomes, statement, Education Accountability Briefing Transcript, pp. 118–120; Connie Hawkins, executive director, Exceptional Children's Assistance Center, Education Accountability Briefing Transcript, pp. 128–29.

⁷³ "No Child Left Behind?" *NEA Today*, May 2003, <<http://www.owl.org>>.

⁷⁴ Rachel F. Quenemoen, senior fellow for technical assistance and research, National Center on Education Outcomes, written statement to the U.S. Commission on Civil Rights, Feb. 6, 2003, p. 4.

⁷⁵ U.S. Department of Education, "Fact Sheet, The No Child Left Behind Act of 2001," July 11, 2002, <<http://www.ed.gov/office/OESE/esea/factsheet.html>>; DOEd, "NCLB Non-Regulatory Draft Guidance," p. 19.

⁷⁶ U.S. Department of Education, Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students, "Part II: Final Non-Regulatory Guidance on the Title III State Formula Grant Program—Standards, Assessments, and Accountability," draft, Feb. 25 2003, p. 6.

⁷⁷ U.S. Department of Education, Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students, "Part I: Non-Regulatory Guidance on Implementation of the Title III State Formula Grant Program," Mar. 26, 2002; McQueen, "Education Overhaul Law."

students need to become proficient in English and not reliant on language supports. Although dependent on myriad factors, most experts agree that students need at least five years to develop parity in English and academic achievement on par with other students.⁷⁸ NCLB's three-year limit, thus, undercuts the necessary time.

To address some of these concerns, in February 2004, DOEd implemented two policies to ease NCLB's LEP requirements: (1) during an LEP student's first year in school, reading content and English proficiency assessments would be optional, but math assessment, with necessary accommodations, is required. States would not be required to include results from either exam in adequate yearly progress calculations; and (2) states now may include students who have recently attained English proficiency in the LEP subgroup for up to two years.⁷⁹ The National Council of La Raza, a Hispanic advocacy group, commended DOEd for examining LEP problems and retooling NCLB as a result, but noted that it is unclear whether these specific policy changes will improve LEP student outcomes.⁸⁰

Holding the Administration Accountable for NCLB Implementation

President Bush and Members of Congress have made lofty promises for the success of this initiative, while generally underestimating the magnitude of change that must occur in American public education to bring about those promises.⁸¹

Implementation of NCLB falls on states, local school boards, and educators. However, the Bush administration has not pushed for funding to support its requirements, leaving state and local school boards, teachers, and administrators without the resources to comply with the law.⁸² For the first year of NCLB implementation, the administration supported a significant increase in appropriations for the Elementary and Secondary Education Act. Since passage, however, actual funding has fallen short of levels authorized in the legislation. In 2003, funding fell \$8 billion short, and in 2004 the President's request was \$11 billion below target.⁸³ The National Education Association estimates that because of funding shortages, only 40 percent of students eligible for Title I funds, which are earmarked for disadvantaged students, are being fully served.⁸⁴

⁷⁸ The Civil Rights Project, Harvard University, *What Works for the Children? What We Know and Don't Know About Bilingual Education*, September 2002, p. 5.

⁷⁹ U.S. Department of Education, "Secretary Paige Announces New Policies to Help English Language Learners," press release, Feb. 19, 2004, <<http://www.ed.gov/print/news/pressreleases/2004/02/02192004.html>> (last accessed Apr. 21, 2004).

⁸⁰ National Council of La Raza, "NCLR Statement on the Bush Administration's New Policies on English Language Lerner Students," press release, Feb. 20, 2004.

⁸¹ Center on Education Policy, *From the Capitol to the Classroom: State and Federal Efforts to Implement the No Child Left Behind Act*, January 2003, p. 2 (hereafter cited as CEP, *From the Capitol to the Classroom*).

⁸² Marvin Pittman, director, Division of School Improvement, North Carolina Department of Public Instruction, statement, Education Accountability Briefing Transcript, p. 159; Howard Manning, statement, Education Accountability Briefing Transcript, p. 26.

⁸³ CEP, *From the Capitol to the Classroom*, p. 2.

⁸⁴ "No Child Left Behind?" *NEA Today*, May 2003, <<http://www.owl.org>>.

The federal government may have trouble demanding 100 percent accountability from schools while only providing 7 percent of the total funding for public elementary and secondary education.⁸⁵ A recent poll found that nearly nine in 10 school superintendents and principals view the law as an “unfunded mandate,” i.e., requiring implementation without providing resources.⁸⁶ Other educators attribute the President’s initial support to a political strategy to help the reform measure pass. Failure to fund what the administration has touted as one of the “most pressing civil rights of our day” demonstrates a lack of commitment on the part of the administration to follow through on its promise of improving education for all students.

DOEd and its leadership have likewise been criticized for failing to adopt timely regulations on how states can comply with NCLB.⁸⁷ As the League of United Latin American Citizens notes, the administration must be held to the standard of accountability to which it holds educators and school administrators.⁸⁸ Moreover, accountability constructs that underlie NCLB assume that the basic conditions for academic success already permeate schools and that students are ready to perform at optimal levels.⁸⁹ Both of these assumptions are false. Relying on tests and allowing transfers out of low-performing schools will not equalize the disparities in resources and outcomes for minority and disadvantaged students, particularly those left behind in failing schools. NCLB, in essence, tries to make separate but equal work.⁹⁰ Determining how the performance of minority and poor students, among other subgroups, can be fairly incorporated into accountability systems could go a long way to resolving the most pressing NCLB problems.⁹¹

Education Secretary Rod Paige has likened opponents of NCLB to segregationists who resisted the *Brown* decision.⁹² In a speech before the American Enterprise Institute he accused NCLB critics of being comfortable with substandard programs for minority children and using their opposition as a political special interest strategy.⁹³ Secretary Paige went on record as declaring that those who oppose NCLB misunderstand it, and those who find its provisions problematic are resistant to change.⁹⁴ By engaging in divisive rhetoric, the administration has not only demonstrated its resistance to criticism, but also its unwillingness to engage in constructive dialogue with the communities affected by its policies.

⁸⁵ CEP, *From the Capitol to the Classroom*, p. 2.

⁸⁶ Lynn Olson, “In ESEA Wake, School Data Flowing Forth,” *Education Week*, Dec. 10, 2003.

⁸⁷ “Rescuing Education Reform,” *New York Times*, Mar. 2, 2004.

⁸⁸ LULAC, “National Education Agenda,” p. 9.

⁸⁹ Jorge Ruiz de Velasco and Michael Fix, “Limited English Proficient Students and High Stakes Accountability Systems,” chapter 17 in Dianne M. Piché, William L. Taylor, and Robin A. Reed, eds., *Rights at Risk: Equality in an Age of Terrorism*, report of the Citizens’ Commission on Civil Rights, 2002, p. 249.

⁹⁰ Kahlenberg, “Can Separate Be Equal?” p. 5.

⁹¹ Tom Loveless, senior fellow, governance studies, and director, Brown Center on Education Policy, Brookings Institute, “No Child Left Behind and the 2004 Campaign,” Jan. 8, 2004, <<http://www.brookings.edu/views/op-ed/loveless/20040108.htm>> (last accessed Apr. 20, 2004).

⁹² Secretary of Education Rod Paige, statement before the American Enterprise Institute, Jan. 7, 2004.

⁹³ *Ibid.*, p. 4.

⁹⁴ Brookings Institution, “Event Summary: No Child Left Behind? The Politics and Practice of Accountability,” Dec. 11, 2003 quoting Secretary of Education Rod Paige, <<http://www.brookings.edu/comm/op-ed/20031211.nclb.htm>> (last accessed Apr. 20, 2004).

The Bush administration and Congress have correctly identified accountability and the persistent achievement gap as priority problems, but the remedies they propose are not likely to result in equal education for all. Civil rights problems may even be exacerbated if funding inadequacies and flawed implementation continue, especially if minority and disabled students fare worse under the law's requirements.

AFFIRMATIVE ACTION

Affirmative action was introduced as a remedy for historical discrimination in the 1960s. President Kennedy used the phrase in 1961 in Executive Order 10,925, which required federal contractors to “take affirmative action to ensure that applicants are employed . . . without regard to their race, creed, color, or national origin.”⁹⁵ Initially a tool to increase racial integration in the workforce, particularly federally financed projects, affirmative action policies eventually extended to other forms of employment, government contracting, and higher education.⁹⁶ Perhaps the order's most auspicious distinction was that it, and the President's Committee on Equal Employment Opportunity that it established, were results of a concerted effort to back the moral imperative against discrimination with the full prestige of the presidency. Previous administrations had maintained low profiles for such actions to the point of obscurity.⁹⁷

The contract compliance orders of Truman and Eisenhower had been brief and technical. Indeed they had been almost apologetic or defensive, typically signed without ceremony and printed in the Federal Register with no accompanying statement, then quietly promulgated with a cautious presidential eye cocked toward an unenthusiastic or hostile Congress. President Eisenhower had never disguised his reservations about federal regulation of private choice, including hiring practices. Few American citizens had ever heard of the government's EEO committees. Moreover, the committees' ability to threaten contract cancellation had never actually led to a cancelled contract or to a debarred contractor. The press and television paid them no heed. Presidents were content that their EEO committees worked quietly and stayed out of the newspapers.⁹⁸

Initially, affirmative action received bipartisan support, and administrations of both parties enacted policies to strengthen and broaden the policy. President Johnson enforced affirmative action in an executive order requiring government contractors to actively pursue minority employees; the directive later included women.⁹⁹ The Nixon administration, although it did not require government agencies to set aside contracts specifically for minority firms, initiated the most far-reaching expansion of affirmative action until then with an order that created goals and

⁹⁵ Establishing the President's Committee on Equal Employment Opportunity, Exec. Order No. 10,925, 3 C.F.R. 448 (1959–1963). The 1935 Wagner Act used the term to emphasize the positive obligation of the National Labor Relations Board to redress unfair labor practices. It linked affirmative action to obligations that extended beyond the duty to cease offending. President Johnson drew from this concept when he drafted Executive Order 10,925 for President Kennedy. See Graham, *Civil Rights and the Presidency*, p. 39.

⁹⁶ See U.S. Commission on Civil Rights, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*, clearinghouse publication 70, November 1981, pp. 21–27 (hereafter cited as USCCR, *Dismantling the Process of Discrimination*).

⁹⁷ Graham, *Civil Rights and the Presidency*, p. 38.

⁹⁸ *Ibid.*, pp. 38–39.

⁹⁹ Equal Employment Order, Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965).

timetables for the employment of minorities by federal contractors.¹⁰⁰ The Carter administration filed amicus curiae briefs supporting contested hiring plans and successfully persuaded the Supreme Court to uphold a government set-aside program.¹⁰¹ In addition, his administration enacted regulations governing civil service hiring and federal contracting.¹⁰²

The momentum shifted, however, in the 1980s during the Reagan presidency. In his campaign, Reagan promised an end to affirmative action.¹⁰³ He opposed the initiatives established under President Carter, likening them to quotas and claiming that the result of affirmative action is discrimination.¹⁰⁴ Using strong rhetoric, President Reagan pitted race, ethnicity, and gender against ability and qualifications. Although DOJ left many of President Carter's regulatory policies in place, under President Reagan, the department took steps to limit race considerations and suspended the use of numerical or statistical formulas to compensate for discriminatory practices.¹⁰⁵

President George H.W. Bush, although never plainly articulating opposition to affirmative action, like Reagan equated such programs with quotas, which he vehemently rejected, even though most affirmative action programs did not fall within the legal definition of a quota.¹⁰⁶ According to legal scholars:

Presidents Reagan and [George H.W.] Bush assaulted affirmative action with a vengeance unknown since the inception of the policy and inflicted severe damages on the concept. Beginning with Reagan, the consensus on affirmative action that existed between the political branches broke down.¹⁰⁷

Reversing course, President Clinton was a vocal proponent of affirmative action programs, although he was criticized for not aggressively responding to legal challenges that sought to

¹⁰⁰ The White House, "Affirmative Action Review," <<http://clinton5.nara.gov/textonly/WH/EOP/OP/html/aa/aa-index.html>>; Borgna Brunner, "Timeline of Affirmative Action Milestones," <<http://www.infoplease.com/spot/affirmativetimeline1.html>>.

¹⁰¹ Emmanuel O. Ihekweumere and Philip C. Aka, "Title VII, Affirmative Action, and the March Toward Color-Blind Jurisprudence," *Temple Political and Civil Rights Law Review*, vol. 1 (Fall 2001), pp. 7–8 (hereafter cited as Ihekweumere and Aka, "Toward Color-Blind Jurisprudence"). President Carter's solicitor general filed amicus briefs supporting contested affirmative action plans in three cases: *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), *United Steelworkers v. Weber*, 443 U.S. 193 (1979), and *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The administration's argument in *Fullilove* is credited with persuading the Court to uphold a government affirmative action program.

¹⁰² Neal Devins, "Affirmative Action After Reagan," *Texas Law Review*, vol. 68 (December 1989), p. 353 (hereafter cited as Devins, "Affirmative Action After Reagan").

¹⁰³ Ihekweumere and Aka, "Toward Color-blind Jurisprudence," p. 8.

¹⁰⁴ Devins, "Affirmative Action After Reagan," p. 354.

¹⁰⁵ *Ibid.*, p. 355.

¹⁰⁶ See Shull, *American Civil Rights Policy*, p. 4. The Supreme Court defined a quota as a distinct line drawn on the basis of race or ethnicity, in this case for college admissions, which allots a specific number of seats to minority applicants, thereby limiting the number available to white applicants. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978).

¹⁰⁷ Ihekweumere and Aka, "Toward Color-Blind Jurisprudence," pp. 11–12.

narrow them.¹⁰⁸ He spoke frequently about the lingering need for affirmative action, recognizing that opportunities are still not widely available to all segments of society.¹⁰⁹ After a landmark decision on federal affirmative action programs (*Adarand Constructors, Inc. v. Pena*, discussed below), President Clinton issued a major policy statement, calling on lawmakers to “mend, not end” such programs.¹¹⁰

Federal Contracting

Early in the Bush presidency, in a move giving hope to advocates and disappointing opponents of affirmative action, the administration registered support for a federal contracting program designed to increase participation of disadvantaged businesses.¹¹¹ In October 2001, in *Adarand Constructors, Inc. v. Mineta*, the Supreme Court revisited for the second time its 1995 *Adarand v. Pena* decision.¹¹² The plaintiff in the original case challenged the constitutionality of a Department of Transportation (DOT) policy that allowed federal contractors to award procurements to minority-owned businesses under certain circumstances to compensate for and correct their low representation on federal projects.¹¹³ The Bush administration filed a brief supporting DOT’s program.

Throughout the multiple levels of judicial review, courts have generally agreed that discrimination adversely affects disadvantaged businesses, and thus DOT’s Disadvantaged Business Enterprise (DBE) program serves a public need. For example, data show that while minorities own 9 percent of construction firms, they receive only 5 percent of construction contracts. Nonminority-owned firms receive 50 times as many loan dollars as African American-owned firms with similar equity.¹¹⁴ Women-owned construction firms receive only 48 cents for every dollar of work that comparable male-owned firms receive.¹¹⁵ Government studies also prove that women- and minority-owned firm participation drops sharply when affirmative action programs such as DBE are eliminated at the state and local levels.¹¹⁶ Moreover, the DBE

¹⁰⁸ U.S. Commission on Civil Rights, *A Bridge to One America: The Civil Rights Performance of the Clinton Administration*, April 2001, p. 68 (hereafter cited as USCCR, *A Bridge to One America*).

¹⁰⁹ Shull, *American Civil Rights Policy*, pp. 59–60.

¹¹⁰ President William J. Clinton, remarks on affirmative action, July 20, 1995.

¹¹¹ The Department of Transportation defines “disadvantaged businesses” as socially and economically disadvantaged companies, in addition to those challenged by discrimination. Its Disadvantaged Business Enterprise (DBE) program is aimed at “everyone, regardless of race or ethnicity, who meets the statutory criteria for social and economic disadvantage based on individual experience.” Brief for Respondent at 4, *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (No. 00-730) (hereafter cited as DOJ, *Adarand* brief) (citing 49 C.F.R. pt. 26).

¹¹² See *Adarand Constructors, Inc. v. Pena*, 513 U.S. 200 (1995); and *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001).

¹¹³ *Adarand v. Pena*, 513 U.S. 200 (1995).

¹¹⁴ Georgina Verdugo, “Affirmative Action in Public Contracting: The Final Years of the Clinton Administration,” chapter 11 in Dianne M. Piché, William L. Taylor, and Robin A. Reed, eds., *Rights at Risk: Equality in an Age of Terrorism*, report of the Citizens’ Commission on Civil Rights, 2002 (hereafter cited as Verdugo, “Affirmative Action in Public Contracting”).

¹¹⁵ U.S. Department of Transportation, Office of Small and Disadvantaged Business Utilization, “The New DOT Disadvantaged Business Enterprise Regulation,” <<http://osdbuweb.dot.gov/business/dbe/Fact.html>>.

¹¹⁶ *Ibid.*

program affects only a small percentage of total DOT contracting dollars. In fiscal year 2000, DBEs received 7 percent of contracts and 2 percent of federal dollars.¹¹⁷ The administration acknowledged these realities in its brief, noting that researchers and government officials presented Congress with ample evidence of discrimination to justify the program's creation.¹¹⁸

The administration's August 2001 brief noted that the post-*Adarand* DOT program expressly prohibits the use of quotas and reserves the use of set-asides for the most egregious instances of discrimination. Moreover, the administration noted that program regulations require recipients to discontinue the use of race-conscious measures if they can achieve adequate DBE participation through race-neutral means.¹¹⁹ The administration thus argued that in the DOT program, discrimination, not race, is the key to DBE status.¹²⁰ The administration was satisfied that the basic definitions of social and economic disadvantage were race neutral. This view comports with the administration's promotion of race-neutral means for achieving diversity, as would later be clarified with respect to higher education.¹²¹

While the administration's premise supported the DBE program, it denied that longstanding discrimination in contracting requires remedial action. The administration also offered no alternative to using race as a factor for increasing minority participation to more proportional levels. Moreover, Bush administration officials said that their support for Supreme Court precedent in the first *Adarand* case, and the DBE program specifically, did not mean that they also favored affirmative action. Rather, the administration filed a brief because it did not find DOT's program improper.¹²² Moreover, the administration's support centered on procedural technicalities (i.e., whether the petitioner had cause of action), and not affirmative action or race-conscious contracting procedures.

When the administration first indicated it would file a brief in support of the DOT program, it drew criticism from affirmative action opponents. Some accused the President of trying to court minority voters, and others argued that this position opposed campaign commitments.¹²³ Other commentators criticized the administration's brief for accepting traditional rationales upholding the need for affirmative action.¹²⁴ One administration supporter said the President's decision to "defend a morally indefensible" program "speaks volumes about the decline of fundamental

¹¹⁷ Verdugo, "Affirmative Action in Public Contracting," p. 147.

¹¹⁸ DOJ, *Adarand* brief, pp. 25–26.

¹¹⁹ *Ibid.*, p. 6; U.S. General Accounting Office, *Disadvantaged Business Enterprises: Critical Information is Needed to Understand Program Impact*, June 2001, p. 19.

¹²⁰ DOJ, *Adarand* brief, p. 18.

¹²¹ See, e.g., U.S. Department of Education, *Race-Neutral Alternatives in Postsecondary Education: Innovative Approaches to Diversity*, March 2003, <<http://www.ed.gov/ocr/raceneutralreport.html>> (hereafter cited as DOEd, *Race-Neutral Alternatives*).

¹²² Gina Holland, "Justice Department Defends Race-Based Contracting Award," Associated Press, Aug. 11, 2001.

¹²³ Wayne Washington, "U.S. To Take Affirmative Action Stand," *Boston Globe*, Aug. 8, 2001; Eric Lichtblau, "Administration Backs Race-Based Contracts," *Mercury News*, Aug. 11, 2001; Neil A. Lewis, "Administration Backs Affirmative Action Plan," *New York Times*, Aug. 11, 2001, p. A11 (hereafter cited as Lewis, "Administration Backs Affirmative Action Plan").

¹²⁴ John O'Sullivan, "Preferred Members: Affirmative Action for All, Except White Members," *National Review*, vol. 53, no. 17 (Sept. 3, 2001).

values of citizenship.”¹²⁵ Not surprisingly, however, many civil rights and legal activists commended the administration for its stand, noting it as the President’s first real statement on affirmative action.¹²⁶

In public comments, President Bush has not gone so far as to express support for affirmative action in federal contracting, instead calling on the need to improve the competitiveness of small businesses. In remarks at a summit of women entrepreneurs, he stated that the administration would “work to make sure American entrepreneurs have got access to government contracting” and that “government contracting must be more open and more fair to small businesses.”¹²⁷ His proposal for doing so mainly hinges on tax incentives, minimizing regulatory burdens, and breaking down large contracts, not specifically increasing the representation of women- and minority-owned firms.

Affirmative Action in Higher Education

Affirmative action has been a component of the college admissions process since the 1970s to remedy the entrenched discrimination policies that had prohibited racial and ethnic minorities and women from attending institutions of higher learning. Recognizing the low rate of minority participation in higher education and the correlation between education, employment, economic self-sufficiency, and political participation, the Commission has long supported affirmative action programs. As early as 1977, the Commission released a statement in which it noted:

[C]olor consciousness is unavoidable while the effects persist of decades of governmentally-imposed racial wrongs. A society that, in the name of the ideal, foreclosed racially-conscious remedies would not truly be color blind but morally blind.¹²⁸

Two and a half decades after its initial statement, the Commission re-examined affirmative action and again acted in support, noting that although minority enrollment has increased markedly over the past 30 years, students of color remain less likely to attend and graduate from

¹²⁵ Ward Connerly, “Losing the Soul of the GOP; Republicans Make Rotten Peace with Race Preferences,” *National Review*, Oct. 1, 2001.

¹²⁶ Lewis, “Administration Backs Affirmative Action Plan,” citing Georgina Verdugo, executive director, Americans for a Fair Chance; Americans for a Fair Chance, “Civil Rights Organizations File an Amicus Brief in Adarand v. Mineta and Applaud President Bush’s Support of the DOT DBE Program,” press release, Aug. 10, 2001. The National Asian Pacific American Legal Consortium, Asian American Legal Defense and Education Fund, and the Asian Law Caucus, among others, voiced support for the administration’s brief.

¹²⁷ President George W. Bush, remarks at the Summit on Women Entrepreneurship in the 21st Century, Washington, D.C., Mar. 19, 2002; *see also* President George W. Bush, satellite remarks to the United States Hispanic Chamber of Commerce, Oct. 17, 2002.

¹²⁸ U.S. Commission on Civil Rights (USCCR), *Statement on Affirmative Action*, clearinghouse publication 54, October 1977, p. 12. *See also* USCCR, *Towards Equal Educational Opportunity: Affirmative Action Programs at Law and Medical Schools*, July 1978; USCCR, *Dismantling the Process of Discrimination*; USCCR, “Civil Rights Commission Urges Administration to Support Minority Scholarships,” press release and statement, Jan. 24, 1991; and USCCR, *Toward and Understanding of Percentage Plans in Higher Education: Are They Effective Substitutes for Affirmative Action?* April 2000.

college and are even less likely to attend the most prestigious institutions.¹²⁹ Despite evidence of its usefulness, opponents charge that affirmative action is “reverse discrimination,” which results in “preferential treatment,” or less qualified individuals being admitted to colleges solely on the basis of race or ethnicity.¹³⁰ Others contend that the educational benefits of diversity, as a justification for affirmative action, do not outweigh the negative effects of the tactics used to achieve it.¹³¹

Against this debate, in 2003, the Supreme Court re-examined the legality of affirmative action in higher-education admissions policies for the first time in 25 years. The Court received more than 100 amicus briefs in two concurrent cases challenging the University of Michigan’s undergraduate and law school admissions policies; the majority favored the use of racial factors to promote diversity. The Bush administration, although uncommitted to an official public position on affirmative action, issued last-minute amicus briefs against the university’s policies, characterizing them as “fundamentally flawed.”¹³² The administration concluded that the undergraduate admissions procedure, which gave 20 out of 150 points to underrepresented minority applicants, was a mechanical substitution for a quota system and inconsistent with Supreme Court precedent.¹³³ However, Michigan’s point system did not meet the Court’s definition of a quota because it did not reserve a set number of seats for minority applicants. The administration’s intentional misuse of the inflammatory term “quota” and its equation with affirmative action appear intended to undermine the legality of such programs and civil rights generally. According to the administration’s brief, the law school admission policy was equally pernicious because, in its pursuit of diversity, it justified racial discrimination.¹³⁴

Two of President Bush’s most trusted advisors distanced themselves from the administration’s position. Secretary of State Colin Powell sought permission to and expressed his disagreement with the administration’s view, identifying himself as a strong proponent of affirmative action.¹³⁵

¹²⁹ U.S. Commission on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education*, staff report, November 2002 (hereafter cited as USCCR, *Beyond Percentage Plans*); USCCR, *Toward an Understanding of Percentage Plans in Higher Education: Are They Effective Substitutes for Affirmative Action?*, April 2000 (hereafter cited as USCCR, *Toward an Understanding of Percentage Plans*); See also U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics, 2002*, tables 183, 185, 206, and 264, p. 222–322.

¹³⁰ Roger Clegg, vice president and general counsel, Center for Equal Opportunity, statement before the U.S. Commission on Civil Rights, May 14, 1999, re: racial and ethnic preferences in higher education; Curtis Crawford, “Weighing the Benefits and Costs of Racial Preference in College Admissions,” *Society*, vol. 37, no. 4 (May/June 2000).

¹³¹ See, e.g., Brief of Amici Curiae for the Center for Equal Opportunity, the Independent Women’s Forum, and the American Civil Rights Institute Supporting Petitioner, *Grutter v. Bollinger*, et al., 539 U.S. 306 (2003) (No. 02-241) and *Gratz v. Bollinger*, et al., 539 U.S. 244 (2003) (No. 02-516).

¹³² The White House, “President Bush Discusses Michigan Affirmative Action Case,” Jan. 15, 2003, <<http://www.whitehouse.gov/news/releases/2003/01/print/20030115-7.html>>.

¹³³ Brief of Amicus Curiae for the United States Supporting Petitioner at 13, *Gratz v. Bollinger*, et al., 539 U.S. 244 (2003) (No. 02-516).

¹³⁴ Brief of Amicus Curiae for the United States Supporting Petitioner at 10, *Grutter v. Bollinger*, et al., 539 U.S. 306 (2003) (No. 02-241) (hereafter cited as DOJ, *Grutter* brief).

¹³⁵ “Powell, Bush and Affirmative Action,” *Ethnic Newswatch*, vol. 1457, Jan. 29, 2003, p. 19, quoting Secretary of State Colin Powell in an interview with CNN, Jan. 26, 2003.

At the time of the Michigan case, some reports said National Security Advisor Condoleezza Rice had privately urged the President to oppose the university's admissions policy.¹³⁶ Nonetheless, she appears to favor affirmative action in higher education generally.¹³⁷

The administration acknowledged that racial and ethnic diversity "is an important and entirely legitimate government objective."¹³⁸ Nonetheless, it asserted that the way to achieve diversity is through race-neutral admissions policies or other preference factors such as socioeconomic status, geographic residence, or "experiential" diversity, each of which is a proxy for race. The administration's proposal circumvents race itself, purporting to promote diversity by other means, such as percentage plans. The administration has long advocated percentage plans modeled after those President Bush initiated statewide during his tenure as governor of Texas and his brother Governor Jeb Bush implemented in Florida. Under percentage plans, students who rank within a certain percentage of their school's graduating class are guaranteed admission to state universities.¹³⁹

Following the briefs, the Department of Education issued a report on behalf of the administration, titled *Race-Neutral Alternatives in Postsecondary Education: Innovative Approaches to Diversity*, to provide a catalog of non-affirmative action admissions policies that would purportedly achieve campus diversity. The report offered no supporting research for the recommendations it contained, nor criteria on which they were based.¹⁴⁰ In both the brief and the report, the administration ignored the many studies which found that percentage plans do not improve or maintain diversity, particularly at the most prestigious state universities.¹⁴¹ Furthermore, in promoting percentage plans as viable alternatives for law school admissions, the administration disregarded the fact that the plans do not apply to, and have not been tested in, graduate programs or professional schools.¹⁴²

¹³⁶ See Mike Allen and Charles Lane, "Rice Helped Shape Bush Decision on Admissions," *Washington Post*, Jan. 17, 2003, p. A1; Mike Allen, "Rice: Race Can Be Factor in College Admissions," *Washington Post*, Jan. 18, 2003, p. A1; Michael Getler, "Rice, Race, and Reporters," *Washington Post*, Jan. 26, 2003, p. B6.

¹³⁷ Joyce Howard Price, "'Lower Standards' for Blacks Ripped; Rice Backs 'Soft Affirmative Action'," *Washington Times*, Mar. 5, 2004, quoting Condoleezza Rice, national security advisor, in an interview with Armstrong Williams, *On Point*, aired Mar. 7, 2004. See also Michael Getler, "Rice, Race and Reporters," *Washington Post*, Jan. 26, 2003, p. B06; and Stuart Silverstein, "Rice Considered Centrist on Affirmative Action at Stanford," *Los Angeles Times*, Jan. 25, 2003, p. 8.

¹³⁸ DOJ, *Grutter* brief at 9.

¹³⁹ See USCCR, *Beyond Percentage Plans* for a full description of percentage plans. Under percentage plans, students are not necessarily allowed to choose which school they will attend, nor are they guaranteed admission to top-tier or research institutions.

¹⁴⁰ See DOEd, *Race-Neutral Alternatives*.

¹⁴¹ See USCCR, *Beyond Percentage Plans*; The Civil Rights Project, Harvard University, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, February 2003; The Civil Rights Project, Harvard University, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida*, February 2003; Marta Tienda et al., *Closing the Gap? Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action*, January 2003; and Tomàs Rivera Policy Institute, *The Reality of Race Neutral Admissions for Minority Students at the University of California: Turning the Tide or Turning Them Away?* March 2003.

¹⁴² See USCCR, *Beyond Percentage Plans*.

The Court's Ruling: Race as One Factor Among Many

The Supreme Court upheld longstanding policy allowing colleges to consider an applicant's race as one factor in admissions, letting stand the Michigan law school's policy. However, the Court struck down the undergraduate policy, concluding that because it awarded specific points for every underrepresented minority *solely on the basis of race*, it was not narrowly tailored to achieve the interest of educational diversity.¹⁴³ The Court found the law school admissions policy acceptable because its objective was to assess the contributions of minority applicants in a flexible, nonmechanical way.¹⁴⁴

The Court found the undergraduate admissions policy unacceptable, but nowhere in its opinion did it promote percentage plans as a solution. Justice David Souter, in his dissent, specifically challenged the efficacy of percentage plans, stating:

The "percentage plans" are just as race conscious as the point scheme (and fairly so), but they get their racially diverse results without saying directly what they are doing or why they are doing it. . . . Equal protection cannot become an exercise in which the winners are the ones who hide the ball.¹⁴⁵

In the law school opinion, Justice Sandra Day O'Connor argued that the administration failed to explain how percentage plans could work for graduate or professional schools; in addition, she noted that the plans may preclude universities from conducting the individualized assessments necessary to assemble student bodies that are diverse racially and in other ways.¹⁴⁶

Is the President's Race-Neutral Diversity Strategy Feasible?

After the decision, President Bush released the following statement:

I applaud the Supreme Court for recognizing the value of diversity on our Nation's campuses. Diversity is one of America's greatest strengths. Today's decisions seek a careful balance between the goal of campus diversity and the fundamental principle of equal treatment under the law.

My administration will continue to promote policies that expand educational opportunities for Americans from all racial, ethnic, and economic backgrounds. There are innovative and proven ways for colleges and universities to reflect our diversity without using racial quotas. . . . I agree that we must look first to these race-neutral approaches to make campuses more welcoming for all students.¹⁴⁷

¹⁴³ Gratz v. Bollinger, et al., 539 U.S. 244, 268 (2003).

¹⁴⁴ Grutter v. Bollinger, et al., 539 U.S. 306, 334 (2003).

¹⁴⁵ Gratz, 539 at 298 (Souter, J., dissenting).

¹⁴⁶ Grutter, 539 U.S. at 340. See also USCCR, *Toward an Understanding of Percentage Plans* and USCCR, *Beyond Percentage Plans* for a more complete discussion of the limitations of percentage plans.

¹⁴⁷ The White House, "President Applauds Supreme Court for Recognizing Value of Diversity," June 23, 2003, <<http://www.whitehouse.gov/news/releases/2003/06/print/20030623.html>>.

Anti-affirmative action groups criticized the administration for lack of zeal in its attack of the Michigan policy.¹⁴⁸ Civil rights groups chastised Bush as duplicitous and hypocritical: simultaneously promoting race-neutral strategies and pacifying minority constituents by claiming victories for diversity.¹⁴⁹ The President's comments mischaracterized the Court's holding, using the decision as a platform to promote race-neutral alternatives and to defend the administration's briefs, neither of which match his verbal support for diversity.

One civil rights group noted that the administration missed a critical opportunity to provide leadership on civil rights and instead engaged in divisiveness, and asked:

Why would a president who personally proclaims the value of diversity and who takes justifiable pride in his appointment of qualified minorities such as Colin Powell and Condoleezza Rice now deny to universities the flexibility to have their student bodies reflect the country's diverse population?¹⁵⁰

In response to the Court's decision, many colleges have reviewed their admissions practices and questioned how affirmative action can be applied. DOJ generally provides guidance on federal implementation of judicial mandates and interprets relevant case law. For example, after the *Adarand* decision, the agency promulgated legal guidance on the implications of the decision.¹⁵¹ However, the Court essentially repudiated DOJ's legal arguments in the Michigan case, and thus DOJ has not issued guidance to schools seeking compliance or for enforcement. Moreover, the administration appears not to have reviewed related policy.¹⁵² The Citizens' Commission on Civil Rights describes this as an abdication of duty; it faults the hostility of Attorney General John Ashcroft and former Solicitor General Theodore Olson toward affirmative action for DOJ's neglect.¹⁵³ The Office for Civil Rights at the Department of Education could likewise provide clarification on how it will interpret the ruling. Some observers, however, expect that the agency will not soon take action, since doing so would require it to declare a position on a politically charged issue during an election year.¹⁵⁴

In 1978, on the heels of another significant Supreme Court decision upholding affirmative action, the Commission recommended that the President instruct appropriate agencies to "launch a widespread, coordinated program designed to bring about the vigorous enforcement of

¹⁴⁸ Anti-affirmative action groups including the Center for Equal Opportunity (CEO) and the Institute for Justice opposed the President's stance. CEO's president, Linda Chavez, stated that she would "hold the administration's feet to the fire." See Lorraine Woellert, "Anger on the Right, Opportunity for Bush," *Business Week*, July 7, 2003, p. 32.

¹⁴⁹ Citizens' Commission on Civil Rights, "The Bush Administration v. Affirmative Action: Justice Department Drags Feet on Upholding Court Rulings," Dec. 9, 2003, p. 9, <<http://www.ccr.org/justice/article.cfm?id=11>> (last accessed Apr. 21, 2004) (hereafter cited as CCCR, "Bush v. Affirmative Action").

¹⁵⁰ Gary T. Johnson and Stuart Meiklejohn, co-chairs, Lawyers' Committee for Civil Rights Under Law, "Bush's Stance on Race Denies Equality and Justice," <<http://www.lawyerscommittee.org/features/oped.html>> (last accessed Sept. 29, 2003).

¹⁵¹ See DOJ, "Adarand Legal Guidance."

¹⁵² CCCR, "Bush v. Affirmative Action."

¹⁵³ *Ibid.*, p. 3.

¹⁵⁴ Peter Schmidt, "Affirmative Action Remains a Minefield, Mostly Unmapped," *Chronicle of Higher Education*, Oct. 24, 2003, p. 22.

affirmative action” in employment, contracting, and education.¹⁵⁵ Despite evidence to the contrary, this administration does not acknowledge that affirmative action remains a valuable tool to providing equal opportunity.

FAIR HOUSING

One of the most significant housing statutes in the first half of the 20th century was the Housing Act of 1949 enacted during the Truman administration.¹⁵⁶ Congress articulated for the first time a national policy of providing a decent home and suitable living environment for every American family, a goal subsequent Congresses reiterated.¹⁵⁷ The 1949 act also called on local authorities to develop “well planned, integrated residential neighborhoods.”¹⁵⁸ However, in the years after its passage, minority housing conditions lagged far behind those of whites. Moreover, the slum clearance program authorized in the act dislocated large numbers of minority and low-income families.¹⁵⁹ Neighborhoods were cleared to make way for highways and industries.¹⁶⁰

It was not until President Johnson and Congress enacted Title VIII of the Civil Rights Act of 1968 that housing discrimination by race, color, religion, national origin, or sex (by amendment in 1974) was prohibited.¹⁶¹ Also known as the Fair Housing Act, Title VIII was the first major federal statute to eliminate discrimination and promote fairness and equal opportunity in housing.¹⁶² Congress recognized that access to safe and healthy housing conditions for all Americans was essential to employment and educational advancement. However, the 1968 Fair Housing Act relied heavily on conciliation and voluntary compliance. A lack of adequate enforcement power was the most serious obstacle to the development of an effective fair housing program within the Department of Housing and Urban Development (HUD). Discrimination persisted in all areas of housing, including rentals, sales, and mortgage lending. Minorities remained segregated and highly concentrated in poor and undeveloped neighborhoods.¹⁶³

In an effort to improve an economy heading toward recession, the Nixon administration established an assistance program to subsidize rental payment known as Section 8, project-based incentives to build low-income housing units, and the Community Development Block Grant to

¹⁵⁵ U.S. Commission on Civil Rights, “Statement on Affirmative Action,” press release, July 1, 1978.

¹⁵⁶ The Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (1949) (codified as amended in scattered sections of 12 U.S.C. and 42 U.S.C.).

¹⁵⁷ Sylvia C. Martinez, “The Housing Act of 1949: Its Place in the Realization of the American Dream of Homeownership,” *Housing Policy Debate*, vol. 2, no. 2 (2000), p. 467.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*, p. 468.

¹⁶⁰ North Carolina Low Income Housing Coalition, “A Brief History of Housing Policy,” <<http://www.nclihc.org/issues/history.shtml>> (last accessed Apr. 23, 2004) (hereafter cited as NCLIHC, “A Brief History of Housing Policy”).

¹⁶¹ The Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73, 81 (codified as amended at 42 U.S.C. §§ 3601–3631 (2000)).

¹⁶² U.S. Commission on Civil Rights, *Prospects and Impact of Losing State and Local Agencies from the Federal Fair Housing System*, September 1992, p. 1 (hereafter cited as USCCR, *Federal Fair Housing System*).

¹⁶³ *Ibid.*, p. 1.

provide funding to state and local governments for infrastructure and support services in low-income areas.¹⁶⁴

The Reagan administration and Congress established the Low Income Housing Tax Credit in 1987 to further encourage development of low-income housing. In this program, state housing agencies awarded tax credits to investors through a competitive process based on state rules.¹⁶⁵ Congress also passed the Fair Housing Amendments Act of 1988,¹⁶⁶ convinced of the need for a stronger and more comprehensive fair housing law. The 1988 act expanded protective coverage to persons with disabilities and families with children.¹⁶⁷ It established an administrative mechanism for enforcing the law; allowed individuals to file complaints with HUD; empowered the secretary of housing to authorize the attorney general to file a civil action seeking appropriate preliminary or temporary relief, pending final disposition of the case; and authorized the secretary to file complaints of alleged discriminatory housing practices on his or her own initiative.¹⁶⁸

In 1992, during the presidency of George H.W. Bush, the Home Ownership and Opportunity for People (HOPE VI) program was developed to provide support for investments in public housing and its residents.¹⁶⁹ Originally called the Urban Revitalization Demonstration, the HOPE VI program was a direct result of a National Commission on Severely Distressed Public Housing report, which was submitted to Congress in August 1992.¹⁷⁰

In 1994, President Clinton issued Executive Order 12,892, creating the Fair Housing Council to ensure a coordinated fair housing effort.¹⁷¹ During his administration, HUD's Office of Fair Housing and Equal Opportunity (FHEO) was reorganized to increase effectiveness in implementing fair housing policies and enforcing the law. President Clinton also unveiled the "Make 'em Pay" initiative in 1997 which aimed to combat housing-related hate crimes. This initiative called for closer partnerships between HUD, DOJ, fair housing enforcement agencies, advocacy groups, and other organizations. On the 30th anniversary of the Fair Housing Act of 1968, President Clinton remarked that "the need to enforce fair housing laws vigorously remains as urgent today as ever."¹⁷²

¹⁶⁴ NCLIHC, "A Brief History of Housing Policy."

¹⁶⁵ Ibid.

¹⁶⁶ Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601–3631 (2000)).

¹⁶⁷ USCCR, *Federal Fair Housing System*, p. 1.

¹⁶⁸ U.S. Commission on Civil Rights, *The Fair Housing Amendments Act of 1988: The Enforcement Report*, September 1994, p. 11 (hereafter cited as USCCR, *Fair Housing Amendments Act Report*).

¹⁶⁹ U.S. Department of Housing and Urban Development, "An Historical and Baseline Assessment of HOPE VI," <<http://www.huduser.org/publications/pubasst/hopevi.html>> (last assessed May 12, 2004).

¹⁷⁰ U.S. Department of Housing and Urban Development, "HOPE VI Program Authority and Funding History," August 2003.

¹⁷¹ Leadership Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing, Exec. Order No. 12,892, 3 C.F.R. 849 (1995).

¹⁷² USCCR, *A Bridge to One America*, p. 36.

Housing Disparities Persist

The anchor of the American dream is a decent, affordable home in a safe community with good schools and resources and within reasonable access to employment opportunities.¹⁷³ Many minority families have not realized this dream. The homeownership gap between white and minority families has narrowed only slightly over the years. Census data on homeownership rates for the first quarter of 2002 showed 74.3 percent for non-Hispanic whites, 48.0 percent for African Americans, 47.6 percent for Hispanic Americans, and 53.7 percent for Asian Americans and other races.¹⁷⁴

Researchers at the Lewis Mumford Center for Comparative Urban and Regional Research at the University of Albany analyzed the 2000 census and other documents and concluded that a high level of racial residential segregation persists in U.S. cities and suburbs.¹⁷⁵ Residential segregation continues because prejudice and discrimination, along with other factors such as a lack of financial resources, constrain the housing choice of many blacks and Hispanics.¹⁷⁶ On average, white persons in metropolitan areas still live in neighborhoods that are 80 percent white and only 7 percent black. Hispanic and Asian Americans are significantly less segregated than blacks.¹⁷⁷

Housing directly affects a person's access to education and employment opportunities, quality health care, transportation, and safe neighborhoods.¹⁷⁸ A major cost of residential segregation is that minorities live in poorer neighborhoods with fewer resources than do whites with similar income.¹⁷⁹ Critically, school segregation has regularly accompanied housing segregation.¹⁸⁰ Inherently unequal, segregated schools exclude minority students from social networks that could lead to employment and wider social contact with different racial groups.¹⁸¹ Equal access to housing is thus a basic civil rights issue that demands presidential attention.

¹⁷³ Millennial Housing Commission, *Meeting Our Nation's Housing Challenges, Report of the Bipartisan Millennial Housing Commission*, May 2002, p. 10.

¹⁷⁴ President George W. Bush, "A Home of Your Own: Expanding Opportunities for All Americans," June 2002, pp. 1, 5 (hereafter cited as President Bush, "A Home of Your Own").

¹⁷⁵ The Mumford Center for Comparative Urban and Regional Research, "Ethnic Diversity Grows, Neighborhood Integration Lags Behind," Apr. 3, 2001, revised Dec. 18, 2001 to include 1980 data, <<http://www.albany.edu/mumford/census>> (last accessed Apr. 28, 2004) (hereafter cited as Mumford Center, "Ethnic Diversity Grows").

¹⁷⁶ John O. Calmore, "Race/ism Lost and Found: The Fair Housing Act at Thirty," *University of Miami Law Review*, July 1998, p. 1072.

¹⁷⁷ Mumford Center, "Ethnic Diversity Grows."

¹⁷⁸ Leadership Council for Metropolitan Open Communities, "Equal Housing Opportunity Is Good for Everyone," <<http://www.lcmoc.org>> (last accessed Apr. 28, 2004).

¹⁷⁹ John R. Logan, Deidre Oakley, and Jacob Stowell, "Segregation in Neighborhoods and Schools: Impacts on Minority Children in the Boston Region," Lewis Mumford Center for Comparative Urban and Regional Research, University of Albany, September 2003, p. 1.

¹⁸⁰ Deborah Kenn, "Institutionalized, Legal, Racism: Housing Segregation and Beyond," *The Boston Public Interest Law Journal*, Fall 2001, p. 50.

¹⁸¹ *Ibid.*, p. 52.

Bush Administration Housing Actions: Limiting the Dream

A Home of Your Own

In June 2002, President Bush announced a housing initiative, *A Home of Your Own: Expanding Opportunities for All Americans*, in an effort to bridge the persistent homeownership gap between whites and minorities. The presidential housing initiative sought to raise the number of minority homeowners by at least 5.5 million before the end of the decade by removing the many remaining barriers.¹⁸² *A Home of Your Own* specifies the following objectives and strategies: (1) \$200 million annually for the American Dream Downpayment Fund to assist 40,000 families with downpayment and closing costs;¹⁸³ (2) the Single-Family Affordable Housing Tax Credit to motivate production of 200,000 affordable homes for sale to low- and moderate-income families; (3) funding increases for housing organizations that help families become homeowners through sweat equity and community volunteerism; and (4) a simplified home buying process.¹⁸⁴

Early indications are that the funding proposal in *A Home of Your Own* is inadequate. One political analyst identified three major flaws: underfunding, continued redlining by lending institutions, and a lack of commitment to low-income housing.¹⁸⁵ The \$200 million in federal funds for 40,000 families is too small given that the housing crisis, particularly with respect to blacks, is so chronic and critical. The Joint Center for Political and Economic Studies noted that without gains in employment and income, blacks will not be able to afford and sustain a home. The head of the Congressional Black Caucus Affordable Housing Legislative Group expressed satisfaction that the administration focused on minority housing, but concurred that the effort is inadequate.¹⁸⁶

Reactions of affordable housing advocates to *A Home of Your Own* also were unenthusiastic. For example, the National Low Income Housing Coalition (NLIHC) stated in 2004 that the administration's housing policies were at best weak efforts to increase homeownership. The administration requested \$200 million for the American Dream Downpayment Act, but Congress appropriated a total of \$162.5 million for 2003 and 2004 combined, 60 percent less than the President's proposal. NLIHC said that President Bush should have pushed for full funding every year.¹⁸⁷ NLIHC also criticized the administration for neglecting to provide programs for rental

¹⁸² President Bush, "A Home of Your Own," pp. 1, 5.

¹⁸³ In December 2003, President Bush signed the American Dream Downpayment Act that Rep. Katherine Harris sponsored. Representative Katherine Harris, "President Bush Signs Congresswoman Harris' Bill to Expand Low-Income Homeownership into Law," press release, <<http://harris.house.gov/News/DocumentSingle.aspx?DocumentID=2047>> (last accessed June 28, 2004).

¹⁸⁴ President Bush, "A Home of Your Own," p. 2.

¹⁸⁵ Redlining is the illegal practice of withholding home-loan funds or insurance from neighborhoods considered poor economic risks. See Syracuse Then and Now, "Redlining," <<http://www.syracusethenandnow.net/Redlining.htm>> (last accessed May 13, 2004).

¹⁸⁶ "Raising Roofs or Just Hopes?" *Black Enterprise*, October 2002, p. 38.

¹⁸⁷ Wayne Washington, "Bush Pushes Home Ownership Opportunities for Minorities," *Boston Globe*, Mar. 27, 2004, p. A3 (hereafter cited as Washington, "Bush Pushes Home Ownership"); National Low Income Housing Coalition, "President Bush Travels to NM, AZ to Discuss Housing but His Record Shows Serious Shortcomings: Weak Homeownership Initiatives, Plans to Cut Rental Assistance," <<http://www.nlihc.org/press/pr030505.html>>

housing.¹⁸⁸ A comprehensive approach to resolving the nation's housing would include assistance for renter families that have limited financial resources.¹⁸⁹

Critiquing the administration's housing initiative from a different angle, the Heritage Foundation considered the recently passed American Dream Downpayment Act, which supports a component of *A Home of Your Own*, a "wasteful and counterproductive extravagance." In defense of its position, the foundation stated that present homeownership rate is at its highest. This notwithstanding, a more complete picture of homeownership would show that the rate gap between whites and minorities remains sizable. The Heritage Foundation also indicated that there already exist less costly federal housing programs that the Federal Housing Administration administers for low-income or savings-impaired families.¹⁹⁰ However, the Millennial Housing Commission declared that "federal support for the housing sector has been insufficient to cover growing needs [and] fill the gaps in availability and affordability."¹⁹¹

A Home of Your Own has its supporters, however, particularly in the construction and banking industries. Freddie Mac, a stockholder-owned congressionally chartered corporation, commended the administration for its commitment to bringing homeownership benefits to minority families.¹⁹² A National Association of Home Builders' economic analysis presented at a 2002 White House conference on minority homeownership argued that the administration's initiative would bring significant economic and social benefits to the nation.¹⁹³ Fannie Mae, a private, shareholder-owned company that ensures that lenders have adequate mortgage funds, likewise said that the Bush housing initiative would benefit minorities, as well as ease recession, speed economic recovery, expand jobs, and ensure the nation's economic security.¹⁹⁴ The National Association of Home Builders and Fannie Mae perhaps expected too much of the administration's housing initiative. Recall that it was largely low interest rates that resulted in an increase in minority and nonminority homeownership over the last decade.¹⁹⁵ However, even as the Bush administration touts minority homeownership, it is cutting and proposing to cut housing programs that assist, among others, very low-income minority renters.

(last accessed Apr. 24, 2004) (hereafter cited as NLIHC, "President Bush Travels to NM, AZ"). As noted, where funding is discussed, all referenced figures are expressed in fiscal years.

¹⁸⁸ Washington, "Bush Pushes Home Ownership"; NLIHC, "President Bush Travels to NM, AZ."

¹⁸⁹ Pete Yost, "President Pushes Home Ownership," *Chattanooga Times Free Press*, Mar. 28, 2004, p. A10.

¹⁹⁰ Ronald D. Utt, Heritage Foundation, "American Dream Downpayment Act: Fiscally Irresponsible and Redundant to Existing Homeownership Programs," Web memo no. 378, Dec. 5, 2003, <<http://www.heritage.org/Research/Budget/wm378.cfm>> (last accessed July 2, 2004).

¹⁹¹ Millennial Housing Commission, *Meeting Our Nation's Housing Challenge*, May 2002, p. 2.

¹⁹² Paul Peterson, executive vice president, Freddie Mac, statement at the White House Conference on Minority Homeownership, Washington, D.C., Oct. 15, 2002, <<http://freddiemac.com/speeches/peterson/pp101502.htm>> (last accessed July 2, 2004).

¹⁹³ National Association of Home Builders, "Home Builders Praise President's Initiative on Minority Homeownership," press release, Oct. 15, 2002.

¹⁹⁴ Fannie Mae, "Fannie Mae Chairman and CEO Raines Say Bush Administration Housing Budget, Initiatives Will Fuel 'New Power of Housing' and Economic Security," press release, Feb. 8, 2002.

¹⁹⁵ Wayne Washington, "Bush Pushes Home Ownership Opportunities for Minorities," *Boston Globe*, Mar. 27, 2004, p. A3.

Section 8 Housing Choice Voucher Program

Described by the congressionally mandated Millennial Housing Commission as the linchpin of federal housing policy for the elderly, disabled, poor families with children, and poor minorities, the Section 8 Housing Choice Voucher Program subsidizes private housing by allowing participating tenants to pay 30 percent of their household incomes toward rent. The local housing authority issuing the voucher pays the difference to the landlord, up to the Voucher Payment Standard.¹⁹⁶ The Section 8 Housing Choice Voucher Program provides rental subsidy to approximately 2 million low-income families with children, senior citizens, and people with disabilities.¹⁹⁷ This represents only about one-fourth of eligible families currently receiving any federal housing assistance due to the program's limited financial resources.¹⁹⁸ The American Civil Liberties Union stated that Section 8 "has been proven to be effective to helping low-income minority families move to more integrated, lower poverty neighborhoods."¹⁹⁹ Because of its relevance to persons with disabilities and low-income families, many of whom are minority, its civil rights implications are significant.

Despite the demonstrated need for the Section 8 program, on April 22, 2004, without warning, HUD announced a change in its method for reimbursing public housing authorities (PHAs) for fiscal year 2004, retroactive to January 1. The change reflects the agency's interpretation of the FY 2004 Consolidated Appropriations Act Provisions for the Housing Choice Program.²⁰⁰ As a consequence, the nation's 2,500 PHAs will be paid based on the average cost of vouchers under lease as of August 1, 2003, with an adjustment for inflation, instead of being paid for the actual cost of the vouchers they administer.²⁰¹ Congress' intent, however, is to fully fund all existing

¹⁹⁶ NLIHC, "President Bush Travels to NM, AZ"; Amy Goldstein, "Bush Aims to Localize Rent Aid," *Washington Post*, Apr. 13, 2003, p. A01; "Helping Families Find a Place to Place," *Miami Herald*, Feb. 24, 2004, p. 22; David W. Chen, "Bush Housing Plan Stirs Anxiety over New York's Share of Aid," *New York Times*, Feb. 20, 2004, p. B1; Affordable Housing Advocacy Project, "Section 8: The Housing Choice Voucher," <<http://www.housingrights.com/ahap/section8.htm>> (last accessed May 13, 2004); Housing Link, "The Big 3 Programs," <http://www.housinglink.org/The_BIG_3.htm> (last accessed May 13, 2004). The local housing authority issuing vouchers in its jurisdiction establishes the Voucher Payment Standard.

¹⁹⁷ Barbara Sard and Will Fischer, "New HUD Policy Will Force Immediate Cuts in Housing Voucher Assistance for Low-income Families," Center on Budget and Policy Priorities, Apr. 26, 2004, p. 1.

¹⁹⁸ Center on Budget and Policy Priorities, "President's Budget Would Slash Major Housing Program by 30 Percent by 2009," Mar. 8, 2004, <<http://www.cbpp.org/2-12-04-pr.htm>> (last accessed May 14, 2004).

¹⁹⁹ The American Civil Liberties Union, "Coalition Letter to HUD Secretary Martinez on Key Civil Rights Issues in the New HUD Administration," Mar. 15, 2001.

²⁰⁰ U.S. Department of Housing and Urban Development, Office of Public and Indian Housing, PIH 2004-7 (HA). The notice expires Apr. 30, 2005. See National Low Income Housing Coalition, "Weekly Housing Update: Memo to Members, Special Report: FY 04 Voucher Funding Crisis—Week 3," vol. 9, no. 18 (May 7, 2004) <<http://www.nlihc.org/mtm/mtm9-18.html>> (last accessed May 12, 2004). Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 3.

²⁰¹ National Low Income Housing Coalition, "Weekly Housing Update: Memo to Members," vol. 9, no. 17 (Apr. 30, 2004) <<http://www.nlihc.org/mtm/mtm917.html>> (last accessed May 14, 2004). This change "will limit the average amount of funding for each voucher in use that a state or local agency receives to the agency's average cost per voucher in May–July 2003, plus an adjustment for rent inflation that has occurred since that time in the agency's region of the country, as determined in accordance with a rent inflation formula that HUD has devised." See Barbara Sard and Will Fischer, "New HUD Policy Will Force Immediate Cuts in Housing Voucher Assistance for Low-income Families," Center on Budget and Policy Priorities, Apr. 26, 2004, p. 2.

Section 8 vouchers in 2004, as evidenced by the additional \$1 billion appropriation to protect voucher holders.²⁰² House Minority Leader Nancy Pelosi describes this action as breaking a 30-year promise to help low-income families, the elderly, and people with disabilities afford decent, safe housing.²⁰³

In explaining its action, HUD said the appropriations act passed in January 2004 compelled dispersion of voucher funding in such a manner that will force assistance reduction. While it is true that that law made modest changes to voucher fund dispersion, the Center on Budget and Policy Priorities contends “nothing in its language requires the harsh approach HUD has taken.”²⁰⁴

On top of this, the administration’s proposed 2005 budget for the Section 8 Housing Choice Voucher Program is \$11.8 billion, a decrease of more than \$1 billion from the 2004 appropriation. This proposed budget is insufficient to maintain the current level of assistance, resulting in a shortfall of more than \$1.6 billion. The 2005 proposal also provides for more cuts in subsequent years; in 2009, the proposed cut reaches \$4.6 billion. Moreover, administrative funding for PHAs to manage voucher programs will also be cut.²⁰⁵ Finally, the Section 8 Housing Choice Voucher Program will be changed to a PHA-administered block grant called the Flexible Voucher Program.²⁰⁶

In response to critics and questions, a HUD spokesperson stated that the administration’s proposed 2005 budget and changes for the Section 8 voucher program will give PHAs more

²⁰¹ National Low Income Housing Coalition, “April 22 HUD Policy Will Force Families Out of Their Homes,” <<http://www.nlihc.org/news/042504.html>> (last accessed May 13, 2004) (hereafter cited as NLIHC, “April 22 HUD Policy”).

²⁰² Ibid.

²⁰³ Genaro C. Armas, “Housing Agencies Scramble with Cuts to Voucher Programs as Democrats Criticize HUD,” Associated Press, May 4, 2004.

²⁰⁴ Center on Budget and Policy Priorities, “Families Face Loss of Housing Voucher Due to HUD Decisions,” Apr. 27, 2004.

²⁰⁵ National Low Income Housing Coalition, “The Bush 2005 Housing Budget,” Feb. 4, 2004, <<http://www.nlihc.org/news/020404.htm>> (last accessed May 12, 2004) (hereafter cited as NLIHC, “The Bush 2005 Housing Budget”); Barbara Sard and Will Fisher, “Administration Seeks Deep Cuts in Housing Vouchers and Conversion of Program to a Block Grant,” Center on Budget and Policy Analysis, Mar. 24, 2004, <<http://www.centeronbudget.org/2-12-04hous.htm>> (last accessed May 14, 2004) (hereafter cited as Sard and Fisher, “Administration Seeks Deep Cuts”); Center on Budget and Policy Priorities, “Administration Proposal Could Cause Loss of 250,000 Housing Vouchers in 2005,” Mar. 8, 2004, <<http://www.cbpp.org/2-24-04hous-fact.htm>> (last accessed May 14, 2004); Center on Budget and Policy Priorities, “President’s Budget Would Slash Major Housing Program by 30 Percent By 2009,” Mar. 8, 2004, <<http://www.cbpp.org/2-12-04hous-pr.htm>> (last accessed May 14, 2004). In 2003, the administration sought to change the Section 8 Housing Choice Voucher Program into a block grant for state governments. The amount of aid would have been formula-based instead of based on the number of needy people. Congress rejected the proposal. See David W. Chen, “Bush Housing Plan Stirs Anxiety Over New York’s Share of Aid,” *New York Times*, Feb. 20, 2004, p. B1.

²⁰⁶ NLIHC, “The Bush 2005 Housing Budget”; Sard and Fisher, “Administration Seeks Deep Cuts.”

flexibility in how to use the subsidy and bring the cost of the program under control. Program costs now constitute half of HUD's budget.²⁰⁷

In reality, however, implementation of HUD's interpretation of the 2004 Consolidated Appropriations Act for the Housing Choice Program will mean that hundreds of public housing agencies will receive fewer federal dollars to administer Section 8 programs.²⁰⁸ For the more than 800 public agencies that have no reserve funds, the change that HUD announced will force difficult decisions, including increasing rents or eliminating the lowest income families from their programs. This group of agencies serves approximately 691,000 low-income, elderly, and disabled families. Other public housing agencies across the nation are trying to find new funding sources or make the same painful decisions.²⁰⁹ The NLIHC anticipates drastic consequences, including an increase in rent levels for voucher holders; a decrease in the maximum rent a voucher covers; failure of PHAs to re-issue vouchers when tenants leave; and a withdrawal of vouchers from families who have them, but have not found a willing landlord.²¹⁰

The funding proposal for the Section 8 Housing Choice Voucher Program for 2005, if implemented, will immediately reduce the number of vouchers by about 250,000; by 2009, funding reduction will result in a loss of 600,000 vouchers.²¹¹ The proposed changeover to a block grant structure also has disadvantages for low-income families. The Center on Budget and Policy Priorities states that this will eliminate federal protections. The block-grant structure allows housing agencies full freedom to terminate assistance to any voucher holder, raise voucher holders' rent contributions, and redirect vouchers away from the neediest families.²¹² Affordable housing advocates, some members of the House of Representatives, and others are mounting a campaign against both initiatives.²¹³

²⁰⁷ Amy Goldstein, "Bush Aims to Localize Rent Aid," *Washington Post*, Apr. 13, 2004, p. A01; James W. Brosnan, "Needy Renters Left Behind," *Albuquerque Tribune*, Mar. 25, 2004, p. A1.

²⁰⁸ Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 3; Senator Edward Kennedy, "Statement on HUD's Changes in Section 8 Vouchers," May 4, 2004, <<http://kennedy-senate.gov/~kennedy/statements/05/04/2004504845.html>> (last accessed May 13, 2004) (hereafter cited as Kennedy statement, May 2004).

²⁰⁹ Kennedy statement, May, 2004; Genaro C. Armas, "Housing Agencies Scramble with cuts to Voucher Programs as Democrats Criticize HUD," Associated Press, May 4, 2004.

²¹⁰ NLIHC, "April 22 HUD Policy."

²¹¹ National Alliance of HUD Tenants, "NAHT News," <<http://www.saveourhomes.org/news.php>> (last accessed May 13, 2004).

²¹² Center on Budget and Policy Priorities, "Administration Proposal Could Cause Loss of 250,000 Housing Vouchers in 2005," <<http://cbpp.org/2-24-04/hous-fact.htm>> (last accessed May 14, 2004).

²¹³ See, e.g., National Low Income Housing Coalition, "Tell Congress: HUD Must Withdraw its New Voucher Policy that Will Force Families Out of Their Homes," <<http://www.nlihc.org/news/043004.html>> (last accessed May 12, 2004); Coalition of Human Needs, "The Fight's Not Over Yet: Three Steps You Can Take This Week to Make Sure Congress Rejects Budget Cuts," Apr. 14, 2004, <<http://www.nlihc.org/news/041404.html>> (last accessed May 12, 2004).

The HOPE VI Program

In 1989 Congress established and charged the National Commission on Severely Distressed Public Housing to: (1) identify severely distressed public housing developments; (2) assess strategies to improve their conditions; and (3) prepare a national action plan to address them. The report concluded that 86,000 of the 1.3 million public housing units in the nation were severely distressed.²¹⁴ It estimated that replacing these units would cost \$7.5 billion in 1992 dollars. Instead, the commission proposed a comprehensive way to address low-cost housing and requested that Congress fund a 10-year program at approximately \$750 million per year.²¹⁵ At the beginning of 1993, Congress appropriated the first \$300 million for the Urban Revitalization Demonstration, now the HOPE VI, program.²¹⁶ Research has since documented that HOPE VI projects are usually found in highly racially segregated communities.²¹⁷

The sunset date for the HOPE VI program was September 30, 2002. Nevertheless, Congress appropriated \$574 million for 2003, an amount identical to that in 2002.²¹⁸ However, the Bush administration sought to eliminate or zero out the HOPE VI program for fiscal year 2004, a move that met furious opposition from Senate and House members of both parties. In the end, Congress appropriated \$150 million for the HOPE VI program in 2004, a 73.7 percent decrease from the previous two years.²¹⁹ The administration again sought to eliminate HOPE VI in 2005, making no provision for the program in its budget.²²⁰ The rationale for zeroing out the program, according to a HUD representative, was that HOPE VI had met the original purpose of demolishing about 100,000 crumbling units. Highlighting some key administration concerns that also contributed to its decision, he noted that only approximately 23,000 of the 60,000 units to be built under existing plans have been built; and only 14 of 165 grants awarded between 1993 and 2001 have been completed.²²¹

²¹⁴ Susan J. Popkin, Bruce Katz, Mary K. Cunningham, Karen Brown, Jeremy Gustafson, and Margery Austin Turner, *A Decade of HOPE VI: Research Findings and Policy Challenges*, May 2004, p. 1 (hereafter cited as Popkin et al., *A Decade of HOPE VI*).

²¹⁵ *Ibid.*, p. 1.

²¹⁶ U.S. Department of Housing and Urban Development, "HOPE VI Program Authority and Funding History," August 2003, p. 1. In the early years, HOPE VI operated through appropriations only and was authorized for the first time in 1999 when the Quality Housing and Work Responsibility Act of 1998 (Public Housing Reform Act) amended section 24 of the 1937 Housing Act. *See* The Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 2461, 2518 (codified as amended at 42 U.S.C. § 1437v (2000)).

²¹⁷ Susan J. Popkin, Diane K. Levy, Laura E. Harris, Jennifer Comey, Mary K. Cunningham, Larry Buron, with William Woodley, *HOPE VI Panel Study: Baseline Report*, September 2002, p. iv.

²¹⁸ Dee NaQuin Shafer, "The Perils of 2003," *Journal of Housing and Community Development*, January/February 2004, p. 20; National Low Income Housing Coalition, "2003 Advocates' Guide to Housing and Community Development Policy," <<http://www.nlihc.org/advocates/hopevi.htm>> (last accessed May 26, 2004) (hereafter cited as the NLIHC, "2003 Advocates' Guide").

²¹⁹ Henry Cisneros and Bruce Katz, "Keep HOPE (VI) Alive," *Atlanta Journal-Constitution*, May 17, 2004, <http://www.brookings.edu/urban/20040517_metroview.htm> (last accessed May 24, 2004).

²²⁰ *Ibid.*

²²¹ Cory Reiss, "Some Balk at Killing HOPE VI Housing Grant," *Sunday Star-News* (Wilmington, NC), pp. 1A, 10A.

The NLIHC states that elimination of the HOPE VI program will force many of the 1.2 million public-housing families, predominantly minority, to continue to live in substandard housing.²²² At the same time, NLIHC supports reform of the HOPE VI program, emphasizing that as currently implemented, the program has a negative impact on some low-income households. Low-income housing advocates' concerns fall into two groups: (1) how the existing residents of public housing developments that become HOPE VI projects are faring; and (2) the program's contribution to the overall loss of affordable housing to extremely poor families.²²³ A recent Urban Institute study, *A Decade of HOPE VI: Research Findings and Policy Challenges*, points to the urgent need for reform if the HOPE VI program is to fulfill its goal of improving the life chances of very low-income minority families and communities.²²⁴ On balance, however, the report supports the continuation of the HOPE VI program.²²⁵

Fair Housing and Civil Rights Enforcement

Recognizing that justice delayed is too often justice denied, the Commission recently examined HUD complaint data to determine how successful HUD and the state and local agencies that participate in the Fair Housing Assistance Program (FHAP) have been in completing investigations of fair housing complaints within the congressional mandate of 100 days.²²⁶ At the beginning of fiscal year 2003, FHAP agencies were processing 64.5 percent of all fair housing open cases while HUD was processing the remainder.²²⁷ The average age of HUD's open cases was 143 days compared with 165 days in FHAP agencies. More importantly, 30.0 percent of HUD's open cases were aged, or more than 100 days old, compared with 44.7 percent of FHAP cases. The average age of HUD's aged cases was 400 days, compared with 317 days at FHAP agencies. HUD and the FHAP agencies have a dismal track record in meeting the congressional mandate of 100 days. In 2003, complaints alleging discrimination on the bases of race, national origin, and color comprised 54.6 percent of all fair housing complaints.²²⁸ It is fair to say that the failure of HUD and FHAP agencies to meet the congressional mandate of 100 days disproportionately affects minorities.

The National Fair Housing Alliance's (NFHA) 2004 Fair Housing Trends Report documents continuing high levels of housing discrimination.²²⁹ Recent HUD research also documents significant levels of discrimination against blacks, Latinos, Native Americans, Asian Americans,

²²² NLIHC, "President Bush Travels to NM, AZ."

²²³ NLIHC, "2003 Advocates' Guide."

²²⁴ Popkin et al., *A Decade of HOPE VI*, p. 5.

²²⁵ Ibid.

²²⁶ FHAP agencies have fair housing laws that HUD certified to be substantially equivalent to FHA. FHEO manages FHAP which provides financial assistance to supplement the enforcement activities of HUD-certified state and local agencies. FHAP funds training, case processing, education and outreach, and improvements to agency data and information systems. U.S. Commission on Civil Rights, *Funding Civil Rights Enforcement: 2004*, June 2003, p. 41.

²²⁷ Derived from HUD data. Kirk I. Perry, senior program analyst, U.S. Department of Housing and Urban Development, Office of Policy and Program Evaluation, submitted via email, Mar. 11, 2004.

²²⁸ U.S. General Accounting Office, "Fair Housing: Opportunities to Improve HUD's Oversight and Management of the Enforcement Process," April 2004, p. 73. Note that some complaints have more than one basis.

²²⁹ National Fair Housing Alliance, "2004 Fair Housing Trends Report," April 2004.

and Pacific Islanders.²³⁰ The Commission's analysis of fair housing complaints filed with HUD and the FHAP agencies showed a 9.1 percent increase between 2001 and 2002, from 7,010 to 7,649 cases.

It is helpful to view HUD and FHAP complaints in a larger context. NFHA maintains records on complaints filed with the organization and collects similar data from HUD, FHAP agencies, and DOJ. The combined totals from these sources for 2001 and 2002 were 23,507 and 25,246, respectively. NAFHA states that the combined total for 2002 "is less than one percent of the estimated incidences of illegal housing discrimination that occurs each year in the United States."²³¹

Despite the prevalence of unreported discrimination, the secretary-initiated complaint process remains a little-used tool. The secretary, through the FHEO assistant secretary, filed only three such complaints between 2001 and 2003, one in 2002 and two in 2003. The National Council on Disability stated that HUD must make greater use of secretary-initiated complaints as a part of its comprehensive effort to more effectively enforce fair housing laws.²³² This is a powerful strategy against broad-based discrimination and its frequent use advances civil rights enforcement.

At the end of the Bush term, what is to be made of his legacy on housing? His housing initiative is inadequately funded because of a failure to grasp the magnitude of the affordable housing crisis for minorities, especially African Americans and Native Americans.²³³ The initiative is imbalanced as it ignores affordable rental housing for low-income minority families, among others. Rental housing is an important component of a comprehensive national housing plan.²³⁴ It is also shortsighted, as rental housing is one of the first steps on the road to homeownership.²³⁵ Further, the administration's attempts to dismantle the Section 8 and HOPE VI programs will disproportionately hurt minority families since they are among the main beneficiaries. The administration's 2004 budget action on Section 8 already has visited upon thousands and thousands of poor minorities the stark reality of continued residence in substandard housing or even homelessness.²³⁶

If not challenged and stopped, the proposed actions on the Section 8 and HOPE VI programs will compound these problems manyfold. Beyond affordable homeownership and rental housing is the urgent need to eliminate housing discrimination that blocks minority access to such opportunities. In light of the negligible number of secretary-initiated complaints, and average age

²³⁰ Ibid., p. 2. The HUD study is titled *Housing Discrimination Study 2000* and was carried out in three phases.

²³¹ National Fair Housing Alliance, "Less than One Percent of Illegal Housing Discrimination Reported, According to New Report by National Fair Housing Alliance," press release, Apr. 16, 2003.

²³² National Council on Disability, *Reconstructing Fair Housing*, Nov. 6, 2001, p. 12.

²³³ U.S. Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*, July 2003, pp. ix-x.

²³⁴ Local Initiatives Support Corporation, "Minority Homeownership Statement to President George W. Bush from Sponsoring Organizations," <<http://www.lisc.org/whatsnew/policy/presidentletter.shtml>> (last accessed July 1, 2004).

²³⁵ Pete Yost, "Bush Ties Tax Relief to Homeownership in Radio Address," Associated Press, Mar. 27, 2004; NLIHC, "President Bush Travels to NM, AZ."

²³⁶ Anne Paine, "Housing Cuts Worry Advocates for Homeless," *The Tennessean*, Apr. 8, 2004, p. 8B.

of open cases that well surpasses the congressional mandate of 100 days, it is reasonable to conclude that timely justice may not be forthcoming for the many victims of housing discrimination.

ENVIRONMENTAL JUSTICE

Researchers have asserted that “there are times when environmental problems raise important civil rights questions.”²³⁷ Civil rights violations occur when certain communities, especially black, Hispanic, and Native American, are inequitably burdened by environmental ills.²³⁸ There are many historical and present-day examples of environmental injustice. Among them:

- Public and private initiatives have targeted minority communities for locating toxic facilities, such as incinerators, oil refineries, power plants, landfills, and diesel bus stations;
- Land-use policies and unhealthy and hazardous conditions have uprooted working class minority communities from neighborhoods; and
- Low-income people and minorities have been excluded from decisionmaking regarding environmental policies, programs, and permits that affected them.²³⁹

Myriad reasons account for the fact that many hazardous waste sites are located in minority communities, ranging from discrimination to economic motivation. Regardless, minority communities bear a disproportionate share of the burden of these sites, including exposure to hazardous conditions and life-threatening chemicals, such as pesticides and cancer-causing solvents, a circumstance that has led people of color to increasingly seek justice from discriminatory environmental policies over the past three decades.²⁴⁰

Environmental justice seeks the equitable treatment of all racial and income groups and cultures in the development, execution, and enforcement of environmental laws, rules, and policies, including their meaningful participation in the decisionmaking processes of the government. Further, environmental justice provides a framework for minorities and low-income populations

²³⁷ U.S. Commission on Civil Rights, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice*, October 2003, p. 181 (hereafter cited as USCCR, *Not in My Backyard*).

²³⁸ Noel Wise, “To Debate or to Rectify Environmental Injustice: A Review of Faces of Environmental Racism,” *Ecology Law Quarterly*, vol. 30 (2003), p. 353.

²³⁹ Asian Pacific Environmental Network, “Environmental Justice and API Issues,” 2002, <http://www.Apen4ej.org/issues_what.htm> (last accessed Apr. 21, 2004) (hereafter cited as APEN, “Environmental Justice and API Issues”).

²⁴⁰ Musa Kenheel, “Lowering the Bar: The Need for New Legislation and Liberalization of Current Laws to Combat Environmental Racism,” *Temple Environmental Law and Technology Journal*, vol. 20 (fall 2001), pp. 105, 106 (hereafter cited as Kenheel, “Lowering the Bar”), citing Paul Mohai and Bunyan Bryant, “Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards,” *Colorado Law Review*, vol. 63 (1992), p. 921; Vicki Been, “What’s Fairness Got to Do With It?: Environmental Justice and the Siting of Locally Undesirable Land Uses,” *Cornell Law Review*, vol. 78 (September 1993), p. 1001; Richard J. Lazarus, “Pursuing Environmental Justice: The Distributional Effects of Environmental Protection,” *Northwestern University Law Review*, vol. 87 (1993), p. 787; USCCR, *Not in My Backyard*.

to identify the continually reinforced political and economic assumptions underlying environmental injustices.²⁴¹

A History of Environmental Justice Policies

In 1970, to better address pollution concerns, President Nixon reorganized environmental functions of federal agencies and created the Environmental Protection Agency (EPA).²⁴² As a federal grant-making agency, EPA has an obligation to ensure compliance with Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, or national origin in programs and activities receiving federal financial assistance and requires federal agencies to regulate against discriminatory practices.²⁴³ The law protects against both intentional discrimination and actions that have a disparate impact on minorities, although the Supreme Court has determined that individuals can only pursue cases alleging the former. They must rely on federal agencies to bring disparate impact environmental justice lawsuits against entities that receive federal funding.²⁴⁴ The statute and Title VI regulations provide EPA with the authority to promote environmental justice policies.²⁴⁵

In the 1970s, mounting evidence of discrimination prompted the birth of the environmental justice movement. In 1979, the residents of an East Houston, Texas, community alleged that the decision to place a garbage dump in their neighborhood was racially motivated and in violation of their civil rights.²⁴⁶ Although the court found that the placement of the dump would irreparably harm the community, it was unable to establish whether intentional discrimination had occurred or whether the site's placement reflected a discriminatory pattern. The case, however, launched the use of courts as a tool and highlighted the need to collect data and make it available to communities challenging environmental decisions.²⁴⁷

In 1982, a citizen protest against a dump containing highly toxic waste, which the state of North Carolina was forcing on one of the poorest counties in the state with a population that was more

²⁴¹ Christine Todd Whitman, former administrator, U.S. Environmental Protection Agency, memorandum to assistant administrators, general counsel, inspector general, chief financial officer, associate administrators, regional administrators, office directors, Aug. 9, 2001, re: EPA's commitment to environmental justice (hereafter cited as Whitman memo); APEN, "Environmental Justice and API Issues."

²⁴² USCCR, *Not in My Backyard*, p. 30

²⁴³ 42 U.S.C. § 2000d (2000). See also U.S. Department of Justice, Civil Rights Division, "Overview of Title VI of the Civil Rights Act of 1964," n.d., <<http://www.usdoj.gov/crt/cor/coord/titlevi.htm>> (last accessed Apr. 30, 2004); and Kenheel, "Lowering the Bar," p. 112, citing *South Bronx Coalition for Clean Air, Inc. v. Conroy*, 20 F. Supp. 2d 565, 572 (S.D.N.Y. 1998).

²⁴⁴ *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (holding that individual complainants do not have private rights of action to enforce regulations promulgated under section 602 of Title VI of the Civil Rights Act of 1964, which governs disparate impact discrimination).

²⁴⁵ U.S. Environmental Protection Agency, "Environmental Justice Initiatives and Annual Report, 1993," p. 11, <http://www.epa.gov/compliance/resources/publications/ej/ej_annual_report_1993.pdf> (last accessed Apr. 26, 2004) (hereafter cited as EPA, "Environmental Justice Initiatives," 1993).

²⁴⁶ See *Bean v. Southwestern Waste Mgmt. Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979), aff'd mem., 782 F.2d 1038 (5th Cir. 1986); *Warren County v. State of North Carolina*, 528 F. Supp. 276 (E.D. N.C. 1981).

²⁴⁷ USCCR, *Not in My Backyard*, p. 13; see also *Bean*, 482 F. Supp. at 673.

than 84 percent black, captured national attention.²⁴⁸ As a result, a congressional delegate asked the U.S. General Accounting Office to conduct a study of hazardous waste landfill sites in the region.²⁴⁹ The study located four hazardous commercial waste landfills—three were in predominantly black communities and the fourth was in a low-income neighborhood.²⁵⁰

As evidence mounted, the need for strong enforcement became clear. EPA issued Title VI regulations in 1972. In 1984, EPA strengthened the regulations to grant the administrator authority to refuse, delay, or discontinue funding to any program recipient operating in a discriminatory manner. The regulations, however, were not enforced against state and local funding recipients until 1993.²⁵¹

The documented patterns of discriminatory dumping and the lack of environmental justice enforcement precipitated President Clinton's 1995 issuance of Executive Order 12,898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." The order directs federal agencies to develop agencywide environmental justice strategies and to review their programs, policies, and activities that have a negative environmental impact on minority and low-income communities.²⁵² Federal agencies are required to create accountability standards and measures to evaluate the goals of the executive order, with EPA the lead agency.²⁵³

Integration of Environmental Equity in EPA Policy

To promote Executive Order 12,898, in August 2001 President Bush asked then EPA Administrator Christine Todd Whitman to issue a memorandum affirming the administration's commitment to environmental justice, including its integration into all programs, policies, and activities.²⁵⁴ EPA headquarters and regional offices responded to the memorandum by developing action plans for obtaining measurable justice outcomes. The plans mandate that information be shared between program offices; establish data collection, management, and evaluation standards; and require that information be shared with and input accepted from external stakeholders. Program and regional offices began implementing the plans in 2003.²⁵⁵

²⁴⁸ *Warren County*, 528 F. Supp. at 276; Robert D. Bullard, Environmental Justice Resource Center, "Environmental Racism PCB Landfill Finally Remedied Bust No Reparations for Residents," <<http://www.ejrc.cau.edu/warren%20county%20rdb.htm>> (last accessed Apr. 13, 2004).

²⁴⁹ U.S. General Accounting Office, *Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities*, June 1983, p. 1 (hereafter cited as GAO, *Siting of Hazardous Waste Landfills*). EPA's Region IV is comprised of Georgia, Florida, Mississippi, Alabama, Kentucky, Tennessee, North Carolina, and South Carolina.

²⁵⁰ EPA, "Environmental Justice Initiatives," 1993, p. 2; GAO, *Siting of Hazardous Waste Landfills*, p. 1.

²⁵¹ USCCR, *Not in My Backyard*, p. 31.

²⁵² Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 3 C.F.R. 859 (1995).

²⁵³ *Id.*

²⁵⁴ Whitman memo.

²⁵⁵ EPA, Office of Environmental Justice, "EPA's Commitment to Environmental Justice," fact sheet, May 2003, EPA/300-F-03-003 (hereafter cited as OEJ, "Commitment to Environmental Justice"). See U.S. Environmental

In the summer of 2003, EPA also launched a \$1.5 million Environmental Justice Collaborative Problem Solving Grant Program for 15 nonprofit community-based organizations, the goal of which is to assist community organizations in finding viable solutions.²⁵⁶ Among the beneficiaries are the Coalition for West Oakland Revitalization, which is addressing the air quality problem in one of the poorest neighborhoods in the Bay Area of California, and the Pioneer Valley Project, Inc., which seeks to resolve health and related economic problems of Vietnamese women employed in nail salons in Springfield, Massachusetts, and surrounding areas caused by exposure to hazardous chemicals.²⁵⁷

Despite these initiatives, the National Academy of Public Administration (NAPA) recommended that EPA set clear expectations for producing results and that the agency establish accountability standards.²⁵⁸ According to NAPA, the administrator's August 2001 memorandum was an example of how the agency espouses strong language and expectations, but fails to provide specific agencywide measures of accountability.²⁵⁹ The study identified several reasons for the deficiency, including EPA's failure to establish goals for specific outcomes or adopt methods for measuring progress.²⁶⁰ Witnesses testifying before the Commission at a 2002 hearing on environmental justice stated that similar problems are found at other agencies.²⁶¹ Since EPA does not identify specific outcomes nor measure progress, it is difficult to assess whether progress has been made toward its goals.²⁶²

Furthermore, EPA's inspector general has determined that the former Bush administrator's memorandum changed the focus of the environmental justice program by deemphasizing minority and low-income populations. The inspector general also found that despite a decade of active pursuit, Executive Order 12,898 is still not part of EPA's core mission.²⁶³ President Bush did not consider implementation of the order a primary goal.²⁶⁴ The inspector general notes that EPA has not developed a clear vision or a comprehensive strategic plan, nor established values, goals, expectations, and performance measurements regarding the order. Further, EPA has not

Protection Agency, "Action Plans to Integrate Environmental Justice," May 21, 2004 <<http://www.epa.gov/compliance/resources/reports/actionplans/ej/index.html>> (last accessed July 20, 2004). This Web site includes links to headquarters and regional action plans. See U.S. Environmental Protection Agency, Office of Environmental Information, "Office of Environmental Information (OEI) Environmental Justice Action Plan for FY 2004–2005," Nov. 17, 2003, for an example of an action plan.

²⁵⁶ OEJ, "Commitment to Environmental Justice."

²⁵⁷ U.S. Environmental Protection Agency, "Environmental Justice Collaborative Problem-Solving Cooperative Agreement Awards 2003–2004," June 7, 2004.

²⁵⁸ USCCR, *Not in My Backyard*, p. 145.

²⁵⁹ *Ibid.*, citing National Academy of Public Administration, *Environmental Justice in EPA Permitting: Reducing Pollution in High-Risk Communities Is Integral to the Agency's Mission*, 2001, pp. 2, 17 (hereafter cited as NAPA, *Environmental Justice in EPA Permitting*).

²⁶⁰ USCCR, *Not in My Backyard*, p. 145, citing NAPA, *Environmental Justice in EPA Permitting*, p. 2.

²⁶¹ USCCR, *Not in My Backyard*, pp. 162–66, 176.

²⁶² *Ibid.*, p. 145, citing NAPA, *Environmental Justice in EPA Permitting*, pp. 2, 17.

²⁶³ U.S. Environmental Protection Agency, Office of the Inspector General, "Evaluation Report: EPA Needs to Consistently Implement the Intent of the Executive Order on Environmental Justice, report no. 2004-P-00007," Mar. 1, 2004 (hereafter cited as EPA, "Evaluation Report") pp. 7–11.

²⁶⁴ See The White House, "Key Bush Environmental Accomplishments," n.d.

provided regional or program offices with standards for what constitutes a minority or low-income community, or defined the term “disproportionately” as it relates to environmental justice. If EPA does not identify parameters for environmental justice, it will not be able to comply with Executive Order 12,898.²⁶⁵

Environmental Justice Enforcement and Guidance

In May 2001, Administrator Whitman formed a task force to resolve 66 open Title VI complaints that had accumulated at EPA between 1998 and 2001. Whitman assembled the task force to take advantage of a congressional decision to allow EPA to use its 2002 appropriations to investigate and resolve Title VI complaints. By February 8, 2002, Whitman had reduced the complaint backlog to 41. Of the 41 remaining cases, 34 were identified as acceptable for investigation.²⁶⁶ Of the 23 complaints filed since February 2002, two were accepted for investigation and 13 were under review as of May 2004.²⁶⁷

Although EPA was commended for reducing the existing backlog and accepting complaints for investigation, environmental justice experts testified before the Commission that some had been improperly handled. For example, a complaint against the Michigan Department of Environmental Quality concerning its issuance of permits for a proposed steel mill was rejected without an investigation into its disparate impact claim. According to one researcher, EPA’s neglect of the disparate impact claim raises concerns that the task force’s objective to reduce the backlog supercedes its obligation to appropriately investigate complaints.²⁶⁸

These concerns merit attention because EPA receives the bulk of Title VI environmental grievances and has taken the lead in providing guidance to environmental stakeholders, advocates, and legal scholars. Adding to uncertainties over EPA’s complaint processing is its failure to issue final Title VI guidance defining: (1) what constitutes disparate impact; (2) when complaints can be filed; (3) how long complaints take to process; (4) how communities are given information about participation in decisionmaking; and (5) how the interests of industry and communities can be balanced. Although EPA has issued various Title VI interim guidance on these issues, final guidance is needed to inform communities continually exposed to environmental pollutants of the important elements of an adverse disparate impact violation. Furthermore, the delay has left state and local regulators, among others, unable to determine when an industrial facility may be violating Title VI.²⁶⁹

²⁶⁵ EPA, “Evaluation Report,” pp. 7–11.

²⁶⁶ USCCR, *Not in My Backyard*, pp. 55–56.

²⁶⁷ U.S. Environmental Protection Agency, “Title VI Complaints Filed with EPA,” May 28, 2004 <<http://epa.gov/civilrights/recdecsn.htm>> (last accessed July 13, 2004).

²⁶⁸ USCCR, *Not in My Backyard*, pp. 56–57.

²⁶⁹ *Ibid.*, pp. 75–76. According to Yasmin Yorker, external compliance assistant director, Office of Civil Rights, U.S. Environmental Protection Agency, as of Aug. 11 2004, EPA had not yet issued final Title VI guidance.

Defining Environmental Standards and Identifying Hazards

The Bush administration has undertaken several actions that undermine environmental justice. In so doing, it seems to believe that minority and low-income populations are not disproportionately affected by environmental pollutants. For example, a 2003 EPA report failed to embrace the notion that poor and disadvantaged populations reside in areas with higher concentrations of pollutants, or that the distribution of environmental burdens is based on race, income, and political power. According to researchers, this claim was a clear reversal of EPA's historical stand that minority and low-income communities are overburdened with environmental pollutants and an apparent retreat from Executive Order 12,898. EPA and other federal agencies typically do not cooperate with health policy experts and affected minority and low-income communities to eliminate or reduce environmental pollutants.²⁷⁰

Furthermore, under President Bush, the EPA has yet to develop a standard for assessing the cumulative impact of environmental hazards.²⁷¹ Cumulative impact is the "threat to public health caused by the exposure to the sum total of releases" of these hazards.²⁷² EPA offices, including the Office for Civil Rights, have published guidance on measuring the risks. The agency has not, however, developed a cumulative impact standard, indicating that the effort to establish a causal relationship between pollutants and health problems is difficult.²⁷³ EPA's delay prevents the government from eliminating the hazardous environmental conditions foisted upon minority communities. For example, one researcher described a mostly minority community in a region between Baton Rouge and New Orleans, Louisiana, where the cumulative environmental hazards produced by local industry far exceed the U.S. average. According to this researcher, environmental pollutants are so numerous that the region is known as "Cancer Alley."²⁷⁴

Fostering Public Participation

The administration has also failed to increase the participation of affected minority and low-income communities in information gathering and dissemination and decisionmaking processes. Meaningful public participation by affected communities in the decisionmaking process is one of the cornerstones of environmental justice. Furthermore, community input is integral to planning, monitoring, problem solving, implementation, and evaluation of environmental policies and practices. Yet, EPA has not conducted public meetings to explain Executive Order 12,898, its other environmental justice policies, or how affected communities could participate in decisionmaking. Other agencies with environmental justice components have similar problems.²⁷⁵

²⁷⁰ USCCR, *Not in My Backyard*, p. 125. See U.S. Environmental Protection Agency, "Draft Report on the Environment 2003," 2003, pp. 4–12 (hereafter cited as EPA, "Draft Report").

²⁷¹ See U.S. Environmental Protection Agency, "Framework for Cumulative Risk Assessment," May 2003, p. xvii (hereafter cited as EPA, "Framework").

²⁷² USCCR, *Not in My Backyard*, pp. 124–25. See U.S. Environmental Protection Agency, "Fact Sheet: Release of EPA's Framework for Cumulative Risk Assessment," May 2003; EPA, "Framework," p. xvii.

²⁷³ USCCR, *Not in My Backyard*, p. 125.

²⁷⁴ *Ibid.*, p. 124.

²⁷⁵ *Ibid.*, pp. 105–19, 169–70.

General Environmental Policies with Civil Rights Relevance

Finally, the administration has adopted general environmental policies that affect minority and low-income communities seemingly without considering the civil rights consequences. For example, in 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act of 2001 into law.²⁷⁶ Although on its face, the act seems like a viable plan to clean up abandoned and contaminated sites and redevelop them for commercial and residential purposes, it fails to account for the reality that white neighborhoods, regardless of economic status, generally fare better under such programs than minority communities. White communities experience faster cleanup, better results, and harsher assessments against those failing to clean them up as expected, despite that many abandoned industrial sites exist in minority and low-income communities.²⁷⁷

Moreover, the act removes legal responsibility for contaminated sites from prospective buyers, contiguous property owners, and “innocent” landowners. In so doing, it exempts small businesses from fines when they or their agents, for example, dispose of trash at waste sites and provides incentive for redevelopment.²⁷⁸ However, this exemption raises concern that removing responsibilities from companies will also remove legal remedies available to those most hurt by contamination, which are disproportionately minority and low-income communities. Furthermore, redevelopment in minority communities is not always successful because there is no vigorous enforcement of regulations that establish redevelopment standards.²⁷⁹

Similarly, the Bush administration has supported the proposed Clean Skies Act despite that the proposal does not provide environmental justice safeguards. The Clean Skies Act would repeal the Clean Air Act’s requirement that facilities install updated pollution control equipment when expanding their capacities.²⁸⁰ The Clean Skies Act also expands emissions allowances within geographic regions to include nitrogen oxides and mercury, in addition to sulfur dioxide. Under the Clean Skies Act, power plants must have one allowance for every ton of pollution they emit. A power plant that reduces emissions can sell unused allowances on the open market to another power plant.²⁸¹ Consequently, the proposed act permits power plants to emit unlimited amounts of nitrogen oxides and mercury provided they purchase allowances from environmentally sound plants.²⁸²

²⁷⁶ Brownfields Revitalization and Environmental Restoration Act of 2001, Pub. L. No. 107-118, Sec. 1, tit. II, § 211, 115 Stat. 2356, 2360–61 (codified at 42 U.S.C.S. § 9601(39) (2004)). Brownfields are abandoned or underutilized industrial or commercial properties where redevelopment is hindered by possible environmental contamination. See U.S. Environmental Protection Agency, “President Signs Legislation to Clean Environment and Create Jobs,” Jan. 11, 2002, <http://www.epa.gov/epahome/headline_011102.htm> (last accessed Sept 1, 2004).

²⁷⁷ USCCR, *Not in My Backyard*, pp. 13–28.

²⁷⁸ *Ibid.*, pp. 143–44.

²⁷⁹ *Ibid.*, pp. 25, 177.

²⁸⁰ H.R. 999, 108th Cong. (2003); S. 485, 108th Cong. (2003); USCCR, *Not in My Backyard*, p. 37.

²⁸¹ The White House, “Executive Summary—The Clear Skies Initiative,” Feb. 14, 2002, <<http://www.whitehouse.gov/news/releases/2002/02/clearskies.html>> (last accessed July 15, 2004) (hereafter cited as White House, “Executive Summary—Clear Skies”).

²⁸² H.R. 999, 108th Cong. (2003); S. 485, 108th Cong. (2003); White House, “Executive Summary—Clear Skies”; USCCR, *Not in My Backyard*, p. 37.

According to researchers, allowing power plants to increase their emissions may heighten the concentration of toxins in predominantly minority and low-income communities because many of the plants that purchase allowances are located in such areas. For example, in San Francisco, 87 percent of the pollution allowances produced by environmentally sound power plants were purchased by refineries and power plants in heavily industrialized and predominately minority and low-income communities.²⁸³

In sum, the Bush administration has not adequately addressed environmental justice issues. Despite developing environmental justice goals, EPA has not created methods to measure the administration's progress toward them.²⁸⁴ Although EPA has reduced its backlog of Title VI complaints, concerns have been raised about those that were dismissed or rejected. The administration also does not recognize or acknowledge that minority and low-income communities are disproportionately exposed to environmental pollutants.²⁸⁵ Despite both the administration's position and whether municipalities and states are intentionally carrying out discriminatory policies, numerous studies reveal that minority communities are home to a disproportionate share of health hazards and waste sites. Minority and low-income people are victimized, and the Bush administration must acknowledge that environmental injustice exists.²⁸⁶

RACIAL PROFILING

Too many of our citizens have cause to doubt our nation's justice, when the law points a finger of suspicion at groups, instead of individuals. All our citizens are created equal, and must be treated equally . . . [Racial profiling is] wrong and we will end it in America.²⁸⁷

– President George W. Bush, February 27, 2001

Shortly after he took office, President Bush expressed an ambitious intent: to eliminate racial profiling in America. As the nation would soon see, however, events during his first year resulted in policies that facilitate, rather than preclude such activity.

Racial profiling is the act of assuming that individuals of one race or ethnicity are more likely than others to engage in misconduct.²⁸⁸ The concept belies the fundamental tenets of equality in the Constitution, as the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment prohibit selective enforcement of the law based on race. However, legal precedent has allowed the use of an alleged suspect's race in stops and searches and granted deference to

²⁸³ H.R. 999, 108th Cong. (2003); S. 485, 108th Cong. (2003).

²⁸⁴ USCCR, *Not in My Backyard*, p. 145, citing NAPA, *Environmental Justice in EPA Permitting*, pp. 2.

²⁸⁵ USCCR, *Not in My Backyard*, p. 125. See EPA, "Draft Report," pp. 4–12.

²⁸⁶ Kenheel, "Lowering the Bar," p. 106.

²⁸⁷ President George W. Bush, Address to the Joint Session of Congress, Feb. 27, 2001, <<http://www.whitehouse.gov/news/releases/2001/02/print/20010228.html>> (last accessed July 1, 2004) (hereafter cited as Bush, Address to Congress, Feb. 27, 2001).

²⁸⁸ U.S. Department of Justice, "Racial Profiling," fact sheet, June 17, 2003, <http://www.usdoj.gov/opa/pr/2003/June/racial_profiling_fact_sheet.pdf> (last accessed June 22, 2004).

police officers' interpretations of reasonable suspicion and probable cause, creating an ambiguous standard for "acceptable" and unlawful profiling.²⁸⁹

Racial and ethnic profiling has long plagued minority communities, restricting freedoms and perpetuating stereotypes. Law enforcement officers have targeted African Americans, Asian Americans, Native Americans, Hispanics, and Arab Americans for unwarranted traffic, airport, or pedestrian stops, searches, and arrests. For more than 20 years, the Commission has monitored profiling in cities and states nationwide.²⁹⁰ The Commission has consistently found that racial tensions, due to profiling and stereotyping, exist between police officers and minorities. Furthermore, if properly trained and culturally sensitive, officers can handle policing with the level of professionalism required to protect lives, property, and civil rights within the boundaries of the law.²⁹¹

In the 1990s, racial profiling became so pervasive, it garnered renewed civil rights and liberties attention. Familiar examples include police stopping a disproportionate number of African American and Hispanic drivers for traffic offenses and using the opportunity to search for drugs, illegal weapons, and other criminal activity.²⁹² In 1999, an American Civil Liberties Union report stated:

Race-based traffic stops turn one of the most ordinary and quintessentially American activities into an experience fraught with danger and risk for people of color. Because traffic stops can happen anywhere and anytime, millions of African Americans and Latinos alter their driving habits in ways that would never occur to most white Americans.²⁹³

²⁸⁹ U.S. Commission on Civil Rights, *Revisiting Who's Guarding the Guardians? A Report on Police Practices and Civil Rights in America*, November 2000, p. 35. See *Whren v. United States*, 517 U.S. 806 (1996); *United States v. Travis*, 62 F.3d 170 (6th Cir. 1995).

²⁹⁰ Ohio Advisory Committee to the U.S. Commission on Civil Rights (USCCR), *Policing in Cincinnati, Ohio: Official Policy vs. Civilian Reality*, January 1981; Nebraska Advisory Committee to USCCR, *Police-Community Relations in Omaha*, June 1982; Florida Advisory Committee to USCCR, *Police-Community Relations in Miami*, November 1989; New Jersey Advisory Committee to USCCR, *Incidents of Bigotry and Violence in Essex County*, December 1988; Florida Advisory Committee to USCCR, *Community Relations in Tampa*, September 1991; Illinois Advisory Committee to USCCR, *Police Protection of the African American Community in Chicago*, September 1993; West Virginia Advisory Committee to USCCR, *Police-Community Relations in Southern West Virginia*, March 1993; USCCR, *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination, Volume I: The Mount Pleasant Report*, January 1993; Wisconsin Advisory Committee to USCCR, *Police Protection of the African American Community in Milwaukee*, November 1994; New Jersey Advisory Committee to USCCR, *The Use and Abuse of Police Powers: Law Enforcement Practices and the Minority Community in New Jersey*, July 1994; West Virginia Advisory Committee to USCCR, *Rising Racial Tensions in Logan County West Virginia*, August 1995; USCCR, *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination, Volume III: The Chicago Report*, September 1995; USCCR, *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination, Volume V: The Los Angeles Report*, May 1999; USCCR, *Police Practices and Civil Rights in New York*, August 2000 (hereafter cited as USCCR, *Police Practices in New York*).

²⁹¹ USCCR, *Police Practices in New York*.

²⁹² Heather McDonald, "The Myth of Racial Profiling," *City Journal*, vol. 11, no. 2 (spring 2001).

²⁹³ David A. Harris, "Driving While Black: Racial Profiling on Our Nation's Highways," American Civil Liberties Union, special report, June 1999.

History provides myriad other examples of profiling, notably Japanese internment during World War II. Asian Americans and Pacific Islanders have also been the subject of increased scrutiny and profiling in recent years. For example, Wen Ho Lee, an American citizen of Taiwanese descent and nuclear scientist, was accused of mishandling secret computer data, which precipitated widespread reports from Asian Pacific American scientists and engineers that they were being unfairly scrutinized by employers and coworkers on suspicion of spying or threatening national security.²⁹⁴

After the public discovered the ethnicity of the individuals who carried out the September 11, 2001, attacks, Arab Americans and Muslims increasingly became targets of law enforcement scrutiny. Law enforcement officials' underlying prejudices and presumptions of guilt tainted routine security procedures. Profiling criteria came to include ethnicity, national origin, and religion, and took on many forms, from heightened scrutiny and harassment at airports to selective enforcement of visa regulations. Arab Americans and Muslims complained that airline personnel and airport security denied them access to aircraft and subjected them to unwarranted searches and harassment.²⁹⁵ In some instances, airport security removed individuals from planes because members of the crew or passengers did not "feel safe."²⁹⁶ On a larger scale, profiling resulted in detentions, forced registration, and extensive monitoring of persons of Middle Eastern descent (see chapter 4).²⁹⁷

Profiling as a Law Enforcement Tool

Critiques of racial profiling's utility as a law enforcement practice are plentiful. Some law enforcement experts believe that racial profiling is a useful and appropriate tool to focus limited resources on those who are most likely to engage in unlawful behavior.²⁹⁸ They argue that there might be times when it is appropriate to violate an individual's rights to protect the welfare of the nation.²⁹⁹ However, studies reveal that racial profiling is an inefficient and ineffective approach to fighting crime.³⁰⁰ By focusing on a certain group, law enforcement leaves other potential offenders unchallenged. Moreover, opponents of profiling argue that it is an ineffective security tool because it distracts from real investigatory work, such as examination of behavioral clues or suspect-specific descriptions, and creates division between communities and law enforcement.³⁰¹

²⁹⁴ USCCR, *Revisiting Who's Guarding the Guardians?* chapter 3.

²⁹⁵ Leadership Conference on Civil Rights Education Fund, *Wrong Then, Wrong Now, Racial Profiling Before and After September 11, 2001*, February 2003 (hereafter cited as LCCR, *Wrong Then, Wrong Now*).

²⁹⁶ American-Arab Anti-Discrimination Committee Research Institute, *Report on Hate Crimes & Discrimination Against Arab Americans: The Post September 11 Backlash, September 11, 2001 to October 11, 2002, 2003*, p.22 (hereafter cited as AAADC, *Report on Hate Crimes & Discrimination Against Arab Americans*).

²⁹⁷ LCCR, *Wrong Then, Wrong Now*.

²⁹⁸ See, e.g., Heather MacDonald, "Is Racial Profiling a Liberal Myth?" *The Responsive Community*, vol. 12, no. 2 (spring 2002), p. 9.

²⁹⁹ Herbert London, "Racial Profiling: Profiling as Needed," *Albany Law Review*, vol. 66 (2003), p. 343.

³⁰⁰ Deborah Berry, "Groups: Racial Profiling on the Rise," *Newsday*, p. A16, Feb. 27, 2003.

³⁰¹ Deborah A. Ramirez, Jennifer Hoopes, and Tara Lai Quinlan, "Defining Racial Profiling in a Post-September 11 World," *American Criminal Law Review*, vol. 40 (summer 2003), p. 1196.

President Clinton attempted to address the profiling problem by issuing orders for the Departments of Treasury, Justice, and Interior to collect statistical data relating to race, ethnicity, and gender for their law enforcement activities.³⁰² He believed that by tracking demographic information on those stopped or searched, disparities could be detected and fairness in law enforcement practices improved. The agencies submitted proposals and implementation plans for field tests of the systems, but the administration did not produce a final report.³⁰³ In its review of the Clinton administration, the Commission recommended that subsequent administrations exceed data collection and initiate more action-oriented efforts to prevent and redress profiling.³⁰⁴

President Bush's Promise to End Racial Profiling

Validating the seriousness of racial profiling in the United States, President Bush promised to end the practice during his 2000 campaign and again immediately after taking office.³⁰⁵ Former Assistant Attorney General for Civil Rights Ralph Boyd Jr. also articulated his commitment to the elimination of profiling. Responding to questions before the United Nations Committee on the Elimination of Racial Discrimination in August 2001, Boyd emphasized the administration's position.³⁰⁶ He assured the committee that the Department of Justice Civil Rights Division was actively working with the administration to eradicate racial profiling. However, just one month later, after the terrorist attacks, the administration retreated from its promise and implemented selective policies that amounted to profiling. In the weeks and months that followed, complaints from victims (detainees, airline passengers, etc.) prompted a federal response. Although some agencies denounced the use of profiling in the discharge of their routine duties, the administration's efforts ultimately were not complete or comprehensive enough to have a measurable positive effect.

Agency Responses to Post-Terrorism Profiling

A full analysis of agency initiatives that end racial profiling exceeds the scope of this report, which is not to evaluate individual enforcement programs. Thus, what follows are examples of the administration's efforts to prevent and counter profiling.

³⁰² President William J. Clinton, memorandum to the secretary of the treasury, the attorney general, and the secretary of the interior, June 9, 1999, re: fairness in law enforcement, collection of data, <<http://clinton6.nara.gov/1999/06/1999-06-09-memorandum-on-fairness-in-law-enforcement.html>> (last accessed June 23, 2004).

³⁰³ President Clinton's Racial Profiling Statistics Directive, n.d., <<http://www.aele.org/fedprof.html>> (last accessed July 22, 2004).

³⁰⁴ USCCR, *A Bridge to One America*, p. 57.

³⁰⁵ Eric Lichtblau, "Bush Issues Ban on Racial Profiling," *New York Times*, June 18, 2003 (hereafter cited as Lichtblau, "Bush Issues Ban"); Bush, Address to Congress, Feb. 27, 2001.

³⁰⁶ Ralph Boyd Jr., assistant attorney general for civil rights, "Reply of the United States to Questions from the United Nations Committee on the Elimination of Racial Discrimination," Aug. 6, 2001, <<http://www.usdoj.gov/crt/speeches/boydgenevaqanda.htm>> (last accessed Jan. 13, 2004).

Department of Transportation Policies for Passenger Screening

Following allegations of profiling after September 11, 2001, the Department of Transportation (DOT) issued a policy statement to employees and those carrying out transportation inspection and enforcement with DOT financial support.³⁰⁷ Specifically, the statement reminded DOT employees to comply with the department's longstanding policy, as well as federal laws prohibiting discrimination on the basis on race, color, religion, ethnicity, or national origin. The guidelines directed employees to treat persons who appear to be Middle Eastern or South Asian and/or Muslim with respect, giving deference to religious or cultural beliefs, and to consider all facts and circumstances when identifying a potential security risk. DOT also released a fact sheet to inform the members of the public about their rights as airline passengers and the circumstances under which an individual might be subject to increased screening.³⁰⁸ These documents are not only useful to DOT employees and the public, but they offer an example of a positive, proactive effort to address profiling.

Department of Homeland Security Office of Civil Rights and Civil Liberties

On November 25, 2002, President Bush signed the Homeland Security Act of 2002, creating the Department of Homeland Security (DHS).³⁰⁹ DHS contains the largest concentration of law enforcement officials in the federal government, making it especially critical that the agency enforce anti-profiling policies. In July 2002, anticipating the new department's creation, the Commission voted to endorse the congressional establishment of an independent civil rights office within DHS.³¹⁰ Congress created the Office for Civil Rights and Civil Liberties (OCRCL) to review and assess allegations of abuse of civil rights or civil liberties, including racial or ethnic profiling by DHS personnel, such as staff from the Border Patrol, Coast Guard, and Bureau of Immigration and Customs Enforcement. That the statutory language creating OCRCL directly identifies the review of racial and ethnic profiling as a central responsibility, seems to signal its importance as a policy matter.³¹¹

The office is required to provide an annual report to Congress on civil rights abuses by DHS personnel, including how complaints were resolved. OCRCL is also responsible for ensuring that civil rights concerns are integrated in DHS policies and that all components implement federal

³⁰⁷ U.S. Department of Transportation, "Carrying Out Transportation Inspection and Safety Responsibilities in a Nondiscriminatory Manner," policy statement, Oct. 12, 2001; Marc Brenman, senior policy advisor, Office of Civil Rights, U.S. Department of Transportation, email to U.S. Commission on Civil Rights, Feb. 9, 2004, re: anti-backlash guidance.

³⁰⁸ U.S. Department of Transportation, Office of the Assistant General Counsel for Aviation Enforcement and Proceedings, "Answers to Frequently Asked Questions Concerning the Air Travel of People Who Are or May Appear to Be of Arab, Middle Eastern, or South Asian Descent and/or Sikh," Nov. 19, 2001.

³⁰⁹ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 5, 6, 18, 44, and 49 U.S.C.).

³¹⁰ See U.S. Commission on Civil Rights, meeting, Detroit, MI, July 19, 2002, transcript, p. 97; USCCR, "Protecting Civil Liberties in the New Homeland Security Department," staff proposal, July 2002; USCCR, "Department of Homeland Security Needs Civil Rights Watchdog," press release, July 23, 2002. The Commission wanted Congress to establish a more specific civil rights enforcement role for OCRCL, but it did not do so.

³¹¹ Section 705 of the Homeland Security Act identifies the responsibilities of the Office for Civil Rights and Civil Liberties.

profiling guidelines (discussed below). According to its 2004 report to Congress, OCRCL is working with the Federal Law Enforcement Training Center to strengthen education on racial profiling for law enforcement cadets.³¹² The office has only been in operation for one year, thus it is too soon to determine its effectiveness. However, OCRCL's annual report does not identify measurable goals for determining the sufficiency of the profiling guidelines and other civil rights policies.

Transportation Security Administration Civil Rights Policy

On November 19, 2001, President Bush signed the Aviation and Public Transportation Security Act, which established the Transportation Security Administration.³¹³ The agency is responsible for securing the nation's transportation systems, including airlines, railways, and ports, and as such conducts passenger screening. On April 7, 2004, it issued a civil rights policy statement, which promises to treat the public in "a lawful, nondiscriminatory manner without regard to race, color, national origin, religion, age, gender, disability, sexual orientation, parental status, or genetic information."³¹⁴ The inclusion of broad bases for protection is a positive indicator of the agency's intolerance for profiling. The extent to which this policy statement is incorporated in daily practice deserves further monitoring and attention.

Taken together, the statements and general policies prohibiting racial profiling seem destined to eradicate such practices within various departments. However, these statements may not have been effectively communicated to employees engaged in public contact or resulted in observable behavior change. Moreover, the administration efforts noted here are limited to broad national security concerns and, as such, do not address other routine forms of profiling that occur on a daily basis. No effort is apparent either at the agency level or governmentwide to measure the effectiveness of nondiscrimination policies or the extent to which sanctioned profiling on the part of government officials has impacted affected communities.

Data Collection on Racial Profiling

As noted above, President Clinton directed federal agencies engaging in law enforcement activities to collect data on the race, ethnicity, and gender of individuals stopped and searched. The Bureau of Justice Statistics at DOJ released a report in 2002 on the characteristics of drivers stopped by police based on data collected in 1999.³¹⁵ In 2000, however, the U.S. General Accounting Office (GAO) found no comprehensive, nationwide source of information that could

³¹² U.S. Department of Homeland Security, *Report to Congress on Implementation of Section 705 of the Homeland Security Act and the Establishment of the Office for Civil Rights and Civil Liberties*, June 2004.

³¹³ Aviation and Transportation Security Act of 2001, Pub. L. No. 107-71, 115 Stat. 597 (codified as amended in scattered sections of 5, 26, 31, and 49 U.S.C.). Originally created as an agency within the Department of Transportation, it was later transferred to the Department of Homeland Security, where it currently resides.

³¹⁴ U.S. Department of Homeland Security, Transportation Security Administration, "Civil Rights Policy Statement," Apr. 7, 2004.

³¹⁵ U.S. Department of Justice, Bureau of Justice Statistics, "Characteristics of Drivers Stopped by Police, 1999," March 2002.

be used to determine whether race is a key factor in motorist stops.³¹⁶ GAO recommended that the government collect better research data on the racial characteristics of persons who commit certain violations that would result in stops. In April 2001, Attorney General Ashcroft announced a funding increase of \$800,000 specifically for the collection of data on traffic stops by police.³¹⁷ DOJ collected additional data in 2002, but has not yet produced an update to its 1999 data report.³¹⁸

The Commission found in 2001 that data on racial profiling in the federal government should be issued sooner rather than later.³¹⁹ In the current climate of increased emphasis on crime prevention and national security, it is remiss that available national data does not extend beyond traffic stops to include other relevant law enforcement activities, such as customs searches, airport screenings, and immigration investigations, and thus cannot fully identify profiling occurrences. Understanding the extent to which and in what contexts profiling occurs is a first step to eliminating the practice. DOJ acknowledges that the act of collecting data sends a message to the police community that racial profiling cannot coexist with effective policing and equal protection.³²⁰

Federal Guidelines on Racial Profiling

Renewing his earlier commitment to end racial profiling, on June 17, 2003, President Bush and his administration made an attempt to regulate the practice when DOJ issued across-the-board guidelines prohibiting federal agents from considering race or ethnicity in *routine* enforcement decisions, such as which motorists to stop for traffic violations.³²¹ The guidelines state that federal law enforcement officers may no longer act on the belief that race or ethnicity signals a higher risk of criminal activity. The White House press release announcing the guidelines stated that, as a result of the directive, “Americans of every race and ethnicity can be confident that generalized stereotypes will have no place in the routine work of federal law enforcement.”³²²

³¹⁶ U.S. General Accounting Office, *Racial Profiling: Limited Data Available on Motorist Stops*, March 2000, p. 7.

³¹⁷ U.S. Department of Justice, “Attorney General Ashcroft Announces \$105.72 Million Funding Increase to Guarantee Rights for All Americans,” press release, Apr. 9, 2001.

³¹⁸ U.S. Department of Justice, Bureau of Justice Statistics, email to the U.S. Commission on Civil Rights, July 22, 2004, re: fairness in law enforcement data collection.

³¹⁹ USCCR, *A Bridge to One America*, p. 57.

³²⁰ U.S. Department of Justice, “A Resource Guide on Racial Profiling Data Collection Systems; Promising Practices and Lessons Learned,” monograph, November 2000, p. 13. This monograph was prepared by Deborah Ramirez, Jack McDevitt, and Amy Farrell through a contract with Northeastern University.

³²¹ U.S. Department of Justice, “Justice Department Issues Guidance to Ban Racial Profiling,” press release, June 17, 2003, <http://www.usdoj.gov/opa/pr/2003/June/03_crt_355.htm> (last accessed June 22, 2004); U.S. Department of Justice, “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies,” June 2003, <http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm> (last accessed June 22, 2004) (hereafter cited as DOJ, “Guidance Regarding the Use of Race”).

³²² Jack Glaser, assistant professor, Goldman School of Public Policy, University of California, Berkeley, “A Bogus Ban on Racial Profiling,” *AlterNet*, July 23, 2003, <<http://www.alternet.org/story.html?story ID=16471>> (last accessed May 12, 2004) (hereafter cited as Glaser, “A Bogus Ban on Racial Profiling”).

According to the guidance, racial profiling in law enforcement is not only wrong, but also ineffective, because it perpetuates negative racial stereotypes that are harmful to the nation's diverse democracy, and greatly impairs efforts to maintain a fair and just society.³²³ Although the guidance forbids the use of generalized stereotypes as the sole basis for federal investigations, it allows law enforcers to use race- or ethnicity-based information. For example, an officer receiving information on a suspect's race from a "trustworthy" source may use the information to identify an individual involved in a crime. In that case, the officer would not be acting on a generalized assumption. The information, however, must be relevant to the locality or timeframe of the criminal activity and tied to a particular criminal incident, scheme, or organization.³²⁴

The potential good of the administration's effort, however, was mitigated by exemptions in the guidelines for investigations involving terrorism and national security matters. The exemptions allow federal agents to target individuals for surveillance, detention, screening, or various other processes based on religion, national origin, nationality, physical appearance, and other factors not related to terrorism.³²⁵ The guidance notes exceptions under the Constitution and U.S. laws that allow for consideration of race and ethnicity in investigating or preventing threats to national security or other catastrophic events.

The administration's ban on racial profiling is commendable in the sense that it represents the first time a President has imposed across-the-board guidelines on profiling. As such, the guidelines have many supporters. Former Assistant Attorney General Boyd described the ban as "anti-stereotyping guidance." He believes the guidance is a balancing tool for the civil rights of the public and the needs of law enforcement.³²⁶ Supporters of the guidance's national security exception believe ensuring the safety of the country is worth the trade-off of targeted individuals' civil rights. One scholar asked, "If [law enforcement personnel] interrogate or detain one person inappropriately, but in the process save one million lives, is it worth the trade-off?"³²⁷

Others, such as members of the Arab American and Muslim communities, consider the guidelines plainly contradictory.³²⁸ They prohibit profiling by federal enforcement officials, but also permit the very act. According to one scholar, the "ban" on racial profiling is nothing more than a new policy offering a broad exception that allows the federal government to profile, resulting in another setback for civil rights.³²⁹ Based on the disparate treatment to which law enforcement personnel have subjected Arab Americans and Muslims, from unreasonable arrests to passenger profiling, the Council on American-Islamic Relations believes the government has failed to balance civil rights protections and homeland security.³³⁰ The director of the American

³²³ DOJ, "Guidance Regarding the Use of Race."

³²⁴ Ibid.

³²⁵ Lichtblau, "Bush Issues Ban;" DOJ, "Guidance Regarding the Use of Race."

³²⁶ Lichtblau, "Bush Issues Ban."

³²⁷ Herbert London, "Symposium on Confronting Realities: The Legal, Moral, and Constitutional Issues Involving Diversity: Panel I: Racial Profiling as Needed," *Albany Law Review*, vol. 66 (2003), p. 343.

³²⁸ Lichtblau, "Bush Issues Ban."

³²⁹ Glaser, "A Bogus Ban on Racial Profiling."

³³⁰ Amber Mobley, "Anti-Muslim Feelings are Blamed on Bush," *Boston Globe*, July 17, 2003, p. A2.

Civil Liberties Union's Washington Legislative Office further stated, "The guidelines acknowledge racial profiling as a national concern, but do nothing to stop it."³³¹

Agencies like DOT were attempting to define unacceptable forms of profiling at the same time lawmakers were crafting rules and policies that sanctioned some forms for national security purposes. One legal expert notes the irony of, for example, DOJ questioning Middle Easterners as terror suspects while also stating its intention to protect those individuals from being targeted based on ethnicity.³³² As will be discussed in the next chapter, the administration's immigration policies increasingly subjected Arab Americans and Muslims to profiling. The administration professes opposition to profiling by outlawing such practices, but also allows enforcers to label anyone a potential security threat under undisclosed circumstances. Thus, any law enforcement officer wishing to target a specific group (for stops, arrests, charges, detentions, etc.) may do so and use national security as a cover.

The guidelines begin a national solution and are commendable for the precedent they set in presidential action against profiling. No past President has attempted to resolve the problem of racial profiling in such a comprehensive manner. But the problem is far from resolved. The guidance needs a mechanism to enforce or track noncompliance; it only applies to federal agencies, leaving state and local law enforcement unaffected; and it has broad exceptions for national security and immigration purposes.³³³

HATE CRIMES

Crimes of hate transcend their immediate victims and cast a shadow of fear and terror throughout entire communities... We are not talking about the obvious physical damage inflicted during a hate motivated attack. We are referring to the fear, the terror, that one experiences when faced with a passionate rejection because of what one is. An absolute stranger looks at you and hates you.³³⁴

Although offenses motivated by hate and bias are deeply rooted in America's history, the term "hate crime" is a relatively recent construction. According to scholars, in the 1980s and 1990s, multiple social movements began to identify and address discriminatory violence against minorities. The federal government, states, and municipalities established task forces; legislative campaigns developed new sentencing rules and criminal categories; special law enforcement units were created; and research and data collection proliferated.³³⁵ These efforts reflect the growing visibility of and public resources directed at violence motivated by bigotry and hatred, and they represent an understanding that crime is different when it also involves

³³¹ American Civil Liberties Union, "ACLU Says New Justice Department Racial Profiling Policy Lacks Enforcement Tool, Suffer from Huge National Security Loophole," June 17, 2003, <<http://www.aclu.org/raciaequality.cfm?ID=12928&c=133>> (last accessed Sept. 24, 2003).

³³² James T. O'Reilly, *Police Traffic Stops and Racial Profiling* (Springfield, IL: Charles C. Thomas, 2002), p. 86.

³³³ David A. Harris, "Profiling Hurts—Not Helps—Police," *The Recorder*, Sept. 26, 2003, vol. 9, p. 26.

³³⁴ 139 Cong. Rec. H6792 (daily ed. Sept. 21, 1993) (statement of Peg Rivera, witness, re: passage of the Hate Crimes Sentencing Enhancement Act of 1993).

³³⁵ Ryken Grattet and Valerie Jenness, "Criminology: Examining the Boundaries of Hate Crime Law: Disabilities and the 'Dilemma of Difference'," *Journal of Criminal Law and Criminology*, vol. 91 (spring 2001), p. 658.

discrimination.³³⁶ Federal and state governments have recognized the “greater harm that is inflicted upon society when criminal acts are committed because of bigoted beliefs.”³³⁷

Federal criminal law makes it illegal to interfere with or engage in violence, intimidation, and threats intended to interfere with a person’s participation in certain federally protected activities because of the person’s race, color, religion, or national origin.³³⁸ Federally protected activities include, for example, the use or enjoyment of public accommodations and places of entertainment; participation in the benefits, programs, services, and activities provided or administered by state or local government; participation in or use of interstate commerce; service on a jury; and voting or qualifying to vote. Punishable offenses include incidents of simple assault and harassment, robbery, vandalism, arson against homes, businesses, and places of worship, aggravated assault, rape, and murder.³³⁹

High-profile hate crimes that receive national media attention often have obvious indicators for being hate crimes, such as those committed by known hate groups. In the 1990s, several highly publicized hate crimes shocked the nation, for example: the beating death of a 21-year-old gay man near Casper, Wyoming; the dragging death of an African American man in Jasper, Texas; and the shooting spree of a 21-year-old neo-Nazi who murdered two men, an African American and a Korean American, and wounded several others.³⁴⁰ More recently, crimes against transgender individuals have become prevalent, including a pattern of assault and murder in the nation’s capital, and the murder of a 17-year-old transgender female in California by acquaintances who discovered her assigned gender.³⁴¹ DOJ, the federal agency that enforces hate crimes laws, acknowledges that the majority of such offenses are not high profile.³⁴²

Identifying Hate Crimes: Data Collection

In April 1990, Congress enacted and George H.W. Bush signed the Hate Crime Statistics Act, requiring DOJ to collect nationwide data on the “incidence of criminal acts that manifest prejudice based on race, religion, homosexuality or heterosexuality, ethnicity, or such characteristics as the U.S. attorney general considers appropriate” and to publish reports

³³⁶ Ibid., pp. 658–59.

³³⁷ Theresa Suozzi, F. Matt Jackson, Jeff Kauffman, and others, “Crimes Motivated by Hatred: The Constitutionality and Impact of Hate Crime Legislation in the United States,” *Syracuse Journal of Legislation and Policy*, vol. 1 (spring 1995), pp. 31–32.

³³⁸ 18 U.S.C. § 245 (2000).

³³⁹ Hate crimes are underreported because victims are often reluctant to notify law enforcement agencies about incidents. Many victims, for example some Hispanics, do not report hate crimes because of distrust of the police or of the criminal justice system which they feel is biased against them. American Psychology Association, “Hate Crimes Today: An Age-Old Foe in Modern Dress,” <<http://www.apa.org/pubinfo/hate/>> (last accessed July 21, 2004) (hereafter cited as APA, “Hate Crimes Today”).

³⁴⁰ U.S. Commission on Civil Rights, *Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? Vol. II: An Evaluation of the Departments of Justice, Labor, and Transportation*, September 2002, p. 25 (hereafter cited as USCCR, *Ten-Year Review, Vol. II*).

³⁴¹ Southern Poverty Law Center, “Why Did Stephanie Thomas Have to Die?,” *Intelligence Report*, no. 112 (winter 2003) pp. 12–13.

³⁴² USCCR, *Ten-Year Review, Vol. II*, p. 25.

analyzing the data.³⁴³ The attorney general delegated the responsibilities of developing the procedures for and implementing, collecting, and managing hate crime data to the Federal Bureau of Investigation (FBI).³⁴⁴ Congress amended the act in 1994 to include data collection on crimes against individuals with disabilities.³⁴⁵

In 1992, the Commission commended Congress and the President for the Hate Crimes Statistics Act. However, in its report, *Civil Rights Issues Facing Asian Americans in the 1990s*, which was released shortly after the act's passage, the Commission recognized that for the law to be meaningful, collecting and reporting statistics had to be accompanied by action.³⁴⁶ The Commission said that the act should reveal more about the nature of hate crimes, document the extent of hate-motivated violence, and assist in the prosecution of such offenses.³⁴⁷

Ten years later, the Commission concluded that the FBI had not implemented the recommendations made in 1992, which called for comprehensive community networking and federal-local coordination; adequate resources; and extensive training on the collection, reporting, and dissemination of hate crime information. The Commission further noted that the collection of hate crime data is not viewed as a civil rights function.³⁴⁸ Instead, the FBI compiles it with all crime data, despite that hate crimes are known to be unique in that they are not random, uncontrollable, or inevitable occurrences.³⁴⁹

Furthermore, the lack of training that the FBI provides in identifying, analyzing, and reporting hate crimes contributes to the major flaw in federal hate crimes data collection: the underreporting of incidents.³⁵⁰ To illustrate, a Southern Poverty Law Center (SPLC) 2001 report

³⁴³ Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275, 104 Stat. 140 (codified as amended 28 U.S.C. § 534 (2000)). See also USCCR, *Ten-Year Review, Vol. II*, pp. 10–11, note 47.

³⁴⁴ Several Department of Justice components address hate crimes. The collection of hate crime data and the investigation of federal hate crimes are the responsibility of the FBI; the prosecution of hate crimes is primarily the responsibility of the Civil Rights Division's Criminal Section. The Community Relations Service offers conciliation and mediation services to state and local officials to resolve racial and ethnic disputes.

³⁴⁵ Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275, 104 Stat. 140 (codified as amended 28 U.S.C. § 534 (2000)).

³⁴⁶ U.S. Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s*, February 1992, pp. 47–48 (hereafter cited as USCCR, *Civil Rights Issues Facing Asian Americans*).

³⁴⁷ USCCR, *Ten-Year Review, Vol. II*, p. 11; USCCR, *Civil Rights Issues Facing Asian Americans*, p. 192.

³⁴⁸ The reporting and collection of hate crime data are assigned to the FBI's Uniform Crime Reporting (UCR) Program. The UCR program provides a national view of crime based on data submitted by city, county, and state law enforcement agencies. The FBI's guidelines, which have not been updated since 1992, minimize the importance or burden of collecting and reporting hate crime data as separate statistics. USCCR, *Ten-Year Review, Vol. II*, pp. 23–24.

³⁴⁹ Researchers conclude that hate crimes should not be collected together with such criminal offenses as homicide, assault, rape, robbery, and arson. There is evidence that society can intervene to reduce or prevent hate motivated violence. See APA, "Hate Crimes Today," p. 3. See also Michael Lieberman, "Federal Action to Confront Hate Violence in the Bush Administration: A Firm Foundation on Which to Build or a Struggle to Maintain Status Quo?" chapter 13 in Dianne M. Piché, William L. Taylor, and Robin A. Reed, eds., *Rights to Risk: Equality in an Age of Terrorism*, report of the Citizens' Commission on Civil Rights, 2002, p. 169 (hereafter cited as Lieberman, "Federal Action to Confront Hate Violence").

³⁵⁰ Except for high-profile incidents, many acts can not be easily identified as bias-motivated. For example, the robbery of a minority-owned store may appear to be, on the surface, a robbery like any other, and the consecration

on hate crimes found a large discrepancy between the number of hate crimes it estimates (50,000 per year) and figures reported in the FBI's annual report on bias-motivated incidents (approximately 8,000 per year).³⁵¹ SPLC attributes the underreporting to voluntary state participation and inconsistent and inaccurate tracking.³⁵²

In 2002, the FBI acknowledged that its hate crimes reports are "insufficient to allow a valid national or regional measure of the volume and types of crimes motivated by hate," but contended that the numbers offer "perspectives on the general nature of hate crime occurrence."³⁵³ Since 2002, the FBI has not changed its data collection procedures, and the level of detail available on hate crimes has not improved.³⁵⁴

National Hate Crime Trends

Although there are inadequacies in national hate crime data reporting and tracking, what is available allows for at least preliminary assessment of the volume and nature of such crimes. During the first two years of the Bush administration (the most recent data available) there was marked fluctuation in the number of hate crimes. Reported incidents have increased since 1998, peaking in 2001, then declining in 2002.³⁵⁵ The most frequently reported incidents of bias are based on race, with anti-black crimes being the highest (see table 3.1). This is followed by crimes based on religion, which are most frequently anti-Jewish, sexual orientation, ethnicity or national origin, and disability, in that order.

of a minority-populated cemetery or burial ground may appear to be foolish prank, but may in fact have been motivated by bias. Thus, the need for training of police personnel in identifying bias-motivated acts is crucial for accurate reporting. *See* USCCR, *Ten-Year Review, Vol. II*, pp. 24–25.

³⁵¹ *Ibid.*, pp. 23–25. *See* Southern Poverty Law Center, "The Hate Crime Statistics Act: Ten Years Later, the Numbers Don't Add Up," *Intelligence Report*, no. 104 (winter 2001) (hereafter cited as SPLC, "The Numbers Don't Add Up"). The SPLC is a "watchdog" organization located in Montgomery, Alabama, that monitors and reports on hate crimes.

³⁵² USCCR, *Ten-Year Review, Vol. II*, p. 25; SPLC, "The Numbers Don't Add Up," p. 7; *See also* APA, "Hate Crimes Today: An Age-Old Foe," p. 4.

³⁵³ USCCR, *Ten-Year Review, Vol. II*, pp. 25–26.

³⁵⁴ For example, the FBI's report does not provide specific information about juvenile hate crime offenders, even though they represent a large number of perpetrators.

³⁵⁵ U.S. Department of Justice, Federal Bureau of Investigation, "Hate Crime Statistics," *Crime in the United States 2002*, <<http://www.fbi.gov/ucr/hatecrime2002.pdf>> (last accessed June 23, 2004) (hereafter cited as FBI, "Hate Crime Statistics, 2002").

Table 3.1. Reported Hate Crimes, by Basis 1997–2002

	1997	1998	1999	2000	2001	2002
Race:	4,710	4,321	4,295	4,337	4,367	3,642
Anti-White	993	792	781	875	891	719
Anti-Black	3,120	2,901	2,958	2,884	2,899	2,486
Anti-American Indian/Alaska Native	36	52	47	57	80	62
Anti-Asian/Pacific Islander	347	293	298	281	280	217
Anti-Multi-Racial Group	214	283	211	240	217	158
Religion:	1,385	1,390	1,411	1,472	1,828	1,426
Anti-Jewish	1,087	1,081	1,109	1,109	1,043	931
Anti-Catholic	31	61	36	56	38	53
Anti-Protestant	53	59	48	59	35	55
Anti-Islamic	28	21	32	28	481	155
Anti-Other Religious Group	159	125	151	172	181	198
Anti-Multi-Religious Group	24	41	31	44	45	31
Anti-Atheism/Agnosticism	3	2	4	4	5	3
Sexual Orientation:	1,102	1,260	1,317	1,299	1,393	1,244
Anti-Male Homosexual	760	850	915	896	980	825
Anti-Female Homosexual	188	223	187	179	205	172
Anti-Homosexual	133	158	178	182	173	222
Anti-Heterosexual	12	12	14	22	18	10
Anti-Bisexual	9	17	23	20	17	15
Ethnicity and National Origin:	836	754	829	911	2,098	1,102
Anti-Hispanic	491	482	466	557	597	480
Anti-Other Ethnicity or National Origin	345	272	363	354	1,501	622
Disability:	12	25	19	36	35	45
Anti-Physical	9	13	10	20	16	20
Anti-Mental	3	12	9	16	26	25
Multiple Bias Incidents	4	5	5	8	9	3
Total Incidents Reported	8,049	7,755	7,876	8,063	9,730	7,462

Source: U.S. Department of Justice, Federal Bureau of Investigation, "Hate Crime Statistics," *Crime in the United States*, 2001 and 2002.

Although the distribution of hate crimes across groups has remained fairly consistent, anomalies can be seen when examining the data. For example, since the September 11, 2001, terrorist attacks, Arab Americans, Muslims, Sikhs, and those perceived to be Middle Eastern have increasingly become the victims of hate violence.³⁵⁶ Hate crimes based on ethnicity and national origin more than doubled between 2000 and 2001. More specifically, for the category Anti-Other Ethnicity or National Origin (which includes Arab Americans) hate crimes increased nearly 425 percent during that period. Although there was an overall decrease in the number of reported hate crimes in 2002, the number in that category remained higher than in the years preceding the terrorist attacks (see table 3.1).³⁵⁷

In addition, religious-bias incidents increased 25 percent from 1,472 in 2000 to 1,828 in 2001. Although anti-Jewish religious incidents were reported more frequently than any other, anti-

³⁵⁶ U.S. Department of Justice, Bureau of Justice Assistance, "A Policymaker's Guide to Hate Crimes," March 1997.

³⁵⁷ FBI, "Hate Crime Statistics, 2002."

Islamic religious incidents were second highest the year after the terrorist attacks with 481 reported; in 2000, anti-Islamic incidents were among the least reported at 28. This translates to an overall increase of more than 1,700 percent in the period before and after September 11, 2001.³⁵⁸ Since hate crimes are generally underreported, it is likely that this number does not accurately capture the true extent of such incidents.

Federal Efforts to Prevent and Redress Hate Crimes

Hate crimes can be deterred through education, training, initiatives designed to reduce such acts, and vigorous enforcement of hate crimes laws.³⁵⁹ The federal government has a central role in enacting strong legislation, providing resources, developing initiatives, and enforcing laws that address acts of bigotry and violence. The strength of the administration's enforcement of federal hate crime laws reveals its priority. As the following discussions will illustrate, over the last decade, hate crimes have received increased federal attention.

In 1968, Congress passed the first federal hate crime legislation.³⁶⁰ Covering only race, color, religion, national origin, and ethnicity, the statute limits protection to victims who are attacked because they are engaged in certain specified federally protected activities, such as voting, serving on a jury, or attending public school. Even with the passage of the legislation, there remained a paucity of statistical information, as well as psychological and scientific research to explain the general nature, incidents, or perpetrators of hate crimes. As noted, it was not until 1990 that the federal government began to collect data on how many and what kind of hate crimes are committed nationwide, and by whom.

During the Clinton administration, Congress passed a series of laws that strengthen hate crime sentencing: the 1994 Hate Crime Sentencing Enhancement Act, which makes provisions for longer sentences for hate crime offenders;³⁶¹ the Violence Against Women Act of 1994, which allocates funding for education, rape counseling, law enforcement training, and victim services, and allows civil remedies for gender-motivated crimes;³⁶² and the 1996 Church Arson Prevention Act, which strengthens criminal law against church burning and desecration.³⁶³

Although the 1990s brought progress, none of the laws in existence offer protections against crimes motivated by the gender, disability, immigration status, or sexual orientation of the victim. Moreover, protections on the basis of race, ethnicity, and religion are limited to crimes that occur during participation in federally protected activities.

³⁵⁸ Federal Bureau of Investigation, "Hate Crime Statistics," *Crime in the United States 2001*, <<http://www.fbi.gov/ucr/01hate.pdf>> (last accessed June 23, 2004).

³⁵⁹ Lieberman, "Federal Action to Confront Hate Violence," p. 169.

³⁶⁰ Hate Crime Prevention Act of 1968, Pub. L. No. 90-284, 82 Stat. 73, title I § 101(a) (codified as amended at 18 U.S.C. 245 (2000)).

³⁶¹ Hate Crime Sentencing Enhancement Act of 1994, Pub. L. No. 103-322, 108 Stat. 2096, title XXVIII (2000).

³⁶² Violence Against Women Act of 1994, Pub. L. No. 103-322, Title VI, 108 Stat. 1902 (codified at 42 U.S.C. § 13891 (2000)).

³⁶³ Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392 (codified at 18 U.S.C. § 247 (2000)).

Words to Action: Prosecution and Prevention

Within DOJ, the Civil Rights Division's Criminal Section (Section) is primarily responsible for prosecuting hate crimes.³⁶⁴ In addition to enforcing the acts listed above, its jurisdiction includes misconduct by law enforcement officials,³⁶⁵ and violations of peonage and involuntary servitude statutes that protect migrant workers.³⁶⁶ The Section also prosecutes violations of the Freedom of Access to Clinic Entrances Act, which protects access to reproductive health services and the exercise of First Amendment religious freedom at places of worship;³⁶⁷ and violations of the Church Arson Prevention Act of 1996, which makes it illegal to damage, destroy, or deface a church because of its religious character or because of the race, color, or ethnic characteristics of an individual associated with the church.³⁶⁸

The prosecution of racial and religious violence has been a priority civil rights area since the 1990s. The Section reported that the Hate Crimes Statistics Act, the enactment of the Church Arson Prevention Act, and the heightened attention to incidence of hate crimes resulted in an increase in complaints filed.³⁶⁹ Cooperation by state district attorneys and attorneys general following a memorandum of understanding involving those parties and the Criminal Section also resulted in an increased coordination of efforts.³⁷⁰

The terrorist attacks on September 11, 2001, ignited a new interest in preventing and prosecuting hate crimes, particularly those committed against Arab Americans and Muslims. Immediately following the attacks, President Bush made it clear that acts of violence or discrimination against Arab Americans, Muslims, and those perceived to be of Middle Eastern descent would not be tolerated. On September 13, 2001, Attorney General Ashcroft issued a statement regarding the reports of violence. He emphasized that Americans must not target individuals based on their race, religion, or national origin in retaliation for the terrorist attacks and that such violence goes against "the very principles and laws of the United States and will not be tolerated."³⁷¹

To reinforce his position, the President and members of his administration met with members of the Arab American, Sikh, and Muslim communities. For example, the week following the attack, DOJ's Civil Rights Division and FBI officials met with members of those communities to

³⁶⁴ This is sometimes referred to as the Prosecution Section because it is responsible for the investigation and prosecution of violations of federal criminal civil rights statutes. *See, e.g.*, U.S. Department of Justice, Civil Rights Division, Congressional Budget Submissions.

³⁶⁵ 18 U.S.C.S. § 242 (2004).

³⁶⁶ 18 U.S.C.S. § 1581, 1584 (2004).

³⁶⁷ Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 694 (codified at 18 U.S.C. § 248 (2000)).

³⁶⁸ Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392 (codified at 18 U.S.C. § 247 (2000)). The Section received additional responsibility with the passage of the Victims of Trafficking and Violence Protection Act of 2000, which requires DOJ to enforce criminal statutes and increase public awareness of incidents that involve the trafficking and forced labor of human beings. Pub. L. No. 106-386, 114 Stat. 1464 (codified at 22 U.S.C.S. § 7101 (2004)).

³⁶⁹ U.S. Department of Justice, Civil Rights Division, FY 2001 Congressional Budget Submission, p. G-20.

³⁷⁰ *Ibid.*, p. G-21.

³⁷¹ U.S. Department of Justice, Civil Rights Division, excerpt from remarks made by Attorney General John Ashcroft, Sept. 13, 2001, <<http://www.usdoj.gov/crt/legalinfo/dojstatements.html>> (last accessed June 6, 2003).

establish an initiative to combat post-terrorism discrimination and to ensure that the agency effectively responded to all allegations.³⁷² Islamic leaders praised the President for his visit on September 17, 2001, to the mosque at the Islamic Center of Washington to express his support.³⁷³ On September 19, 2001, Secretary of Education Rod Paige issued a news release urging school leaders to take steps to protect students from harassment and violence.³⁷⁴

Despite the administration's efforts to quell the growing unrest, the Departments of Justice and Labor and the Equal Employment Opportunity Commission continued to receive reports of discrimination, harassment, and violence against Arab Americans and Muslims in the workplace. On November 19, 2001, the agencies issued a joint statement reaffirming the government's commitment to the civil rights of all working people. They vowed to make American workplaces models of respect and understanding and to "defeat the forces that seek to undermine the American way of life."³⁷⁵

As of February 2004, the Civil Rights Division, the FBI, and U.S. Attorneys offices had investigated 546 hate crimes against individuals of Middle Eastern or South Asian origin. The crimes consisted of assaults, bombing plots, threats, vandalism, and murder. The Civil Rights Division's Criminal Section, in coordination with federal and local prosecutors and investigators, initiated 121 state and local criminal prosecutions. In addition, federal charges were filed in 13 cases against 18 defendants.³⁷⁶ In 2003, the Civil Rights Division ranked the priority of its programs, based on salaries and expenses. The Criminal Section ranked number one (of 10 sections) within the Civil Rights Division.³⁷⁷

Combating Hate Crimes: Unfinished Business

Key players in the administration, including President Bush, have repeatedly denounced hate crimes and called for strong prosecution of perpetrators. The administration sent a strong anti-hate message, particularly following the surge in hate crimes after September 11. However, the President has retreated from his strong rhetoric foremost by failing to support legislation that would strengthen hate crimes protections. The Local Law Enforcement Enhancement Act (LLEEA), first introduced in 1999 and reintroduced several times since, would expand federal

³⁷² U.S. Department of Justice, "Statement of Department of Justice Officials," n.d., <<http://www.usdoj.gov/crt/legalinfo/dojstatements.html>> (last accessed June 6, 2003).

³⁷³ Salah Hassan, "Arabs, Race and the Post-September 11 National Security State," *Middle East Report*, fall 2002, <<http://www.usdoj.gov/crt/legalinfo/dojstatements.html>> (last accessed Feb. 9, 2004).

³⁷⁴ U.S. Department of Education, "School Officials Urged to Prevent Harassment of Muslim and Arab-American Students," press release, Sept. 19, 2001, <<http://www.ed.gov/news/pressreleases/2001/09/09192001c.html>> (last accessed June 23, 2004).

³⁷⁵ U.S. Department of Justice, "Joint Statement Against Employment Discrimination in the Aftermath of the September 11 Terrorist Attacks," Nov. 19, 2001, <<http://www.usdoj.gov/crt/legalinfo/jointstatement.html>> (last accessed June 6, 2003).

³⁷⁶ U.S. Department of Justice, Civil Rights Division, "Enforcement and Outreach Following the September 11 Attacks," updated Feb. 18, 2004, <<http://www.usdoj.gov/crt/legalinfo/discrimupdate.htm>> (last accessed June 22, 2004).

³⁷⁷ Civil Rights Division, FY 2003 Congressional Budget Submission, p. G-62. Other program areas include education, voting rights, employment, disability rights, and housing enforcement.

authority to investigate and prosecute cases of bias violence based on the victim's actual or perceived sexual orientation, gender, or disability. It would also eliminate the requirement of proof that the victim was engaged in a federally protected activity at the time of the crime.³⁷⁸ On June 15, 2004, the Senate passed LLEEA by a vote of 65-33, as a provision attached to the 2005 Department of Defense Authorization bill.

Despite bipartisan congressional support, however, President Bush has not supported the bill and has stated that "all violent crimes are crimes of hate."³⁷⁹ This broad, sweeping view mischaracterizes hate crimes and the legal interpretation of such acts as motivated by prejudice. "Race-neutral," "gender-neutral," or otherwise unspecific terms that the President uses dilute the symbolic significance of bias-motivated crimes against traditionally victimized groups. Moreover, the fact that the President has not supported legislation that would protect women, gay men and lesbians, or persons with disabilities fosters a view that he does not perceive such crimes as discriminatory. How President Bush will act should the House and Senate reach consensus on the bill and whether he will provide the leadership necessary to ensure its enforcement will reveal his true commitment to eradicating crimes of bias and signal recognition of the pervasive impact of hate crimes on affected communities.

³⁷⁸ Local Law Enforcement Enhancement Act, S.966. The main sponsors of the most recent version were Senators Gordon Smith (R-OR) and Edward Kennedy (D-MA). Later this year, the House of Representatives and the Senate will meet in conference to develop compromise legislation

³⁷⁹ President George W. Bush, response to the NAACP 2004 Presidential Candidate Civil Rights Questionnaire, p. 15, <http://www.naacp.org/work/washington_bureau/presidentialresponses.pdf> (last accessed July 28, 2004); *see also* David Espo, "Senate OKs Law to Protect Gays, Lesbians," Associated Press, June 16, 2004, quoting Whitehouse Spokesperson Claire Buchan.

Chapter 4: Tolerance and Justice: Protecting Rights of Disadvantaged Groups

While African American civil rights dominated the pre-1970s struggles, their efforts shared a common goal with and benefited other minority groups and women. Problems of similarly situated groups became understood as also having roots in discrimination, and as such, eligible for comparable solutions.¹ The Ford and Carter administrations were the first to work with Congress and react to the judicial decisions which applied laws and extended hard-won African American rights to other protected classes, such as Hispanics, language minorities, institutionalized persons, individuals with disabilities, and the elderly.² Nonetheless, the following will demonstrate that the nation's struggle toward equal rights for all Americans is still elusive and dependent on the aggregated impact of executive, judicial, congressional, and agency leadership.

IMMIGRATION POLICIES AND THE FAIR TREATMENT OF IMMIGRANTS

Countless immigrants have arrived in America seeking a better life or to escape from political, religious, or ethnic persecution.³ Historically, however, the United States government has not fully applied civil rights considerations to immigration policies or how it treats immigrants. Dating back more than a century, the nation limited who could enter and for what purpose, and who could become citizens. For example, the Chinese Exclusion Act of 1882, renewed in 1892 and made permanent in 1902, banned Chinese immigration for 10 years and prevented Chinese immigrants from becoming U.S. citizens.⁴ The act was only the first among many restricting immigration from certain parts of the world.⁵

Under the 1952 Immigration and Nationality Act (INA), many immigration statutes were codified, and the structure of immigration law was reorganized.⁶ The Immigration and Nationality Act of 1965 (INA 1965) dramatically altered the original INA by abolishing an

¹ Hugh Davis Graham, *Civil Rights and the Presidency* (New York: Oxford University Press, 1992), p. 4.

² *Ibid.*, p. 5.

³ U.S. Commission on Civil Rights, *Crossing Borders: The Administration of Justice and Civil Rights Protections in the Immigration and Asylum Context*, January 2003 (hereafter cited as USCCR, *Crossing Borders*).

⁴ Howard F. Chang, "Immigration and the Workplace: Immigration Restrictions as Employment Discrimination," *ITT Chicago-Kent Law Review*, vol. 78 (2003) (hereafter cited as Chang, "Immigration and the Workplace"); Natsu Taylor Saito, "The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty," *Catholic University Law Review*, vol. 51 (summer 2002); Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 *repealed by* Chinese Exclusion Repeal Act of 1943, ch. 344, 57 Stat. 600; Vernon M. Briggs Jr. "American Unionism and U.S. Immigration Policy," Center for Immigration Studies, August 2001, <<http://www.cis.org/articles/2001/back1001.html>> (last accessed Dec. 10, 2003).

⁵ Richard A. Boswell, "Racism and U.S. Immigration Law: Prospects for Reform After 9/11?" *Journal of Gender, Race & Justice*, vol. 7 (fall 2003) (hereafter cited as Boswell, "Racism and U.S. Immigration Law"); Chang, "Immigration and the Workplace."

⁶ USCCR, *Crossing Borders*; Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 210. U.S. Department of Homeland Security, Bureau of Citizenship and Immigration Services, "Immigration and Nationality Act," Feb. 18, 2004, <<http://www.bcis.gov/graphics/lawsregs/INA.htm>> (last accessed July 1, 2004) (hereafter cited as DHS/BCIS, "Immigration and Nationality Act").

immigration quota system focusing on national origin, race, and religion. Under INA 1965, family ties and employment skills became the basis of U.S. immigration policy and remain so.⁷ Later, the United States adopted policies allowing more immigrants into the country. The Immigration Reform and Control Act of 1986, passed during the Reagan administration, provided amnesty for some undocumented foreign citizens, permitting them to eventually become U.S. citizens and sponsor their spouses and minor children.⁸

These relatively open immigration policies were closed when, under President Clinton, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which allowed the federal government to “conduct expedited removal proceedings for individuals entering the country [who had] invalid or fraudulent travel documents.”⁹ Asylum seekers became subject to excessive detention and maltreatment during incarceration under IIRIRA, and detention was applied unevenly.¹⁰ IIRIRA was seen partly as an effort to ban immigrants from the United States and was called “the most radical reform of immigration law in decades—or perhaps ever.”¹¹

The nation’s historical treatment of immigrants established clear precedent for the Bush administration’s immigration policies.¹² From the Chinese Exclusion Act to IIRIRA, America has frequently denied immigrants, especially those of color, equal protection via actions designed to make them appear “different than us,” “not part of us,” and “un-American” in the eyes of the nation.”¹³

⁷ Boswell, “Racism and U.S. Immigration Law”; USCCR, *Crossing Borders*. See Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

⁸ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

⁹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 309 (codified in scattered sections of 8 U.S.C.); USCCR, *Crossing Borders*; Lawyers’ Committee for Human Rights, “Imbalance of Powers: How Changes to U.S. Law & Policy Since 9/11 Erode Human Rights and Civil Liberties,” September 2002–March 2003, p. 28 (hereafter cited as LCHR, “Imbalance of Powers”).

¹⁰ Natsu Taylor Saito, “For Our Security: Who is An ‘American’ and What is Protected by Enhanced Law Enforcement and Intelligence Powers,” *Seattle Journal for Social Justice*, vol. 2, no. 1 (fall 2003/winter 2004) (hereafter cited as Saito, “For Our Security”); Susan M. Akram and Kevin R. Johnson, “Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims,” *New York University Annual Survey of American Law*, vol. 58, no. 3 (2002), p. 331 (hereafter cited as Akram and Johnson, “Race, Civil Rights, and Immigration”).

¹¹ Andrea Montavon-McKillip, “CAT Among Pigeons: The Convention Against Torture, A Precarious Intersection Between International Human Rights Law and U.S. Immigration Law,” *Arizona Law Review*, vol. 44 (spring 2002) (hereafter cited as Montavon-McKillip, “CAT Among Pigeons”).

¹² Teresa A. Miller, “Citizenship and Severity: Recent Immigration Reforms and the New Penology,” *Georgetown Immigration Law Journal*, vol. 17 (summer 2003) (hereafter cited as Miller, “Citizenship and Severity”); Montavon-McKillip, “CAT Among Pigeons.”

¹³ Hiroshi Motomura, “Immigration Policy, Immigration, and We the People After September 11,” *Albany Law Review*, vol. 66 (2003) (hereafter cited as Motomura, “We the People After September 11”); Michael Rowan, “The Latest Chapter in the Saga of a Spiritless Law: Detaining Haitian Asylum Seekers as a Violation of the Spirit and the Letter of International Law,” *Margins*, vol. 3 (fall 2003) (hereafter cited as Rowan, “The Latest Chapter”); Kevin R. Johnson, “Open Borders?” *UCLA Law Review*, vol. 51 (October 2003) (hereafter cited as Johnson, “Open Borders?”); Boswell, “Racism and U.S. Immigration Law”; Saito, “For Our Security.”

Viewing Immigration as a Threat: President Bush's Policies

Immigration is not a problem to be solved. It is a sign of a confident and successful nation. New arrivals should be greeted not with suspicion and resentment, but with openness and courtesy.¹⁴

– President George W. Bush, July 2001

Speaking to a naturalization ceremony on Ellis Island—against a backdrop symbolizing the hopes and freedoms of U.S. immigrants—President Bush articulated a welcoming position. But actions that followed presented challenges for immigrant populations. The legal status and rights of undocumented Mexican immigrants, an early priority of the President, remain uncertain as the President's attention has shifted to other issues. Haitian asylum seekers and Arab and Muslim immigrants and visitors have been treated unfairly and bear the burden of the administration's policies and practices.

Undocumented Immigrant Workers

The lesson of America's 300-year experiment with immigration is that a society that embraces immigrants and helps them develop the skills they need to succeed will be stronger for it.¹⁵

During its first year in office, the administration championed proposals to make the United States more accessible to foreign visitors.¹⁶ Under consideration was a plan to grant amnesty to approximately 3 million undocumented Mexican immigrants already residing in the United States, and issue temporary work visas for Mexican citizens wishing to live here.¹⁷ Although a priority on the administration's political agenda, President Bush withdrew support for the plan when conservatives objected, and congressional supporters suggested that Mexican immigration reform proceed gradually and not before the 2002 midterm elections.¹⁸ Commentators from

¹⁴ President George W. Bush, remarks at INS Naturalization Ceremony, Ellis Island, NY, July 10, 2001.

¹⁵ James M. Lindsay, senior fellow, foreign policy studies, and Gregory Michaelidis, senior policy analyst, the Hatcher Group, Brookings Institution, "The Post-Sept. 11 Debate Over Immigration Policy," as published in *San Diego Union Tribune*, Nov. 8, 2001 <<http://www.brook.edu/views/op-ed/lindsay/20011108.htm>>.

¹⁶ Ibid. See also Peter Skerry, nonresident senior fellow, government studies, Brookings Institution, "Why Amnesty Is the Wrong Way to Go," as published in *Washington Post*, Aug. 12, 2001 <<http://www.brook.edu/views/op-ed/skerry/20010812.htm>> (hereafter cited as Skerry, "Why Amnesty").

¹⁷ Howard F. Chang, "The Immigration Paradox: Poverty, Distributive Justice, and Liberal Egalitarianism," *DePaul Law Review*, vol. 52 (spring 2003) (hereafter cited as Chang, "The Immigration Paradox"); Ruben J. Garcia, "Ghost Workers in an Interconnected World," *University of Michigan Journal of Law Reform*, vol. 36 (summer 2003) (hereafter cited as Garcia, "Ghost Workers in an Interconnected World"); Mark Krikorian, "The Vicente Fox Show, Delegating White House Policy to Mexico," *National Review Online*, Sept. 7, 2001, <<http://www.nationalreview.com/comment/comment-krikorianprint090701.html>> (last accessed July 1, 2004) (hereafter cited as Krikorian, "The Vicente Fox Show"); Boswell, "Racism and U.S. Immigration Law"; Skerry, "Why Amnesty"; "Mexico to Place Emergency Stations in Dangerous Border Crossing Areas," Associated Press, Sept. 4, 2001 (hereafter cited as "Mexico to Place Emergency Stations.")

¹⁸ Krikorian, "The Vicente Fox Show"; "Little Support Seen for Bush-Fox Amnesty Plans," *National Journal Congress Daily*, Sept. 5, 2001 (hereafter cited as "Little Support Seen"); Robert Leiken, nonresident senior fellow, foreign policy studies, Brookings Institution, "Border Colleagues: On Migration, Bush and Fox Belong on the Same Side," as published in *Washington Post*, Sept. 2, 2001, <<http://www.brook.edu/views/op-ed/leiken/20010902.htm>>

across the political spectrum have alleged that President Bush put forth this proposal merely to win over Hispanic voters.¹⁹

In January 2004, President Bush proposed a temporary worker program.²⁰ The proposal revived the administration's efforts to address the issue of undocumented workers.²¹ Under this new proposal, the United States would grant three-year visas to individuals entering the country to work, and undocumented workers already arrived, for hard-to-fill positions.²² Individuals wanting to work in the United States would be allowed to do so provided they had secured employment.²³ To participate in the program, undocumented workers would have to show proof

(hereafter cited as Leiken, "Border Colleagues"); Skerry, "Why Amnesty"; Miller, "Citizenship and Severity"; Chang, "Immigration and the Workplace"; Chang, "The Immigration Paradox"; Garcia, "Ghost Workers in an Interconnected World"; Johnson, "Open Borders?"

¹⁹ See Robert S. Leiken, Center for Immigration Studies, "Enchilada Lite: A Post-9/11 Mexican Migration Agreement," March 2002, p. 7 (hereafter cited as Leiken, "Enchilada Lite"); "Mexico-U.S. Immigration Deal Unlikely Soon, Analysts Say," Reuters, Aug. 6, 2002 (hereafter cited as "Mexican-U.S. Immigration Deal Unlikely Soon"); Leiken, "Border Colleagues"; Miller, "Citizenship and Severity"; Skerry, "Why Amnesty."

²⁰ The White House, "Background Briefing by Conference Call on Immigration Policy," Jan. 6, 2004, <<http://www.whitehouse.gov/news/releases/2004/01/print/20040106-3.html>> (last accessed Jan. 28, 2004) (hereafter cited as White House, "Background Briefing"); "Guest Workers," *New Jersey Law Journal*, Jan. 19, 2004 (hereafter cited as "Guest Workers"); Mike Allen, "Bush Plan Would Give Immigrants Legal Status," *Washington Post*, Jan. 7, 2004, p. A1 (hereafter cited as Allen, "Bush Plan Would Give Immigrants Legal Status"); Mike Allen and Kevin Sullivan, "Mexico's Fox Backs Bush Proposal on Immigration; Most Workers to Return Home," *Washington Post*, Jan. 13, 2004, p. A1 (hereafter cited as Allen and Sullivan, "Mexico's Fox Backs Bush Proposal"); Elisabeth Bumiller, "Border Politics as Bush Woos 2 Key Groups with Proposals," *New York Times*, Jan. 8, 2004 (hereafter cited as Bumiller, "Border Politics as Bush Woos 2 Key Groups"); Arian Campo-Flores, "Se Habla Electoral Votes," *Newsweek*, Jan. 19, 2004, p. 32 (hereafter cited as Campo-Flores, "Se Habla Electoral Votes"); Chang, "The Immigration Paradox"; Perkins Coie, "New Proposal Would Provide Temporary Jobs to Foreign Workers," *Alaska Employment Law Letter*, vol. 9, no. 3 (March 2004) (hereafter cited as Coie, "New Proposal Would Provide Temporary Jobs"); See Stanley Mailman and Stephen Yale-Loehr, "Immigration Law, Sanity for the Southwestern Border," *New York Law Journal*, vol. 231 (Feb. 23, 2004), p. 3 (hereafter cited as Mailman and Yale-Loehr, "Immigration Law"); Stuart Taylor Jr., "They're Coming to America; At Least Bush's Guest-Worker Proposal Has the Potential To Reduce Illegal Immigration," *Legal Times*, Jan. 19, 2004, p. 46 (hereafter cited as Taylor, "They're Coming to America").

²¹ Nicole Jacoby, "America's De Facto Guest Workers: Lessons from Germany's Gastarbeiter for U.S. Immigration Reform," *Fordham International Law Journal*, vol. 21 (April 2004). See Krikorian, "The Vicente Fox Show"; Boswell, "Racism and U.S. Immigration Law"; Chang, "The Immigration Paradox"; Garcia, "Ghost Workers in an Interconnected World"; Skerry, "Why Amnesty"; "Mexico to Place Emergency Stations."

²² Jennifer A. Dlouhy, "Bush Immigration Plan Will Need to Overcome Skeptics," *CQ Today*, Jan. 12, 2004, pp. 1, 6 (hereafter cited as Dlouhy, "Bush Immigration Plan Will Need to Overcome Skeptics"); Allen, "Bush Plan Would Give Immigrants Legal Status"; Allen and Sullivan, "Mexico's Fox Backs Bush Proposal"; Elisabeth Bumiller, "Bush Would Give Illegal Workers Broad New Rights," *New York Times*, Jan. 7, 2004 (hereafter cited as Bumiller, "Bush Would Give Illegal Workers New Rights"); Bumiller, "Border Politics as Bush Woos 2 Key Groups"; Campo-Flores, "Se Habla Electoral Votes"; "Guest Workers"; Mark Krikorian, "Amnesty Again," *National Review*, Jan. 26, 2004 (hereafter cited as Krikorian, "Amnesty Again").

²³ John Conyers Jr. and Sheila Jackson Lee, "Immigration Deform: Guest Worker Program Would Create Underclass," *Texas Lawyer*, vol. 19, no. 49 (Feb. 9, 2004) (hereafter cited as Conyers and Lee, "Immigration Deform"); Allen, "Bush Plan Would Give Immigrants Legal Status"; Allen and Sullivan, "Mexico's Fox Backs Bush Proposal"; Bumiller, "Border Politics as Bush Woos 2 Key Groups"; Campo-Flores, "Se Habla Electoral Votes."

of employment and pay an unspecified registration fee, not charged to those applying for the visa from outside the country.²⁴

The proposal garnered support from Mexican President Vicente Fox and some Hispanic American leaders, but others opposed it.²⁵ Conservatives objected to the proposal's "amnesty" provisions that would grant undocumented immigrants legal standing.²⁶ Immigrant advocacy groups worried that a permanent underclass—allowed to work but not to vote—would be created.²⁷ Other commentators expressed concern that the proposal would result in the departure of immigrants at the end of the work period, as President Bush expected.²⁸ Finally, many were convinced, as they had been about the earlier amnesty proposal, that the President presented this plan to capture the Hispanic vote.²⁹

Immigration experts state that the President's inaction on his proposal has continued border control policies that clash with domestic demand for low-skilled immigrant labor.³⁰ Once in the U.S., immigrants typically earn low wages despite working long hours with few benefits.³¹ One expert posits that each immigrant creates a drain on the economy by using \$55,200 more in public services during a lifetime than he or she pays in taxes.³² Another researcher, however, counters that immigrants enhance the economy of the states in which they reside. According to this researcher, California and Texas are the two richest and most prosperous states in the nation because they receive the vast majority of undocumented immigrants.³³ The positive contributions of immigrants to the economy are supported by a 2002 study that found they comprised more

²⁴ Anne Heavey Scheinfeldt, "President Bush Proposes New Temporary Worker Program," *Georgetown Immigration Law Journal*, vol. 18 (winter 2004) (hereafter cited as Scheinfeldt, "President Bush Proposes New Temporary Worker Program"); White House, "Background Briefing"; Coie, "New Proposal Would Provide Temporary Jobs"; Dlouhy, "Bush Immigration Plan Will Need to Overcome Skeptics."

²⁵ Coie, "New Proposal Would Provide Temporary Jobs"; Allen and Sullivan, "Mexico's Fox Backs Bush Proposal"; Bumiller, "Border Politics as Bush Woos 2 Key Groups."

²⁶ Coie, "New Proposal Would Provide Temporary Jobs"; Krikorian, "Amnesty Again."

²⁷ Allen, "Bush Plan Would Give Immigrants Legal Status"; Campo-Flores, "Se Habla Electoral Votes."

²⁸ Scheinfeldt, "President Bush Proposes New Temporary Worker Program"; Allen and Sullivan, "Mexico's Fox Backs Bush Proposal"; Bumiller, "Bush Would Give Illegal Workers New Rights."

²⁹ See Stephen Dinan, "Democrats Look to Relax Rules on Illegal Aliens," *Washington Times*, May 5, 2004 (hereafter cited as Dinan, "Democrats Look to Relax Rules on Illegal Aliens") p. A3; Conyers and Lee, "Immigration Deform"; Kenneth T. Walsh, "Well-Timed Reform," *U.S. News and World Report*, Jan. 19, 2004 (hereafter cited as Walsh, "Well-Timed Reform") p. 33; Campo-Flores, "Se Habla Electoral Votes"; Bumiller, "Border Politics as Bush Woos 2 Key Groups."

³⁰ Wayne Cornelius, director, Center for Comparative Immigration Studies, and director, Center for U.S.-Mexican Studies, University of California, San Diego, statement before the U.S. Commission on Civil Rights, Briefing on San Diego Border Issues, Nov. 14, 2003, transcript, p. 53 (hereafter cited as San Diego Border transcript). Roberto Marinez, former director, American Friends Service Committee Border Project, San Diego Border transcript, p. 76. See Kevin R. Johnson, "September 11 and Mexican Immigrants: Collateral Damage Comes Home," *DePaul Law Review*, vol. 52 (spring 2003).

³¹ Johnson, "Open Borders?"

³² Steven A. Camarota, Center for Immigration Studies, "Tired and Poor: Bankrupt Arguments for Mass, Unskilled Immigration," Sept. 3, 2001.

³³ Mario Obeldo, National Coalition of Hispanic Organizations, San Diego Border transcript, p. 11.

than half of the growth of the entire civilian labor force in the United States in the 1990s, a time of tremendous economic growth.³⁴

Haitian Asylum Seekers

Upon taking office, President Bush took a tough stand on Haitian asylum seekers, using national security concerns as justification. Among actions, he appointed to policy positions individuals who had criticized the Clinton administration's open engagement with Haiti. The President also continued the government's policy of viewing Haitians as economic and not political refugees, making it harder for them to gain asylum.³⁵ Beginning in December 2001, the Bush administration instituted a regulation that allowed the former Immigration and Naturalization Service (INS) to detain Haitian asylum seekers for months without the right to a bond hearing until their cases were heard.³⁶ Before that, INS did not detain Haitian asylum seekers who established a credible fear of persecution if returned to Haiti. Such refugees were released into the community and allowed to appear in court for their asylum hearings.³⁷

The new regulation sharply contrasts with the treatment of other asylum seekers. For example, Cuban refugees who arrive on U.S. land are quickly released into the community and allowed to apply for permanent residency after being in the country for one year.³⁸ Asylum seekers from most other nations are typically released on bond once they establish a credible fear of persecution if returned to their homeland.³⁹

Matters escalated when, in April 2003, Attorney General John Ashcroft ruled that Haitians would be immediately and indefinitely detained without bond, even if a court determined they could be released on bail while awaiting an asylum decision.⁴⁰ The attorney general said this

³⁴ As cited in Johnson, "Open Borders?"

³⁵ Robert Maguire, "U.S. Policy Toward Haiti: Engagement or Estrangement?" *The Haiti Program Papers*, no. 8 (November 2003), pp. 2–4, 7 (hereafter cited as Maguire, "U.S. Policy Toward Haiti").

³⁶ U.S. Commission on Civil Rights, "Briefing on Haitian Asylum Seekers and U.S. Immigration Policy," June 21, 2002, executive summary (hereafter cited as USCCR, "Briefing on Haitian Asylum Seekers"); Rowan, "The Latest Chapter"; Jim DeFede, "Haitian Policy Still a Sham," *Miami Herald*, Nov. 10, 2002 (hereafter cited as DeFede, "Haitian Policy"); USCCR, *Crossing Borders*; LCHR, "Imbalance of Powers," pp. 30–32; Thomas, "Miami Leaders." Effective March 1, 2003, the duties of INS were transferred to U.S. Citizenship and Immigration Services, a bureau within the Department of Homeland Security.

³⁷ Rowan, "The Latest Chapter"; Haitian-American Grassroots Coalition, "Bush Administration and Haitian Refugees Containment Policy—Update on Haitian Refugees at Krome," n.d., <<http://hagcoalition.freehosting.net/custom4.html>>.

³⁸ See Read Sawczyn, "The United States Immigration Policy Toward Cuba Violates Established Maritime Policy, It Does Not Curtail Illegal Immigration, and Thus Should be Changed So That Cuban Immigrants Are Treated Similarly to Other Immigrants," *Florida Journal of International Law*, vol. 13 (summer 2001) (hereafter cited as Sawczyn, "The United States Immigration Policy toward Cuba"); Clarence Page, "Bush's Boat People," *Washington Times*, Nov. 9, 2002 (hereafter cited as Page, "Bush's Boat People"); Ken Thomas, "Miami Leaders Ask Congress to Overturn Haitian Immigration Policy," *The Associated Press State and Local Wire*, June 4, 2003 (hereafter cited as Thomas, "Miami Leaders").

³⁹ Page, "Bush's Boat People"; Thomas, "Miami Leaders."

⁴⁰ Margaret D. Stock, "Two Years of Policy Revamping; In the Wake of September 11, 2001, the Federal Government Reorganized the Work of the INS, With Mixed Results," *National Law Journal*, vol. 26, no. 16 (Dec. 15, 2003), p. 19 (hereafter cited as Stock, "Two Years of Policy Revamping"); Thomas, "Miami Leaders."

policy was necessary to discourage mass migration from Haiti because Pakistanis, Palestinians, and others used Haiti as an illegal entryway to the United States, thus threatening national security.⁴¹ Immigrant advocates disputed this claim and, initially, the State Department did as well.⁴² Regardless, the implications have been devastating for Haitians.

Haitian immigrants are not treated like other immigrants who are allowed to reside in the community while their cases are being adjudicated. The administration's policy advocates believe that Haitian immigrants must continue to present asylum claims and be denied refuge until approved.⁴³ They state that the protection of Haitian asylum seekers in the United States and other countries must "be a last resort, not a first option."⁴⁴ However, despite the administration's position that Haitians are economic refugees, the political violence inflicted upon individuals forcibly returned to Haiti shows otherwise. Such incidents clearly demonstrate that U.S. policy failed to recognize legitimate asylum claims by Haitian immigrants.

Community leaders are outraged by the insurmountable barrier placed before Haitian asylum seekers, even those establishing a credible fear of persecution if returned to Haiti.⁴⁵ They view the policy as unjust and inhumane on many fronts, but especially because it links Haitian asylum seekers to terrorists and terrorism via unsubstantiated and highly dubious allegations.⁴⁶ A group of leaders from Miami, Florida, including the mayor of Miami-Dade County, asked that Haitian immigrants be treated fairly, and the U.S. Conference of Mayors unanimously approved a resolution calling for an end to the detention policy.⁴⁷ The Commission condemned the policy in a 2002 letter to President Bush, calling it discriminatory.⁴⁸ Despite these pleas, the administration has not changed its position or modified its policy.

Treatment of Middle Eastern Immigrants and Visitors in an Era of Terrorism

After the September 11, 2001, terrorist attacks, securing the nation's borders became the administration's most urgent job. Among responses, President Bush authorized federal officials to round up hundreds of Arabs, Muslims, and Arab Americans as material witnesses in its

⁴¹ Rowan, "The Latest Chapter"; Stock, "Two Years of Policy Revamping," p. 19.

⁴² Mike Pope, "Bush's Detention Policy for Refugees is Inhumane," *Tallahassee Democrat*, *Tallahassee.com*, June 15, 2003 (hereafter cited as Pope, "Bush's Detention Policy"); Thomas, "Miami Leaders"; LCHR, "Imbalance of Powers," pp. 30–32.

⁴³ Federation for Immigration Reform, "U.S. Asylum Policy: Reforms Needed in Current System," May 3, 2001 <<http://www.fairus.org/Legislation/Legislation.cfm?ID=1801&c=58&insearch=haitian%20and%20asylum%20and%20seekers>> (last accessed June 30, 2004).

⁴⁴ Federation for Immigration Reform, "Interdiction Policy Averting Haitian Migration Crisis, For Now," April 2004 <<http://www.fairus.org/Research/Research.cfm?ID=2413&c=54&insearch=haiti>> (last accessed June 30, 2004).

⁴⁵ Haitian-American Grassroots Coalition, "Bush Administration"; DeFede, "Haitian Policy"; USCCR, *Crossing Borders*. See USCCR, "Briefing on Haitian Asylum Seekers."

⁴⁶ Rowan, "The Latest Chapter"; Pope, "Bush's Detention Policy"; Thomas, "Miami Leaders"; LCHR, "Imbalance of Powers," pp. 30–32.

⁴⁷ Pope, "Bush's Detention Policy"; Thomas, "Miami Leaders." See USCCR, "Briefing on Haitian Asylum Seekers."

⁴⁸ U.S. Commission on Civil Rights, "U.S. Commission on Civil Rights Expresses Concern Over Plight of Haitian Refugees," press release, May 20, 2002.

investigation of the attacks and detain them on minor immigration violations.⁴⁹ Arab and Muslim immigrants and visitors were identified as a “dangerous class,” signaling the government’s intention to deny them entry into the country whenever possible.⁵⁰ America’s borders thus became more tightly controlled, and certain immigrants bore the burden of the administration’s policies.

Days after the attacks, the Bush administration modified policies for legal entry to the United States.⁵¹ New rules restricted those seeking temporary entry, including business, tourist, and student visitors, and subjected Arab and Muslim entrants to increased scrutiny and monitoring.⁵² For example, in June 2002, Attorney General Ashcroft announced the National Security Entry-Exit Registration System (NSEERS) requiring certain foreign nationals to register and submit fingerprints and photographs upon arrival in the United States.⁵³ The program also required these individuals to inform an immigration agent when leaving the country.⁵⁴ Although entry-exit registration has been the government’s legal right since the passage of INA in 1952, subsequent revisions to immigration law did not prescribe discrimination based on nationality, until now.⁵⁵ NSEERS targets immigrants from 25 countries; except for North Korea, all nations targeted are Arab or have substantial Muslim populations.⁵⁶

Facing a torrent of complaints from diverse groups who felt the policy was discriminatory, in December 2003, the Department of Homeland Security (DHS) stopped requiring most nonimmigrants to report to immigration offices.⁵⁷ However, visitors from certain, almost

⁴⁹ Akram and Johnson, “Race, Civil Rights, and Immigration,” p. 327.

⁵⁰ *Ibid.*, pp. 301–03; Miller, “Citizenship and Severity.”

⁵¹ James M. Lindsay and Audrey Singer, “Changing Faces: Immigrants and Diversity in the Twenty-First Century,” chapter 7 in *Agenda for the Nation* (Washington, D.C.: Brookings Institution, 2003) (hereafter cited as Lindsay and Singer, “Changing Faces”), p. 229; Nora V. Demleitner, “Immigration Threats and Rewards: Effective Law Enforcement Tools in the “War” on Terrorism,” *Emory Law Journal*, vol. 51 (summer 2002); Stock, “Two Years of Policy Revamping,” p. 19.

⁵² Akram and Johnson, “Race, Civil Rights, and Immigration,” p. 342; Lindsay and Singer, “Changing Faces,” p. 229; Ruth Ellen Wasem, “Immigration Legalization and Status Adjustment Legislation,” Congressional Research Service, Apr. 15, 2002, p. CRS-8 (hereafter cited as Wasem, “Immigration Legalization and Status Adjustment Legislation”); Stock, “Two Years of Policy Revamping,” p. 19; Motomura, “We the People After September 11.”

⁵³ U.S. Department of Justice, “Attorney General Prepared Remarks on the National Security Entry-Exit Registration System,” fact sheet, June 6, 2002, <<http://www.usdoj.gov/ag/speeches/2002/060502agpreparedremarks.htm>> (last accessed Feb. 2, 2004). Akram and Johnson, “Race, Civil Rights, and Immigration,” p. 342; Miller, “Citizenship and Severity.”

⁵⁴ Miller, “Citizenship and Severity”; Migration Policy Institute, “Chronology of Events Since September 11, 2001 Related to Immigration and National Security,” p. 11 (hereafter cited as MPI, “Chronology of Events”).

⁵⁵ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 210; DHS/BCIS, “Immigration and Nationality Act.”

⁵⁶ Motomura, “We the People After September 11”; U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, “Changes to National Security Entry/Exit Registration System (NSEERS),” fact sheet, Dec. 1, 2003, <<http://www.ice.gov/graphics/news/newsrel/articles/nseersFS120103.htm>> (hereafter cited as DHS, “Changes to NSEERS”) (last accessed July 8, 2004). The countries include: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Libya, Lebanon, Morocco, North Korea, Oman, Pakistan, Qatar, Somalia, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen.

⁵⁷ The Department of Homeland Security inherited the NSEERS project from DOJ when the new agency was created. Ricardo Alonso-Zaldivar, “U.S. to End Immigrant Registration Program,” *Los Angeles Times*, Dec. 2, 2003,

exclusively Middle Eastern, countries continue to face additional scrutiny, and NSEERS' registration and identification requirements still apply to all visitors.⁵⁸ According to DHS, the change to NSEERS will increase the efficiency of the program because it will target individuals, not entire categories of people.⁵⁹

The administration's policies also affected immigrants and visitors already here. When the USA Patriot Act was signed into law on October 27, 2001, the attorney general was given the authority to detain foreign citizens if believing that they pose a national security threat.⁶⁰ By November 5, 2001, the Department of Justice (DOJ) had detained more than 1,100 men of Middle Eastern and South Asian descent.⁶¹ DOJ did not reveal who it had detained, the reasons for detention, nor where detainees were held, not even to their families.⁶²

Many detainees alleged mistreatment by prison guards, including being hosed down with cold water, strip searched, forced to sleep upright in freezing conditions, denied food or legal representation, and kept in their cells for long periods.⁶³ The DOJ inspector general released a report stating that from December 15, 2001, to June 15, 2002, 34 complaints of civil rights violations, including accusations that employees at federal detention centers had beaten Muslim

p. 12; DHS, "Changes to NSEERS"; U.S. Department of Homeland Security, "NSEERS 30-Day and Annual Interview Requirements to Be Suspended," Dec. 1, 2003, <<http://www.dhs.gov/dhspublic/display?content=3021>> (last accessed June 21, 2004); Shannon McCaffrey, "U.S. Ends Antiterror Program," *Philadelphia Inquirer*, Dec. 2, 2003, p. A3 (hereafter cited as McCaffrey, "U.S. Ends Antiterror Program"); Helen Kennedy, "Feds Nix Muslim Registry," *Daily News*, Dec. 2, 2003, p. 35.

⁵⁸ McCaffrey, "U.S. Ends Antiterror Program," p. A3.

⁵⁹ DHS, "Changes to NSEERS."

⁶⁰ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, § 412, 115 Stat. 272 (codified as amended at 8 U.S.C.S. § 1226a (2004)); See also John W. Whitehead and Steven H. Aden, "Forfeiting 'Enduring Freedom' for 'Homeland Security': A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives," *American University Law Review*, vol. 51 (August 2002). U.S. Commission on Civil Rights, *Civil Rights Concerns In the Washington, D.C., Area In the Aftermath of the September 11, 2001, Tragedies*, June 2003, p. 21 (hereafter cited as USCCR, *Civil Rights Concerns*).

⁶¹ USCCR, *Civil Rights Concerns*, p. 19; Miller, "Citizenship and Severity."

⁶² Karen Engle, "Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)," *Colorado Law Review*, vol. 75 (winter 2004); Motomura, "We the People After September 11"; Robert S. Chang, "(Racial) Profiles in Courage, Or Can We Be Heroes Too?" *Albany Law Review*, vol. 66 (2003) (hereafter cited as Chang, "(Racial) Profiles in Courage, Or Can We Be Heroes Too?"); USCCR, *Civil Rights Concerns*, p. 19.

⁶³ Amnesty International, "USA: Special Registration Process Must Be Reviewed," Jan. 10, 2003, <<http://web.amnesty.org/library/index/ENGAMR510042003>> (last accessed May 4, 2004); Thomas W. Joo, "Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11," *Columbia Human Rights Law Review*, vol. 34 (fall 2002) (hereafter cited as Joo, "Presumed Disloyal"); Anne Scheinfeldt, "Executive Branch Developments: Office of the Inspector General Releases Report Reviewing the Treatment of Alien Detainees," *Georgetown Immigration Law Journal*, vol. 17 (summer 2003) (hereafter cited as Scheinfeldt, "Executive Branch Developments"). See Marie A. Taylor, "Immigration Enforcement Post-September 11: Safeguarding the Civil Rights of Middle Eastern-American and Immigration Communities," *Georgetown Immigration Law Journal*, vol. 17 (fall 2002) (hereafter cited as Taylor, "Immigration Enforcement Post-September 11").

and Arab immigrants, were filed.⁶⁴ In all, DOJ received 1,073 complaints during the six-month period following the implementation of the Patriot Act.⁶⁵

Although detentions were reserved for those believed to be a national security threat, other Arab and Muslim immigrants were also viewed with suspicion. On November 9, 2001, Attorney General Ashcroft allowed the “voluntary” interviews of approximately 5,000 men, ages 18 to 33, who had entered the United States with nonimmigrant visas from countries suspected of giving refuge to terrorists.⁶⁶ These men were not suspects in the attacks, but interviewers were told to ask about their religious practices, feelings towards the U.S. government, and immigration status.⁶⁷

Because the men interviewed were all of Middle Eastern and South Asian ancestry, critics of the policy accused the government of participating in racial and ethnic profiling.⁶⁸ Interviewees were disturbed by the government’s unabashed willingness to use ancestry as a proxy for terrorism. Despite their feelings, many acquiesced to the request believing the government would monitor them if they did not.⁶⁹

A Dual System of Rights

Although the administration’s policies and practices reflect its determination to secure the nation, they also reveal its failure to extend equal protections to all immigrants alike. Under these policies, Haitian immigrants are indefinitely incarcerated without bond even if a court rules they should be released until a decision is made on their asylum claims.⁷⁰ Conversely, Cuban immigrants reaching dry U.S. land are released and allowed to apply for permanent residency after one year.⁷¹ Arab and Muslim immigrants and visitors are frequently the target of

⁶⁴ Scheinfeldt, “Executive Branch Developments.”

⁶⁵ See Taylor, “Immigration Enforcement Post-September 11.”

⁶⁶ Chang, “(Racial) Profiles in Courage, Or Can We Be Heroes Too?”; “Government Wants to Interview 5,000 Men,” *Milwaukee Journal Sentinel*, Nov. 14, 2001, p. 15A (hereafter cited as “Government to Interview 5,000 Men”); Michael P. O’Connor and Celia M. Rumann, “Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland,” *Cardozo Law Review*, vol. 24 (April 2003) (hereafter cited as O’Connor and Rumann, “Into the Fire”); Muzaffar A. Chishti et al., “America’s Challenge: Domestic Security, Civil Liberties, and National Unity After September 11,” Migration Policy Institute, 2003, p. 8; MPI, “Chronology of Events,” p. 4; American Immigration Lawyers Association, “Executive Branch Actions Since September 11, 2001,” *Civil Liberties Issue Packet*, June 12, 2003. Nonimmigrant visas include business, tourist, and student visas. See Department of Homeland Security, Bureau of Citizenship and Immigration Services, “Temporary Visitors,” Mar. 4, 2003, <<http://www.bcis.gov/graphics/services/tempbenefits/index.htm>> (last accessed July 1, 2004); Lindsay and Singer, “Changing Faces,” p. 229; Wasem, “Immigration Legalization and Status Adjustment Legislation,” pp. CRS-5–6.

⁶⁷ Laura W. Murphy, director, and Timothy H. Edgar, legislative council, ACLU, Washington National Office, testimony before the Subcommittee on Immigration, Border Security, and Claims on the Judiciary, United States House of Representatives, May 8, 2003; “Government to Interview 5,000 Men.”

⁶⁸ O’Connor and Rumann, “Into the Fire.”

⁶⁹ Chang, “(Racial) Profiles in Courage, Or Can We Be Heroes Too?”

⁷⁰ Stock, “Two Years of Policy Revamping,” p. 19; Thomas, “Miami Leaders.”

⁷¹ Sawczyn, “The United States Immigration Policy toward Cuba”; Page, “Bush’s Boat People”; Thomas, “Miami Leaders.”

surveillance, incarceration, or various other processes merely because of their religion, nationality, physical appearance, or similar factors unrelated to terrorism.⁷²

While the United States must ensure that immigration policy does not imperil national security, it must equally ensure that established policies are not used to deny immigrants fair treatment. It is possible for just immigration policy and national security to coexist if the former is implemented in context of the latter.⁷³ Although the President has taken a step in this direction by twice proposing to provide undocumented workers the ability to legally work in the United States, immigration experts question his proposals. These researchers are concerned that such individuals will be allowed to work legally but denied other benefits, including the right to one day become citizens. Moreover, commentators from across the political spectrum believe that President Bush made these proposals to win over Hispanic voters.⁷⁴

Changes to the nation's policies under the Bush administration have left immigrants unprotected and unfairly treated.⁷⁵ New immigration policies have created a dual system of rights and protections based largely on national origin, race, and ethnicity. The circumstances the United States now faces must not close the once open doors of a nation founded by immigrants.

NATIVE AMERICANS

To ensure the future success of America's tribal communities, my Administration is committed to improving education, increasing employment and economic development and ensuring better access to health and human services for all American Indians and Alaska natives.⁷⁶

– President George W. Bush, November 2003

In recognition of National American Indian Heritage Month, 2003, President Bush spoke with the knowledge that America owes Native Americans a great debt.⁷⁷ In exchange for land and in

⁷² Joo, "Presumed Disloyal."

⁷³ Kristine M. Holland, "Immigration and National Security: A Comprehensive Look at the Connections and Policies," *Diplomacy and World Affairs (DWA) Discussion Paper No. 102*, April 2002, p. 34 <<http://departments.oxy.edu/dwa/papers/102.pdf>> (last accessed June 22, 2004).

⁷⁴ Krikorian, "The Vicente Fox Show"; "Little Support Seen"; Leiken, "Border Colleagues"; Skerry, "Why Amnesty"; Miller, "Citizenship and Severity"; Chang, "Immigration and the Workplace"; Chang, "The Immigration Paradox"; Garcia, "Ghost Workers in an Interconnected World"; Johnson, "Open Borders?"; White House, "Background Briefing"; "Guest Workers"; Allen, "Bush Plan Would Give Immigrants Legal Status," p. A1; Allen and Sullivan, "Mexico's Fox Backs Bush Proposal," p. A1; Bumiller, "Border Politics as Bush Woos 2 Key Groups"; Campo-Flores, "Se Habla Electoral Votes"; Chang, "The Immigration Paradox"; Coie, "New Proposal Would Provide Temporary Jobs"; See Mailman and Yale-Loehr, "Immigration Law"; Taylor, "They're Coming to America"; See Leiken, "Enchilada Lite," p. 7; "Mexico-U.S. Immigration Deal Unlikely Soon"; Dinan, "Democrats Look to Relax Rules on Illegal Aliens"; Conyers and Lee, "Immigration Deform"; Walsh, "Well-Timed Reform."

⁷⁵ Joo, "Presumed Disloyal."

⁷⁶ The White House, "National American Indian Heritage Month," Nov. 14, 2003, <<http://www.whitehouse.gov/news/releases/2003/11/20031114-15.html>>.

⁷⁷ In this section, the term "Native American" is used in lieu of "American Indian" or other terminology when not specifically citing or paraphrasing other work. It should be understood to include Alaska Natives unless otherwise noted. Native Hawaiians are generally not included in the Native American category because they are not

compensation for forced removal from their original homelands, the United States agreed, through laws, treaties, and pledges, to support and protect Native Americans. The special government-to-government, or trust relationship, that resulted is defined by three components: land, self-governance, and social services. The latter is often considered the most critical and represents the United States' commitment to improving the welfare of Native peoples.⁷⁸

History's tale, however, is one of persecution, discrimination, and empty promises. The United States has not fulfilled its pledge, and Native Americans perennially look toward a better future that never arrives. Native Americans continue to suffer poor educational achievement, higher rates of illness, substandard housing, and more frequent crime than the general population. Sadly, conditions in Indian Country are current-day reflections of the federal government's failure to meet its obligations to Native peoples.⁷⁹

Promises Unkept

For nearly half a century, the Commission has documented the dismal conditions in indigenous communities and the nation's failure to meet its trust responsibilities.⁸⁰ Native American education is just one example where the government has incessantly failed to provide equal opportunity.⁸¹ Federal funding of Native American education has been continually reduced over the last few decades resulting in insufficient resources and unequal access to educational tools.⁸²

Present-day conditions among Native American elementary school students reflect the consequences of repeated failures. According to the Bush administration, only 17 percent of Native American fourth-grade students scored at or above proficient on the 2000 National Assessment of Educational Progress reading assessment. By comparison, 40 percent of white students attained proficiency. Mathematics results were similar, with 14 percent of Native Americans achieving proficiency compared with 35 percent of whites.⁸³

recognized as having the same government-to-government relationship, and are thus not eligible for the federal programs available to other Native groups. The term "Indian Country" refers to geographic regions encompassing reservations and trust lands within which Indian laws and customs and federal laws relating to Indians apply. See Theodore H. Haas, chief counsel, United States Indian Service, *The Indian and the Law* (Lawrence, KS: Haskell Institute, June 1949), p. 15, <<http://thorpe.ou.edu/cohen/tribalgovtpam2ptl&2.htm>>.

⁷⁸ U.S. Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*, July 2003, p. 3 (hereafter cited as USCCR, *A Quiet Crisis*); see also American Indian Policy Review Commission, *Final Report to Congress*, vol. 1 (May 17, 1977), p. 130.

⁷⁹ USCCR, *A Quiet Crisis*, pp. ix, 6.

⁸⁰ *Ibid.*, p. 6.

⁸¹ Montana Advisory Committee to the U.S. Commission on Civil Rights, *Equal Educational Opportunity for Native American Students in Montana Public Schools*, July 2001, pp. 1, 22; Alaska Advisory Committee to the U.S. Commission on Civil Rights, *Racism's Frontier: The Untold Story of Discrimination and Division in Alaska*, April 2002, pp. 21–24.

⁸² USCCR, *A Quiet Crisis*, p. 86.

⁸³ U.S. Department of Education, "Reaching Out . . . Raising American Indian Achievement," n.d., <http://www.ed.gov/nclb/accountability/achieve/achievement_native.html> (last accessed June 22, 2004) (hereafter cited as DOE, "Raising American Indian Achievement").

The Commission has also examined Native American health care, finding that federal funding has failed to keep pace with the growing service population and expanding health care costs.⁸⁴ Funding increases have been woefully inadequate and deny Native Americans the same medical care available to other Americans.⁸⁵ The situation long ago reached a point at which the medical services available to indigenous peoples are far below those required to remedy health needs, and the difference continues to grow. Consequently, Native Americans have a life expectancy that is nearly six years shorter than other racial/ethnic groups, with roughly 13 percent dying before the age of 25.⁸⁶ Native Americans are far more likely to die from various diseases and injury than nonindigenous populations, including other minority groups. These differences are so significant that they range from 52 percent more likely to die from pneumonia to 770 percent more likely to die from alcoholism and related illnesses.⁸⁷

An Uncertain Future

President Bush has focused his administration's efforts with Native Americans on improving educational opportunities.⁸⁸ Toward this end, the President issued two executive orders. Executive Order 13,270 extends an order issued by President Clinton to ensure accountability in the federal government for meeting its obligations to tribal colleges and universities.⁸⁹ President Bush has expressed a belief that the government must help tribal colleges and universities strengthen institutional viability, improve financial management and security, develop institutional capacity, enhance physical infrastructure, and implement the No Child Left Behind

⁸⁴ See U.S. Commission on Civil Rights, "Native American Health Care Disparities Briefing, Executive Summary," February 2004 (hereafter cited as USCCR, "Native American Health Care Disparities Briefing"); USCCR, *A Quiet Crisis*, chap. 3.

⁸⁵ USCCR, "Native American Health Care Disparities Briefing," p. 35.

⁸⁶ USCCR, *A Quiet Crisis*, pp. 34, 41.

⁸⁷ USCCR, "Native American Health Care Disparities Briefing," p. 5.

⁸⁸ The White House, "National American Indian Heritage Month Proclamation," Nov. 19, 2001, <<http://www.whitehouse.gov/news/releases/2001/11/20011112-4.html>> (last accessed May 13, 2004); See Allison M. Dussias, "Let No Native American Child Be Left Behind: Re-Envisioning Native American Education for the Twenty-First Century," *Arizona Law Review*, vol. 43 (winter 2001) (hereafter cited as Dussias, "Let No Native American Child Be Left Behind"); Judith A. Winston, "Rural Schools in America: Will No Child Be Left Behind? The Elusive Quest for Equal Educational Opportunities," *Nebraska Law Review*, vol. 82 (2003) (hereafter cited as Winston, "Rural Schools in America"); "Privatization of Federal Indian Schools: A Legal Uncertainty," *Harvard Law Review*, vol. 116 (March 2003) (hereafter cited as "Privatization Of Federal Indian Schools"); U.S. Department of Education, "Secretary of Education Rod Paige Announces Funding Increase for Tribal Colleges and Universities," Jan. 27, 2003, <<http://www.ed.gov/news/pressreleases/2003/01/01272003.html>> (last accessed Apr. 27, 2004) (hereafter cited as DOE, "Secretary of Education Announces Funding Increase").

⁸⁹ Tribal Colleges and Universities, Exec. Order No. 13,270, 3 C.F.R. 242 (2002).

Act of 2001 (NCLB).⁹⁰ Executive Order 13,336 seeks to assist Native American students in meeting the academic standards of NCLB.⁹¹

The administration's 2004 budget proposal touted a 5 percent funding increase for tribal colleges and universities. According to the secretary of education, the total request was \$19 million, \$1 million more than the administration's 2003 request.⁹² This was the second straight year the administration proposed increased funding for these institutions.⁹³ However, despite the administration's desire to improve education at tribal colleges and universities, the 2004 proposal barely covered the cost of paying personnel at these institutions. In addition, the proposed increase was concurrent with the administration's desire to terminate \$1.5 billion in funding for other education programs benefiting Native Americans.⁹⁴ The request was also \$3.8 million less than the 2003 congressional appropriation of \$22.8 million and \$4 million below the 2004 congressional appropriation of \$23.2 million.⁹⁵

Native American elementary and secondary education have fared no better despite the administration's declaration that no Native American child would be left behind.⁹⁶ As part of NCLB, the administration has instructed schools to annually examine achievement by race, economic background, and disabilities.⁹⁷ The President also declared that the government will work with Native Americans, educational agencies, and other entities to ensure that education programs serving indigenous children are of the highest quality in every respect.⁹⁸

As noted in chapter 2, funding is a signal of the administration's commitment to civil rights, and hence Native American rights. Despite the Bush administration's overtures, Native communities have not received the financial resources required to meet the goals of NCLB.⁹⁹ Further hindering implementation of NCLB in Indian Country is the incompatibility of the legislation

⁹⁰ U.S. Department of Education, "White House Initiative on Tribal Colleges and Universities," n.d., <<http://www.ed.gov/about/inits/list/whtc/brochure.pdf>> (last accessed June 22, 2004) (hereafter cited as DOEd, "White House Initiative on TCU").

⁹¹ American Indian and Alaska Native Education, Exec. Order No. 13,336, 65 Fed. Reg. 25,295 (May 5, 2004) (hereafter cited as Exec. Order No. 13,336). *See also* DOEd, "Secretary of Education Announces Funding Increase"; DOEd, "White House Initiative on TCU."

⁹² DOEd, "Secretary of Education Announces Funding Increase"; John W. Cheek, executive director, National Indian Education Association, statement before the Committee on Indian Affairs, United States Senate, Feb. 26, 2003 (hereafter cited as Cheek testimony, 2003) p. 8.

⁹³ DOEd, "Secretary of Education Announces Funding Increase."

⁹⁴ Cheek testimony, 2003, p. 8.

⁹⁵ U.S. Department of Education, "Department of Education Fiscal Year 2004 Congressional Action," Feb. 19, 2004.

⁹⁶ To Close the Achievement Gap with Accountability, Flexibility, and Choice so that No Child is Left Behind (NCLB), Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.); Dussias, "Let No Native American Child Be Left Behind"; Winston, "Rural Schools in America"; "Privatization Of Federal Indian Schools"; DOEd, "Raising American Indian Achievement"; Exec. Order No. 13,336.

⁹⁷ NCLB, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.); Dussias, "Let No Native American Child Be Left Behind"; Winston, "Rural Schools in America"; "Privatization Of Federal Indian Schools"; DOEd, "Raising American Indian Achievement."

⁹⁸ "Privatization Of Federal Indian Schools."

⁹⁹ Cheek testimony, 2003, p. 15.

with educational conditions in poor and rural areas. For example, NCLB requires a quality teacher in every classroom, a difficult task for rural schools because they are often unable to recruit and retain quality teachers due to the low pay they offer. This obstacle is compounded by the administration's failure to adequately fund NCLB in Indian Country.¹⁰⁰

The administration has followed a similar tact in funding other Native American programs, such as health care. For 2004 the administration requested \$3.6 billion in funding for Indian Health Services (IHS), which is the principal federal health care provider and health advocate for Native American people.¹⁰¹ The request was \$130 million more than the President's 2003 request of \$3.47 billion.¹⁰² However, Native American health is still severely underfunded. It is estimated that in 2005 IHS must be funded at \$19.4 billion if the unmet health needs of Native Americans are to be met.¹⁰³ The lack of funding results in IHS hospitals, for example, that lack modern facilities and amenities, contributing to the health disparities noted above.¹⁰⁴

President Bush's budget requests also have been inadequate for Native American housing despite the thousands of families inhabiting unsafe, indecent, and unsanitary homes.¹⁰⁵ For 2005, the administration requested \$647 million for the Native American Housing Block Grant (NAHBG), which can be used to develop new housing, maintain existing housing, provide housing services, administer housing programs, or prevent crime. However, it is estimated that by 2007, \$1 billion will be needed to provide Native Americans with adequate housing.¹⁰⁶ The administration's request was only \$2 million more than NAHBG was funded in 2003 and casts doubt that NAHBG will be funded at necessary levels in 2007.¹⁰⁷ Inadequate funding has left Native American communities with housing that lacks water, sewer systems or facilities, roads, and

¹⁰⁰ Winston, "Rural Schools in America." In March 2004, the administration announced new policies giving teachers in rural schools three additional years to demonstrate that they are highly qualified and giving states some flexibility for how qualifications are assessed. See U.S. Department of Education, "New No Child Left Behind Flexibility: Highly Qualified Teachers," fact sheet, <www.ed.gov/print/nclb/methods/teachers/hqtflexibility.html>.

¹⁰¹ U.S. Department of Health and Human Services, "FY 2004 Budget in Brief," n.d., p. 21 (hereafter cited as HHS, "FY 2004 Budget in Brief") p. 21; U.S. Department of Health and Human Services, Indian Health Services, "Introduction," <<http://www.ihs.gov/AboutIHS/IHSintro.asp>>.

¹⁰² HHS, "FY 2004 Budget in Brief," pp. 20–21.

¹⁰³ National Indian Health Board, "Fiscal Year 2005 AI/AN National Budget Perspective," n.d. <http://www.nihb.org/docs/budget_fy05_handbook.pdf> (last accessed June 22, 2004).

¹⁰⁴ Thomas Scheffey, "The Worst Place in America to Be Born," *Connecticut Law Tribune*, Mar. 19, 2001.

¹⁰⁵ George H. Cortelyou, "An Attempted Revolution in Native American Housing: The Native American Housing Assistance and Self-Determination Act," *Seton Hall Legislative Journal*, vol. 25 (2001); National American Indian Housing Council, "Statement of Russell Sossamon, Chairman, National American Indian Housing Council, On the Bush Administration's Fiscal Year 2005 Budget Proposal," Feb. 4, 2004 (hereafter cited as NAIHC, "Sossamon Statement").

¹⁰⁶ USCCR, *A Quiet Crisis*, p. 58; Virginia Davis, "A Discovery of Sorts: Reexamining the Origins of the Federal Indian Housing Obligation" *Harvard Blackletter Journal*, vol. 18 (spring 2002) (hereafter cited as Davis, "A Discovery of Sorts"); National American Indian Housing Council, "Indian Housing Leader Requests \$1 Billion in Funding," Feb. 26, 2003; NAIHC, "Sossamon Statement."

¹⁰⁷ USCCR, *A Quiet Crisis*, p. 58; Davis, "A Discovery of Sorts."

utilities.¹⁰⁸ Perhaps more significant, it has left Indian Country immediately requiring approximately 210,000 housing units for its residents.¹⁰⁹

Law enforcement has a long history of inadequate funding in Indian Country, and President Bush continues this tradition.¹¹⁰ Under the Bush administration, programs such as the Tribal Drug Court Program (TDCP), which was designed to integrate substance abuse treatment with sanctions and transitional services, were phased out. In 2001, TDCP received \$3.4 million in funding. In 2002, funding was reduced to \$2.7 million. By 2003, funding for the program was terminated, despite the need for alcohol and substance abuse treatment in Native American communities.¹¹¹ President Bush has cut funding despite a consensus among law enforcement professionals that the problems with the criminal justice system in Indian Country are serious and often understated.¹¹² Persistent lack of funding indicates that law enforcement in Indian Country will remain inadequate.¹¹³

Thus, despite administration rhetoric, Native American needs remain unmet. Although acknowledging that the nation has failed to meet the agreements entered into with its indigenous peoples, President Bush continues this bitter tradition. The administration offers Native Americans the promise of a better future, but does not provide the money to reach that future. Tribal colleges and universities and Native American elementary and secondary students welcome the President's executive orders and NCLB as paths to improve the education of Native Americans now. However, inadequate funding stymies a better future in its infancy.

Native Americans continue to receive inferior health care because medical needs remain unfulfilled and rapidly expand. It is a vicious cycle that is made worse by substandard living conditions, which contribute to higher disease rates and shorter life spans among Native Americans. Native American welfare is also threatened by inadequate law enforcement. The Bush administration has not developed new and innovative ways to assist indigenous peoples, nor has it supported the mechanisms already in place.

¹⁰⁸ National American Indian Housing Council, *Building the Framework, Housing Infrastructure Development in Indian Country*, 2003, p. 4, <<http://naihc.net/NAIHC/files/cclibraryfiles/filename/0000000125/Infrastructure%20Study.pdf>> (last accessed June 22, 2004).

¹⁰⁹ Davis, "A Discovery of Sorts."

¹¹⁰ USCCR, *A Quiet Crisis*, pp. 67–73.

¹¹¹ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, "Tribal Drug Court Grant Program," <http://www.ojp.usdoj.gov/BJA/grant/tribal_drug.html>; U.S. Department of Justice, Office of Justice Programs, "Office of Justice Programs, Drug Courts Program Office, FY 2002 Grant Application Kit," n.d., <<http://www.ojp.ncjrs.org/dcpoform/>> (last accessed May 6, 2004); U.S. Department of Justice, Office of Justice Programs, "Promising Practices and Strategies to Reduce Alcohol and Substance Abuse Among American Indians and Alaska Natives," August 2002, pp. 1–4; U.S. Department of Justice, Office of Justice Programs, "American Indian and Alaska Native Affairs," Apr. 8, 2004, <<http://www.ojp.usdoj.gov/americanative/funding.htm>> (last accessed May 6, 2004). The Tribal Drug Court Grant Program application links to Web pages no longer active and to an application page for 2002.

¹¹² Victor H. Holcomb, "Prosecution of Non-Indians for Non-Serious Offenses Committed Against Indians in Indian Country," *North Dakota Law Review*, vol. 75 (1999), pp. 779–80.

¹¹³ Courtney A. Stouff, "Native Americans and Homeland Security: Failure of the Homeland Security Act to Recognize Tribal Sovereignty," *Dickinson Law Review*, vol. 108 (summer 2003).

INDIVIDUALS WITH DISABILITIES

Administrations over the last 30 years have made progress toward the goal of equal opportunity for persons with disabilities. Legislation first addressed accessibility and integration in the 1970s. President Nixon signed the Rehabilitation Act of 1973 into law. It prohibits discrimination on the basis of disability in programs conducted by federal agencies or receiving federal funds.¹¹⁴ President Ford signed the Individuals with Disabilities Education Act (formerly known as the Education for all Handicapped Children Act) into law in 1975, requiring states to provide integrated education to all children with disabilities.¹¹⁵

The Carter administration created the National Council on the Handicapped to evaluate all federal policies and programs for individuals with disabilities. Initially housed at the Department of Education, the council was later made an independent federal agency and renamed the National Council on Disability.¹¹⁶ Under President Reagan, accessibility requirements were extended to polling places,¹¹⁷ and the Fair Housing Act was amended to include protections against discrimination in housing.¹¹⁸

These federal efforts culminated with the passage of the American with Disabilities Act (ADA), signed into law on July 26, 1990, by President George H.W. Bush. The spirit of ADA is to ensure that persons with disabilities have access to equal opportunity, full participation in government services, public accommodations, independent living, and economic self-sufficiency.¹¹⁹ After pushing Congress to pass the ADA, President Bush Sr. signed one of the most far-reaching disability rights laws and redefined accessibility and accommodation. The Clinton administration built on the ADA's progress by improving access to federal jobs through two executive orders: 13,163, which sought to increase the number of disabled persons employed by the federal government; and 13,164, which required the development of written federal agency procedures for responding to reasonable accommodation requests from employees and applicants with disabilities.¹²⁰

¹¹⁴ Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701–761 (2000)).

¹¹⁵ Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–1487 (2000)).

¹¹⁶ Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955 (codified as amended at 29 U.S.C. §§ 701–794 (2000)).

¹¹⁷ Voting Accessibility for the Elderly and Handicapped Act of 1984, Pub. L. No. 98-435, 98 Stat. 1678 (codified as amended at 42 U.S.C. §§ 1973ee–1973ee-6 (2000)).

¹¹⁸ Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601–3631 (2000)).

¹¹⁹ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2000)). See U.S. Commission on Civil Rights, *Sharing the Dream: Is the ADA Accommodating All?* October 2000, <<http://www.usccr.gov/pubs/ada/exsum.htm>>.

¹²⁰ Increasing Opportunities for Individuals with Disabilities to be Employed in the Federal Government, Exec. Order No. 13,163, 3 C.F.R. 285 (2001); Requiring Federal Agencies to Establish Procedures to Facilitate the Provision of Reasonable Accommodation, Exec. Order No. 13,164, 3 C.F.R. 286 (2001).

New Freedom Initiative

During his campaign, President Bush voiced support for more comprehensive disability rights. The cornerstone was the New Freedom Initiative (NFI), a plan that would build upon the success of ADA by further integrating individuals with disabilities into the workforce and removing barriers to full participation in community programs and services.¹²¹ Significant barriers to full participation remain, and President Bush declared his administration's commitment to tearing them down.¹²²

According to the U.S. census, 53 million Americans (roughly 20 percent of the U.S. population) have a disability; of those, 33 million have a severe disability and 10 million require assistance in their daily lives.¹²³ The White House has noted that disability "is an experience that will touch most Americans at some point during their lives."¹²⁴ The obstacles facing such individuals include: 44 percent unemployment among those who are able to work and 68 percent among all individuals with disabilities; less than 10 percent homeownership; and computer usage and Internet access 50 percent lower than individuals who do not have disabilities.¹²⁵ The administration adopted NFI, indicating it would eliminate these obstacles by providing tax incentives, low-interest loans, and grants to expand access to assistive technologies.¹²⁶

In January 2001, as President Bush was taking office, the National Council on Disability (NCD) issued a series of recommendations in which it expressed support for NFI, and implored President Bush to follow through on his plan. NCD encouraged the President to exercise bold leadership in developing federal strategy to implement NFI and the NCD recommendations.¹²⁷ On February 1, 2001, the White House unveiled a succession of policies to: (1) increase access to

¹²¹ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2000)). See also "Governor Bush Statement on the 10th Anniversary of the Americans with Disabilities Act," *NewsMax.com*, July 24, 2000, <<http://www.newsmax.com/articles/print/shtml?a=2000/7/26/132926>>.

¹²² The White House, "Foreword by President George W. Bush," Feb. 1, 2001, <<http://www.whitehouse.gov/news/freedominitiative/freedominitiative.html>> (hereafter cited as White House, "Foreword"); President George W. Bush, "New Freedom Initiative," February 2001, p. 1, <<http://www.whitehouse.gov/news/freedominitiative/freedominitiative.pdf>> (hereafter cited as President Bush, "New Freedom Initiative").

¹²³ U.S. Census Bureau, "Meeting the Challenge: Americans with Disabilities, 1997," chap. 19 in *Population Profile of the United States: 2000*. Severely disabled individuals are defined as: requiring the use of a wheelchair, cane, crutches, or walker; having a mental condition that seriously interferes with everyday activities; receiving federal benefits based on inability to work; or having inability to see, hear, speak, or perform physical activities.

¹²⁴ White House, "Foreword"; President Bush, "New Freedom Initiative," p. 1.

¹²⁵ National Organization on Disability, "Employment Rates of People with Disabilities," July 24, 2001, <<http://www.nod.org/content.cfm?id=134>> (last accessed July 22, 2004); National Council on Disability, *National Disability Policy: A Progress Report, December 2001–December 2002* (Washington, D.C.: NCD, July 26, 2003).

¹²⁶ Edwin Chen, "Bush Initiative Targets Barriers to the Disabled," *Los Angeles Times*, Feb. 2, 2001, p. A21 (hereafter cited as Chen, "Bush Initiative").

¹²⁷ National Council on Disability, "Investing in Independence: Transition Recommendations for President George W. Bush," January 2001, pp. 1, 6.

assistive and universally designed technologies; (2) expand education opportunities; and (3) promote full access to community life for people with disabilities.¹²⁸

NFI quickly drew praise from the National Organization on Disability (NOD); its president described the initiative as “exciting,” and one that “augurs well” for the disabled community under the Bush administration.¹²⁹ NFI also garnered support from both parties in Congress despite suggestions that it might face Republican opposition.¹³⁰ In his 2004 budget, President Bush proposed \$2.1 billion in new NFI spending over a five-year period.¹³¹

In addition, President Bush issued an executive order directing the U.S. Departments of Justice, Health and Human Services (HHS), Education, Labor (DOL), and Housing and Urban Development, as well as the Social Security Administration to assist states in expanding community-based services for individuals with disabilities.¹³² In implementing NFI, President Bush has relied heavily on DOL and HHS to administer grants that improve community involvement, housing, access to health care, and other living conditions for individuals with disabilities.¹³³ Another component of NFI was the creation of DisabilityInfo.gov, a Web site launched in October 2002 under the direction of DOL, to make readily available online information on disability services and to coordinate the efforts of numerous federal agencies to improve access.¹³⁴

Through NFI the administration shows it recognizes the critical needs of individuals with disabilities. NFI is an example of an effective multi-agency effort that reflects the administration’s commitment. The effort builds on the momentum created by the ADA, especially to reach out more effectively to the disability rights community and bring attention to remaining obstacles to equal access. Although some progress has been made in recent years, gaps in key life activities persist between persons with disabilities and those without. According to the 2004 NOD/Harris survey of Americans with disabilities, some social and economic indicators, such as education and employment, have shown improvement since 1986, and discrimination against people with disabilities has declined. However, other indicators, such as

¹²⁸ White House, “Foreword”; President Bush, “New Freedom Initiative,” pp. 3–5.

¹²⁹ “National Organization on Disability Applauds Bush’s New Freedom Initiative,” *U.S. Newswire*, Feb. 1, 2001.

¹³⁰ Tom Ramstack, “New Freedom for Disabled,” *Washington Times*, Mar. 12, 2001 p.D10; “Disabilities: Bush Faces Opposition in Court, Congress,” *American Health Line*, Mar. 12, 2001; Chen, “Bush Initiative.”

¹³¹ U.S. Department of Health and Human Services, Center for Medicare and Medical Services, “President Will Propose \$1.75 Billion Program to Help Transition Americans with Disabilities from Institutions to Community Living,” press release, Jan. 23, 2003, <<http://cms.hhs.gov/newfreedom/nfi12303pr.asp>>.

¹³² Community Based Alternatives for Individuals with Disabilities, Exec. Order No. 13,217, 3 C.F.R. 774 (2001).

¹³³ “Administration Announces Steps to Promote Community Living for People with Disabilities,” *U.S. Newswire*, Mar. 25, 2002; “Labor Dept. Announces \$6 million Available for Grants to Integrate Disabled People into Workforce,” *States News Service*, July 24, 2002; “U.S. Department of Labor Announces New Freedom Initiative Award,” *U.S. Newswire*, July 3, 2002; “HHS Awards \$2.5 Million to Five States to Enable More Disabled Persons to Work,” *U.S. Newswire*, Feb. 24, 2003; “HHS Approves New York’s Request to Expand Medicaid to Working Individuals with a Disability,” *U.S. Newswire*, June 26, 2003; “HHS to Fund Demonstrations to Recruit and Retain Personal Assistance Workers to Help People with Disabilities,” *U.S. Newswire*, June 20, 2003.

¹³⁴ “devIS Announces Launch of DisabilityInfo.gov: The New Freedom Initiative’s Online Resource for Americans with Disabilities, Site Mandated by Executive Order from the President of the United States,” *Business Wire*, Oct. 16, 2002; The White House, memorandum for the heads of executive departments and agencies, Aug. 28, 2002.

access to health care and transportation, have not improved.¹³⁵ Survey results indicate that the ADA, as well as initiatives such as NFI, have made advancements, but the persistent gaps reveal that much more must be done to ensure equal opportunity for persons with disabilities.

President's Commission on Excellence in Special Education

The passage of the Individuals with Disabilities Education Act (IDEA) in 1975, under the Ford administration, for the first time required by law that all children be afforded the right to a public education that met their individual needs.¹³⁶ Congress intended to end the history of segregation and exclusion of children with disabilities from the public school system.¹³⁷

The IDEA was reauthorized in 1997, amended to clarify and strengthen its implementation, and was scheduled for reauthorization again in 2002. However, Congress was unable to reach an agreement on some of the law's provisions, including discipline of students with disabilities and funding, so it lingered unrenewed for two years. On May 13, 2004, the Senate finally passed a reauthorization bill, which has yet to be reconciled with a House version.¹³⁸ The administration has not pressed Congress to reauthorize IDEA despite earlier efforts to examine the law's implementation.

Recommendations for IDEA Reauthorization

In October 2001, President Bush issued Executive Order 13,227, creating the President's Commission on Excellence in Special Education (PCESE), a board created to collect information and study federal, state, and local special education.¹³⁹ The executive order required PCESE to present its findings and provide recommendations for the reauthorization of IDEA. In February 2002, PCESE visited nine cities and heard testimony from more than 100 special education experts and 175 parents. It presented the information it collected in a report released in July 2002.¹⁴⁰ PCESE identified nine findings that led to three major recommendations: (1) the special

¹³⁵ National Organization on Disability/Harris Interactive, "2004 National Organization on Disability/Harris Survey of Americans with Disabilities," June 24, 2004, <http://www.nod.org/pdffiles/harris2004/harris2004_pres.pdf> (last accessed July 27, 2004).

¹³⁶ Education of the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1487 (2000)).

¹³⁷ U.S. Commission on Civil Rights, "Making a Good IDEA Better: The Reauthorization of the Individuals with Disabilities Education Act," briefing paper, Apr. 12, 2002, <<http://www.usccr.gov/pubs/idea/paper.htm>> (last accessed Apr. 22, 2004).

¹³⁸ The Senate bill (S. 1248) passed by a vote of 95-3. See A Bill to Reauthorize the Individuals with Disabilities Education Act, S. 1248, 108th Cong. (2004). However, because the Senate and House versions differ significantly, the conference is expected to be contentious. Bill Swindell, "Senate Passes Rewrite of Main Program Funding Special Education Grants," *CQ Today*, May 14, 2004, p. 8.

¹³⁹ President's Commission on Excellence in Special Education, Exec. Order No. 13,227, 3 C.F.R. 793 (2002); The White House, "Executive Order 13,227—The President's Commission on Excellence in Special Education," Oct. 2 2001, <<http://www.ed.gov/inits/commissionboards/whspecialeducation/about.html>>.

¹⁴⁰ "President's Commission Hits the Road, Hears Concerns," *The Special Educator*, vol. 17, no. 18 (Feb. 12, 2002); Andrew Mollison, "Commission's Special Ed Report Pleases Senators," *Cox News Service*, July 9, 2002 (hereafter cited as Mollison, "Commission's Special Ed Report"); President's Commission on Excellence in Special

education system must focus more on results rather than process; (2) special education must focus more on preventing academic failure than remedying it; and (3) children with disabilities must be considered as general education children first.¹⁴¹ PCESE also recommended ways to build accountability for student performance in a manner similar to that sought by the No Child Left Behind Act.¹⁴²

The Commission has long regarded the IDEA as an important statute. Not only does it affect the 6 million students with disabilities who benefit from its funding, but because of the disparities in special education needs and services between minority and nonminority students, it has civil rights implications.¹⁴³ In May 2002, the Commission issued reauthorization recommendations to strengthen the law, based on extensive research and testimony from special education experts.¹⁴⁴

PCESE echoed many of the Commission's recommendations, including improving the dispute resolution mechanisms of IDEA, improving teacher quality, and treating all children as general education students first.¹⁴⁵ However, with regard to funding, the Commission supports immediate full funding and federal assistance to help small states meet their student resource needs.¹⁴⁶ PCESE did not recommend full funding for IDEA, but rather asked for increases for specific needs.¹⁴⁷ In defending its recommendation, PCESE weighed special education funding against other federal priorities, including health care research and national defense.¹⁴⁸ The Commission stated that, in denying full funding for special education, the federal government is abdicating its duty to ensure equal educational opportunities.¹⁴⁹

Special education experts also have expressed reservations about PCESE's recommendations.¹⁵⁰ For example, one of PCESE's most controversial recommendations was that parents be able to send their children to a school of their choice, whether public, private, or charter, if it will meet specific education needs. Further, PCESE recommends that states be given the flexibility to use

Education, "A New Era: Revitalizing Special Education for Children and Their Families" July 1, 2002 (hereafter cited as PCESE, "A New Era").

¹⁴¹ PCESE, "A New Era," pp. 2–8. This approach is aligned with the recommendations of the PCESE and was designed to focus the department's monitoring efforts on states that need the most support to improve performance.

¹⁴² See NCLB, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.); Dave Winans, "IDEA Faces Reauthorization: NEA Members in California are Working to Ensure its Fully Funded and Effectively Addresses the Needs of Students," *NEA Today*, vol. 21, no. 6 (Mar. 1, 2003).

¹⁴³ U.S. Commission on Civil Rights, "U.S. Commission on Civil Rights Recommendations for the Reauthorization of the Individuals with Disabilities Education Act," May 2002, <<http://www.usccr.gov/pubs/idea/recs.htm>> (hereafter cited as USCCR, "Recommendations for the Reauthorization of IDEA").

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ PCESE, "A New Era," pp. 28–35.

¹⁴⁸ "Bush Panel Disputes Need For Guaranteed Special Education Funding," *The Bulletin's Frontrunner*, July 10, 2002.

¹⁴⁹ USCCR, "Recommendations for the Reauthorization of IDEA."

¹⁵⁰ Mollison, "Commission's Special Ed Report"; "Experts Skeptical of Commission's Recommendations on Vouchers," *The Special Educator*, vol. 18, no. 2 (July 26, 2002) (hereafter cited as "Experts Skeptical").

federal funds toward vouchers in a manner they see fit.¹⁵¹ The executive director of the National Association of State Directors of Special Education described vouchers as a drain of resources, especially given the already inadequate funding for special education.¹⁵²

The American Speech-Language-Hearing Association commended the report's recommendation that IDEA focus on achieving results rather than meeting procedural requirements.¹⁵³ Another organization praised PCESE's call for more accountability on student performance, but criticized it for failing to recommend complete funding.¹⁵⁴ The Citizens' Commission on Human Rights applauded PCESE for calling on schools to eliminate wasteful special education spending through reductions in learning disorder misdiagnoses.¹⁵⁵

The Council for Exceptional Children (CEC) had difficulty responding to the report, stating that some of the recommendations lacked supporting data. Nevertheless, CEC expressed wariness over a PCESE recommendation suggesting that voluntary and mandatory funding be consolidated; CEC fears that pooling funds may lead to overall special education reductions. Furthermore, CEC stated that PCESE's report contained no explanation for how merging the funds would yield administrative or programmatic benefits.¹⁵⁶

The Administration's Commitment to Special Education

The Bush administration has generally demonstrated commitment to improving special education. In his 2002 and 2003 budgets, President Bush requested \$1 billion increases in funding for special education, the largest ever proposed.¹⁵⁷ He also proposed an increase of \$1 billion in grants to states for 2005, but level or reduced funding for other IDEA provisions, such as personnel preparation, parent information centers, preschool grants, and research.¹⁵⁸ Moreover, in his 2005 budget proposal, President Bush recommends eliminating 38 DOEd programs, among them dropout prevention, school counseling, and smaller learning community

¹⁵¹ PCESE, "A New Era," pp. 39–40.

¹⁵² "Experts Skeptical."

¹⁵³ American Speech-Language-Hearing Association, "ASHA Comments on Bush Commission Report; Focus on Schools," *A.S.H.A. Leader*, Sept. 10, 2002.

¹⁵⁴ Amy Hetzner, "Special Ed Panel Likes Phonics, Vouchers; But Some Wonder Why More Money Isn't Mentioned," *Milwaukee Journal Sentinel*, July 14, 2002, p. 1B. At the Wisconsin Association of School Boards, however, executive director Ken Cole welcomed the recommendations from the President's commission and said he hopes Congress incorporates them into law.

¹⁵⁵ "Mental Health Watchdog Applauds President's Commission on Excellence in Special Education," *U.S. Newswire*, July 10, 2002.

¹⁵⁶ "CEC Says Commission's Accountability Recommendations Unclear," *The Special Educator*, vol. 18, no. 8 (Nov. 5, 2002). The PCESE also identified data quality issues, including inconsistent reporting and data formats. While education officials acknowledged that the special education discipline data contain some inaccuracies, they indicated that states were taking measures to improve accuracy.

¹⁵⁷ President George W. Bush, remarks on the 12th Anniversary of the signing of the Americans with Disabilities Act, Washington, D.C., July 26, 2002.

¹⁵⁸ "Budget Proposal," *Inclusive Education Programs*, Feb. 27, 2004.

programs, to save \$1.4 billion. He recommends that the services they provide be funded through flexible grant programs. Many of these programs serve students with disabilities.¹⁵⁹

Although establishing PCESE constitutes a commitment to examining special education, some of PCESE's recommendations oppose those of organizations working most closely with special education children.¹⁶⁰ Moreover, the federal government has not fully implemented the changes Congress made to IDEA in 1997, and thus should be cautious about further sweeping changes. These caveats demand that the Bush administration fully fund IDEA and carefully examine whether changing IDEA before entirely implementing existing provisions will hinder progress.

WOMEN'S RIGHTS

Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it's the only thing that ever has.

—Margaret Mead

More than 150 years ago, at the Seneca Falls Convention of July 1848, a gathering of women seeking a more active role in society launched the women's suffrage movement. An effort to achieve full citizenship in the United States, the movement was borne from the bravery and strength of small groups of women throughout the country. Drawing from the Declaration of Independence, leaders outlined ideals toward improving the new republic and attaining the liberties and freedoms for which the American Revolution had been fought.¹⁶¹ In the Declaration of Sentiments, a list of women's grievances, Elizabeth Cady Stanton demanded equality:

Now, in view of this entire disenfranchisement of one-half the people of this country, their social and religious degradation, . . . and because women do feel themselves aggrieved, oppressed, and fraudulently deprived of their most sacred rights, we insist that they have immediate admission to all the rights and privileges which belong to them as citizens of the United States.¹⁶²

The views of Stanton and her contemporaries were well ahead of their time, and their calls for equality drew opposition and intense ridicule. But the women stood firm, and the negative publicity sparked a revolution, as masses of women joined. Winning the right to vote was their

¹⁵⁹ "Small Programs for Special Needs Students at Risk," *California Special Education Alert*, Mar. 4, 2004.

¹⁶⁰ The Bush administration is also involved with the Personnel Preparation to Improve Services and Results for Children with Disabilities program (assisting states in ensuring that special and regular education teachers have the skills to work with special education children) and State Improvement Grant program (assisting states in ensuring that teachers working with children with disabilities possess the content and pedagogical skills to help them meet the same state standards as nondisabled students). See The White House, "A Quality Teacher in Every Classroom: Improving Teacher Quality and Enhancing the Profession," pp. 21–22, <<http://www.whitehouse.gov/infocus/education/teachers/>> (last accessed June 23, 2004).

¹⁶¹ National Women's History Project, "Living the Legacy: The Women's Rights Movement, 1848–1998," <<http://www.legacy98.org/move-hist.html>> (last accessed May 28, 2004) (hereafter cited as National Women's History Project, "Living the Legacy").

¹⁶² *Ibid.*, quoting Elizabeth Cady Stanton, 1848.

first mission, since it would provide means to other reforms, and in 1920, the vote was won.¹⁶³ In the generations that followed, women struggled for access to education, employment opportunities, religious freedom, and government participation.¹⁶⁴

However, women remained largely excluded from federal policy and decisionmaking until the 1960s, which gave birth to the second wave of post-suffrage activism. In 1961, President Kennedy established the Commission on the Status of Women, naming former first lady Eleanor Roosevelt as its chair, to recommend ways to overcome barriers to full social participation for women. Many research and political advocacy groups grew out of this initiative.¹⁶⁵

In 1963, the Equal Pay Act passed in Congress, promising equal wages for the same work, regardless of sex, race, color, religion, or national origin.¹⁶⁶ The following year brought the passage of the Civil Rights Act of 1964, which included protection against employment discrimination on the basis of sex.¹⁶⁷ In 1968, President Johnson amended Executive Order 11,246, to include a prohibition against sex discrimination by government contractors and require affirmative action hiring plans for women.¹⁶⁸

The path to women's equality, as with other group efforts, has not been without obstacle. For example, an Equal Rights Amendment (ERA) to guarantee equality for men and women was first proposed in 1923, but did not receive congressional attention until 1970. Congress eventually passed the constitutional amendment in 1972, but supporters of the ERA were unable to attain ratification by the necessary 38 state legislatures.¹⁶⁹ That year, however, in one of the most important moments in women's history, President Nixon signed into law Title IX of the Education Amendments of 1972.¹⁷⁰ The law, which will be discussed in greater detail below, guaranteed freedom from sex discrimination in any educational institution receiving federal funds. In 1974, President Ford launched the National Commission on the Observation of International Women's Year, an effort to root out remaining discriminatory barriers to women's equality. Building upon the initial plan of action, more than 20 years later, President Clinton

¹⁶³ The Nineteenth Amendment to the Constitution reads: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. amend. XIX.

¹⁶⁴ National Women's History Project, "Living the Legacy." See also National Women's History Project, "Timeline of Legal History of Women in the United States," <<http://www.legacy98.org/timeline.html>> (last accessed May 28, 2004).

¹⁶⁵ The National Council for Research on Women, *Missing: Information about Women's Lives*, March 2004, p. 4 (hereafter cited as NCRW, *Missing*).

¹⁶⁶ Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206 (2000)).

¹⁶⁷ Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (2000)).

¹⁶⁸ Equal Employment Order, Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965).

¹⁶⁹ Margaret M. Heckler, "America Needs an Equal Rights Amendment (1970)," pp. 303-05, in *Opposing Viewpoints in American History, Volume II: From Reconstruction to the Present* (San Diego, CA: Greenhaven Press, Inc., 1996).

¹⁷⁰ Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681-1688 (2000)).

appointed a high-level President's Interagency Council on Women to implement a strategy for addressing women's issues through federal involvement.¹⁷¹

Redefining Women's Issues, Undercutting Women's Rights

In ways both well-publicized and carefully hidden, glaring and subtle, the Bush Administration is taking steps to roll back women's progress in every aspect of their lives—their opportunities to succeed at work and in school, their economic security, their health and reproductive rights.¹⁷²

Women's groups have criticized the Bush administration for attempting to redirect national policy on women's issues, specifically narrowing its agenda and lowering its priority. In 2004, the National Women's Law Center reviewed the administration's record on women's rights and found several examples of actions that, if left unchecked, will roll back women's progress. For example, the administration:

- Closed the White House Office for Women's Initiatives and Outreach. Among its duties, the office advocated on behalf of women's issues and kept the President and his administration informed about women's needs;¹⁷³
- Attempted to close the Women's Bureau at the Department of Labor (DOL), in existence since 1920, but eventually decided to leave it in operation;
- Abolished the Equal Pay Matters Initiative at DOL, an effort to achieve pay equity for women;¹⁷⁴
- Repealed DOL regulations that allowed paid family leave through state unemployment compensation funds;
- Weakened enforcement of job discrimination cases by the Department of Justice and abandoned several pending sex discrimination suits;
- "Archived" guidance on sexual harassment in schools, no longer making it available to the public;

¹⁷¹ NCRW, *Missing*, p. 4.

¹⁷² National Women's Law Center, *Slip-Sliding Away: The Erosion of Hard-Won Gains for Women Under the Bush Administration and an Agenda for Moving Forward*, April 2004, p. 1 (hereafter cited as NWLC, *Slip-Sliding Away*).

¹⁷³ The White House, "The Office for Women's Initiatives and Outreach," <<http://clinton3.nara.gov/women/>> (hereafter cited as White House, "Office for Women"); Patti Caldwell, "Guest Opinion," *Tucson Citizen*, May 16, 2003, p. 5B; Jodi Enda, "Bush, Women's Groups Connect," *Tallahassee Democrat*, Feb. 3, 2002; Kristie Reilly, "'W.' is for Women," *In These Times*, Mar. 4, 2002, p. 5 (hereafter cited as Reilly, "'W' is for Women").

¹⁷⁴ Women for International Peace and Arbitration, "Bush Administration Plans to Close All Regional Offices of the Women's Bureau At Labor Department," <<http://www.wipa.org/WomensBureauCuts.htm>>; Douglas Quenqua, "Women's Groups Kick Off Effort Against Chao's Cuts," *PR Week (US)*, Jan. 14, 2002, p. 5 (hereafter cited as Quenqua, "Women's Groups"); Reilly, "'W' is for Women."

- Proposed modifications to welfare laws that would impose stricter work requirements without increasing child care assistance; and
- Appointed or nominated numerous individuals who oppose women's rights.¹⁷⁵

Likewise, the administration has changed the dialogue about women's issues. For example, according to the National Council for Research on Women (NCRW), the Department of Labor Women's Bureau has been rendered silent on women's economic status and workplace rights.¹⁷⁶ Fact sheets about job equity are no longer posted or distributed, and data about the pay gap between men and women have been recast in deceptively positive light.¹⁷⁷ Supporters of the administration's actions argue that the pay gap is a myth and that the NCRW report "unfairly disparages the administration's efforts to give individuals more control over their lives."¹⁷⁸ They assert that legislating compensation stifles entrepreneurship and initiative and that laws and policies have not kept pace with the changing workplace.¹⁷⁹ While the latter assertion may be true, it is not cause to roll back workplace rights, but rather to extend them to protect all workers and ensure income parity. By changing the dialogue, the administration has decided what issues are important to women and removed information that would allow women to judge workplace issues for the themselves.

With regard to women's health, NCRW notes that information on a federal Web site excludes important, scientific reproductive health information that conflicts with the administration's religious base. Research on the Department of Health and Human Service's Web site has been altered to promote abstinence-only programs rather than potentially life-saving safe sex practices.¹⁸⁰ In addition, despite a lengthy history of legal and academic support, the administration re-evaluated Title IX regulations and proposed to weaken its enforcement provisions. Only after considerable public outcry did the administration abandon its efforts.

Title IX Under Attack

One of the most celebrated outcomes of the women's rights movement was the enactment of Title IX of the Education Amendments of 1972, which explicitly prohibits sex discrimination in any school receiving federal funds.¹⁸¹ For 30 years, Title IX has been praised as a means for

¹⁷⁵ See NWLC, *Slip-Sliding Away*.

¹⁷⁶ NCRW, *Missing*, p. 5.

¹⁷⁷ *Ibid.*, p. 13, citing U.S. General Accounting Office, *Women's Earnings: Work Patterns Partially Explain Difference Between Men's and Women's Earnings*, October 2003, p. 15.

¹⁷⁸ Independent Women's Forum, "National Women's Law Center Reveals Radical Big-Government Agenda," press release, Apr. 8, 2004, <http://www.iwf.org/initiatives/init_detail.asp?ArticleID=570> (last accessed July 14, 2004).

¹⁷⁹ Independent Women's Forum, "Women and Work," <http://www.iwf.org/initiatives/women_and_work.asp> (last accessed July 14, 2004); see also Independent Women's Forum, "Agenda for Women 2004," <http://www.iwf.org/pdf/agenda_04_1.pdf> (last accessed July 14, 2004).

¹⁸⁰ NCRW, *Missing*, p. 6. The Web site in question can be found at <<http://www.4women.gov>>.

¹⁸¹ Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681-1688 (2000)).

women to gain equal access to classes, activities, and educational services.¹⁸² Title IX has most closely been associated with school sports, particularly at the postsecondary level, as a vehicle for ensuring that women and girls have equal access to athletic programs, scholarships, and sports facilities.¹⁸³

President Nixon signed Title IX into law on June 23, 1972. In the administrations since, its scope and application have been clarified and expanded. Under the Ford administration, the Title IX regulations were developed; and under the Carter administration, interpretive policy guidelines were published. The Civil Rights Restoration Act of 1987 rendered all programs of an educational institution receiving federal funds subject to Title IX.¹⁸⁴ The Clinton administration required colleges and universities to collect athletic participation information by gender. The Department of Education also distributed a letter clarifying Title IX enforcement to colleges receiving federal funds.¹⁸⁵ The current administration is the first in the 30-year history of Title IX to attempt to narrow the interpretation and enforcement of the law.

Title IX policy guidance describes compliance requirements with respect to financial assistance, benefits and opportunities, and accommodation of interests and abilities—the latter of which applies to school athletics. To comply with Title IX, a school must: (1) provide intercollegiate participation opportunities for men and women substantially proportionate to their undergraduate enrollments (known as the proportionality test); (2) demonstrate that it has a history and continuing practice of extending women’s programs; or (3) show it is fully accommodating the interests and abilities of women.¹⁸⁶ These criteria are known as the three-part test, with the first criterion being the threshold—if not met, schools must meet one of the other two. The first test, proportionality, is also the most controversial, with opponents erroneously likening it to a quota. However, Title IX does not require identical athletic programs for males and females, nor does it compare one team to another in the same sport or rely strictly on participation numbers as a quota would imply. Rather, it requires that men and women have access to similar services, facilities, and supplies, and that comparable total athletic programs are available to each gender.¹⁸⁷

Title IX has brought about significant successes and has opened doors for female students. In 1971, roughly 294,000 girls participated in high school athletics; they comprised only 7.4 percent of all high school athletes. Today that number has grown to more than 2.7 million, an increase of

¹⁸² See U.S. Commission on Civil Rights, *Equal Educational Opportunity and Nondiscrimination for Girls in Advanced Mathematics, Science, and Technology Education: Federal Enforcement of Title IX*, July 2000.

¹⁸³ The responsibility for enforcing Title IX rests with the Office for Civil Rights (OCR) at the Department of Education.

¹⁸⁴ Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended at 20 U.S.C. §§ 1681, 1687–88, 42 U.S.C. § 2000d-4a (2000)).

¹⁸⁵ The Secretary of Education’s Commission on Opportunity in Athletics, “*Open to All*” *Title IX at Thirty*, final report, Feb. 28, 2003, pp. 19–20 (hereafter cited as COA, “*Open to All*”).

¹⁸⁶ COA, “*Open to All*,” p. 15.

¹⁸⁷ U.S. Department of Education, “Q & A—Secretary’s Commission on Opportunity in Athletics,” <<http://www.ed.gov/print/about/bdscomm/list/athletics/qsandas.html>> (hereafter cited as DOEd, “Q & A”).

nearly 850 percent.¹⁸⁸ Although the gains made are impressive, the reality is that women still lag behind men in athletic opportunities. Females comprise 41 percent of all high school athletes, and 42 percent of college varsity athletes, despite making up more than half of the college population. Moreover, female participation today remains below pre-Title IX male participation.¹⁸⁹

While these discrepancies are sometimes attributed to societal influences or lack of interest in sports, there are clear disparities in funding for athletic programs. For example, in Division I colleges, which have the largest and most prestigious athletic programs, women make up more than half the student body, but receive 43 percent of scholarship dollars, 32 percent of recruiting dollars, and 36 percent of operating budgets. In these schools, for every dollar spent on women's sports, nearly two are spent on men's athletic programs.¹⁹⁰

Despite the persistent need for Title IX enforcement, the law has come under fire. Some claim that men's teams have been unfairly scaled back with funds diverted toward women's teams, ignoring evidence that the majority of schools that have added women's teams over the last decade have done so without discontinuing men's sports.¹⁹¹ This perception prompted the National Wrestling Coaches Association to sue the Department of Education (DOEd) alleging that Title IX's interpretation and the use of the three-part test are unlawful. The suit also alleged that enforcement has resulted in the discriminatory elimination of hundreds of men's athletic programs.¹⁹² DOEd moved to dismiss the lawsuit, and in June 2003 a district court did so. This lawsuit and others precipitated Secretary of Education Rod Paige's creation of a commission to study Title IX and its enforcement.

The Bush Administration's Commission on Opportunity in Athletics

In June 2002, Secretary Paige created the Commission on Opportunities in Athletics (COA), a 15-member panel made up of educators, athletic program officials, government officials, legal analysts, and athletes.¹⁹³ Two main problems served as the impetus for the commission and guided its mission:

¹⁸⁸ Patrick N. Findlay, "The Case for Requiring a Proportionality Test to Assess Compliance with Title IX in High School Athletics," *Northern Illinois University Law Review*, vol. 23 (Nov. 23, 2002), p. 33; COA, "Open to All," p. 2.

¹⁸⁹ National Women's Law Center, "Quick Facts on Women and Girls in Athletics," June 2002, <http://www.nwlc.org/pdf/quickfacts_June2002.pdf> (hereafter cited as NWLC, "Quick Facts on Women and Girls in Athletics").

¹⁹⁰ NWLC, "Quick Facts on Women and Girls in Athletics."

¹⁹¹ COA, "Open to All," p. 19. See National Women's Law Center, "Debunking Myths About Title IX and Athletics," June 2002, <http://www.nwlc.org/pdf/DebunkingTheMyths_June2002.pdf> (last accessed Aug. 13, 2004); U.S. General Accounting Office, *Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams*, March 2001.

¹⁹² National Wrestling Coaches Association, et al. v. U.S. Department of Education, Case No. 1:02CV00072 EGS (D.D.C.); DOEd, "Q & A."

¹⁹³ U.S. Department of Education, "Charter—Secretary's Commission on Opportunity in Athletics," July 5, 2002, <<http://www.ed.gov/print/about/bdscomm/list/athletics/charter.html>>.

- Many college administrators claimed that DOEd had failed to provide clear guidance on how to comply with Title IX and its interpretations.
- Some argued that DOEd has not effectively enforced Title IX, while others argued that the manner in which it is enforced results in the unfair elimination of men's teams.¹⁹⁴

The COA held six public meetings between July 2002 and January 2003 and issued its final report to Secretary Paige in February 2003. The final report called on the secretary to disseminate clearer guidelines on Title IX compliance and called for more rigorous enforcement.¹⁹⁵

As the final report notes, COA heard no testimony recommending the wholesale repeal or revision of Title IX.¹⁹⁶ Rather, COA reported that individuals who testified unanimously endorsed Title IX and agreed that the law contributed greatly to opportunities for women.¹⁹⁷ The COA also heard testimony that, despite Title IX's progress, women and girls continue to face discrimination in access to athletic programs and in equality of facilities and services. The COA concluded:

Enforcement of Title IX needs to be strengthened toward the goal of ending discrimination against girls and women in athletics, and updated so that athletic opportunities for boys and men are preserved. The [COA] strongly believes that Title IX has been and needs to remain an important civil rights statute.¹⁹⁸

Nonetheless, based on complaints that DOEd's Title IX guidance lacks clarity and has created confusion about compliance, the majority of COA's members agreed that Title IX needs an in-depth review and that its enforcement requires adjustment. Among other recommendations, the COA final report suggested that the DOEd Office for Civil Rights (OCR) clarify implementation guidelines and issue new guidelines to assist male athletes in non-revenue sports. It also recommended that OCR not change policies in a manner that would undermine enforcement, and that OCR should increase enforcement and noncompliance sanctions.¹⁹⁹

These recommendations reinforce the need for stronger enforcement and clarity. However, COA made other, more controversial recommendations that would modify implementation of Title IX's three-part test. In that regard, the final report recommended that:

- OCR allow institutions to conduct interest surveys to demonstrate compliance with the three-part test;

¹⁹⁴ COA, "Open to All," p. 3.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid., p. 33.

¹⁹⁷ Ibid., p. 21.

¹⁹⁸ Ibid., p. 22.

¹⁹⁹ Ibid., pp. 4–6, 33–40.

- OCR consider different ways of measuring participation opportunities for demonstrating compliance, such as counting the number of available slots on teams as opposed to the actual number of participants toward the proportionality test;
- In demonstrating compliance with the proportionality requirement, the male/female participation ratio be measured only against a school's undergraduate population minus nontraditional (for example older, part-time, etc.) students;
- All three parts of the three-part test be weighed equally; and
- DOEd explore other ways to demonstrate equity beyond the three-part test.²⁰⁰

Expressing disagreement with the final report, two COA members issued a minority report and disassociated themselves from many of the “unanimous” recommendations. Specifically, the authors of the minority report stated that these recommendations would “seriously weaken Title IX’s protections and substantially reduce the opportunities to which women and girls are entitled under current law.”²⁰¹ They argued that changing the way athletic slots are counted to include those theoretically available, not those actually filled, would artificially inflate the percentage of athletic opportunities available to women.

In addition, the minority report challenged the proposal to discount nontraditional students as unfair because women disproportionately make up this segment of the student body.²⁰² The report challenged the use of interest surveys on grounds that they force women to “prove their right to equal opportunity before giving them the chance to play.”²⁰³ The minority report noted that this proposal is based on the stereotype that women are inherently less interested in sports than men.

In short, the minority report called for maintaining the three-part test, but suggested that DOEd provide enhanced technical assistance on the means by which schools can comply. The authors noted that in every legal challenge, a federal court of appeals has upheld the three-part test, and thus changing it would open the law to additional litigation.²⁰⁴

A Setback for Women’s Opportunity

The final recommendations have displeased organizations on both sides: male sports advocates say they do not go far enough to ensure that men’s sports are not hindered, and women’s sports advocates say they will result in a setback for athletic opportunities.²⁰⁵ Other women’s interest groups disagree with the secretary of education that COA’s recommendations are benign.

²⁰⁰ Ibid., pp. 33–40.

²⁰¹ Donna de Varona and Julie Foudy, *Minority Views on the Report of the Commission on Opportunity in Athletics*, Feb. 26, 2003, p. 1.

²⁰² Ibid., pp. 13–14.

²⁰³ Ibid., p. 16.

²⁰⁴ Ibid., p. 7.

²⁰⁵ Welch Suggs, “Cheers and Condemnation Greet Report on Gender Equity,” *Chronicle of Higher Education*, Mar. 7, 2003, p. 40.

According to a joint statement of the National Women's Law Center, the American Association of University Women, and the Women's Sports Foundation:

The [final] report contains recommendations that would devastate the current Title IX policies and drastically reduce the athletic opportunities and scholarship dollars to which women and girls are legally entitled today.²⁰⁶

They contend that the recommendations, which COA describes as minor or moderate adjustments to strengthen Title IX, will weaken and reverse policies that counter gender discrimination.²⁰⁷ The American Bar Association further opined that the proposed changes to Title IX regulations are inconsistent with congressional intent, judicial interpretations, and regulatory policy.²⁰⁸ Specifically, Title IX advocates have voiced concern about the suggested restructuring of the three-part test, which has served as the basis for compliance and been routinely upheld by case precedent.

In the end, Secretary Paige refused to include the minority report in the record, but stated that he would move forward only on the so-called unanimous recommendations in the majority report, which accounted for 15 of the total 23 recommendations. However, after months of debate and uncertainty, DOEd announced that it would not make changes to its Title IX enforcement program. Proponents of Title IX hailed the decision, while advocates for reform chastised the Bush administration for conceding to the "gender quota crowd."²⁰⁹

Although the administration has shown modest signs of support for Title IX, as in its request that the court dismiss the National Wrestling Coaches Association lawsuit, some women's rights groups believe that the very creation of COA signaled an attempt to undermine the law.²¹⁰ Others conclude that the administration underestimated public support for Title IX and then succumbed to pressure to leave the law alone.²¹¹ Still other commentators note that the administration was persuaded to maintain the status quo by testimonials from educators and college officials in support of Title IX.²¹²

²⁰⁶ Marcia D. Greenberger, co-president, National Women's Law Center, Jacqueline Woods, executive director, American Association of University Women, and Dawn Riley, president, Women's Sports Foundation, letter to editorial page editors, writers, and columnists, Mar. 6, 2003, re: threats to Title IX and sports opportunities for women and girls.

²⁰⁷ Ibid.

²⁰⁸ Robert D. Evans, American Bar Association, Government Affairs Office, letter to Rod Paige, secretary of education, Apr. 28, 2003.

²⁰⁹ Mike Terry, "Decision Retains Title IX Status Quo; Education Department Clarifies Rules, Taking Focus Off Proportionality, but Makes No Changes," *Los Angeles Times*, July 12, 2003, part 4, p. 1, quoting Eric Pearson, chairman, College Sports Council (hereafter cited as Terry, "Decision Retains Title IX Status Quo").

²¹⁰ See, e.g., National Women's Law Center, "Court Rules Against Wrestlers and Upholds Long-Standing Title IX Policies, as Urged by NWLC," press release, June 11, 2003, <<http://www.nwlc.org/details.cfm?id=1553§ion=newsroom>>

²¹¹ Terry, "Decision Retains Title IX Status Quo." One survey found that, of individuals familiar with the law, 70 percent thought it should either be stronger or left alone; only 21 percent wanted it weakened. See Erik Brady, "Poll: Most Adults Want Title IX Left Alone," *USA Today*, Jan. 7, 2003.

²¹² Mechelle Voepel, "Title IX Remains Unaltered; Administration Keeps Status Quo," *Kansas City Star*, July 13, 2003, p. C4.

The process for reviewing Title IX has also come under fire. The COA has been criticized as a waste of time and taxpayers dollars, and some Title IX experts believe the government could have better spent the money educating the public and school administrators about its requirements to counter misinterpretation.²¹³ Instead, the group designed to study the law offered no substantive recommendations for strengthening enforcement or clarifying its requirements, leaving Title IX prey to the same challenges it has long faced.

Women's Entrepreneurship in the 21st Century

In keeping with its pro-business and market strategy, the administration set in motion a plan to improve women's access to capital and sustain the viability of women-owned businesses. It is estimated that 6.2 million women own business firms that employ 9.2 million people and generate annual sales of \$1.15 trillion and revenues of \$3 trillion.²¹⁴ These businesses are driving the economy by continuously creating jobs, are growing at twice the rate of all other firms in the United States, and are being started at twice the rate of male-owned business.²¹⁵ In 1997, the most recent census survey of business owners, women owned 26 percent of all nonfarm businesses in the United States and were equal co-owners in another 17 percent of businesses.²¹⁶ Despite the growth and success of women-owned businesses, barriers make it difficult for women to access capital and win government procurement contracts.²¹⁷ In 2001, for instance, it was reported that only 39 percent of women launching a business obtained bank loans, compared with 52 percent of men. Consequently, 32 percent of female business owners used credit cards to finance their ventures, compared with 21 percent of men.²¹⁸

²¹³ Terry, "Decision Retains Title IX Status Quo."

²¹⁴ U.S. Department of Labor and U.S. Small Business Administration, "Women Entrepreneurship in the 21st Century: About Us," n.d., <<http://www.women-21.gov/about.asp>> (last accessed June 22, 2004) (hereafter cited as DOL and SBA, "About Us"); U.S. Department of Labor, "Summary Report: Women Entrepreneurship in the 21st Century," Mar. 18–19, 2002, p. 1 (hereafter cited as DOL, "Summary Report"); U.S. Small Business Administration, "Women Entrepreneurship in the 21st Century Comes to New Britain, Connecticut," press release, Aug. 5, 2002, <<http://www.sba.gov/news/indexheadline.html>> (hereafter cited as SBA, "Women Entrepreneurship"); Amanda Temple, "1-Stop Resource Shopping for Women Entrepreneurs," *Chicago Tribune*, Apr. 23, 2003, p. 3 (hereafter cited as Temple, "1-Stop Resource"). Revenue is the amount of sales during a specific period, including discounts and returned merchandise. It is the primary figure from which costs are subtracted to determine net income.

²¹⁵ The White House, "President Unveils Small Business Plan at Women's Entrepreneurship Summit," Mar. 19, 2002, <<http://www.whitehouse.gov/news/releases/2002/03/print/20020319-2.html>>; U.S. Department of Labor, Bureau of International Labor Affairs, "Labor Markets in the 21st Century: Skills and Mobility Proceedings of a Joint United States and European Union Conference," September 2002, <<http://www.dol.gov/ilab/media/reports/oiea/labormarkskills/labormarkskills.htm>> (hereafter cited as DOL, "Labor Markets"); Rochester Institute of Technology, "RIT Study Examines Motivating Influences for Women in Business," Aug. 14, 2001, <<http://www.rit.edu/%7E93www/Proj/News/viewstory.php3?id=319>>; SBA, "Women Entrepreneurship."

²¹⁶ U.S. Census Bureau, "1997 Economic Census, Survey of Women-Owned Business Enterprises," March 2001, p. 9. The Census Bureau conducts its Survey of Business Owners and Self-Employed Persons every five years (in years ending in 2 and 7). The results of the 2002 survey are scheduled for release in 2005.

²¹⁷ DOL, "Summary Report," pp. 2, 3–7.

²¹⁸ Jim Hopkins, "Mars vs. Venus Extends to Entrepreneurs, Too," *USA Today*, May 19, 2003, p. 1B.

Many additional historical obstacles continue to impede women business owners and those wishing to start a business, including minority women. Compared with white women, who are 6.0 percent of entrepreneurs, only 2.8 percent of African American women and 4.2 percent of Hispanic women own a business.²¹⁹ Furthermore, although the overall share of federal dollars spent on women-owned businesses was 2.9 percent in fiscal year 2002, up from 2.1 percent in 1997, the 5 percent goal established by Congress in 1994 has never been reached.²²⁰ The 5 percent goal—a governmentwide strategy to award 5 percent of all federal contracts to women-owned small businesses—is intended to produce needed opportunities for new women-owned businesses and assist existing ones to grow.²²¹ Adding to this decade-long failure is a decrease in the overall share of government contracts for women-owned businesses from 3.8 percent in 1999 to 3.4 percent in 2002. In real terms, only \$6.8 billion federal procurement dollars of a total \$235.4 billion was spent on women-owned small businesses in 2002. Out of 8.1 million federal contracts, women-owned small businesses only received 272,305, or 3.4 percent. Lastly, the average federal contract value for women-owned businesses was \$25,069 compared with \$29,222 for all businesses.²²²

The administration has expressed a determination to promote policies and programs that eliminate obstacles to growth and promote the lasting viability of women in business.²²³ The President directed the Department of Labor and Small Business Administration to develop Women-21.gov, a Web site dedicated to supporting women entrepreneurs by providing information for achieving success.²²⁴ The site, which was launched in March 2003, is geared toward, among other things, making the federal government more accessible to women who own businesses or are thinking of starting one.²²⁵

In addition to the Web site, between July 2002 and September 2003, the administration held two conferences, a summit, and four regional forums addressing the major concerns of women entrepreneurs, including workplace issues.²²⁶ During these events, women business owners

²¹⁹ National Women's Business Council, "Hispanic Women and Entrepreneurship," fact sheet, September 2003.

²²⁰ National Women's Business Council, "Issues in Brief," August 2003; National Women's Business Council, "Federal Spending with Women-Owned Businesses Increased in FY 2002, But 5% Goal Still Unclaimed," *Engage!*, September/October 2003, p. 1 (hereafter cited as NWBC, "Federal Spending").

²²¹ U.S. Senate, Committee on Small Business, "Bond Resolution Urging President To Support Women's Business Contracting Goal Passes," press release, May 24, 2000, <<http://www.senate.gov/~sbc/106press/may2400.html>> (hereafter cited as U.S. Senate, "Bond Resolution").

²²² National Women's Business Council, "Issues in Brief," August 2003; NWBC, "Federal Spending."

²²³ DOL and SBA, "About Us."

²²⁴ *Ibid.*; See DOL, "Labor Markets," for a discussion of additional DOL work in this area

²²⁵ Temple, "1-Stop Resource."

²²⁶ See U.S. Department of Labor, "Women Entrepreneurship in the 21st Century," conference in Washington, D.C., Mar. 18–19, 2002, <http://www.dol.gov/21cw/Women_3_18/index.htm> (last accessed June 22, 2004); U.S. Department of Labor, "Women Entrepreneurship in the 21st Century," conference in Philadelphia, PA, Apr. 3, 2003, <<http://www.dol.gov/21cw/030403phil/index.htm>>; U.S. Department of Labor, "Women Entrepreneurship in the 21st Century," conference in Tampa, FL, Sept. 23, 2003, <<http://www.dol.gov/21cw/092303tampa/index.htm>>; National Women's Business Council, "Women's Entrepreneurship in the 21st Century—A Summary of Data from National and Regional Summaries," June 2003, p. 1 (hereafter cited as NWBC, "A Summary of Data").

interacted with government and business leaders who provided information and listened to their concerns.²²⁷

The Commission commends the administration for its efforts to break down barriers facing women entrepreneurs and for attempting to level the resources in an arena too long favoring men. It can and should do much more to ensure the economic and social well-being of women. While the administration is making an attempt to bolster women's entrepreneurship, this single initiative does not make up for other areas of retreat.

GAY RIGHTS AND THE ADMINISTRATION OF JUSTICE

Past administrations have been relatively silent on sexual orientation issues, despite that the gay rights movement has been galvanizing since the 1960s. The Clinton administration spotlighted discrimination on the basis of sexual orientation, focused on the issue of gay men and lesbians in the military, and offered the compromise "Don't Ask, Don't Tell" policy, which allowed the military to investigate a service member's sexual orientation only when it received credible information of homosexual conduct or stated homosexuality.²²⁸ President Bush has maintained the Clinton policy, while stating his opposition to gay men and lesbians serving in the military.²²⁹

This split position is indicative of the administration's stance with respect to gay rights issues generally. President Bush has attempted to take a middle-of-the-road approach: not reversing existing policies outright, but restricting rights when pushed. The most prominent gay rights issues of this administration have been same-sex marriage, employment discrimination in the federal government, and recognition of Gay Pride Month among federal employees.²³⁰ According to one researcher, in his first year in office, the President amassed an historic record on gay and lesbian issues for his political party.²³¹ He appointed advocates for gay rights to his Cabinet and top positions, and he refused to overturn executive orders signed by President Clinton barring discrimination against gay men and lesbians in federal employment and security

²²⁷ NWBC, "A Summary of Data," p. 1.

²²⁸ U.S. Commission on Civil Rights, *A Bridge to One America: The Civil Rights Performance of the Clinton Administration*, April 2001, pp. 32–34.

²²⁹ Jason Cianciotto and Roddrick Colvin, National Gay and Lesbian Task Force, "The Bush-Cheney Administration on Lesbian, Gay, Bisexual, and Transgender Issues," January 2004, p. 15 (hereafter cited as Cianciotto and Colvin, "The Bush-Cheney Administration"); see also Aaron Belkin and Melissa Sheridan Embser-Herbert, "A Modest Proposal: Privacy as a Flawed Rationale for the Exclusion of Gays and Lesbians from the U.S. Military," *International Security*, Fall 2002 (hereafter cited as Belkin and Embser-Herbert, "A Modest Proposal").

²³⁰ See "Not Antigay Enough: Far-right Leaders Wage Political War Over President Bush's 'Pro-gay' Bent," *The Advocate*, June 2003, <http://www.advocate.com/html/stories/892/892_bush.asp> (hereafter cited as "Not Antigay Enough"); Belkin and Embser-Herbert, "A Modest Proposal"; Tony Mauro, "U.S. Supreme Court Strikes Down Law Banning Gay Sex," *Legal Times*, June 27, 2003 (hereafter cited as Mauro, "U.S. Supreme Court"); Lou Chibbaro Jr., "Mixed Reviews on Lesbian and Gay Rights for Bush's First Year," chapter 15 in Dianne M. Piché, William L. Taylor, and Robin A. Reed, eds., *Rights at Risk: Equality in an Age of Terrorism* (Washington, D.C.: Citizens Commission on Civil Rights, 2002), pp. 219–25 (hereafter cited as Chibbaro, "Mixed Reviews"); "John Ashcroft and Gay Pride," *New York Times*, June 13, 2003, p. A32 (hereafter cited as "John Ashcroft and Gay Pride"); "Beyond the Pale," *New York Times*, June 23, 2003, p. A20 (hereafter cited as "Beyond the Pale").

²³¹ See Chibbaro, "Mixed Reviews," p. 219.

clearances.²³² He also signed a law allowing domestic partners in Washington, D.C., the right to register their relationships.²³³ These positive actions, however, must be considered in the context of other presidential policies and appointments that have curtailed gay rights.

Pro- and Anti-Gay Appointments

When President Bush supported the appointment of former Montana governor Marc Racicot to chair the Republican National Committee (RNC), he backed an individual who promoted a Montana hate crimes bill that included protections for gay and lesbian individuals and helped defeat an anti-gay bill introduced in the Montana legislature.²³⁴ As RNC chair, Racicot favored dealing with sexual orientation unequivocally. He argued that those promoting an anti-gay agenda within his party should not hide behind rhetoric or political correctness.²³⁵ At least one civil rights organization views this selection as a sign of inclusiveness and tolerance in the Republican Party.²³⁶

Likewise, gay rights organizations praised the selection of Christine Todd Whitman, former New Jersey governor, to head the Environmental Protection Administration (EPA). Even though her EPA position did not involve policymaking related to gay and lesbian issues, she was a known supporter of gay and lesbian interests.²³⁷ Some gay rights groups who commended Tommy Thompson for his strong support in the fight against HIV/AIDS as governor of Wisconsin and for his efforts to remove anti-gay language from the Republican Party platform praised his appointment as secretary of health and human services.²³⁸ Not all gay rights activists supported this nomination, however. The executive director of the National Gay and Lesbian Task Force objected based on the calculation that Thompson's marriage and welfare agendas would reduce

²³² See, e.g., Further Amendment to Executive Order 11478, Equal Employment Opportunity in the Federal Government, Exec. Order No. 13,087, 3 C.F.R. 191 (1998) (hereafter cited as Exec. Order No. 13,087); Chibbaro, "Mixed Reviews," p. 220; Jill Lawrence, "Bush Leaves GOP Door Ajar for Gays, Lesbians," *USA Today*, Apr. 17, 2001 (hereafter cited as Lawrence, "Bush Leaves GOP Door Ajar"); Sheryl Gay Stolberg, "Vocal Gay Republicans Upsetting Conservatives," *New York Times*, June 1, 2003.

²³³ Lawrence, "Bush Leaves GOP Door Ajar"; Log Cabin Republicans, "Opposition to D.C. Domestic Partner Law Folds in U.S. Senate," press release, Nov. 7, 2001 <<http://www.lcr.org/press/20011107.asp>>; Chibbaro, "Mixed Reviews," pp. 219–20, 223.

²³⁴ "Not Antigay Enough"; Chibbaro, "Mixed Reviews," pp. 221, 223. Marc Racicot resigned as chair of the Republican National Committee on June 16, 2003. See Ramesh Ponnuru, "Coming Out Ahead: Why Gay Marriage Is On the Way," *National Review*, vol. 55, no. 14 (July 28, 2003) (hereafter cited as Ponnuru, "Why Gay Marriage Is On the Way"); Don Plummer, "RNC Chief Leaves to Lead Bush Race," *Atlanta Journal-Constitution*, June 17, 2003, p. 5A.

²³⁵ "Not Antigay Enough."

²³⁶ Chibbaro, "Mixed Reviews," p. 221.

²³⁷ Human Rights Campaign, "HRC Gives Bush a Mixed Record," press release, Dec. 22, 2000, <http://www.hrc.org/Content/ContentGroups/News_Releases/2000/HRC_GIVES_BUSH_A_MIXED_RECORD.htm> (last accessed Apr. 23, 2004) (hereafter cited as HRC, "HRC Gives Bush a Mixed Record"); Elizabeth Toledo, executive director, National Gay and Lesbian Task Force, "Tommy Thompson: A Poor Choice for HHS Secretary," Jan. 1, 2001, <<http://www.thetaskforce.org/library/thompson.htm>> (last accessed Apr. 28, 2004) (hereafter cited as Toledo, "Tommy Thompson").

²³⁸ HRC, "HRC Gives Bush a Mixed Record."

social services for gay men and lesbians by, among other things, limiting same-sex partner benefits and restricting adoptions by gay and lesbian couples.²³⁹

The President also selected Scott Evertz, who is openly gay, to head the White House AIDS Policy Office. However, Evertz was later removed from his position and given a job as a senior advisor to Secretary Thompson. The National Gay and Lesbian Task Force said he was reassigned allegedly because he advocated the use of condoms to prevent the spread of AIDS, in conflict with the administration's abstinence-only message. The White House did not provide an official reason for the transfer.²⁴⁰

President Bush also nominated anti-gay rights individuals to other prominent positions. For example, he nominated Alabama Attorney General William Pryor to the United States Court of Appeals for the 11th Circuit. As Alabama's attorney general, Pryor submitted a brief to the Supreme Court in favor of a Texas same-sex anti-sodomy law and labeled his postponement of a family vacation to avoid a day when many gay men and lesbians attended Disney World a "value judgment."²⁴¹ Among the groups opposing Pryor's confirmation was the Log Cabin Republicans, a gay rights organization, which claims that Pryor's work reveals an inability to conduct a "fair-minded review of matters of concern to gay and lesbian Americans."²⁴² Despite these concerns, President Bush bypassed the confirmation process and appointed Pryor under his congressional recess authority (see chapter 2).

The administration also nominated Timothy Tymkovich, a former Colorado state attorney who argued in favor of Colorado's Amendment 2 before the Supreme Court, to the United States Court of Appeals for the 10th Circuit.²⁴³ Amendment 2 sought to repeal existing, and prohibit any future, city ordinances in Colorado barring discrimination against gay, lesbian, and bisexual individuals.²⁴⁴

The administration's most troublesome selection from a gay rights perspective was that of former Missouri Senator John Ashcroft for the position of U.S. attorney general.²⁴⁵ Attorney General Ashcroft was an outspoken opponent of gay rights during his tenure in the Senate,

²³⁹ Toledo, "Tommy Thompson."

²⁴⁰ Jason Cianciotto, policy analyst, National Gay and Lesbian Task Force, "President George W. Bush on Lesbian, Gay, Bisexual, and Transgender Issues," December 2003.

²⁴¹ "Beyond the Pale"; See Michael Carney and Grant Schulte, "Sodomy Decision Triggers Emotional Reactions," *Washington Times*, June 27, 2003, <http://dynamic.washtimes.com/print_story.cfm?StoryID=20030626_110210-5920r>; Charles Lane, "Justices Overturn Texas Sodomy Law: Ruling is Landmark Victory for Gay Rights," *Washington Post*, June 27, 2003, p. A1; Mauro, "U.S. Supreme Court."

²⁴² Log Cabin Republicans, "Log Cabin Republicans Oppose Nomination of Alabama Attorney General William Pryor to U.S. Court of Appeals," press release, June 9, 2003, <<http://www/lcr.org/press/20030609.asp>>.

²⁴³ Chibbaro, "Mixed Reviews," p. 222.

²⁴⁴ Col. Const. amend. II; Lambda Legal, "U.S. Supreme Court Rules Amendment 2 Unconstitutional!," June 1996 <<http://www.lambdalegal.org/cgi-bin.iowa/documents/record?record=14>>; National Organization for Women, "Court Urged to Just Say No to Colorado's Amendment 2," *National Times*, August 1995, <<http://www.now.org/nnt/08-95/nnt08-95.html>>; Chibbaro, "Mixed Reviews," p. 222.

²⁴⁵ See British Broadcasting Corporation, "Profile: John Ashcroft," *BBC News Online: World: Americas*, Jan. 16, 2001, <<http://news.bbc.co.uk/1/hi/world/americas/1120440.stm>> (hereafter cited as BBC, "Ashcroft"); Chibbaro, "Mixed Reviews," pp. 220–22.

voting against the Employment Non-Discrimination Act (ENDA) and Hate Crimes Prevention Act (HCPA).²⁴⁶ ENDA would have prevented the discharge of gay and lesbian employees based on sexual orientation, while HCPA sought federal recognition of crimes committed because of a person's gender, sexual orientation, or disability.²⁴⁷

Celebrating Gay Pride

Concerns about Attorney General Ashcroft's anti-gay opinions, and whether they would affect policy decisions, proved valid. During his confirmation hearing, Ashcroft pledged that he would permit DOJ Pride, a voluntary organization of gay, lesbian, and bisexual Department of Justice (DOJ) employees, to continue using DOJ facilities to celebrate Gay Pride Month.²⁴⁸ During the 2002 Gay Pride Month celebration, he kept his promise, and allowed former Deputy Attorney General Larry D. Thompson as the main speaker at the gathering.²⁴⁹ In 2003, however, the attorney general notified DOJ Pride that it could not celebrate Gay Pride Month in a DOJ facility because the White House had not issued a proclamation recognizing the month.²⁵⁰ He eventually relented and offered to host the event in the department, but made DOJ Pride responsible for all costs.²⁵¹ The organization declined the department's offer and selected an alternate location.²⁵²

This incident not only represented a departure from an earlier pledge to uphold nondiscriminatory policies against gay and lesbian Americans, it signaled a retreat from other actions that appeared promising. Gay Pride was not treated equal to other diversity celebrations, such as Black History Month or Hispanic Heritage Month. For example, requiring DOJ Pride to pay for its celebration activities was a policy not required for other diversity events, and there was no White House proclamation declaring the importance of the celebration. Perhaps most

²⁴⁶ Employment Non-Discrimination Act, S. 1705, 108th Cong. (2003); Local Law Enforcement Hate Crimes Prevention Act, H.R. 1343, 107th Cong. (2001); James Ridgeway, "Democrats Folding on Ashcroft: But Public Opposition Builds," *The Village Voice*, Jan. 24–30, 2001 (hereafter cited as Ridgeway, "Democrats Folding on Ashcroft"); HRC, "HRC Gives Bush A Mixed Review"; The National Transgender Advocacy Coalition, "NTAC Opposes the Confirmation of John Ashcroft as Attorney General," January 2001 <<http://www.ntac.org/news/01/01/19ashcroft.html>> (hereafter cited as NTAC, "NTAC Opposes Ashcroft"); BBC, "Ashcroft"; Chibbaro, *Mixed Reviews*, p. 220–21.

²⁴⁷ Ridgeway, "Democrats Folding on Ashcroft"; NTAC, "NTAC Opposes Ashcroft."

²⁴⁸ Shane Harris, "Justice Department Bans Gay Employee Gathering," *GovExec.com*, June 6, 2003 <<http://www.govexec.com/news/index.cfm?mode=report&articleid=25811&printerfriendlyVers=1&>> (hereafter cited as Harris, "Justice Department Bans Gay Employee Gathering"); Human Rights Campaign, "HRC Decries John Ashcroft's Decision to Ban Gay Pride Celebration at Department of Justice," June 6, 2003, <<http://www.hrc.org/newsreleases/2003/030606ashcroft.asp>> (hereafter cited as HRC, "HRC Decries Ashcroft Decision").

²⁴⁹ American Family Association, "Gay Pride Celebration at John Ashcroft's Justice Department," June 2002 <<http://www.afa.net/activism/aa061802.asp>>; Harris, "Justice Department Bans Gay Employee Gathering"; U.S. Department of Justice, "Deputy Attorney General Larry D. Thompson to Step Down," Aug. 11, 2003, <http://www.usdoj.gov/opa/pr/2003/august/03_ag_453.htm>; "John Ashcroft and Gay Pride."

²⁵⁰ "Pride and Prejudice," *The New Republic*, June 23, 2003, p. 8 (hereafter cited as "Pride and Prejudice"); "John Ashcroft and Gay Pride"; Harris, "Justice Department Bans Gay Employee Gathering"; HRC, "HRC Decries Ashcroft Decision."

²⁵¹ "John Ashcroft and Gay Pride"; "Pride and Prejudice."

²⁵² DOJ Pride, "2003 DOJ Pride Awards Ceremony," June 18, 2003, <<http://www.dojpride.org/>>.

troubling is the failure of the attorney general, as the officer responsible for investigating and enforcing the nation's civil rights laws, to uphold equal treatment in his own agency.

Equality Denied

The most publicized gay rights policy of this administration is that of same-sex marriage. This is an area of particular concern because it illustrates the President's willingness to restrict group and individual rights in an unprecedented manner. During his campaign, President Bush declared that he is against same-sex marriage and that marriage should be between a man and a woman.²⁵³ On the other hand, as a candidate, Vice President Dick Cheney, whose daughter is openly gay, argued that marriage equality is a state matter and noted that society should tolerate and accommodate whatever types of relationships into which people choose to enter.²⁵⁴

The President reiterated his stance in November 2003 after the Massachusetts Supreme Judicial Court struck down the state's ban on same-sex marriage.²⁵⁵ The ruling meant that, in compliance with actions taken by the state legislature, beginning May 17, 2004, same-sex couples could marry in Massachusetts, making it the only state to permit same-sex marriage.²⁵⁶ Both supporters and opponents of same-sex marriage reacted quickly to the ruling.²⁵⁷ Republican lawmakers, and later President Bush, called for a constitutional amendment banning gay and lesbian marriage.²⁵⁸ In his 2004 State of the Union Address President Bush chastised "activist judges" for "redefining

²⁵³ The Bush administration justified its stand on gay marriages based on the Defense of Marriage Act (DOMA), which bans federal recognition of gay marriages, does not obligate states to recognize same-sex marriages legally performed in other states, and defines marriage as "a legal union between one man and one woman as husband and wife." Defense of Marriage Act of 1996, Pub. L. No. 104-99, 100 Stat. 2419 (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738C (2000)). See "Bush Wants Marriage Reserved for Heterosexuals," *CNN.com*, July 30, 2003 <<http://www.cnn.com/2003/ALLPOLITICS/07/30/bush.gay.marriage.ap/>>; Sheryl Gay Stolberg, "White House Avoids Stand On Gay Marriage Measure," *New York Times*, July 2, 2003, p. A22; Laurence McQuillan, "President Wants to 'Codify' Marriage," *USA Today*, July 30, 2003; Dana Bash, "White House Considers Constitutional Amendment to Ban Gay Marriage," *CNN.com*, July 31, 2003 <<http://www.cnn.com/2003/ALLPOLITICS/07/31/bush.gay.marriage/>>.

²⁵⁴ Cianciotto and Colvin, "The Bush-Cheney Administration," pp. 3, 7-8.

²⁵⁵ See *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003); Mary Wiltenburg, "Out of the Margins, Into the Mainstream," *Christian Science Monitor*, Dec. 10, 2003.

²⁵⁶ Pam Belluck, "Massachusetts Gives New Push to Gay Marriage in Strong Ruling," *New York Times*, Feb. 5, 2004.

²⁵⁷ According to an openly gay Massachusetts U.S. congressman, the earliest the amendment would come before the state's voters is 2006, when same-sex marriages will already be recognized by Massachusetts.

²⁵⁸ Tom Raum, "Bush Criticizes Gay Marriage Ruling," Nov. 18, 2003, <http://www.salon.com/news/wire/2003/11/18/bush_antigay/> (last accessed Dec. 16, 2003); The White House, "President Defends Sanctity of Marriage," press release, Nov. 18, 2003, <<http://www.whitehouse.gov/news/releases/2003/11/20031118-4.html>>; see also President George W. Bush, remarks via satellite to the National Association of Evangelicals convention, Mar. 11, 2004, <<http://www.whitehouse.gov/news/releases/2004/03/print/20040311-1.htm>> (last accessed May 20, 2004). In a July 14, 2004 vote, the Senate failed to get the 60 votes needed to bring the amendment to a final vote, effectively killing the measure for 2004. It is expected that the House will take up its own bill in September. Helen Dewar, "Ban on Gay Marriage Fails," *Washington Post*, July 15, 2001, p. A01.

marriage by court order” and described the proposed constitutional amendment as the only alternative to protect the will of the people.²⁵⁹

Two weeks later, President Bush issued the following statement, leaving no room to question his willingness to support a constitutional amendment against same-sex marriages:

[The] ruling of the Massachusetts Supreme Judicial Court is deeply troubling. Marriage is a sacred institution between a man and a woman. If activist judges insist on re-defining marriage by court order, the only alternative will be the constitutional process. We must do what is legally necessary to defend the sanctity of marriage.²⁶⁰

A week later, President Bush publicized his intent to endorse an amendment that would ban same-sex marriage, but not prevent states from allowing same-sex civil unions. Vice President Cheney backed away from his earlier position and stated that he would support the President’s decision to push for a constitutional amendment.²⁶¹

President Bush views domestic partnerships, for the purpose of legal arrangements, as a state matter.²⁶² He views marriage as a federal matter. Political strategists argue that the President’s stance is designed to appease both supporters and opponents by emphasizing that the President favors traditional marriage, but does not oppose gay and lesbian individuals.²⁶³ However, according to one legal scholar, not only is President Bush’s attempt to preempt the judicial process “historically unprecedented and procedurally premature,” the constitutional amendment he seeks discriminates against gay men and lesbians.²⁶⁴ Unlike any other amendment in history, the proposed marriage amendment would restrict, rather than extend, rights of groups. The act of singling out one group to make sure they are discriminated against, and not protected equally to everyone else, is extreme and unprecedented.

Lack of Workplace Protections

The Bush administration also opposes passage of ENDA, which would add sexual orientation to existing federal employment discrimination protections and effectively prevent the unfair discharge of gay and lesbian employees.²⁶⁵ ENDA does not apply to religious organizations or to uniformed members of the military; nor does it require employers to provide benefits to same-

²⁵⁹ President George W. Bush, State of the Union Address, Jan. 20, 2004, <<http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>> (last accessed June 22, 2004).

²⁶⁰ The White House, “President’s Statement on Massachusetts’ Court Ruling,” press release, Feb. 4, 2004, <<http://www.whitehouse.gov/news/releases/2004/02/print/20040204-9.html>> (last accessed June 22, 2004).

²⁶¹ Cianciotto and Colvin, “The Bush-Cheney Administration,” pp. 7–8.

²⁶² Jennifer A. Dlouhy, “Republican Leaders Could Be Wary of Marriage Amendment During Election Year,” *CQ Today*, Jan. 5, 2004, p. 9; Craig Crawford, “As Speech Sets Up Bush’s Bid, Marriage Is A Theme,” *CQ Today*, Jan. 20, 2004, p. 9.

²⁶³ Mike Allen and Alan Cooperman, “Bush Plans to Back Marriage Amendment,” *Washington Post*, Feb. 11, 2004, p. A01.

²⁶⁴ Scott D. Gerber, “Don’t Abuse a Rare Process,” *New Jersey Law Journal*, Mar. 12, 2004.

²⁶⁵ Employment Non-Discrimination Act, S. 1705, 108th Cong. (2003); Ponnuru, “Why Gay Marriage Is On the Way”; American Civil Liberties Union, “Fact Sheet: Employment Non-Discrimination Act,” Dec. 31, 1996 <<http://www.aclu.org/news/NewsPrint.cfm?ID=9189&c=100>> (hereafter cited as ACLU, “ENDA Fact Sheet”).

sex domestic partners. First introduced in the Senate in August 1996, ENDA failed to gain passage and has been reintroduced numerous times without success, most recently in October 2003.²⁶⁶ Supporters of ENDA believe the law is necessary to protect the employment rights of gay and lesbian individuals; but opponents argue that such protections already exist under current laws and, thus, ENDA only serves to give homosexual groups enormous power in the workplace.²⁶⁷

In another attempt to limit protections for gay men and lesbians in the workforce, in February 2004, Bush-appointed U.S. Special Counsel Scott Bloch removed all materials from the Office of Special Counsel's (OSC) Web site relating to sexual orientation discrimination in the federal government, including training guides and complaint forms. In addition, he suspended enforcement of sexual-orientation bias cases. The special counsel said that he did so in order to review and subsequently clarify his office's jurisdiction over the enforcement of nondiscrimination in federal employment.²⁶⁸ The provision in question, from the Civil Service Reform Act of 1978, states that it is unlawful to discriminate against a federal employee or applicant "on the basis of conduct which does not adversely affect the performance of the employee or the applicant or the performance of others."²⁶⁹

Under past administrations, dating back to the Reagan era, the federal Office of Personnel Management (OPM) has interpreted the prohibition to include discrimination based on sexual orientation.²⁷⁰ Moreover, in 1998, President Clinton signed an executive order expressly prohibiting discrimination on the basis of sexual orientation in the federal government.²⁷¹ President Bush did not repeal the order, and the policy remains in effect at OPM. OPM advises federal employees who believe they have been discriminated against on the basis of sexual

²⁶⁶ Tracy Davis and Sarah Oppenheim, "Extending Non-Discrimination in Employment to Gays and Lesbians," *Human Rights Brief: A Legal Resource for the International Human Rights Community*, vol. 7, no. 3 (spring 2000), <<http://www.wcl.american.edu/hrbrief/07/3legislativefocus.cfm>>. See Senator Edward Kennedy, "Senator Kennedy, Joined By President Clinton, Calls for Passage of Employment Non-Discrimination Act to Protect Gay and Lesbian Americans from Workplace Discrimination," Apr. 27, 1997, <http://www.senate.gov/~kennedy/index_low.html>; "Statement of Senator Edward M. Kennedy, on Introduction of The Employment Non-Discrimination Act of 2001," July 31, 2001, <http://www.senate.gov/~kennedy/index_low.html>; "Statement of Senator Edward M. Kennedy, on the Re-Introduction of The Employment Non-Discrimination Act of 2003," Oct. 2, 2003, <http://www.senate.gov/~kennedy/index_low.html>.

²⁶⁷ People for the American Way, "Employment Non-Discrimination Act Reintroduced," *Civil Rights and Equal Rights*, n.d., <<http://www.pfaw.org/pfaw/general/default.aspx?oid=4149&print=yes>>; ACLU, "ENDA Fact Sheet."

²⁶⁸ U.S. Office of Special Counsel, "Legal Interpretation of Discrimination Statute," Feb. 27, 2004, <http://www.osc.gov/documents/press/2004/pr04_01.htm> (last accessed Mar. 23, 2004).

²⁶⁹ Civil Service Reform Act of 1978, 5 U.S.C. 2302(b)(10) (2000).

²⁷⁰ "Press Conference Re: Protection for Federal Workers From Discrimination Based on Sexual Orientation," *Federal News Service*, Mar. 31, 2004. Representatives Barney Frank, George Miller, and Eliot Enger, and Senator Barbara Boxer participated in the press conference. See also U.S. Equal Employment Opportunity Commission, "Federal Laws Prohibiting Job Discrimination, Questions and Answers," updated May 24, 2002 <<http://www.eeoc.gov/facts/qanda.html>> (last accessed June 8, 2004) (hereafter cited as EEOC, "Federal Laws Prohibiting Job Discrimination").

²⁷¹ Exec. Order No. 13,087. "Bush Gay Discrimination Policy Affirmed," *New York Times*, Apr. 1, 2004 (hereafter cited as "Bush Gay Discrimination Policy").

orientation to seek assistance from OSC, which is charged with enforcing the Civil Service Reform Act.²⁷²

Because other civil rights and employment laws do not specify discrimination based on sexual orientation, OSC provides the only recourse for gay and lesbian federal workers.²⁷³ Thus, the special counsel's actions prompted an outcry among employee unions, civil rights advocates, and lawmakers who called upon the President to either overturn Bloch's decision or fire him.²⁷⁴ In response, President Bush issued an affirmation of his support for protecting gay and lesbian workers from discrimination, although the administration would not comment on what specific actions it would take.²⁷⁵ In April 2004, the special counsel announced that his office will continue to protect federal employees from discrimination on the basis of sexual orientation, but would also continue to assess the appropriateness of material offered on its Web site. He again expressed that the documents previously posted had not been clear about the statutory basis for OSC's authority.²⁷⁶

²⁷² "OSC Accused of Rolling Back Protections Against Sexual Orientation Discrimination," *Federal Human Resources Week*, vol. 10, no. 43 (Mar. 1, 2004); EEOC, "Federal Laws Prohibiting Job Discrimination."

²⁷³ Marie Beaudette, "Special Counsel Denies Gay Workers Protection," *The Legal Intelligencer*, vol. 230, no. 65 (Apr. 5, 2004), p. 4.

²⁷⁴ "OSC Again Acknowledges Sexual Orientation Discrimination as a PPP," *Federal EEO Advisor*, vol. 7, no. 3 (Apr. 23, 2004); Shawn Taylor, "Federal Office Confirms Laws Cover Lesbian, Gay Workers," *Chicago Tribune*, Apr. 13, 2004, p. C4.

²⁷⁵ "Bush Gay Discrimination Policy."

²⁷⁶ U.S. Office of Special Counsel, "Results of Legal Review of Discrimination Statute," press release, Apr. 8, 2004; "Federal Worker Sexual Orientation Bias May Be Prohibited Practice, OSC Concludes," *Daily Labor Report*, Apr. 12, 2004, p. A-10.

Chapter 5: Promoting Access to Federal Programs

One measure of an administration's commitment to civil rights is the extent to which it voices public support for and takes action to promote equality for all. By continuously improving access to federal programs, the administration can promote equal opportunity and eliminate economic and social disparities.¹ While some administrations have improved conditions for language, racial and ethnic, and religious minorities, equal access has been elusive and still requires federal investment.

IMPROVING ACCESS TO FEDERAL SERVICES FOR LANGUAGE MINORITIES

With each successive decade, the nation's population has become more diverse, and non-English speaking communities have increased in prominence. In 1980, 23.1 million people spoke a language other than English at home; by 1990, that number had increased to 31.8 million. In 2000, the Census Bureau reported that 47 million persons spoke a language other than English at home, and 2.6 million adults did not speak English at all.² If the rate of growth remains constant, the number of persons who speak a language other than English at home will increase to more than 69 million by 2010.³ As language minorities grow, so too does the demand for language assistance. All-English federal programs and services are inaccessible to individuals with limited English proficiency, preventing full participation, which results in unequal access and outcomes. For example:

- In health care, the lack of language assistance causes some limited English proficient (LEP) individuals to avoid seeking services until their health problems become acute. Often, interpreters are not qualified to translate medical terms, or they minimize the degree of illness, affecting the amount of care. Frequently, children who may not have the vocabulary and maturity to understand medical conditions interpret for their LEP parents or family members.⁴
- In law enforcement, the absence of bilingual police officers engenders fear and distrust in many LEP persons. Thus, they initiate little contact with departments, have minimal

¹ Federally assisted programs are operated by a recipient of federal financial assistance, including a state or its political subdivision, trust territory, public or private agency, institution, organization, or individual. Title VI of the Civil Rights Act of 1964 mandates that recipients of federal funds operate programs, activities, and facilities in an accessible and nondiscriminatory manner. A federally conducted program is a government-run program. Any federal entity must ensure that its own programs, activities, and facilities are also accessible and nondiscriminatory. *See* 42 U.S.C. § 2000d (2000).

² U.S. Census Bureau, "Language Use and English-Speaking Ability: 2000," October 2003, p. 2, <<http://www.census.gov/prod/2003pubs/c2kbr-29.pdf>> (last accessed June 23, 2004).

³ *Ibid.*, table 2, p. 5. The 10 most frequently spoken languages at home other than English and Spanish are Arabic, Polish, Russian, Korean, Italian, Vietnamese, Tagalog, German, French, and Chinese.

⁴ U.S. Commission on Civil Rights, *The Health Care Challenge, Acknowledging Disparity, Confronting Discrimination and Ensuring Equality, Volume 1: The Role of Governmental and Private Health Care Programs and Initiatives*, September 1999, pp. 35, 37, 191, 193.

access to police services, such as mediation and counseling, and obtain limited police assistance, protection, and crime reporting.⁵ The lack of language assistance in courts often results in inadequate legal services, representation, and protections. This affects every component of the justice system including probation, family services, domestic violence relief, and other services provided by the courts.⁶

- The increasing growth and diversity in LEP student populations has made it difficult for the nation's school systems to create educational programs to meet all student needs. Often school districts' LEP programs are geared toward one ethnic group, ignoring others.⁷
- Many federal housing programs have inadequate bilingual staff and lack multilingual information to assist LEP individuals in accessing public and assisted housing or emergency shelters. There is also a need for more bilingual inspectors to ensure safe housing.⁸
- Often LEP individuals are hindered from civic participation because of the lack of bilingual poll workers, voting information, and ballots.⁹

Enforcing Language Accessibility

While Title VI of the Civil Rights Act of 1964 bans discrimination in federal programs based on national origin, it does not specify language barriers as a form of national origin discrimination. The 1974 Supreme Court case *Lau v. Nichols* clarified that national origin discrimination includes disparate program participation resulting from the inability to read, write, or speak English.¹⁰ However, because the *Lau* decision applies mainly to education, LEP communities continue to confront barriers to federal programs in areas such as housing, voting, and health care.

In August 2000, President Clinton signed Executive Order 13,166 to improve access to federally conducted and assisted programs and activities for persons who are limited in their English

⁵ U.S. Commission on Civil Rights (USCCR), *Police Practices and Civil Rights in New York City*, August 2000, pp. 9–14, 38–39; USCCR, *Racial and Ethnic Tensions, Los Angeles*, May 1999, p. 137; USCCR, *Racial and Ethnic Tensions, Mount Pleasant*, January 1993, pp. 40–41 (hereafter cited as USCCR, *Mount Pleasant Report*); New Jersey Advisory Committee to the USCCR, *The Use and Abuse of Police Powers: Law Enforcement Practices and the Minority Community in New Jersey*, July 1994, p. 10.

⁶ USCCR, *Mount Pleasant Report*, p. 58.

⁷ U.S. Commission on Civil Rights, *Equal Educational Opportunity and Nondiscrimination for Students with Limited English Proficiency: Federal Enforcement of Title VI and Lau v. Nichols*, Equal Educational Opportunity Project Series, vol. 3, November 1997, pp. 1–3.

⁸ USCCR, *Mount Pleasant Report*, pp. 118–19, 149–50; USCCR, *Racial and Ethnic Tensions, Chicago*, September 1995, pp. 50–51, 143.

⁹ See U.S. Commission on Civil Rights, *Election Reform: An Analyses of Proposals and the Commission's Recommendations for Improving America's Election System*, November 2001; USCCR, *Voting Irregularities in Florida During the 2000 Presidential Election*, June 2001; and Asian American Legal Defense Fund, "Challenging Anti-Asian Voter Discrimination," press release, Oct. 14, 2003.

¹⁰ *Lau v. Nichols*, 414 U.S. 563 (1974).

proficiency.¹¹ The order requires each federal agency to prepare a plan for improving access. It also requires each federal agency that provides financial assistance to draft Title VI guidance consistent with DOJ's language assistance, but tailored to its own programs.¹²

The legality of the Title VI regulations relating to disparate impact and language access was challenged in 2001. In the case of *Alexander v. Sandoval*, the Supreme Court ruled that private individuals cannot file suit to enforce these regulations.¹³ *Sandoval* restricted the ability of individuals to file a disparate impact claim under Title VI, thus nullifying the portion of Executive Order 13,166 that applies to federal programs and activities.¹⁴ In response to the decision, however, DOJ issued a memorandum to federal agencies affirming the Bush administration's commitment to implementing the order and clarifying its requirements; it did not change the nature, intent, requirements, or DOJ's responsibilities.¹⁵

In December 2001, DOJ created the Interagency Working Group on Limited English Proficiency to improve the efficiency and effectiveness of Title VI and executive order implementation.¹⁶ The workgroup's mission is to build awareness of the need to ensure that LEP persons have meaningful access to federal and federally assisted programs.¹⁷ It created a Web site that promotes understanding of the importance of language access.

DOJ issued subsequent instructions that required all federal agencies providing federal financial assistance to publish guidance on meaningful access for their recipients. Ten agencies have published guidance thus far.¹⁸ Agencies that do not provide financial assistance must create or modify plans to ensure meaningful access to services, information, and rights. DOJ further requested that agencies consider participating in the LEP working group and post Internet links to the LEP.gov Web site.¹⁹

¹¹ Improving Access to Services for Persons With Limited English Proficiency, Exec. Order No. 13,166, 3 C.F.R. 289 (2001).

¹² *Id.*

¹³ 532 U.S. 275 (2001). The plaintiff in *Sandoval* challenged a state of Alabama decision to administer driver's license exams only in English, alleging that the rule amounted to national origin discrimination. The Supreme Court held that Congress did not intend for section 602 of the Civil Rights Act of 1964 to provide a private right of action for disparate impact claims. Prior to the decision and pursuant to section 602, federal agencies promulgated regulations that prohibited funding recipients from engaging in practices that have a disparate impact on protected classes. *Id.* See also Ralph Boyd Jr., former assistant attorney general for civil rights, memorandum to federal agencies, Oct. 26, 2001 (hereafter cited as Boyd memo, Oct. 26, 2001).

¹⁴ Boyd memo, Oct. 26, 2001.

¹⁵ *Ibid.*

¹⁶ Ralph F. Boyd Jr., former assistant attorney general for civil rights, memorandum to heads of federal agencies, general counsels, and civil rights directors, July 8, 2002, re: Exec. Order No. 13,166 (hereafter cited as Boyd memo, July 8, 2002).

¹⁷ "About LEP.gov: Meaningful Access for People who are Limited English Proficient," Jan. 13, 2004, <<http://www.lep.gov/about.html>> (last accessed June 22, 2004).

¹⁸ U.S. Department of Justice, "Executive Order 13,166: Improving Access to Services for Persons with Limited English Proficiency, Guidance and Materials," n.d. <<http://www.usdoj.gov/crt/cor/13166.htm>> (last accessed Apr. 15, 2004).

¹⁹ Boyd memo, July 8, 2002.

Under the Bush administration, agencies have incorporated the executive order in their missions through various methods. For example:

- The Department of Labor participates in the interagency LEP working group and has assigned implementation to its Civil Rights Center. The agency created an internal LEP workgroup to integrate Executive Order 13,166 into its program offices. The Employment and Training Administration, for instance, designates an LEP liaison in each region to assist grantees and makes information available in multiple languages.²⁰
- The Department of Health and Human Services (HHS) created two committees on language assistance: the LEP Council and HHS Language Access Steering Committee. The LEP Council develops guidance and technical assistance materials for recipients and collects information on LEP activities. The Language Access Steering Committee creates tools to address language needs and resources, conducts assessments, and develops component and department plans. The Steering Committee has also inventoried non-English program documents and established a Web site that includes lists of interpreters and translators, standards for bilingual personnel, Internet sources for language services, and HHS Web pages in non-English languages.²¹
- Prior to the executive order, the Social Security Administration (SSA) chartered an inter-component LEP workgroup to set the framework for improving public access to services. The workgroup monitors LEP policies and practices to ensure their continued effectiveness. In 2001, SSA created a multilanguage gateway for the public to access documents translated into Spanish and 14 other languages. In 2002, the workgroup obtained third-party interpreter services for a 24-hour, 7-day-a-week national telephone line. SSA has also issued agencywide policy to ensure that communications through interpreters and translated materials are accurate.²²

In addition to the administration's work on implementing the executive order through agency missions, it has implemented other initiatives that are indirectly linked, including the HERE Hispanic Initiative Grant Award, which provides English instruction for 2,000 immigrant workers and new American Citizens; the Hispanic Worker Initiative, which helps Hispanic Americans prepare for and find decent paying jobs; and the National Professional Development Program, which improves instruction for students learning English.²³

²⁰ U.S. Department of Labor, response to the U.S. Commission on Civil Rights Language Assistance Interrogatory, Nov. 4, 2003, pp. 1–2, 5–6, 15.

²¹ U.S. Department of Health and Human Services, response to the U.S. Commission on Civil Rights Language Assistance Interrogatory, Oct. 31, 2003, pp. 2, 10–12.

²² U.S. Social Security Administration, response to the U.S. Commission on Civil Rights Language Assistance Interrogatory, Nov. 25, 2003, pp. 10–14, 18–19.

²³ U.S. Department of Labor, remarks prepared for delivery by U.S. Secretary of Labor Elaine L. Chao before HERE Hispanic Initiative Grant Award, Las Vegas, NV, Mar. 16, 2004, <http://www.dol.gov/_sec/media/speeches/20040316_HERE.htm> (last accessed June 22, 2004).

Measuring Implementation and Assessing Success

Executive branch agencies have made attempts to improve language accessibility, to the extent the law requires. The Bush administration clarified its interpretation, but did not build on Executive Order 13,166 and agency responsibilities to overcome language barriers.²⁴ For example, the administration does not require output measures or other assessments to evaluate government progress.²⁵ Nor did it strengthen the executive order by granting DOJ the authority to review and approve language assistance plans. DOJ can only urge federal agencies to develop, submit, and publish LEP guidance, and prepare plans in a timely manner.²⁶ Even with Title VI enforcement, no procedures or output measures exist to assess whether language access to federal programs and services is improving.²⁷ The administrative enforcement procedure of Title VI is an insufficient remedy.

Moreover, federal agencies have been criticized for their ineffective implementation of the executive order. For example, according to one scholar, HHS' Office for Civil Rights, suffers from inefficiency and a decreasing interest in ensuring compliance with disparate impact regulations. Charging agencies with overseeing implementation of their own regulations carries an inherent bias and is insufficient to advance the rights of non-English-speaking persons who are deprived access to services.²⁸

Some federal agencies have found more effective means to implement the executive order than others, but more outreach to LEP populations is needed. In 2001, 25 percent of federal agency Web sites offered foreign language features, but by 2003, the proportion had grown to 40 percent.²⁹ The administration deserves credit for improving some bilingual access, but must now extend its obligation to all programs and services. Moreover, to eliminate language barriers greater enforcement and agency oversight are needed.

IMPROVING ACCESS TO FEDERAL PROGRAMS FOR UNDERSERVED GROUPS

Given the continuing disparities in socioeconomic and health status between minority and nonminority groups, improving access to federal programs and services remains a pressing civil rights goal. Upon taking office, President Bush extended several initiatives of previous administrations designed to improve access for specific minority groups. Some are intended to assess a population's general needs and develop solutions. Others are more narrow in scope, and focus on a specific program or purpose. Regardless, these initiatives warrant continued presidential attention and priority.

²⁴ Boyd memo, Oct. 26, 2001.

²⁵ U.S. Department of Justice, Civil Rights Division, response to the U.S. Commission on Civil Rights Language Assistance Interrogatory, Dec. 5, 2003, pp. 9, 14, 19.

²⁶ *Ibid.*, p. 16.

²⁷ *Ibid.* See also Nondiscrimination in Federally Assisted Programs: Implementation of Title VI of the Civil Rights Act of 1964, 28 C.F.R. § 42.104(b)(2) (2003).

²⁸ Barbara Plantiko, "Comment: Not-So-Equal Protection: Securing Individuals of Limited English Proficiency with Meaningful Access to Medical Services," *Golden Gate University Law Review*, vol. 32 (spring 2002), p. 239.

²⁹ Darrell West, Brown University, "State and Federal E-Government in the United States, 2003," <<http://www.insidepolitics.org/egovt03us.html>> (last accessed May 7, 2004).

President's Advisory Commission on Asian Americans and Pacific Islanders

The nation's Asian Pacific American population is growing and becoming increasingly diverse. The group collectively referred to as Asian Americans and Pacific Islanders represents nearly 50 countries and ethnic groups, speaks numerous languages, and is comprised of subpopulations whose needs vastly differ.³⁰ Traditionally, the government has not understood the population's distinctions and, consequently, has not served its needs. Despite stereotypes to the contrary, Asian Americans and Pacific Islanders have higher poverty rates and lower rates of homeownership than whites, are more likely to have less than a ninth-grade education, and are more likely to be uninsured.³¹ To address these disparities, as well as the difficulties compounded by language barriers, the federal government must engage in a coordinated, cross-cutting effort to promote access to its programs and services.

President Clinton established the Office of the White House Initiative on Asian Americans and Pacific Islanders and the 15-member President's Advisory Commission on Asian Americans and Pacific Islanders (PACAAP) with the goal of increasing participation in federal programs and improving quality of life. PACAAP is charged with making recommendations to the President for coordinating federal efforts, data collection, and increasing participation in federal programs.³² Health care was viewed as a source of problems for the Asian American population; thus, the Department of Health and Human Services was charged with leading the initiative's implementation and coordinating collaboration among 32 participating agencies.³³

At the start of the new administration, PACAAP urged President Bush to continue to support its work and to improve programs for the underserved population it represented.³⁴ He issued Executive Order 13,216, which had the stated intent to build upon efforts that had already been started.³⁵ With this order, President Bush extended the advisory commissioners' terms until June 7, 2003.³⁶

³⁰ U.S. Census Bureau, "The Asian and Pacific Islander Population in the United States: March 2002," Current Population Reports, May 2003, <<http://www.census.gov/prod/2003pubs/p20-540.pdf>> (last accessed July 14, 2003).

³¹ Ibid. See also National Council of Asian Pacific Americans, *Call to Action: Platform for Asian Pacific Americans National Policy Priorities*, 2004, pp. 5, 22, 25, 28.

³² Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs, Exec. Order No. 13,125, 64 Fed. Reg. 31,105 (June 10, 1999) (hereafter cited as Exec. Order No. 13,125).

³³ The White House, Initiative on Asian Americans and Pacific Islanders, "About Us," <<http://www.aapi.gov/aboutus.htm>>; Exec. Order No. 13,125.

³⁴ U.S. Department of Health and Human Services, Health Resources and Services Administration, "President's Advisory Commission on Asian Americans and Pacific Islanders Released Its Interim Report to the President and the Nation," press release, Jan. 17, 2001.

³⁵ Amendment to Executive Order 13125, Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs, Exec. Order No. 13,216, 3 C.F.R. 773 (2001) (hereafter cited as Exec. Order No. 13,216); The White House, "Fact Sheet—Executive Order 13,216," September 2001 <<http://www.aapi.gov/president/factsheet.htm>>; The White House, "Executive Order 13,125, Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs," press release, June 7, 1999. See The White House, "The White House Initiative on Asian Americans and Pacific Islanders," <<http://www.aapi.gov/president.htm>>.

³⁶ Exec. Order No. 13,216; Exec. Order No. 13,125.

To foster PACAAPI work, the White House created a Web site that includes, among other things, access to PACAAPI's reports to the President.³⁷ In January 2001, PACAAPI submitted an interim report, *A People Looking Forward: Action for Access and Partnerships in the 21st Century*, to President Bush. The report focused on five general areas, rather than specific problems like health and education, since the order requires PACAAPI "to improve the quality of life of Asian Americans and Pacific Islanders in a broad, comprehensive manner."³⁸ The report recommended that the federal government:

- improve data collection, analysis, and dissemination for Asian Americans and Pacific Islanders;
- ensure linguistic access and cultural competence for Asian Americans and Pacific Islanders;
- protect civil rights and equal opportunity for Asian Americans and Pacific Islanders;
- strengthen and sustain Asian American and Pacific Islander community capacity; and
- recognize and include Native Hawaiians and Pacific Islanders in programs and services.³⁹

PACAAPI found that, of the 32 federal departments and agencies the White House directed to focus on the unmet Asian American and Pacific Islander needs, 17 (53 percent) devoted at least one full-time-equivalent staff position to this activity. However, most federal agencies did not develop related national or strategic plans. Only seven offered grant programs providing priority funding to Asian Americans and Pacific Islanders.⁴⁰ PACAAPI recommended the establishment of specific goals for increasing funding for Asian American and Pacific Islander programs and services; the designation and funding of staff positions dedicated to the implementation of the White House initiative; and increased interagency coordination of Asian American and Pacific Islander activity.⁴¹

The administration responded to the interim report by setting up two Web sites, hosted through HHS.⁴² The Web sites offer health information, including information on diseases that

³⁷ The Web site can be accessed at <<http://www.aapi.gov/president.htm>>.

³⁸ President's Advisory Committee on Asian Americans and Pacific Islanders, *A People Looking Forward: Action for Access and Partnerships in the 21st Century*, January 2001, p. 10 (hereafter cited as PACAAPI, *A People Looking Forward*).

³⁹ *Ibid.*, p. 10.

⁴⁰ *Ibid.*, pp. 18, 20.

⁴¹ Exec. Order No. 13,125; PACAAPI, *A People Looking Forward*, p. 22.

⁴² See The White House, "The White House Initiative on Asian Americans and Pacific Islanders," *News and Events*, <<http://www.aapi.gov/news.htm>>; The White House, Initiative on Asian Americans and Pacific Islanders, "Deliverables," *FY 2002 Federal Inventories and Implementation Plans*, <<http://www.aapi.gov/fiw/deliverables.htm>> (hereafter cited as White House, "Deliverables"); U.S. Department of Health and Human Services, "HHS Expands Online Health Information For Asian Americans, Native Hawaiians and Pacific Islanders," press release, May 13, 2003, <<http://www.hhs.gov/news/press/2003pres/20030513.html>>; U.S. Department of Health and Human Services, "Healthfinder—Your Guide to Reliable Health Information," <<http://www.healthfinder.gov/justforyou/>> (hereafter cited as HHS, "Your Guide to Health Information"); U.S.

disproportionately affect Asian Americans and Pacific Islanders.⁴³ In addition, several agencies took inventory to assess the number of Asian Americans and Pacific Islanders represented in their workforces, and developed implementation plans to express their efforts in support of Executive Order 13,125.⁴⁴

In 2003, PACAAPI submitted a report to the President on health disparities among Asian Americans and Pacific Islanders. The report presented detailed information on disease occurrence in different communities, as well as the obstacles to health care access and the cultural barriers inherent in the health system. The report also offered strategies for improving health care using service delivery models and strengthening data collection.⁴⁵

Other than the limited activities described, almost two and a half years after President Bush issued Executive Order 13,216, little materialized for Asian Americans and Pacific Islanders. There has been no indication of effort to examine whether the recommendations made in PACAAPI's reports are being effectively implemented at the community level. Plans exist to publish several more reports, but timelines are unclear due to a year-long lapse in PACAAPI's mandate and subsequent redirection of its mission.⁴⁶

President Bush let the commissioners' terms expire in June 2003. Advocacy organizations and a bipartisan group of senators urged President Bush to renew PACAAPI, but his reaction was slow. In a letter to the President, the senators noted that, by allowing the initiative to lapse, the administration left the impression that Asian American and Pacific Islander matters were not a priority.⁴⁷ PACAAPI lost time and attention when they were not reappointed until May 2004, nearly a year later.⁴⁸ When the administration finally pressed forward with the initiative, it made wholesale changes to its structure, which threaten to stymie its progress.

In his new executive order, President Bush followed a recommendation of his advisory committee to move its headquarters from HHS to the Department of Commerce. He did so without consideration for the views of the Asian American community. The National Council of Asian Pacific Americans, for example, sent a letter to the President in March 2004 expressing its

Department of Health and Human Services, National Library of Medicine, "Asian American Health," May 16, 2003 <<http://asianamericanhealth.nlm.nih.gov/>> (hereafter cited as NLM, "Asian American Health").

⁴³ HHS, "Your Guide to Health Information"; NLM, "Asian American Health."

⁴⁴ Exec. Order No. 13,125. See White House, "Deliverables."

⁴⁵ President's Advisory Committee on Asian Americans and Pacific Islanders, *Addressing Health Disparities: Opportunities for Building a Healthier America*, report to the President and the Nation, 2003.

⁴⁶ Information was provided via a telephone conversation with the Office of the White House Initiative on Asian and Pacific Islanders on Jan. 14, 2004.

⁴⁷ Senator Daniel Kahikina Akaka (D-HI), "Senators Urge President to Renew Advisory Commission on Asian Americans and Pacific Islanders," press release, Nov. 18, 2003. The Senate letter was signed by Senators Akaka, Daniel K. Inouye (D-HI), Maria Cantwell (D-WA), Dianne Feinstein (D-CA), Barbara Mikulski (D-MD), Lisa Murkowski (R-AK), Richard Durbin (D-IL), John Corzine (D-NJ), George Allen (R-VA), and Edward Kennedy (D-MA).

⁴⁸ Increasing Economic Opportunity and Business Participation of Asian Americans and Pacific Islanders, Exec. Order No. 13,339, 65 Fed. Reg. 28,037 (May 13, 2004).

concerns with this proposal, but received no response.⁴⁹ Asian American leaders and activists criticized the plan, stating that the administration placed emphasis on economic and business interests at the expense of basic health care.⁵⁰ Critics pointed out that the shift would result in the neglect of pressing health issues unique to the Asian American and Pacific Islander population. Others, including members of the congressional Asian Pacific American Caucus, claim that the Bush administration's actions work counter to the purpose of the initiative and the broader needs of Asian Americans and Pacific Islanders.⁵¹

A coalition of Asian American and Pacific Islander advocacy groups describes the retooled initiative as a drastic narrowing of the original mission, which was to broadly help underserved Asian Pacific American communities.⁵² The new initiative will devote needed resources to the problem of economic development, but does so at the expense of education, health care, and other policy priorities aimed at improving the quality of life generally. In addition, the president of the National Asian Pacific American Legal Consortium noted that the initiative has been underfunded for the past few years, and the recent changes will likely make fewer resources available.⁵³

The shift in priorities appears to be underway. For example, in September 2003, the Departments of Labor and Housing and Urban Development hosted a joint two-day conference on strengthening economic development in the Asian American and Pacific Islander community. However, problems such as discrimination in education and health care were not on the agenda. PACAAPI plans five training and employment workshops in 2004 and 2005. While these efforts are important, they are no substitute for other critical problems, such as health care.

Initiative on Educational Excellence for Hispanic Americans

Like the Asian American and Pacific Islander population, the Hispanic American population has unique needs and challenges. Education has been the main focus of federal initiatives for Hispanics. However, disparities in educational achievement and outcomes persist, despite federal efforts. For example:

- Hispanic students score significantly lower on standardized tests in reading and math than their white counterparts.⁵⁴

⁴⁹ National Council of Asian Pacific Americans, "National AAPI Leaders Denounce Gutting of Historic Executive Order; Community Leaders Call on President Bush to Retain Focus on Improving the Quality of Life of Underserved Asian Americans and Pacific Islanders," press release, May 14, 2004, <http://www.ncapaonline.org/detail_pressreleases.asp?PID=12> (last accessed May 24, 2004) (hereafter cited as NCAPA, "National AAPI Leaders Denounce Gutting").

⁵⁰ Cecilia Kang, "Critics Fear Neglect of Asian Health Care," *San Jose Mercury News*, Jan. 14, 2004.

⁵¹ Ibid.

⁵² NCAPA, "National AAPI Leaders Denounce Gutting."

⁵³ Ibid., quoting Karen K. Narasaki, president and executive director, National Asian Pacific American Legal Consortium.

⁵⁴ U.S. Department of Education, "Reaching Out . . . Raising Hispanic Achievement," n.d., <http://www.ed.gov/nclb/accountability/achieve/achievement_hisp.html>.

- Hispanic Americans aged 16 to 24 have significantly higher dropout rates than African Americans or whites. One of every three Hispanic American high school students drops out.⁵⁵
- Compared with white and Asian American high school graduates, Hispanic American high school graduates are less likely to go directly to college.⁵⁶
- Although 96 percent of Hispanics surveyed in a study examining ways to improve educational outcomes expect their children to attend college, most are unaware of what it takes to make college a reality.⁵⁷

To compound matters, the federal government does not adequately monitor, measure, or coordinate educational programs and research that benefit Hispanic Americans.⁵⁸ In addition, Hispanic American students, like all immigrant students, occupy a unique position in the U.S. educational system.⁵⁹ Those arriving to the United States from other countries not only typically face a language barrier, but also an education system vastly different from their own.⁶⁰

Federal Efforts to Address the Needs of Hispanic Students

The Bush administration continued the White House Initiative on Educational Excellence for Hispanic Americans, which was first established by executive order in 1995 under the Clinton administration.⁶¹ President Bush renewed the initiative in October 2001 and amended its goals to conform to certain principles of the No Child Left Behind Act (NCLB).⁶²

⁵⁵ Thomas G. Dolan, "Latinos in the White House," *Ethnic News Watch*, vol. 13, no. 3 (Nov. 4, 2002), p. 10; Alex Kingsbury, "Initiative Announced to Improve Education for Hispanics," *Dallas Morning News*, July 10, 2003.

⁵⁶ Center for Latino Educational Excellence, The Tomás Rivera Policy Institute, "Closing Achievement Gaps: Improving Educational Outcomes for Hispanic Children," July 2003, p. 8 (hereafter cited as CLEE, "Closing Achievement Gaps").

⁵⁷ Marilyn Gilroy, "www.YoSiPuedo.gov; Helping Hispanics Prepare for College," *Ethnic News Watch*, vol. 13, no. 10 (Feb. 24, 2003), p. 35 (hereafter cited as Gilroy, "Helping Hispanics").

⁵⁸ President's Advisory Commission on Educational Excellence for Hispanic Americans, *From Risk to Opportunity: Fulfilling the Educational Needs of Hispanic Americans in the 21st Century*, final report submitted to President Bush, Mar. 31, 2003, p. viii, <<http://www.yic.gov/paceea/final.html>> (last accessed June 23, 2004) (hereafter cited as PACEEHA, *From Risk to Opportunity*).

⁵⁹ Unique situations are faced by other immigrant students, including Asian Americans and Pacific Islanders, Haitians, and those from nations on the continent of Africa. Naturally, native U.S. student populations also include members who experience similar challenges. Entering an educational system based on a Euro-American model challenges members of both cultural and numerical minority groups, including African Americans and Native Americans.

⁶⁰ It should be noted that many Hispanic immigrant students arrive in the United States with knowledge of the English language. See Equity Center, "The Immigration Experience," Sept. 6, 2001, <<http://www.nwrel.org/cnorse/booklets/immigration/4.html>>.

⁶¹ Educational Excellence for Hispanic Americans, Exec. Order No. 12,900, 3 C.F.R. 865 (1995). See also U.S. Commission on Civil Rights, *A Bridge to One America: The Civil Rights Performance of the Clinton Administration*, April 2001, p. 42.

⁶² President's Advisory Commission on Educational Excellence for Hispanic Americans, Exec. Order No. 13,230, 3 C.F.R. 802 (2001).

President Bush's executive order also extended the President's Advisory Commission on Educational Excellence for Hispanic Americans (PACEEHA), which was based in the Department of Education prior to being disbanded.⁶³ Its mission was to develop a multiyear action plan to close the achievement gap between Hispanic and non-Hispanic students.⁶⁴

The expressed purpose of the White House Initiative was to increase Hispanic participation in federal education programs. To complete its mission, PACEEHA held 11 meetings and four bilingual town hall forums with more than 1,600 experts, parents, teachers, students, and business and community leaders.⁶⁵ PACEEHA submitted its report to President Bush on March 31, 2003, and listed six recommendations for improving the educational achievement of Hispanic Americans and strategies for implementing them, which were to:

- set new and high expectations for Hispanic American children;
- support NCLB;
- reinforce and expand a high-quality teaching profession;
- develop a federal research agenda to identify the needs of Hispanic American students;
- create pathways to college graduation; and
- create increased federal accountability and coordination.⁶⁶

The Bush administration also developed a Web site, www.YesICan.gov (a Spanish language version can be found at www.YoSiPuedo.gov), to help Hispanic American parents and students make informed decisions about college.⁶⁷ The White House developed this site in response to a Tomás Rivera Policy Institute report, which found that Hispanics are largely unaware of success strategies for college admission, but neglected the report otherwise.⁶⁸ Still, the institute's president praised the administration's quick response.⁶⁹ The administration has also been credited with increasing funding for Hispanic-serving institutions by 36 percent since 2001, and

⁶³ The White House, "White House Initiative on Educational Excellence for Hispanic Americans," n.d., <<http://www.yic.gov/wwa/index.html>> (last accessed June 23, 2004) (hereafter cited as White House, "Initiative on Hispanic Education"); PACEEHA, *From Risk to Opportunity*; The White House, "Presidential Advisory Commission on Educational Excellence for Hispanic Americans," n.d., <<http://www.yesican.gov/paceea>> (last accessed June 23, 2004) (hereafter cited as White House, "PACEEHA"); Gilroy, "Helping Hispanics."

⁶⁴ White House, "Initiative on Hispanic Education"; PACEEHA, *From Risk to Opportunity*; White House, "PACEEHA."

⁶⁵ PACEEHA, *From Risk to Opportunity*; The White House, "Presidential Advisory Commission on Educational Excellence for Hispanic Americans Releases Final Report," press release, Apr. 9, 2002, <http://www.yic.gov/releases/finalreport_april03.html> (hereafter cited as White House, "PACEEHA Releases Final Report").

⁶⁶ PACEEHA, *From Risk to Opportunity*, pp. 1–52; White House, "PACEEHA Releases Final Report."

⁶⁷ Gilroy, "Helping Hispanics."

⁶⁸ Ibid.; CLEE, "Closing Achievement Gaps," pp. 20–21, 43.

⁶⁹ Ines Pinto Alicea, "College Knowledge: Many Latino Parents Flunk TRPI 'College Knowledge Quiz'; The Tomás Rivera Policy Institute," *Ethnic News Watch*, vol. 13, no. 8 (Jan. 27, 2003), p. 22.

increasing grants to colleges of education to prepare teachers to work with limited English students by 64 percent.⁷⁰

Plans Without Action or Outcomes

Upon closer examination, the administration's efforts and PACEEHA's recommendations have resulted in plans, but few concrete actions and even fewer demonstrable outcomes. President Bush reviewed the recommendations and is considering budgetary and congressional measures aimed at assisting Hispanic Americans.⁷¹ However, more than a year has passed since the recommendations were made.⁷² There is no evidence that the administration has implemented any specific programs to resolve the disparities that hinder equal opportunity for Hispanic students. Moreover, the initiative relies on NCLB strategies, which have serious weaknesses, as this report has demonstrated. According to the Tomás Rivera Policy Institute, "there is growing debate as to whether the implementation of NCLB is on track with the vision."⁷³ Thus, reliance on the reform effort to improve the condition of Hispanic education appears shortsighted and will likely prove ineffective.

Insufficient federal funding for NCLB effectively nullifies PACEEHA's recommendations and strategies. For example, states and school districts will have difficulty increasing the percentage of students reading at or above proficiency on the National Assessment of Educational Progress, if funding remains insufficient. Funding is especially critical for Hispanic American students since many of them are enrolled in the lowest performing schools. Subsequently, despite PACEEHA's report and the initiative's goals, many Hispanic American students will remain unprepared for college, especially prestigious institutions.⁷⁴

Past administrations have undertaken studies and proposed improving educational opportunities for Hispanic American students, yet the same problems persist. Under President Clinton, for example, federal agencies never compiled an inventory of available programs for Hispanic students despite an executive order to do so.⁷⁵ PACEEHA encountered similar resistance when it requested basic information about existing federal services for Hispanic American students. The result of this lack of cooperation and leadership has made many Latino community advocates cynical about whether the federal government will bring about improvement any time soon. They argue that they know what the research says, and what the condition of education is, but the administration needs to demonstrate a willingness to implement solutions.⁷⁶

⁷⁰ Peter Schmidt, "Academe's Hispanic Future," *Chronicle of Higher Education*, Nov. 28, 2003, p. 8 (hereafter cited as Schmidt, "Academe's Hispanic Future").

⁷¹ Gilroy, "Helping Hispanics." At the time this report was drafted, it was unclear what, if anything, the President would recommend.

⁷² U.S. Department of Education, "Federal Advisory Committees," <<http://www.ed.gov/print/about/bdscomm/list/com.html>> (last accessed Apr. 21, 2004).

⁷³ CLEE, "Closing Achievement Gaps," p. 22.

⁷⁴ Sandra Gardner, "Money, Academics, and Access: The Rhetoric and the Realities," *Ethnic News Watch*, vol. 13, no. 18 (June 16–29, 2003), p. 12–15.

⁷⁵ Schmidt, "Academe's Hispanic Future."

⁷⁶ *Ibid.*, quoting Lauro F. Cavazos, secretary of education under Presidents Reagan and George H.W. Bush.

The White House Initiative on Historically Black Colleges and Universities

The Higher Education Act of 1965 defined Historically Black Colleges and Universities (HBCUs) as institutions “established prior to 1964, whose principal mission was, and is, education of black Americans.”⁷⁷ Fifteen years later, in 1980, President Carter established the White House Initiative on Historically Black Colleges and Universities, a federal program aimed at ensuring that historically black colleges could surmount the lingering effects of discrimination and provide a quality education.⁷⁸ The initiative as it is known today was first implemented under President Reagan in 1981 and has been renewed by each President since.

During the administration of George H.W. Bush, the initiative was renewed and the President’s Advisory Committee on Historically Black Colleges and Universities was established.⁷⁹ The committee counseled the secretary of education on augmenting both federal and private sector efforts to strengthen HBCUs and making technical, planning, and development advice more readily available. President Clinton again renewed the initiative, formed the President’s Advisory Board, and required federal agencies to establish and report whether they had met annual objectives for working with HBCUs.⁸⁰ President Clinton’s executive order not only charged the board with providing advice, as did the committee under President Bush Sr., but it also committed federal agencies to providing support to HBCUs through grants, contracts, and cooperative arrangements.⁸¹

During his second year in office, President Bush issued Executive Order 13,256, which re-established the President’s Board of Advisors on HBCUs in the Office of the Secretary at the Department of Education (DOEd).⁸² The board’s duties include:

- preparing and issuing an annual report to the President on the results of the participation of HBCUs in federal programs;

⁷⁷ 20 U.S.C. § 1061(2) (2000).

⁷⁸ Historically Black Colleges and Universities, Exec. Order No. 12,232, 45 Fed. Reg. 53,437 (Aug. 12, 1980). U.S. Department of Health, Office of Minority Health, “Overview of The White House Initiative on Historically Black Colleges and Universities,” Mar. 18, 2002, <http://www.omhrc.gov/omh/historically%20black/about/about_002.htm> (hereafter cited as OMH, “HBCU Overview”).

⁷⁹ OMH, “HBCU Overview.”

⁸⁰ Ibid. The President’s Advisory Board on Historically Black Colleges and Universities is the predecessor to the President’s Board of Advisors on Historically Black Colleges and Universities. Under President Clinton, federal agencies were first required to establish objectives for working with HBCUs in their annual plans. At the end of each fiscal year, they reported their performance in their Annual Performance Reports.

⁸¹ President’s Board of Advisors on Historically Black Colleges and Universities, *Historically Black Colleges and Universities for the 21st Century*, annual report, March 1999, p. 2.

⁸² President’s Board of Advisors on Historically Black Colleges and Universities, Exec. Order No. 13,256, 3 C.F.R. 200 (2002) (hereafter cited as Exec. Order No. 13,256); The White House, “Advisors for Historically Black Colleges and Universities,” Feb. 12, 2002 <<http://www.whitehouse.gov/news/releases/2002/02/20020212-3.html>> (last accessed June 23, 2004) (hereafter cited as White House, “HBCU Advisors”).

- providing advice to the President and to the secretary of education regarding the needs of HBCUs in the areas of infrastructure, academic programs, and faculty and institutional development;
- making recommendations on the role of the private sector, including private foundations, in strengthening HBCUs; and
- ensuring that the annual report places emphasis on enhancing institutional planning and development, strengthening fiscal stability and financial management, and improving institutional infrastructure, including the use of technology, to provide long-term viability of these institutions.⁸³

Each of the 27 agencies participating in the HBCU initiative, as identified by the secretary of education, is required to develop an annual plan for increasing the ability of HBCUs to secure federal grants and contracts.⁸⁴ At the end of each year, agencies must also submit performance reports detailing whether they met the goals outlined in their plans. DOEd extracts data from the plans and reports (expenditures, projects, awards, etc.) and submits a report to the board of advisors, which then submits a final report to the President.

At the time this report was drafted, the board was still working on the final 2001–2002 HBCU performance report, two years behind schedule. That report was scheduled for release in May 2004, but was not completed at that time.⁸⁵ Based on this significant delay, the administration does not appear to be aggressively enforcing the development of plans, or the production of final reports, rendering it difficult to conduct a governmentwide evaluation of the HBCU program.

Upon review of the agency plans that are available, of particular interest is the amount of grant funding marked for historically black colleges. In 2002, the board of advisors recommended that 10 percent of all federal money spent on higher education be designated for HBCUs.⁸⁶ The “10 percent solution,” as it was called, would boost the teaching and research capacities of HBCUs and open the doors to fields in which African Americans remain absent. The percentage of

⁸³ Exec. Order No. 13,256; White House, “HBCU Advisors.”

⁸⁴ Exec. Order No. 13,256; White House, “HBCU Advisors.” Participating agencies are the following: U.S. Departments of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, Interior, Labor, State, Transportation, Treasury, and Veterans Affairs, U.S. Agency for International Development, Appalachian Regional Commission, Central Intelligence Agency, U.S. Environmental Protection Agency, U.S. Equal Employment Opportunity Commission, National Aeronautics and Space Administration, National Credit Union Administration, National Endowment for the Arts, National Endowment for the Humanities, National Science Foundation, U.S. Nuclear Regulatory Commission, U.S. Small Business Administration, and U.S. Social Security Administration. An Internet search for agency plans revealed that relatively few are posted on agency Web sites, and many are not current. DOEd does not post the plans either, even though they are public documents.

⁸⁵ Information was obtained via a telephone conversation with office of the White House Initiative on Historically Black Colleges and Universities on Jan. 12, 2004. Follow-up information was provided in an email exchange between Commission staff and Barbara Lindler, program analyst, White House Initiative on Historically Black Colleges and Universities.

⁸⁶ “HBCUs Among Few Winners in Bush’s Budget Plan,” *Black Issues in Higher Education*, vol. 21, no. 1 (Feb. 26, 2004), p. 6; Steve Miller, “Advisory Panel Asks Funds Rise for Black Schools; Proposal Eyes Higher Education ‘10 Percent Solution’,” *Washington Times*, Dec. 13, 2002, p. A03.

federal grant dollars awarded to HBCUs, however, varies by agency, and most have not achieved this goal.

Agency Compliance with the 10 Percent Solution

In his 2003 budget, President Bush pledged to increase DOEd funding for HBCUs by 30 percent between 2001 and 2005.⁸⁷ In his 2004 budget request, President Bush requested a 4.7 percent increase for the agency's HBCU program. This is significant given his request to decrease total higher education funding by 9 percent.⁸⁸ In 2003, DOEd's HBCU program received approximately 10 percent of the total higher education program funding, and 9 percent of the discretionary funding appropriated to the Office of Postsecondary Education.⁸⁹

The Department of Agriculture (USDA) has typically awarded a larger share of its higher education grants to HBCUs than other agencies: 10.6 percent in 2000, 8.0 percent in 2001, and 8.8 percent in 2002.⁹⁰ The largest share of USDA's awards to HBCUs are for facilities and equipment and student tuition assistance. The department also seeks to build on the research and teaching capacities of HBCUs.⁹¹

Other agencies have not exhibited, nor has the administration required, the same level of commitment to the HBCU initiative. The Department of Health and Human Services (HHS), the agency with the second highest fiscal commitment to the HBCU initiative, has recently cut HBCU-dedicated funding. Dating back to 1992, HHS' operating divisions were instructed to develop a plan to increase HBCU funding by 15 percent annually until HBCUs received 3 percent of the overall department grants and contract funding for which they are qualified.⁹² More than 10 years later, in 2003, the agency dedicated only 1.2 percent of its total funding for institutes of higher education to HBCUs. Between 2002 and 2003, the agency witnessed an 18 percent reduction in HBCU funding.⁹³

⁸⁷ U.S. Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2003*, "U.S. Department of Education."

⁸⁸ U.S. Department of Education, "Department of Education Fiscal Year 2004 Congressional Action," Jan. 28, 2004, <<http://www.ed.gov/about/overview/budget/budget04/04action.pdf>>, pp. 16–17 (hereafter cited as DOEd, "FY 2004 Congressional Action").

⁸⁹ DOEd, "FY 2004 Congressional Action," pp. 16–18.

⁹⁰ U.S. Department of Agriculture, "Performance Report for the U.S. Department of Agriculture: Awards to Historically Black Colleges and Universities, FY 2001"; U.S. Department of Agriculture, "Performance Report for the U.S. Department of Agriculture: Awards to Historically Black Colleges and Universities, FY 2002" (hereafter cited as USDA, "HBCU Performance Report, 2002").

⁹¹ USDA, "HBCU Performance Report, 2002."

⁹² See U.S. Department of Health and Human Services, Office of Minority Health, "Plans and Reports," June 2003, <http://www.omhrc.gov/omh/historically%20black/prs/prs_toc.htm>; U.S. Department of Health and Human Services, Office of Minority Health, "History of the HHS Historically Black Colleges and Universities Initiative," Mar. 5, 2002, <http://www.omhrc.gov/omh/historically%20black/about/about_004.htm>.

⁹³ Eve E. Slater, assistant secretary for health, U.S. Department of Health and Human Services, letter to Leonard H.O. Spearman, executive director, White House Initiative on Historically Black Colleges and Universities, June 5, 2002, re: FY 2003 annual plan on HBCUs.

Likewise, the Department of Veteran's Affairs (VA), was expected to award \$47.3 million to HBCUs in 2003; this represents only 2.3 percent of the agency's legislative awards and 1.3 percent of discretionary awards to institutions of higher education.⁹⁴ There is no indication that VA intends to increase the proportion of awards disbursed to HBCUs in the future.

Neither the President nor his board of advisors has demanded compliance with the 10 percent plan. As a result, agencies have exhibited differing levels of commitment to the HBCU program. Moreover, the HBCU Initiative, as it currently operates, focuses largely on procurement and awards, limiting participation to grant-making federal agencies. While it is important that agencies continue to provide much-needed funding to HBCUs, the administration has not demanded attention from smaller federal agencies that might develop collaborative relationships with HBCU students, researchers, and faculty, thereby increasing the visibility of these institutions.

Financial Aid for HBCU Students

Lack of compliance with the HBCU initiative and the 10 percent solution has not only adversely affected institutions that could benefit from the funding, but other fiscal cutbacks have directly affected HBCU students. For example, officials and students at HBCUs, as well as the National Association for Equal Opportunity in Higher Education, criticized President Bush's 2003 higher education budget for inadequately funding student financial aid programs. Nearly 90 percent of HBCU students receive financial assistance, but the President chose to maintain the maximum Pell Grant award at \$4,000.⁹⁵ The average award covers less than 30 percent of the typical costs at a four-year public institution.⁹⁶ Almost 50 percent of students at minority-serving institutions, including HBCUs, receive Pell grants compared with 28 percent of all college students.⁹⁷ According to the president of one historically black college, to eliminate the unmet financial needs of students at that institution, the President should have increased the maximum Pell grant to \$5,500.⁹⁸ By cutting financial assistance to the students who could most benefit, the administration undercuts its efforts to improve the economic viability of HBCUs.

ACCESS TO FEDERAL FUNDING FOR RELIGIOUS GROUPS

Between 1996 and 2000, Congress enacted several laws permitting the government to give funds to approved religious and charitable organizations for providing public services, such as

⁹⁴ Ibid. Legislative awards include mainly tuition assistance to students on GI Bills and supporting institutional subsidies.

⁹⁵ Richard Morgan, "Historically Black Colleges Criticize Bush's Budget Provisions on Student Aid," *Chronicle of Higher Education*, Feb. 22, 2002, p. 22 (hereafter cited as Morgan, "HBCUs Criticize Bush"); U.S. House of Representatives, Committee on Education and the Workforce, "President Bush's Budget: Failing to Meet the Needs of Historically Black Colleges," Feb. 12, 2002, <http://www.house.gov/eoo_democrats/hbcuhandout.html>.

⁹⁶ Elijah E. Cummings, "Formula for Success," *Baltimore Afro-American*, Nov. 21, 2003, p. 11.

⁹⁷ Charles Dervarics, "Minority-Serving Institutions Join Forces to Seek Change," *Black Issues in Higher Education*, vol. 20, no. 2 (Mar. 13, 2003), p. 6.

⁹⁸ Morgan, "HBCUs Criticize Bush."

counseling, drug treatment, after-school care, and housing assistance.⁹⁹ Collectively, the laws, which applied to four specific grant programs, became known by the general term “charitable choice.”¹⁰⁰ The term was originally defined in Section 104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, also known as welfare reform, passed during the Clinton administration.¹⁰¹ Section 104, which was crafted by then-Senator, now Attorney General John Ashcroft, allows federal and state governments to enter into contractual agreements with religious and charitable organizations for the purpose of providing social services, either through direct aid or by redeeming vouchers for services.¹⁰²

The passage of charitable choice legislation was historic. Unlike earlier policies, charitable choice did not require religious organizations to create secular subsidiaries, such as United Jewish Communities, Catholic Charities USA, or Lutheran Social Services, to qualify for government funds.¹⁰³ It allowed federal and state governments to contract with sectarian organizations, even churches, that do not separate the religious from the secular.¹⁰⁴ While some praised the legislation for opening doors for religious groups and social service providers, others expressed concern that it represented an unconstitutional blurring of the principle of separation of church and state. The Establishment Clause in the First Amendment forbids Congress from making any law establishing or aiding a religion or a church.¹⁰⁵ The clause’s main purpose is to

⁹⁹ The four programs that initially included charitable choice provisions were: Temporary Assistance for Needy Families (TANF) in 1996, the welfare-to-work program added to TANF in 1997, the Community Services Block Grant Program reauthorization of 1998, and in 2000 the substance abuse prevention and treatment services funded under the Public Health Services Act. *See* David M. Ackerman, legislative attorney, American Law Division, Congressional Research Service, “Public Aid to Faith-Based Organizations (Charitable Choice): Background and Select Legal Issues,” updated Apr. 10, 2003, p. CRS-8 (hereafter cited as CRS, “Public Aid to Faith-Based Organizations”).

¹⁰⁰ The White House, “Charitable Choice: The Facts,” *n.d.* <<http://www.whitehouse.gov/government/fbc/guidance/charitable.html>> (last accessed Sept. 3, 2004).

¹⁰¹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 § 104 (codified at 42 U.S.C. § 604a (2000)). *See* Eileen W. Lindner, National Council of Churches, “Considering Charitable Choice,” Feb. 8, 2001, <<http://www.nccusa.org/news/01news10a.html>> (hereafter cited as Lindner, “Considering Charitable Choice”).

¹⁰² Lindner, “Considering Charitable Choice.”

¹⁰³ Steven K. Green, “Charitable Choice and Neutrality Theory,” *New York University Annual Survey of American Law*, vol. 57 (2000) (hereafter cited as Green, “Charitable Choice and Neutrality Theory”); Andrea Pallios, “Should We Have Faith in the Faith-Based Initiative? A Constitutional Analysis of President Bush’s Charitable Choice Plan,” *Hastings Constitutional Law Quarterly*, vol. 30 (fall 2002), p. 131 (hereafter cited as Pallios, “Should We Have Faith in the Faith-Based Initiative?”).

¹⁰⁴ Scott M. Michelman, “Recent Development: Faith-Based Initiatives,” *Harvard Journal on Legislation*, vol. 39 (summer 2002), p. 477–78 (hereafter cited as Michelman, “Faith-Based Initiatives”).

¹⁰⁵ U.S. CONST. amend. I; Stephen L. Carter, “The J. Byron McCormick Lecture: Reflections on the Separation of Church and State,” *Arizona Law Review*, vol. 44 (summer 2002); Pallios, “Should We Have Faith in the Faith-Based Initiative?”; Daniel K. Storino, “Resurrecting the Faith-Based Plan: Analyzing Government Funding for Religious Social Service Groups,” *Notre Dame Law Review*, vol. 79 (December 2003); Alexis Peters, “The Office of Faith-Based and Community Initiatives: Why the Establishment Clause Prevents Religious and Public Social Service Providers from Competing on a Level Playing Field,” *Whittier Law Review*, vol. 23 (2002) (hereafter cited as Peters, “The Office of Faith-Based and Community Initiatives”); Elbert Lin et al., “Faith in the Courts? The Legal and Political Future of Federally-Funded Faith-Based Initiatives,” *Yale Law and Policy Review*, vol. 20 (2002) (hereafter cited as Lin et al., “Faith in the Courts?”).

protect religious liberty and prevent government infringement upon an individual's right to choose and practice a religious faith.¹⁰⁶ Charitable choice legislation attempted to satisfy the Establishment Clause by prohibiting religious organizations from using federal funds for religious worship, instruction, or proselytization. However, the legislation failed to include any enforcement procedure for ensuring religious organizations complied with this provision.¹⁰⁷

Expanding Charitable Choice: President Bush's Faith-Based Initiative

President Bush has made the objective to increase involvement by faith-based groups in federally funded service programs a centerpiece of his domestic agenda.¹⁰⁸ He has pursued this agenda as a top priority by both administrative and legislative actions, and has achieved differing degrees of success.

Executive Authority and Administrative Channels

Upon taking office, President Bush used his executive authority to expand charitable choice beyond the four areas to which it was initially limited. His Faith-Based and Community Initiatives incorporated charitable choice in all the major federal programs that provide service funding, including education, housing, health care, and economic development. He has since issued four related executive orders: Executive Order 13,199 created the White House Office of Faith-Based and Community Initiatives; Executive Order 13,198 established faith-based and community initiatives centers at the Departments of Justice, Education, Labor, Health and Human Services, and Housing and Urban Development (HUD); Executive Order 13,280 established centers at the Department of Agriculture and the Agency for International Development; and Executive Order 13,279 directed these seven agencies to revise their regulations to conform to the principles of charitable choice and to encourage religious groups to apply for funding.¹⁰⁹

¹⁰⁶ Peters, "The Office of Faith-Based and Community Initiatives."

¹⁰⁷ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 § 104 (codified at 42 U.S.C. § 604a (2000)). See Green, "Charitable Choice and Neutrality Theory."

¹⁰⁸ CRS, "Public Aid to Faith-Based Organizations," p. CRS-9.

¹⁰⁹ Agency Responsibilities with Respect to Faith-Based and Community Initiatives, Exec. Order No. 13,198, 3 C.F.R. 750 (2002) (hereafter cited as Exec. Order No. 13,198); Establishment of White House Office of Faith-Based and Community Initiatives, Exec. Order No. 13,199, 3 C.F.R. 752 (2002); Equal Protection of the Laws for Faith-Based and Community Organizations, Exec. Order No. 13,279, 3 C.F.R. 258 (2002); Responsibilities of the Department of Agriculture and the Agency for International Development with Respect to Faith-Based and Community Initiatives, Exec. Order No. 13,280, 3 C.F.R. 262 (2002) (hereafter cited as Exec. Order No. 13,280); Equal Protection of the Laws for Faith-Based and Community Organizations, Exec. Order No. 13,279, 3 C.F.R. 258 (2003) (hereafter cited as Exec. Order No. 13,279); The White House, Office of Faith Based and Community Initiatives, "President Bush's Faith-Based and Community Initiative," n.d., <<http://www.whitehouse.gov/government/fbci/mission.html>> (last accessed June 23, 2004); Vee Burke, Domestic Social Policy Division, Congressional Research Service, "Charitable Choice, Faith-Based Initiatives, and TANF," May 9, 2003, p. CRS-3; President George W. Bush, remarks at the White House Conference on Faith-Based and Community Initiatives, Philadelphia, PA, Dec. 12, 2002 (hereafter cited as President Bush, remarks at the Conference on Faith-Based Initiatives, Dec. 12, 2002).

The last executive order is the broadest in scope, applying to social service programs administered by the seven agencies or by state and local governments using federal funds to support their programs. It is also the most controversial. Through this single action, the President repealed civil rights policy in existence since President Johnson signed Executive Order 11,246, which prohibits federal contractors from discriminating in employment based on race, color, religion, sex, or national origin.¹¹⁰ President Bush amended the historic order so that it no longer applies to religious corporations, associations, educational institutions, or societies that receive federal contracts.¹¹¹

Furthermore, Executive Order 13,279's beneficiary protections, including prohibitions against indoctrination and religious instruction and the requirement that participation in religious activities be voluntary, explicitly apply to programs *directly* funded by the federal government, not those that are funded *indirectly* such as through vouchers.¹¹² The agency regulations subsequently issued affirm this distinction. They also clearly state that receipt of federal funds does not affect a religious organization's exemption from Title VII of the Civil Rights Act of 1964 (discussed in greater detail below).¹¹³ For example, in its revised regulations, HUD eliminated provisions barring grant recipients from engaging in religious discrimination in employment.¹¹⁴ In its regulations, DOJ likewise unequivocally stated that the law does not restrict the government from funding religious organizations that consider faith in employment decisions.¹¹⁵ In at least one case, program regulations undermine nondiscrimination requirements built into other legislation as well.¹¹⁶ The significance of this is alarming and far-reaching. Every participating agency that had regulatory provisions prohibiting employment discrimination based on religion by funding recipients has repealed those regulations.

The President's Legislative Agenda

The President also pursued the faith-based initiative through a legislative agenda.¹¹⁷ The Bush White House pressed Congress to pass legislation that would expand federal funding to religious

¹¹⁰ Equal Employment Order, Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965).

¹¹¹ Exec. Order No. 13,279 § 4(c).

¹¹² See Exec. Order No. 13, 279 §§ 2(e–f).

¹¹³ CRS, "Public Aid to Faith-Based Organizations," p. CRS-14.

¹¹⁴ Participation in HUD Programs by Faith-Based Organizations; Providing for Equal Treatment of all HUD Program Participants; Final Rule, 68 Fed. Reg. 56,396 (Sept. 30, 2003) (codified at 24 C.F.R. pts. 92, 570, 572, 574, 576, 582, 583, 585).

¹¹⁵ Participation in Justice Department Programs by Faith-Based Organizations; Providing for Equal Treatment of all Justice Department Program Participants; Final Rule, 69 Fed. Reg. 2,703 (Jan. 21, 2004) (codified at 28 C.F.R. pts. 31, 33, 38, 90, 91, 93) (hereafter cited as DOJ Final Rule).

¹¹⁶ The Substance Abuse and Mental Health Services Administration (SAMHSA) at HHS issued program regulations that state that the religious nondiscrimination in employment requirements of the Public Health Service Act do not apply if an organization can demonstrate that compliance would "substantially burden" its religious exercise. CRS, "Public Aid to Faith-Based Organizations," pp. CRS-15.

¹¹⁷ President George W. Bush, letter to congressional leaders, Nov. 7, 2001, re: proposed "armies of compassion" legislation.

social service providers and ease restrictions on how recipients use the funds they receive.¹¹⁸ The President's legislative agenda did not include protection from religious discrimination.

Both the House and Senate drafted bills that would provide tax incentives for faith-based organizations and grant them the right to compete with secular entities for funding. In July 2001, the House passed the Community Solutions Act of 2001, a controversial bill that President Bush viewed as the primary legislative vehicle for his initiative.¹¹⁹ The act would have extended charitable choice to most of the federal government's social service programs and allow program administrators to more easily "voucherize" programs.¹²⁰ It included language allowing religious organizations that provide social services with federal funds to engage in religious instruction. Groups, such as the American Jewish Congress, asserted that this provision would allow federal money to be used to support religious indoctrination and proselytizing.¹²¹ The bill also exempted religious organizations receiving federal funds from laws prohibiting employment discrimination on the basis of religion and preempted conflicting state and local nondiscrimination laws.¹²² Despite concerns from religious and civil rights groups, the administration supported and pushed for the House bill's passage.

The Community Solutions Act failed to gain support in the Senate and was criticized by Senate members for provisions that would have weakened anti-discrimination laws and also separation of church and state requirements and infringed on the religious freedoms of service beneficiaries.¹²³ Members of the Senate proposed alternate legislation, the Charity Aid, Recovery, and Empowerment Act (CARE Act), which secured the President's support.¹²⁴ Originally, in the 2002 version, sponsors did not exempt religious employers from anti-discrimination laws; but neither did they propose rules to protect beneficiaries from discrimination based on religion, or to prevent federal funds from being used for religious purposes.¹²⁵ The bill failed to gain wide support—religious organizations were among those who questioned its viability and legality—and did not reach the Senate floor for a vote.¹²⁶ The version that eventually passed in April 2003 contained only one faith-based provision, a \$150 million

¹¹⁸ Michelman, "Faith-Based Initiatives," p. 475.

¹¹⁹ Community Solutions Act, H.R. 7, 107th Cong. (2001); *see also* CRS, "Public Aid to Faith-Based Organizations," pp. CRS-10–CRS-11.

¹²⁰ CRS, "Public Aid to Faith-Based Organizations," pp. CRS-26.

¹²¹ American Jewish Congress, "Voucher Case Revises Danger of 'Charitable Choice' Legislation," action alert, July 16, 2002, <http://www.ajcongress.org/action_alert_charitable_choice_7-16-2002.htm> (last accessed June 10, 2004) (hereafter cited as AJC, "Danger of 'Charitable Choice' Legislation").

¹²² Michelman, "Faith-Based Initiatives," p. 475; CRS, "Public Aid to Faith-Based Organizations," p. CRS-21.

¹²³ Michelman, "Faith-Based Initiatives," p. 475.

¹²⁴ Charity Aid, Recovery, and Empowerment Act, S. 1924, 107th Cong. (2002).

¹²⁵ Michelman, "Faith-Based Initiatives," p. 476–77.

¹²⁶ *See* United Church of Christ, "Charity Aid, Recovery, and Empowerment Act (CARE) of 2002," 2004, <<http://www.ucc.org/justice/cc/care.htm>> (last accessed June 10, 2004); AJC, "Danger of 'Charitable Choice' Legislation."

fund to provide technical assistance to small religious and community organizations competing for federal funds, and essentially amounted to a tax bill that encourages charitable donations.¹²⁷

The House and Senate have yet to proceed with comprehensive legislation, thus leaving legal issues unresolved, such as whether religious groups receiving federal funds are exempt from nondiscrimination laws, and forcing the administration to resort to the administrative channels described above to implement the initiative. Moreover, because there is no overarching charitable choice legislation, Congress has included faith-based provisions in individual proposals and bills, creating the potential for a morass of independent laws and conflicting rules that are program dependent and applicable to individual programs. For example, a House proposal for the reauthorization of the Workforce Investment Act now contains a provision that would exempt religious organizations from a requirement in the existing statute that prohibits religious discrimination in employment.¹²⁸

An Inaccurate Representation: Charitable Choice as a Civil Right

The President has referred to the faith-based initiative as “one of the most important commitments of my administration.”¹²⁹ It is also the most frequently promoted “civil rights” effort of the Bush administration. As discussed in chapter 2, more than half of the President’s statements characterized as civil rights plans of action or concrete proposals promote the faith-based initiative despite that it does not promote a civil rights objective. President Bush has publicly spoken about his faith-based initiative nearly 100 times each year he has been in office.¹³⁰ Conversely, he rarely has spoken out on recognized civil rights issues, such as affirmative action and racial intolerance.¹³¹ The President appears passionate about the faith-based initiative, but he does not display the same commitment to recognized civil rights problems.

The administration, in public statements and actions, uses words that characterize the faith-based initiative as an effort to end discrimination. For example, Executive Orders 13,198 and 13,280 direct participating agencies to “remove barriers” that prevent religious groups from obtaining public funding.¹³² President Bush stated support for “equal opportunity for all without

¹²⁷ Charity Aid, Recovery, and Empowerment Act, S. 476, 108th Cong. (2003). *See also* Eliza Newlin Carney, “Leap of Faith,” *The National Journal, Government Executive*, June 2003, p. 52 (hereafter cited as Carney, “Leap of Faith”); Robert W. Carter Jr., “Faith-Based Initiatives: Expanding Government Collaboration with Faith-Based Social Service Providers,” *Seton Hall Legislative Journal*, vol. 27 (2003), pp. 376–77.

¹²⁸ CRS, “Public Aid to Faith-Based Organizations,” pp. CRS-3, CRS-11.

¹²⁹ The White House, “President Names New Faith-Based & Community Initiatives Director,” February 1, 2002, <<http://www.whitehouse.gov/news/releases/2002/02/20020201-4.html>>.

¹³⁰ While in office, President Bush has publicly commented on the faith-based initiative more than 350 times (as of July 2004). Figure is based on a USCCR document search retrieved from the U.S. General Printing Office, “Weekly Compilation of Presidential Documents,” <<http://www.gpoaccess.gov>>.

¹³¹ Staff used the U.S. Government Printing Office’s on-line resource, Weekly Compilation of Presidential Documents, which can be found at <<http://www.gpoaccess.gov>>. The weekly compilation is issued every Monday and contains statements, messages, and other materials released by the White House during the preceding week.

¹³² Exec. Order No. 13,198 § 2; Exec. Order No. 13,280 § 2.

discrimination or prejudice of any kind.”¹³³ He said that “tolerance and respect” must be taught in order to save “young minds and souls lost to hate.”¹³⁴ President Bush stated an intent to “level the playing field” for all faith-based and community groups.¹³⁵ He declared “I’m telling America, we need not discriminate against faith-based programs.”¹³⁶

When President Bush presents the faith-based initiative as a civil rights program, he discusses it in specific language, describing the need for “equal access and equal treatment” of religious groups, and calling on the government to eliminate the “fear of bureaucracy.”¹³⁷ That this is the same language that historically has been associated with improving opportunities for traditionally underserved minority groups is significant. Upon hearing the President’s statements, many would believe that the faith-based program is a seminal civil rights initiative. However, the First Amendment “barriers” to which the President refers exist to prevent government support of religion, not to deny people of diverse religious faiths equal treatment.

Permitting Religious Discrimination

Perhaps the most alarming aspect of charitable choice generally, and the President’s faith-based initiative specifically—especially given his aggressive portrayal of it as having civil rights implications—is its potential to undermine pre-existing anti-discrimination laws. Although there is no federal statute that generally bars *religious* discrimination in federally funded programs, Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against individuals because of their religion.¹³⁸ The laws protect against religious discrimination in all aspects of employment, including pre-employment questions, testing, recruiting, and firing. Laws further require employers to provide employees and job applicants reasonable accommodation for their religious practices, such as flexible scheduling of examinations and job assignments that do not conflict with religious activities.¹³⁹ Courts have routinely upheld the principles of religious accommodations and freedoms.

Section 702 of Title VII of the Civil Rights Act of 1964 has always protected the ability of faith-based organizations to maintain their religious liberty and identity by hiring employees who

¹³³ President George W. Bush, remarks to the American Jewish Committee, Washington, D.C., May 3, 2001, <<http://www.whitehouse.gov/news/releases/2001/05/20010504.html>> (last accessed June 16, 2004).

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.* See also President George W. Bush, State of the Union Address, Jan. 20, 2004, <<http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>> (last accessed June 22, 2004).

¹³⁷ President George W. Bush, remarks at the First White House National Conference on Faith-Based and Community Initiatives, Washington, D.C., June 1, 2004, <<http://www.whitehouse.gov/news/releases/2004/06/20040601-10.html>> (last accessed June 10, 2004) (hereafter cited as President Bush, remarks at the National Conference on Faith-Based Initiatives, June 1, 2004).

¹³⁸ Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on race, color, sex, religion, or national origin. It only applies to employers with 15 or more employees. See 42 U.S.C. §§ 2000e–2000e-17 (2000).

¹³⁹ U.S. Equal Employment Opportunity Commission, “Facts About Religious Discrimination,” June 28, 2002, <<http://www.eeoc.gov/facts/fs-relig.html>> (last accessed June 9, 2004).

share their religious beliefs.¹⁴⁰ Prior to charitable choice and the faith-based initiative, longstanding principles of constitutional law barred the government from aiding private discrimination, including by way of funding. However, according to the administration's interpretation of the law and the legislative proposals offered thus far, the Title VII exemption applies to entities accepting public funds, thus permitting religious organizations to discriminate against job applicants if they do not share the organization's faith or subscribe to its tenets.¹⁴¹ In guidelines to faith-based organizations, the White House simply stated:

There is no general Federal law that prohibits faith-based organizations that receive Federal funds from hiring on a religious basis. Nor does the Civil Rights Act of 1964, which applies regardless of whether an organization receives federal funds, prohibit faith-based organizations from hiring on a religious basis.¹⁴²

The administration asserts that when the Title VII exemption was adopted, congressional intent was that it apply regardless of whether federal funds were involved. According to one legal expert, however, in its attempts to defend its faith-based policy, the administration's casual and ambiguous guidance fails to acknowledge the tension between the nation's commitment to equal employment opportunity and the autonomy of religious organizations, and clearly values the latter over the former.¹⁴³ Until the administration's interpretation is tested in the courts or specifically addressed through legislation, the revised agency regulations issued in response to the administration's directive, which uniformly endorse the religious exemption for federally funded organizations, stand as policy.¹⁴⁴ Thus, the Bush administration has used administrative channels to define the scope of civil rights laws and congressional intent, and the President's

¹⁴⁰ See 42 U.S.C. § 2000e-1(a).; Lin et al., "Faith in the Courts?"; The White House, Office of Faith-Based and Community Initiatives, "Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must Be Preserved," n.d., p. 2, <<http://www.whitehouse.gov/government/fbci/booklet.pdf>> (last accessed June 23, 2004).

¹⁴¹ See Jo Renee Formicola and Mary Segers, "The Bush Faith-Based Initiative: The Catholic Response," *Journal of Church and State*, vol. 44, no. 4 (September 2002), pp. 694, 696 (hereafter cited as Formicola and Segers, "The Bush Faith-Based Initiative"); Lance T. LeLoup and Steven A. Shull, *The President and Congress: Collaboration and Combat in National Policymaking* (New York: Pearson Education, Inc., 2003), pp. 137–38 (hereafter cited as LeLoup and Shull, *The President and Congress*); Americans United for Separation of Church and State, "Bush's Adjustments Fail To Address Faith-Based Initiative's Fatal Flaws," June 27, 2001, <<http://www.au.org/press/pr62701.htm>> (hereafter cited as AUSCS, "Bush's Adjustments"); Carney, "Leap of Faith."

¹⁴² White House Office of Faith Based and Community Initiatives, "Guidance to Faith-Based and Community Organizations on Partnering with the Federal Government," n.d., <<http://www.whitehouse.gov/government/fbci/guidance/index.html>> (last accessed Sept. 15, 2004), p. 12. See also White House Office of Faith Based and Community Initiatives, "Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations; Why Religious Hiring Rights Must Be Preserved," n.d., <<http://www.whitehouse.gov/government/fbci/booklet.pdf>> (last accessed Sept. 15, 2004).

¹⁴³ K. Hollyn Hollman, general counsel, Baptist Joint Committee on Public Affairs, testimony before the Subcommittee on Criminal Justice, Drug Policy, and Human Resources, Committee on Government Reform, United States House of Representatives, Mar. 23, 2004.

¹⁴⁴ See, e.g., Participating in Education Department Programs by Religious Organizations; Providing for Equal Treatment of All Education Program Participants, 69 Fed. Reg. 31,708, 31,714 (June 4, 2004) (to be codified at 34 C.F.R. pts. 74, 75, 76, 80); DOJ Final Rule, p. 2,836; and Affirmative Action and Nondiscrimination Obligations of Government Contractors, Executive Order 11,246, as Amended; Exemptions for Religious Entities; Final Rule, 68 Fed. Reg. 56,392 (Sept. 30, 2003) (codified at 41 C.F.R. pt. 60-1).

initiative represents a retreat from laws prohibiting those who discriminate from receiving federal funds.¹⁴⁵

Furthermore, expanding the reach of the Title VII exemption will potentially provide a bridge to broader discrimination beyond religion. The right to be free from discrimination is a civil rights, but under charitable choice and the faith-based initiative, organizations receiving federal funds could discriminate against other persons who have been historically subjected to discrimination. Religious employers can do so by citing “religious incompatibility” to justify or cover up their actions. Similarly, the administration’s initial faith-based proposals did not include any language to prohibit religious groups from discriminating against gay men and lesbians.¹⁴⁶ The administration considered and declined a request by the Salvation Army to adopt regulatory language that allows religious organizations to make decisions based on sexual orientation and exempts them from state and local laws that bar such discrimination.¹⁴⁷ The administration left open the potential for such discrimination by pointing out that prevailing federal civil rights laws do not specifically prohibit discrimination based on sexual orientation.¹⁴⁸

Implications and Reaction

In promoting the faith-based initiative, President Bush has repeatedly noted that religious organizations can use public funds to provide social services, while still retaining their “religious character.”¹⁴⁹ President Bush has furthermore stated that “[religious] groups should be allowed to access social service grants so long as they don’t proselytize.”¹⁵⁰ However, none of the administration’s actions thus far indicate a commitment to enforcing this stipulation. The President’s plan does not expressly separate religious practices from the provision of services, leading some critics to assert that, without checks in place, federal funds could be used for employment discrimination, as well as infringement on the rights of service beneficiaries to be free from religious discrimination or unwanted indoctrination.¹⁵¹

¹⁴⁵ Lin et al., “Faith in the Courts?”

¹⁴⁶ See Community Solutions Act, H.R. 7, 107th Cong., (2001); Major Garrett, “White House: No Deal with Salvation Army,” *CNN.com*, July 2001, <<http://www.cnn.com/2001/ALLPOLITICS/07/10/bush.salvationarmy/>> (hereafter cited as Garrett, “No Deal”); Dana Milbank, “Bush Legislative Approach Failed in Faith Bill Battle; White House is Faulted for Not Building a Consensus in Congress,” *Washington Post*, Apr. 23, 2003, p. A01; Formicola and Segers, “The Bush Faith-Based Initiative,” p. 695; AUSCS, “Bush’s Adjustments.”

¹⁴⁷ Lin et al., “Faith in the Courts?”; Garrett, “No Deal”; Mike Allen and Dana Milbank, “Rove Heard Charity Plea on Gay Bias,” *Washington Post*, July 12, 2001, p. A01; Carter M. Yang, “No Deal: White House Rejects Salvation Army Request to Protect Anti-Gay Hiring Policy,” July 2001, <http://abcnews.go.com/sections/politics/DailyNews/Bush_Salvation010710.html> (hereafter cited as Yang, “White House Rejects”); Dana Milbank, “Bush Drops Rule on Hiring Gays,” *Washington Post*, July 11, 2001, p. A1.

¹⁴⁸ Garrett, “No Deal”; Yang, “White House Rejects.”

¹⁴⁹ Aaron Cain, “Faith-Based Initiative Proponents Beware: The Key in Zelman Is Not Just Neutrality, But Private Choice,” *Pepperdine Law Review*, vol. 31 (2004); Pallios, “Should We Have Faith in the Faith-Based Initiative?”

¹⁵⁰ President Bush, remarks at the National Conference on Faith-Based Initiatives, June 1, 2004.

¹⁵¹ See Mark Levine, legislative counsel to U.S. Representative Barney Frank, ranking member, Committee on Financial Services, memo to members and staff of the Committee on Financial Services, Feb. 13, 2003, re: proposed HUD rule on “faith-based” organizations; Americans United for Separation of Church and State, “The ‘Faith-Based’ Initiative: Churches, Social Services, and Your Tax Dollars,” n.d.,

The faith-based initiative, a so-called civil rights action, actually constitutes a retreat, not an advancement from employment discrimination. The President has described the faith-based initiative as a remedy to discrimination against religious organizations in obtaining public funds, comparing it to the bias other groups have suffered throughout U.S. history. Ironically, the initiative permits employment discrimination by allowing religious organizations to deny equal employment opportunity while accepting public funding.¹⁵²

President Bush has employed executive, administrative, and legislative strategies to integrate his faith-based initiative throughout the federal government.¹⁵³ Although he has failed thus far to secure an acceptable result legislatively, the President has pursued administrative channels. Many executive branch actions, such as revising regulations, were done without much public discussion. The scope and reach of the revisions drew little attention despite their potential to set back longstanding civil rights policy. The administration could have made provisions to ensure that no organization receiving public, taxpayer money can discriminate in its services or employment practices, but it did not. Instead of protecting the integrity of civil rights laws, the President has pursued a path that is more divisive than inclusive, and as such contradicts what he identified as his goal for the faith-based initiative.

<http://www.au.org/site/DocServer/The_Faith_Based_Initiative.pdf?docID=111> (last accessed Sept. 27, 2004); AJC, "Danger of 'Charitable Choice' Legislation."

¹⁵² The White House, Office of Faith-Based and Community Initiatives, "Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must Be Preserved," n.d., p. 2, <<http://www.whitehouse.gov/government/fbci/booklet.pdf>> (last accessed June 23, 2004); Formicola and Segers, "The Bush Faith-Based Initiative"; AUSCS, "Bush's Adjustments"; Carney, "Leap of Faith"; Americans United for Separation of Church and State, "President Bush and 'Faith-Based' Initiatives: AU Report and Answers To Frequently Asked Questions," Jan. 29, 2001, <<http://www.au.org/press/pr12601.htm>>; LeLoup and Shull, *The President and Congress*, p. 138; Lin et al., "Faith in the Courts?."

¹⁵³ As noted, the President issued several executive orders, directed federal agencies to revise their regulations, and pushed Congress to statutorily mandate the faith-based initiative. See Exec. Order No. 13,279; President Bush, remarks at the Conference on Faith-Based Initiatives, Dec. 12, 2002; CRS, "Public Aid to Faith-Based Organizations," pp. CRS-2–CRS-3, CRS-8, CRS-11.

Chapter 6: The Bush Record Reviewed

This report documents that civil rights problems are entrenched in American society, the result of unequal treatment over the course of history. Furthermore, new means of prejudice and discrimination have become manifest, for example, unequal treatment in a post-terrorism era. Past Presidents have tried to resolve civil rights problems with varying levels of vigor and success. Only robust enforcement and vigorous commitment on the part of the country's leaders will fulfill the promise of civil rights laws and ensure the survival of equality and freedom from oppression.

In the Commission's last presidential evaluation, it offered six indicators of effective presidential civil rights leadership. It said that the President should:

- (1) Clarify and articulate a commitment to civil rights and equal opportunity.
- (2) Aggressively secure resources for civil rights promotion and enforcement.
- (3) Demonstrate beliefs and intent through actions and perseverance.
- (4) Develop a strategy and implementation plan in coordination with other branches of government and civil rights groups.
- (5) Develop and implement success measures for civil rights goals.
- (6) Find and build upon common ground, even on controversial civil rights problems.

Have George W. Bush and his administration advanced civil rights as tested against the six indicators?

(1) Clarify and Articulate a Commitment to Civil Rights

President Bush has not been clear in his commitment to civil rights. Overall, he has made relatively few public statements about related matters, and when he has done so, overwhelmingly it has been to carry out official duties, for example to declare annual heritage celebrations or to note significant historical dates. He also substitutes the term "diversity" for civil rights. Although a worthy concept which includes ethnicity, background, and race, diversity does not represent all that civil rights embody or guarantee that protections will be upheld.

President Bush also characterizes problems that are fundamentally civil rights in nature as ones that are general, with no such focus. For example, hate-motivated violence has heretofore been understood as attacks that denigrate a class of people for their beliefs or immutable characteristics. President Bush has said that all violent crime constitutes hate crime. That belief ignores the common feature of bias-motivated lynchings, draggings, beatings, and firebombings: that they are committed upon people *because of* characteristics such as race, color, creed, ethnicity, national origin, or sexual orientation.

The reverse is also true; that is, President Bush refers to programs that have little or no civil rights relevance as ones that promote equality and justice. For example, the program that he most frequently promotes as a civil rights measure, the faith-based initiative, has nothing to do with civil rights, except that it *allows* employment discrimination prohibited under Title VII. He equates the lack of support for churches with prejudice and bigotry, making a case for his initiative that the public feels compelled to support. He speaks about the faith-based initiative in civil rights terms more than any legitimate civil rights proposal. Characterizing unrelated programs as ones that end prejudice and bigotry not only confuses the public, but also directs resources and attention from relevant initiatives, and as such is detrimental.

The President's appointments say much about his commitment. A number of his key appointments are admirably diverse by race, ethnicity, and gender. However, his statements reveal that he equates color with civil rights expertise. In significant instance, irrespective of their race, ethnicity, or other characteristics, his appointees do not favor, and some are on record as opposing, prevailing civil rights law.

Furthermore, the President eschews advice from mainstream civil rights leaders. He does not invite them to the White House to discuss policy concepts, nor does he regularly attend their events. He points to the presence of people of color in his Cabinet as a substitute for external collaboration and evidence of a civil rights agenda, but then does not consider their civil rights views. For example, his national security advisor and secretary of state both publicly stated unequivocal support for affirmative action, but the President has not.

(2) Secure Resources for Civil Rights Enforcement

President Bush has earned a mixed record on securing appropriate resources for civil rights programs. He did no better or worse than his immediate predecessors insofar as enforcement funding is concerned. He was ineffective in pushing Congress to increase or sustain funding levels, and there is no evidence that he tried. He did not fight for sufficient funding for the No Child Left Behind (NCLB) Act and, in fact, in 2003 and 2004 combined, funding was \$19 billion below the authorized level. He promised that NCLB would lead to accountability and high standards in public education, but he has not advocated for the funding to back its requirements. Other initiatives that depend on successful NCLB implementation, such as the President's Advisory Commission on Education Excellence for Hispanic Americans and the President's Commission on Excellence in Special Education, also suffer from implementation failures and lack of resources.

For decades, advocacy groups and government researchers have documented the dire conditions of Native American communities. Indeed, President Bush acknowledged the great debt America owes its native people. However, the Commission's examination of the President's funding requests for tribal programs reveals inadequacies across the board. Lack of commitment to the nation's trust responsibility to Native Americans ensures that their education, housing, and law enforcement conditions remain substandard.

Similarly, the President has significantly reduced funding for programs that benefit other low income individuals and minority communities. For example, he requested a \$1 billion decrease for low income housing for 2005, and reductions totaling \$4.6 billion between 2005 and 2009. He attempted in his 2004 and 2005 requests to eliminate all funding for the HOPE VI program,

which has rehabilitated severely distressed housing for the last 10 years. Such funding decisions profoundly affect how equal opportunity is distributed to American people.

The President also directed resources away from key and longstanding women's programs. For example, he terminated the Department of Labor's Equal Pay Matters Initiative, and would have closed all 10 regional offices in its Women's Bureau had not women's organizations protested. He tried to undo the government's Title IX enforcement programs, but the effort failed after affected groups expressed overwhelming support for prevailing law.

(3) Demonstrate Beliefs and Intent Through Actions and Perseverance

With regard to affirmative action, the President's actions defy his words and reveal underlying beliefs. For example, despite being asked, he has taken no public position supporting or opposing affirmative action. Instead, he has tried to appease both sides, at times referencing quotas to appeal to opponents and in other contexts convincing proponents that he is open-minded on affirmative action. He is vague and misleading as a result. For example, the administration points out that it submitted a brief asking the Supreme Court to dismiss a case that challenged a Department of Transportation program for disadvantaged businesses. However, the brief asked for the dismissal based not on support for the disadvantaged business program or affirmative action, but on disagreement over procedural technicalities. The administration also filed a brief opposing admissions practices that consider race as one factor among others that public colleges may use in deciding whom to admit. President Bush expended considerable effort championing use of admissions methods, such as percentage plans, which, based on the Commission's work and other evidence, have very limited effectiveness and are not uniformly applicable. President Bush has not plainly stated opposition to affirmative action, but he has not demonstrated support, and the "alternatives" he offers threaten to undermine the progress affirmative action has made. In short, President Bush has not exerted strong vision or example on this issue where such leadership qualities are vital.

As for other civil rights matters, President Bush's statements similarly suggest he is trying to appeal to all sides. His statements also contrast with actions, and the latter indicate more about his beliefs. For example, he stated that hate crimes are abhorrent, but did not support stronger enforcement. Likewise, he said that individuals should not be discriminated against based on their sexual orientation, but opposed efforts, such as the Employment Non-Discrimination Act, that would make employment bias against gay men and lesbians unlawful. Additionally, he supports a constitutional amendment banning same-sex marriage. If it passed, President Bush would hold the distinction of being the first President to successfully amend the Constitution to limit equal rights for a specific group. The President's statements belie actions that reveal his true beliefs. Taken together, his deeds demonstrate the lack of importance President Bush places on the need to correct prevalent civil rights problems.

(4) Develop a Coordinated Strategy and Implementation Plan in Conjunction with Other Branches of Government and Civil Rights Groups

The administration demonstrated strategic skills and proved, with the passage of NCLB, that it could work effectively with Congress to pass legislation that it deemed important. However, it did not apply the same might to election reform. Congress eventually passed the Help America

Vote Act (HAVA), but not under any pressure from the administration. The administration seated the national oversight board 11 months behind schedule, setting into motion a series of delays that foiled the opportunity to reform the nation's election systems and end widespread disenfranchisement. Despite the effort the administration applied to passing NCLB, neither it nor HAVA have been implemented fully successfully. NCLB has been plagued with unrealistic goals and timelines. In both, agencies so far have been without effective leadership and, more importantly, without sufficient funds to execute the tasks that the laws demand.

Other examples illustrate the administration's collaborative efforts, some of which have been more successful than others. For instance, the administration directed the Department of Labor and the Small Business Administration to launch a joint initiative to render government contracts more accessible to women entrepreneurs, who as a group are underrepresented in federal procurement. The New Freedom Initiative was crafted to increase access to technology and education for individuals with disabilities. The purpose of this multi-agency initiative is to bring together the various responsibilities of individual departments in a central, accessible repository of resources for persons with disabilities. In light of the administration's poor record of support for its initiatives, there is no guarantee that the President will adequately fund or establish concrete reporting mechanisms, evaluation factors, deadlines, accountability standards, and clear delegation of authority to ensure smooth implementation for both of these important undertakings. For example, lack of agency coordination and executive support have impaired civil rights advancement in environmental justice and for Native Americans. The administration lacks interagency action plans, outcome measures, and cooperation strategies necessary to support its environmental justice efforts. Lack of coordination between agencies that provide health, education, housing, and justice programs also result in unmet Native American needs.

(5) Develop and Implement Success Measures for Civil Rights Goals

Without assessments and measures of accountability, the government cannot gauge its progress or determine when it meets its goals. The administration expressed the clear, identifiable goal to foster academic proficiency for all students by 2014. However, the administration did not fulfill the responsibility to ensure that assessments identified the problem and provided a reliable indicator of progress. The President's homeownership initiative also is commendable for the specificity with which goals were set, namely, increasing minority homeownership by 5.5 million before the end of the decade. Homeownership is a measurable outcome and, again, an admirable goal, but the administration supported this initiative while retreating from more utilitarian rental programs for low-income communities.

Many other civil rights initiatives lack evaluation factors that would help the administration determine whether or not they are producing desired outcomes. For example, the President let stay an executive order directing the Environmental Protection Agency (EPA) to develop environmental justice strategies. However, EPA has made little progress, and the President has not pushed the agency's administrator to account for its status. EPA's inspector general determined that it has shifted away from traditional understandings of environmental justice, and de-emphasized inequality experienced by minority and low-income Americans. As a result, progress made over the previous decade has reversed, and environmental justice goals have languished.

Similarly, President Bush established an objective to increase to 10 percent federal grants and contracts to Historically Black Colleges and Universities. However, the administration has not established intractable plans, deadlines, and timetables, nor given any one entity full authority for enforcing the plan. In like fashion, the administration identified an objective of removing language barriers to federal programs, but has not established evaluation tools nor delegated authority for enforcing the program.

While President Bush did not dismantle some of the previous administration's programs, he also did not develop a strategy to strengthen or advance them, nor demand accountability from those charged with responsibility to carry them out. The administration reauthorized numerous study efforts and advisory committees, but few have produced noteworthy results. Furthermore, some have been relegated to administrative channels for implementation without perceptible support from the administration, and as such, seem without true purpose. For example, President Bush renewed the President's Advisory Commission on Asian Americans and Pacific Islanders; however, the office has not moved forward any specific plans or established tangible goals.

(6) Build Upon Common Ground, Even on Controversial Civil Rights Problems

When the President has sought input from affected populations, such as the New Freedom Initiative and the President's Commission on Special Education, he has found cooperation and success. However, he has not made effective use of this tool in other endeavors. For example, he consistently consults a narrow base for advice and support, particularly with regard to controversial civil rights issues. He has declined opportunities to seek dialogue and counsel from established civil rights leadership, including the Congressional Black Caucus. Not only has he not invited them to the White House, even to discuss matters on which they have invaluable expertise, he also has declined invitations to speak at some of their main conventions, such as National Council of La Raza and the NAACP. Doing so would represent respect and cooperation, and also demonstrate an openness to diverse viewpoints in the policy process.

After the September 11 attacks, some praised the administration's initial response against backlash directed toward Arab Americans, Muslims, people of Middle Eastern descent, and those perceived to be so. The administration asked Americans not to blame and suspect all Arab Americans, and vowed to punish perpetrators. That response was eventually overshadowed by policies that now allow law enforcers and government agents to target individuals and groups for surveillance, detention, arrest, and other actions, without rights to counsel and representation. Policies allow such behavior so long as the enforcers assert they are acting to avert terrorism. The administration's own policies soon fomented a backlash against certain groups.

Failing to build on common ground, the Bush administration missed opportunities to build consensus on key civil rights issues and has instead adopted policies that divide Americans. President Bush could have, early on, called on public officials to unify and show America and the world that, together, the nation could improve its voting systems. Likewise, he could have exerted leadership on affirmative action by soliciting diverse viewpoints and promoting policies that achieve diversity. Future presidential administrations, in fulfilling their duty to advance civil rights, should inspire Americans to unity, not divisiveness.