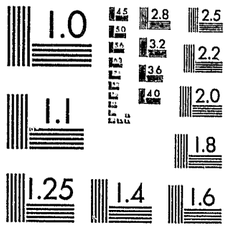






# Department of Justice



STATEMENT

OF

WM. BRADFORD REYNOLDS
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE

THE



SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

CONCERNING

DOJ AUTHORIZATION

ON

APRIL 17, 1985

FY 1986 Authorization Testimony

Mr. Chairman and Members of the Subcommittee, I appear before you today in support of the Civil Rights Division's authorization request for fiscal year 1986. My statement will supplement the information in the Department's budget submission. The request -- which provides for 404 positions, 424 workyears and $22,352,000 -- reflects, after adjustments for uncontrollable increases, a cost reduction of $469,000 in administrative costs and management savings.

During this Administration, the Subcommittee has previously authorized the following resources for our program.

| | Positions | Funding | Workyears |
|---|---|---|---|
| FY 82 | 385 | 17,603 | 408 |
| FY 83 | 385 | 19,223 | 406 |
| FY 84 | 399 | 20,700 | 416 |
| FY 85 | 404 | 22,624 | 424 |

As these figures show, Congress repeatedly has indicated its commitment to an active civil rights enforcement program and we earnestly ask that it continue to do so.

I recognize that as to some policy choices and court decisions there is, among some members of the Subcommittee, disagreement with the Administration's positions and I look forward to a frank discussion of those differences. But even

the most dedicated critic cannot fairly dispute the remarkable record of civil rights enforcement that the Civil Rights Division has compiled over the past four years in all of its areas of responsibility. In my testimony today, I will discuss some of these achievements in order to introduce a degree of balance into these hearings that has thus far been largely lacking.

It is a particular pleasure to appear before you this year since no such opportunity to discuss our entire enforcement program was provided me during the FY 85 authorization cycle. */ As a consequence, the published Subcommittee report (H.R. Res. 98-759) is replete with inaccurate descriptions of the Division's activities based on the untested testimony of others and unspecified "public documents." And from this collection of what most aptly can be described as bits and pieces of misinformation, the Subcommittee rather ominously went so far as to state that the Division's "continued disregard for its statutory mandate will most surely result in legislative action in the upcoming year."

*/Hearings were conducted only with respect to the Civil Rights of Institutionalized Persons Act.



Since the Division has never strayed from its statutory mandate, and has no intention of doing so, the spectre of "legislative action" has never loomed very large. But the existence of so rash a statement in a subcommittee report demonstrates how misguided the authorization process can become when those who participate insist on doing so unencumbered by the facts of record.

That has, regrettably, been the tenor of most of the remarks in this year's hearings. The testimony which follows is aimed at providing some factual content to the loose rhetoric furnished to date. In addition, I am appending to my statement, for inclusion in the record, needed corrections to last year's report. This data would have been supplied last year had I been provided the normal opportunity in the authorization process to "come before the Judiciary Committee . . . for authorization of its annual appropriations." (See H.R. Rep. 98-759)

An overview of the activities of the Civil Rights Division shows that we have been, and continue to be, very active in carrying out our mandated responsibilities across the board. Among the more significant accomplishments, I note the following: criminal civil rights prosecutions are proceeding at a record pace; the Voting Section is conducting review of changes submitted under Section 5 of the Voting Rights Act in

unprecedented numbers, while at the same time moving on a number of fronts to enforce amended Section 2 of the Act; investigations and negotiated remedial plans are securing remedies for those confined in institutions at an accelerated rate; enforcement activities under the Fair Housing Act have increased to levels in excess of those achieved by our predecessor; equal employment opportunity cases seeking color-blind relief are filed regularly and often; schools are being desegregated without resort to the regressive relief of court-ordered busing; special attention is being given to protecting the civil rights of American Indians; and we can point to an almost unprecedented number of wins in the Supreme Court. Each of these subject matter areas is discussed more fully below.



## Criminal Civil Rights Violations

The Division has never been more active in its aggressive investigation and prosecution of individuals who deprive persons of their civil rights in violation of the federal criminal code. During the Reagan Administration we have thus far brought 177 criminal civil rights prosecutions, comparing favorably with the 167 prosecutions brought during the prior administration. Our Criminal Section and the various United States Attorneys' offices receive and screen about 10,000 complaints per year. After screening the FBI conducts approximately 3500 investigations each year. At the request of the subcommittee we have provided a listing of all such investigations since January 1, 1982. Our Criminal Section staff consists of 23 prosecutors and 19 support staff.

Criminal prosecutions that result from this investigative effort fall into several priority classifications: racial violence, police misconduct, and abuse of aliens and migrant workers. A brief description of some of our more significant prosecutions will perhaps demonstrate to the subcommittee the breadth and importance of these efforts.

One of our most recent successful prosecutions involved the conviction on March 28, 1985 of ten members and former members of the police of Puerto Rico, a prosecution commonly referred to

as the Cerro Maravilla case. (United States v. Perez, et al.) On July 25, 1978, two alleged terrorists suspected of planning to blow up a radio tower on Cerro Maravilla mountain, were killed in what was initially reported as a shoot out with police who had been alerted by an undercover agent. An extensive local and federal investigation was closed after failing to obtain contrary evidence. In 1984, following disclosures before a committee of the Commonwealth Senate, a new investigation was initiated to assess whether there had been a conspiracy to cover up the actual facts; the five year statute of limitations on substantive civil rights offenses had expired. Indictments were returned and a jury found all ten defendants guilty of conspiracy and perjury charges. Several defendants have now been charged with murder and other crimes by local authorities.

In the area of racial violence we have also been very active in recent months. On February 20, 1985, following an extensive investigation by the FBI and local authorities, we indicted and obtained guilty pleas from two Klansmen and a Klan sympathizer in the arson of the headquarters of the Southern Poverty Law Center in Montgomery, Alabama. In late January of this year we obtained convictions of two men in Knoxville, Tennessee (United States v. White and Castile). They were found guilty of the arson of a home being constructed for a black family in a predominantly white neighborhood.



We have also actively sought to vindicate the exploitation of aliens. Most recently in January of this year, we obtained a guilty plea of a U.S. border patrol officer for three counts of sexually abusing female aliens and then allowing them to return to Mexico. (United States v. Smith). We are preparing to go to trial in the near future in United States v. Mussry, et al., which involves the illegal importation of Indonesians to work as domestic servants. Following the dismissal of this case in the District Court we obtained a reversal in the Court of Appeals, establishing that the statutes against involuntary servitude are violated when persons are held by intangible threats as well as by physical restraints. (United States v. Mussry, 726 F.2d 1448 (9th Cir. 1984), cert. denied sub nom. Singman v. United States, 53 U.S.L.W. 3239 (U.S. October 1, 1984).) We are currently investigating allegations of the physical abuse of a group of Jamaican aliens in Louisiana.

I could continue with other examples, Mr. Chairman, but I trust the basic point is clear. This is one of the most vital law enforcement operations in our government. There is no more significant function of government than to track down and successfully prosecute those who wilfully violate the basic constitutional protections guaranteed by our nation's laws. I am proud to be associated with the men and women who perform this critical work. They do it extraordinarily well.

## Discrimination in Public Employment

Title VII assigns exclusive enforcement responsibility to eliminate discrimination by public employers to the Attorney General. This responsibility has been delegated to the Civil Rights Division. Based on prior reports issued by the Subcommittee, and public statements of some members, it is no secret that the policy changes we have made affecting available remedies for employment discrimination have met with strong objection from some quarters. I welcome that debate, and hope in the questions-and-answers to follow that we can have a full and frank discussion of these changes. In anticipation of just such an exchange, let we provide a factual backdrop that too often gets lost in a discussion focused solely on the remedial issues.

First and foremost, the Division is in fact continuing to look for, find and bring lawsuits against public employers that discriminate on the basis of race, sex and national origin. Indeed, such suits are being filed at the same or even at a slightly accelerated rate as they were in prior administrations. Since January 20, 1981, for example, we have filed or intervened as parties in 53 such suits. In the four years of the previous administration, the Division participated in 51 employment discrimination cases, 10 of which were merely briefs filed as friend-of-the-court in private litigation.



Second, the Division continues to demand as relief for any Title VII violation (1) an immediate halt to all discriminatory conduct, (2) "make whole" relief for identifiable victims of the employer's unlawful discrimination, and (3) "affirmative action" remedies in the traditional sense of that term -- that is, affirmative outreach, recruitment and training programs designed to attract to the pool of qualified applicants increased numbers of minorities and women able to compete on merit for the vacant positions. Our position on quotas, or preferential goals-and-timetables tied to race or sex, is based on legal precedent and sound public policy considerations. In the words of one Supreme Court Justice: "No discrimination based on race [or sex] is benign . . . No action disadvantaging a person because of skin color [or gender] can be affirmative." */

At the Chairman's request, we have provided the Subcommittee with a list of 51 cases in which we have suggested to opposing counsel that existing decrees should be modified to reflect the current state of the law as interpreted by the Supreme Court last term in Firefighters Local Union No. 1784 v. Stotts, _____ U.S. _____ (52 U.S. Law Week 4767, June 12, 1984). There, the Court delineated the scope of remedial authority granted to federal courts in Section 706(g) of Title VII, agreeing in full with our

*/See United Steelworkers of America v. Weber, 443 U.S. 193, 254 (1979), Rehnquist, J. dissenting.

legal position that Congress intended "to provide make-whole relief only to those who have been actual victims of illegal discrimination." Moreover, the Court cited with approval the contemporaneous interpretation of the principal architects of the Act that "Title VII does not permit the ordering of racial quotas in businesses or unions."

While I am aware that some lawyers (and perhaps a few judges) still profess not to regard this issue as settled, the Stotts opinion appears to be as clear and basic an interpretation of the statute as could be requested. In a word, federal courts may not require or permit race-or-gender-conscious hiring, promotion or layoff quotas as an element of Title VII relief (whether incorporated in a court order or a consent decree) in an employment discrimination case. Accordingly, decrees to which the Justice Department is a party that contain such preferential relief necessarily must be reformed. That program is not only sensible as a matter of sound public policy, it is also one that I must undertake as Assistant Attorney General to insure that the law of the land -- i.e., the command of nondiscrimination in the Supreme Court's Stotts decision -- is followed.

I should add that the Division is no less committed to the proposition that the Fourteenth Amendment precludes public employers from making any personnel decisions on their own (without court order) on the basis of race, sex or national



origin. That discrete constitutional question has been answered variously by the lower Federal courts but has yet to be resolved by the Supreme Court. Just this past Monday, however, the Court granted certiorari in a case (Wygant v. Jackson Board of Education, No. 84-1340) squarely presenting the question, so we presumably will soon receive some definite guidance in this difficult area. In the meantime we will, of course, continue to advance the equal employment opportunity policy of this Administration to insure that all individuals enjoy the full measure of employment protection under the Fourteenth Amendment and Title VII without regard to race, gender, religion or national origin.

There is one final point that bears mention before leaving the employment field. Last year the Subcommittee expressed concern that the Division might participate in AFSME v. State of Washington, 578 F. Supp. 846, and file a brief in opposition to the district court's "comparable worth" decision in that case. While we did, indeed, have that matter under active consideration, it was our judgment that Department participation on appeal to the Ninth Circuit became unnecessary with that circuit's subsequent decision in Spaulding v. University of Washington, _____ F.2d _____ (1984) -- an exceedingly well-reasoned opinion rejecting in toto the "comparable worth" analysis used by the court in AFSME. I might note parenthetically that the theory has fared no better in other Federal courts that have to date addressed the issue.

The Justice Department has reviewed the "comparable worth" issue in depth and it is our considered judgment that neither Title VII nor the Equal Pay Act is violated by a showing of salary differences for traditionally male and female jobs that are dissimilar but said to be of "comparable worth." What the Federal laws do require is equal pay for equal work, and to the extent salaries are set by any employer in a manner that is designed to depress the wages of women in the workforce because of sex, such activity is condemned under both statutes. Our enforcement activity is guided accordingly.



## Voting Rights

One of the Civil Rights Division's most active efforts continues to be the enforcement of the Voting Rights Act of 1965, as amended, both through litigation and administrative review of changes covered by Section 5 of the Act. During the first four years of this Administration, the Division filed 27 suits as plaintiff, intervened as a party in 17 others and filed legal briefs as friend-of-the-court in 9 more -- a total participation in 53 cases. (The comparative total for the prior administration, according to Division records, was 47 cases.) One additional voting case has been filed since January 20, 1985. Of the 45 cases brought as plaintiff or intervenor, 26 have sought to correct alleged violations of Section 2 of the Act, i.e., to correct voting systems that "result" in discrimination. In addition, we have deployed a total of 3722 federal observers to attend 41 elections in 6 states to prevent or document any instances of discrimination during the balloting process.

Contemporaneously with this impressive litigation effort has been an unparalleled level of review of voting changes submitted under Section 5. Within the Voting Section there is a Section 5 Unit consisting of 2 attorney supervisors and 20 paralegal analysts. This unit not only reviews submitted changes

but systematically canvasses the covered jurisdictions to assure that all voting changes have been submitted for preclearance prior to implementation. The resulting effort has been prodigous. In the first term of this Administration, the unit reviewed 50,322 voting changes and, on behalf of the Attorney General, I objected to the implementation of 266 such changes. */ (Changes reviewed under the last administration were 20,772; objections entered were 249.) Many of these submissions are routine and require little time to review. Others, however, such as the 6800 annexations or the 1500 redistrictings, are exceedingly complex and require the most detailed kind of factual and legal analysis. We have entered 110 objections to various redistrictings that had the purpose or effect of discriminating against minority citizens; the prior administration entered only 26 such objections.

Thus far we have defended in 18 suits in which jurisdictions are seeking to "bailout" of the Act's coverage. Because of the 1982 Amendments to the bailout standards, we can expect an increasing number of such suits.

*/Interestingly, the expected decrease in the high tide of submissions experienced after the publication of the 1980 Census, has not occurred. We are continuing to receive changes for review at the rate of about 12,000 per year.



## Public Education

In recent years the Division has not had occasion to file a large number of new school desegregation cases. In major part this is because some 30 years after the Brown decision most school districts have either come into compliance voluntarily or have been engaged in litigation either by private parties or by the government. We have brought three suits as plaintiff, intervened in one and filed as amicus in another. Several additional suits have been proposed and we have 11 major investigations underway. However, our major enforcement effort at this stage is to complete the very significant litigation which is pending.

We are, for example, engaged in discovery and/or litigation with three statewide systems of higher education, Mississippi, Alabama and Louisiana, involving a total of some 25 institutions. We have recently finished a year long trial involving discrimination in both schools and housing in Yonkers, New York, and have been actively pursuing discovery in the Charleston, South Carolina case since mid-1984. Since January 1, 1984, we have also negotiated 16 consent decrees and participated in several dozen court hearings on various motions. We have court orders involving approximately 400 school districts which require monitoring of compliance reports. In short, the Educational Opportunities Section has an extremely active caseload.

There are two current issues that are significant and controversial. As you know this Administration has taken the position in a number of cases that mandatory busing to achieve or maintain racial balance in schools is neither a fair nor efficacious remedy. Instead, we seek to provide constitutional compliance through combinations of devices such as school closings, boundary adjustments, magnet school plans, and incentives for voluntary transfer. I believe these efforts are succeeding. In cities as diverse as Chicago and Bakersfield, plans conceived with the help of local educators are beginning to work. Enrollment losses have begun to decline. Educational quality has begun to improve. And positive desegregative results are being achieved. We are encouraged by these developments and plan to continue and expand this effort -- not to shrink from eliminating purposeful segregation, but to seek to achieve that national goal in the most sensitive and sensible possible way.

The other current issue involves the literally hundreds of school districts that are operating under court-ordered desegregation plans. I believe that we need to develop a strategy that contemplates the return of operating authority to the locally elected leaders. Where a plan has been in place for a number of years and the vestiges of past segregation have been successfully removed, we believe, and the law contemplates, that the cases should be closed and the decisional power restored to where it belongs. Obviously, each case must be judged on its own merits. Where there has been recent acts of discrimination, or where



full, good faith compliance with the decree cannot be demonstrated, judicial monitoring must continue. But the presumption, I submit, after years of good faith compliance ought to be that the disease has been cured. We expect to continue to counsel the courts consistent with this policy.

## Fair Housing Act

Enforcement of the Fair Housing Act has become one of our major priorities. During the prior administration, the separate Division component that enforced the Fair Housing Act, the Housing and Credit Section, was merged into a larger General Litigation Section, which was principally concerned the school desegregation matters. At that time, the responsibility for bringing and handling routine fair housing cases was delegated to the United States Attorneys. As a consequence, Title VIII enforcement activity dropped dramatically. Shortly after my appointment, I sought to rectify this situation by directing that the responsibility for investigating and prosecuting these cases be returned to the Division attorneys. There was, regrettably but necessarily, a startup period that followed this reorientation of litigation activity, since investigations had to begin from scratch. The changes produced results, however, over time, and as the Division began once again to build its fair housing litigation, I became convinced that the Title VIII enforcement activity could and should be even more concentrated.

Accordingly, in November, 1983, I reorganized the Division by dividing our General Litigation Section into two discrete sections, one responsible for school matters and the other having as its priority fair housing enforcement.



I am pleased to report that case filings by the new Housing and Civil Enforcement Section have increased until they now exceed the rate of case filings in the prior administration. Under the previous administration, the Division filed complaints as plaintiff or plaintiff-intervenor in 67 cases alleging discrimination, an average of 16.5 cases per year. An even more precise comparision is that during the last 16 months of that administration 18 such complaints were filed. During the 16-month period since our new section was formed, we have filed 29 new cases, a yearly average of 21.75 cases. In the "pipeline" there are already 11 more cases authorized and in the negotiation phase.

Accordingly, I can report to the subcommittee that we have hit stride in our fair housing efforts. It is one of our priority programs and we intend to keep up this effort.

Civil Rights of Institutionalized Persons Act

While questions have been raised, by members of this Subcommittee and others, over our enforcement role with respect to the Civil Rights of Institutionalized Persons Act (CRIPA), the record in this area earns high marks as well. Our understanding of the statute was discussed at some length during last year's hearings and, while there appears to be some disagreement, we have been offered no reasoned basis to depart from our present course under CRIPA -- a course that coincides fully with the intent of Congress. */ Specifically, we continue to believe that we can obtain more and higher quality relief, and can obtain it more quickly by identifying constitutionally defined conditions of confinement and, where possible, obtaining the voluntary commitment of the state or local government to adopt corrective programs. Litigation may well be necessary under this approach, but only as the final resort, after all reasonable and good faith efforts to negotiate a voluntary resolution of the problems have failed.

*/ I have recently had occasion to describe our program in some detail in correspondence to Senator Weicker. I would ask that that correspondence , which is attached, be entered in the record in support of this testimony.



I would add only that to date this Administration has sent notice letters under CRIPA on 45 occasions, we have filed 7 suits to enforce the Act and 22 investigations are pending. We have obtained four consent decrees and comprehensive voluntary remedial plans in eight other instances. We have, in short, a practical, vigorous and effective enforcement program under this statute.

Other Activities

In addition to the major subject matter areas I have discussed, the Division is also engaged in other significant enforcement activities.

Our Coordination and Review Section has been actively working with 91 federal agencies in developing and publishing regulations to protect the rights of the handicapped in federally conducted programs covered by Section 504. In December, 1984, we published a notice of proposed rulemaking setting forth Section 504 regulations for the Justice Department's activities. In addition, the section has been reviewing federal agencies' civil rights implementation plans, and preparing quarterly reports to the President on gender bias in agency regulations and federal law.

We have also focused on enforcement of all of the civil rights laws as they relate to Native Americans. We successfully challenged several voting systems in the southwest where we determined that they resulted in discrimination against Indians, are presently litigating an employment discrimination case against the City of Gallup, New Mexico, and have obtained court decrees under the Equal Credit Opportunity Act protecting Indian victims.



Finally, we have an active appellate program which not only handles civil rights cases in which the Government is a party, but also seeks out and files friend-of-the-court briefs on significant civil rights issues under consideration in private litigation. In the Supreme Court, for example, this Administration has taken a position on the merits in 31 cases. In 22 of these the Court agreed with our position, including such significant cases as Firefighters Local Union No. 1784 v. Stotts, 52 U.S.L.W. 4767 (U.S. June 12, 1984); Hishon v. Spaulding, 42 U.S.L.W. 4627 (U.S. May 22, 1984); Palmore v. Sidoti, 42 U.S.L.W. 4497 (U.S. April 25, 1984); Grove City College v. Bell, 52 U.S.L.W. 4283 (U.S. February 28, 1984); and Consolidated Rail Corp. v. Darrone, 52 U.S.L.W. 4301 (U.S. February 28, 1984).

CONCLUSION

Mr. Chairman, when Attorney General Meese took office last month, he articulated as one of his three major goals "the vigilant and energetic defense of the civil rights of all Americans." In the ways that I have set out in this testimony and with the personal diligence and commitment that such a vital goal deserves, I am confident that we are on track to carrying out the Attorney General's pledge and the President's firm commitment. We do not intend to stray from that course.

I would be pleased to answer any questions that members of the Subcommittee may have.

ATTACHMENT #1

[This is responsive to the June 1984 Report of the Committee on the Judiciary as it relates to the Civil Rights Division's FY 1985 budget authorization]

## CIVIL RIGHTS DIVISION

The Report postulates that there are "serious questions about the extent to which the Attorney General is frustrating congressional intent in enforcing the federal civil rights laws," and ominously concludes that the Division's "continued disregard for its statutory mandate will most surely result in legislative action in the upcoming year." The bases for the Committee's conclusions and its resolve to legislate in the future were said to be certain criticisms by "civil rights attorneys and activists" advanced back in May, 1983 during authorization hearings on the FY 1984 budget, more recent subcommittee hearings (February 8, 1984) on the enforcement of the Civil Rights of Institutionalized Persons Act (CRIPA), and some undated and unspecified "documents within the public domain." Although in its prior authorization report on the FY 1984 budget (H.R. Rep. 98-181, p. 3-4), the Committee also recited the existence of "serious allegations" and announced the resolve that it "must review [these issues] in further hearings during the current and 1984 fiscal years," except for the CRIPA hearings identified above, no such "further hearings" have been held.

Instead of affording the Administration the public opportunity to explain and defend its policies as contemplated by the authorization process, */ in all areas save one, the Committee has seen fit to pass current judgment on the basis of stale charges and unidentified public "documents." The Report's resulting comments are both inaccurate and, predictably, outdated.

Because of this unique approach to the authorization and oversight functions, it is necessary for the Department to take this means of attempting to correct the record. The Report discusses three subject matter areas of concern and then follows with some more general observations. Each of these is dealt with below. Additional information, of course, can be supplied upon request.

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*/The subject report (H.R. Rep. 98-759) correctly describes the process as one in which the Department would "come before the Judiciary Committee . . . for authorization of its annual appropriations."

Title VII Of The 1964 Civil Rights Act (Employment Discrimination)

Not only is the Committee's concern overstated but the inaccuracy of its remarks are confirmed by a subsequent Supreme Court decision. The Committee complains that the Division does not (a) "support race and gender-conscious relief" and that it does so (b) "despite the fact that such relief continues to be upheld by the Courts." The first proposition, required in our view by the Constitution, is true; the second is palpably erroneous. In Firefighters Local Union No. 1784 v. Stotts, ____ U.S. ____ (52 U.S. Law Week 4767, June 12, 1984), the Supreme Court agreed with the Administration that the policy underlying Title VII is "to provide make-whole relief only to those who have been actual victims of illegal discrimination," quoting with approval the contemporaneous congressional view that ". . . Title VII does not permit the ordering of racial quotas in business or unions." Although, obviously, this opinion dealing with preferential layoffs does not settle all such issues, we respectfully submit that the thrust of the Attorney General's legal analysis was much more accurate than that advanced by the Committee.

Citing "a recent news report" that the Assistant Attorney General planned to challenge a decision finding that a wage gap between male and female employees in the State of Washington violated Title VII, */ the Report concluded that any such action would put the Attorney General "on the side of the defendants" upholding "an act which is clearly inconsistent with the Title VII mandate." We can report two things to the Committee: First, the decision on whether to participate in this appeal is a matter currently under review in the Department and discussions have been had with representatives of both plaintiffs and defendants. Second, the Committee's conclusion, that such wage disparaties "clearly" violate the anti-discrimination laws, is "clearly" an overstatement. The Court of Appeals for the Ninth Circuit, which will be reviewing the decision in the Washington State case, has just decided Spaulding, et al. v. University of Washington, ____ F.2d ____ (1984) (Daily Labor Rpt. July 11, 1984, No. 133), in which it held that a wage disparity supported by a comparable worth analysis does not constitute a prima facie violation of Title VII. A reading of this opinion demonstrates that this is an exceedingly complex legal issue which requires the most careful

*/AFSCME v. State of Washington, 578 F.2d 846 (W.D. Wash. 1983) pending on appeal.



review of court decisions and legislative history prior to making an informed judgment on the reach of federal law. As the Stotts case teaches, until judicial review is complete an assumption that lower court decisions accurately reflect the correct legal interpretation may well be incorrect.

Civil Rights Of Institutionalized Persons Act (CRIPA)

Although this was the subject of detailed testimony by the Assistant Attorney General for Civil Rights in which he carefully explained how the Division's enforcement program and approach was both productive and fully consistent with congressional intent, the Report fails to discuss these efforts and is factually inaccurate and/or outdated. Before bringing a lawsuit challenging conditions in an institution, CRIPA requires that the Attorney General provide the responsible state or local officials with (a) prior notice of an investigation, (b) a specific determination of any constitutional deficiencies found during an investigation and (c) an opportunity to undertake corrective remedial action. Since each of these steps may result in remedial action, the proper measure of the success of the enforcement program must be to evaluate all of the improvements generated throughout the process -- not just by the gross number of lawsuits on file.

Although this was carefully documented at the hearings, the Committee Report merely concludes that since "only three cases" have been filed and "the only 'enforceable' agreement" was rejected by the court as unenforceable, the Division has failed in its enforcement responsibility. Such an appraisal is inaccurate and unfair. As of the time the Report was written, the Department had not only filed 3 cases but had initiated 31 investigations, completed 11 and, in 9 instances obtained remedial action required to meet constitutional requirements. As of this writing the Department is participating in six lawsuits under CRIPA. While as the Report notes, the District Court initially declined to enter a consent decree involving the Michigan state prisons, that Court has since approved a modified consent decree presented to it personally by the Assistant Attorney General.

It is respectfully submitted that the Committee should amend its Report to correct the false impression that the Department is failing to carry out its mission under CRIPA.

Title IV Of The 1964 Civil Rights Act (School Desegregation)

On balance, the thrust of the Committee's concern on this subject is simply a disagreement with the Department's approach to a remedy. When intentional segregation is discovered in a school district, we no longer automatically seek to impose mandatory busing to achieve some optimum racial balance. Instead, as in Bakersfield, California, the approach is to work with local school authorities and parents to develop a system of student assignments that rely on improved educational opportunities, modified attendance zones and open enrollment opportunities. The resulting plans provide improved educational opportunities while assuring that the district does not violate the Constitution by racial assignments. In addition to Bakersfield, such plans are in place in Chicago, Cincinnati, Shreveport, St. Louis and Little Rock. We urge the Committee to examine such plans carefully for they hold the promise of achieving compliance without the divisive imposition of orders to transport children long distances with the frequent result of driving them from the system in frustration. Within the framework, the Administration has been aggressively pursuing an effective school desegregation program. We have, for example, filed three new suits */ (not one as reported by the Committee), sought supplemental relief in three others **/ and obtained 14 consent decrees, 5 agreed orders and 5 contested orders.

The Committee also expressed concern that the Department "first sought to oppose [the] intervention" of minority parents in a school desegregation case in Charleston County, South Carolina. Again we must point out that this is a totally incomplete account. Because of ongoing settlement negotiations we originally advised the Court that intervention should be considered after the completion of such negotiations, and, further, that if negotiations broke down we would not oppose the parents' request to participate. In December, 1983, the Court held a hearing on intervention where we reported that settlement discussions had been suspended and that we consented to intervention. The Court granted the parents' motion and, since then settlement discussions among all the

*/West Feliciana, Louisiana; Bakersfield, California; and the State of Alabama. A fourth school case has been authorized for filing and the parties are currently involved in negotiations in an effort to arrive at an agreed settlement.

**/Americus and Sumter Counties, Georgia; Lawrence County, Mississippi; Conecuh County, Alabama.



parties have been resumed. We suggest that a review of all the relevant facts leaves no room to fault the Division's performance in this case.

The balance of the Committee's Report is most distressing. Using the Department's records of case filings and consent decrees from January 20, 1977 through March 16, 1984, the Committee attempted to compare the level of activity during this Administration and the prior administration. The published version of the Committee Report contends that there has been an "83% drop in the number of new civil complaints filed." This calculation is based on irresponsible and inaccurate calculations, but beyond the problem of numbers and arithmetic, focusing solely on the gross total of civil actions initiated is not a fair measure of the Division's law enforcement effort. */ In addition to civil actions during comparable periods, the Division has initiated so far 158 criminal prosecutions, compared to 139, and participated as friend of the court in 13 cases, compared to 21. While comparative statistics for a given time period may not be the most accurate measure of effective enforcement, contrary to the Committee's conclusion, these figures show at a minimum a comparable level of activity.

Relying on the statistical misinformation cited above, the Committee also concluded that it "must wonder whether allegations that 'enforcement' is being conducted from the Assistant Attorney's (sic) office and that line-attorneys have little to do are accurate." We assume that the accurate statistics will satisfy the Committee's stated curiosity. In any event, however, it should be advised that these "allegations" -- whatever their source -- are absolute fabrications. The Division's enforcement effort under this Administration includes not only the efforts summarized above, but also hundreds of court appearances and review of over 30,000 changes in voting practices under §5 of the Voting Rights Act. The notion that a program of this magnitude could be conducted by the eight front office attorneys while 157 line-attorneys stand idle is self refuting.

We respectfully request that in the future the Department be given an opportunity to explain its programs or, at least, to verify the accuracy of data prior to its publication.

*/When questioned about the basis for the figure in the Report, the Chairman of the Subcommittee on Civil and Constitutional Rights acknowledged that this was "clearly an error" stating the "the change in the number of new civil complaints should be 55%." Unfortunately, even this correction is incorrect and appears to be based on an unfair comparision between the entire 48 months of the prior administration and only the first 38 months of this Administration. This again seriously overstates the comparative filings.

**U.S. Department of Justice**

Civil Rights Division

ATTACHMENT #2

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

April 2, 1985

Honorable Lowell P. Weicker, Jr.
United States Senate
313 Russell Senate Office Building
Washington, D. C. 20510

Dear Senator Weicker:

I have had an opportunity to review the "Staff Report on the Institutionalized Mentally Disabled" prepared at your request and would appreciate it if you would make the enclosed response a part of the hearing record.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

Attachment

cc: Members of the Subcommittee on the Handicapped, Committee on Labor and Human Resource

Members of the Subcommittee on Labor, Health and Human Services, Education and Related Agencies, Committee on Appropriations

RESPONSE TO SENATE SUBCOMMITTEE'S REPORT

The Senate Subcommittee on the Handicapped has issued a 246 page "Staff Report on the Institutionalized Mentally Disabled". Thirty-four pages of that Report are devoted to the enforcement activities of the Department of Justice under the Civil Rights of Institutionalized Persons Act (CRIPA). We believe the Report's discussion of our activities is unbalanced, factually inaccurate and plainly unfair.

Before addressing the specific inaccuracies in the Report, I believe it is important to reiterate that the Department's objective under CRIPA is to provide relief required under the Act to the greatest number of people in the shortest period of time. CRIPA requires that, before the Attorney General can bring a civil action, he must have reasonable cause to believe that the conditions of confinement (1) are "flagrant and egregious;" (2) result from a pattern or practice on the part of the state or the facility involved; (3) result in "grievous harm to the patients or residents at the facility," and (4) deprive the institutionalized persons of identifiable constitutional rights.

I should further note that the Act requires the Department to attempt to resolve issues through conciliation and

negotiation before it turns to litigation as a last resort. If successful, the rights of institutionalized persons receive the full measure of constitutional protection far more rapidly and comprehensively than could ever be accomplished through protracted litigation. Our enforcement efforts have, therefore, sought in each case to resolve our constitutional concerns through meaningful negotiations -- and have met with considerable success by utilizing that approach. Where, however, negotiations have broken down, or come to an impasse, we have not hesitated to turn to the courts for needed relief. This approach is the one mandated by Congress and the one that has proved most effective in carrying out our CRIPA enforcement responsibilities. A constant reevaluation of our activities in this area convince us that there is no sound reason to depart from the course we are on.

The Department is fully committed to the protection of the rights of mentally ill and mentally retarded persons. We continue to believe that the protection of the rights of those less fortunate individuals who must be confined in institutions deserve our utmost attention and our determined action. We are sensitive to their needs, concerned about their welfare, and dedicated to their protection.

Our record under CRIPA demonstrates the strength of our resolve. Since the statute's enactment in 1980, the Department has begun investigations of 15 mental hospitals and 11



mental retardation facilities. All but two of these investigations have been initiated during the Reagan Administration. Of the 26 investigations, 14 are still open. Of the 12 that have been closed, four resulted in the filing of a complaint and accompanying consent decree in court. The remaining eight have produced substantial voluntary remedial efforts aimed at redressing the constitutional deficiencies we had identified. This is hardly a record that suggests a lack of "aggressiveness," or an insensitivity to the rights of mentally ill and mentally retarded persons.

It is also important to note that our enforcement activities under CRIPA are not limited to facilities for mentally ill and mentally retarded persons. We have been equally vigorous in the area of prisons, jails, and juvenile detention facilities. In these areas, we have initiated 27 investigations, 7 of which are still open. Two cases resulted in substantial court-ordered remedial measures (both by consent decree), and 12 investigations resulted in substantial voluntary remedial efforts that obviated the need to file suit.

The specific criticisms in the Report of the Department's activities under CRIPA are not well-documented. Unnamed "observers" (e.g., Report at 141) and the remarks of two former attorneys with the Civil Rights Division apparently formed the principal bases of the Subcommittee staff's allegations that the Department has not aggressively pursued the

protection of the rights of those confined in state mental health facilities. These allegations -- many of which have been raised and answered before -- are utterly without foundation.

The Report states that, since the hearing at which I testified in November 1983, six investigations of state mental health and mental retardation facilities were initiated by the Department (Report at 152). In fact, there are seven. The Report was apparently prepared prior to the opening of our investigation of the Kalamazoo Regional Psychiatric Hospital in Michigan. Pursuant to CRIPA, notice of that investigation was provided to appropriate State officials in February 1985.

Our attorneys have met with officials of each of the six states in which the named facilities are located and have visited each of them along with experts retained by the Department to assist in our investigations. The two investigations begun in the last two months of 1983 in Michigan and Colorado are complete, state officials have been notified of our findings, and we are completing negotiations with the states to secure judicially enforceable settlement agreements. The Michigan State legislature has, as a result of our investigation of Northville and Ypsilanti Regional Psychiatric Centers, appropriated $14 million for improvements at the Northville facility alone. The State has hired 34 additional nurses at the Ypsilanti facility and already has reduced the patient population, with further re-



ductions planned. We consider these results significant vindication of our approach to conciliate rather than resort to premature and potentially lengthy litigation to achieve needed improvements.

With respect to the four other investigations on page 152, which the Report correctly indicates were begun in 1984:

(1) The South Beach Psychiatric Center investigation was closed in November 1984 after tours in April and August 1984 by our attorneys and consultants revealed that the conditions that prompted our investigation had been voluntarily remedied by the Center. South Beach is presently certified by both the JCAH and HHS.

(2) The investigation at Southbury Training School in Connecticut has been completed. Our attorneys and consultants visited the School on three occasions. We anticipate that our Notice of Findings letter will be forthcoming in the near future.

(3) Our investigation of Belle Chasse State School in Lousiana is moving rapidly. It began on November 30, 1984, with the sending of the required notification letter. In January 1985, our attorneys met with state officials to discuss issues and procedures for the investigation. Our attorneys have already spent two days reviewing

records and toured the facility with two expert consultants on March 6-7, 1985.

(4) The investigation of the Fort Stanton Hospital and Training School in New Mexico, which began in December 1984, is also proceeding. We have already completed one tour of the Fort Stanton School with two of our experts. Whether further investigation is warranted will depend, of course, on the reports of these consultants and our evaluation of them.

Finally, in the investigation of the Kalamazoo Regional Psychiatric Hospital, which was initiated in February 1985 and is not referenced in the Report, our attorneys have begun collecting information. In mid-March 1985, Department attorneys met with Hospital officials. Shortly thereafter, Department attorneys conducted a two-day tour of the Hospital with two expert consultants in the mental health field.

Thus, during the past 17 months since the last Senate hearing, the Department has actively pursued its investigations of these seven facilities.

During that same 17-month period, we have achieved significant results in our other investigations. In March 1984, we obtained a judicially enforceable consent decree with the State of Indiana with respect to Central State Hospital and Logansport State Hospital. The state not only committed



to meet constitutional standards at the two facilities under investigation, but also volunteered to evaluate its three other mental hospitals and agreed to follow the requirements of the Consent Decree in those facilities as well. As a result of our investigation and negotiation, Indiana also committed to hire 550 additional employees (a 13.5 percent increase in staff). The Indiana Mental Health Department has indicated that it may seek as much as $30 million from the legislature for capital improvements in its psychiatric hospitals.

In January 1985, we obtained a judicially enforceable consent decree requiring the State of Maryland to provide constitutional conditions of confinement at Rosewood Center. The State has already submitted plans for correcting the unconstitutional conditions that were found to exist at that facility, and the Governor has sought an additional $7.3 million in funds for Rosewood.

South Carolina, as well, has responded to our efforts at negotiation. On March 28, 1985, Governor Riley informed me of steps the State had taken or intends to take with respect to the South Carolina State Hospital, including seeking $4.5 million in additional funds, reducing patient population at the Hospital to 700 from 1100 patients, and providing additional staff training and more qualified staff. As well, South Carolina expects to open a new facility, the Harris Psychiatric Hospital, in June 1985. We have not yet determined

whether the Remedial Action Plan of the State remedies all of our concerns regarding unconstitutional conditions at the Hospital.

Of the remaining investigations referred to on pages 143-144 of the Report, several have been closed due to voluntary compliance, a few have been closed because the conditions at the facilities did not warrant further proceedings under CRIPA, and several are at various stages of negotiation (with the possibility of consent decrees being entered in three different jurisdictions in the near future).

Thus, we have, in fact, made significant progress in virtually all of our investigations without having to resort to litigation. But, as I testified last year before Committees in both Houses, when the occasion arises where the conciliation process mandated by CRIPA does not resolve or remedy unconstitutional conditions found to exist at a facility, the Department will not hesitate to pursue the matter in court. In February 1985, the Department filed a suit under CRIPA against the State of Massachusetts. Our endeavor to remedy the unconstitutional conditions of confinement at Worcester State Hospital were met with unyielding resistance. We therefore resorted to legal action. This is the third lawsuit filed by the Department under CRIPA following the failure of negotiations. [The first involved a State correctional facility and the second involved a city jail.]



In sum, the Department has a solid record of action under CRIPA. Our motivating force is the protection of the constitutional rights of persons confined in state institutions. Our guiding principles are adherence to the role prescribed for us by Congress in the statute and fidelity to the rulings of the Supreme Court as to the constitutional protections that are due institutionalized persons. We continue to believe that our role under CRIPA, although carefully circumscribed by the legislation, is an exceedingly important one. The experience of the past four years underscored the soundness of Congress' approach to federal involvement in this area. By using the tools of persuasion and negotiation in the first instance, and resort to litigation only if an agreed solution cannot be found, the Department has effectively used CRIPA to protect the constitutional rights of more people at more institutions over less time than we ever could have achieved through a reflex rush to the courthouse to commence protracted lawsuits.

We are proud of our enforcement record under CRIPA, as well we should be. But our satisfaction with the past results will not lull us into being any less active in the months and years ahead. The statute provides the largest measure of protection against constitutional deprivations suffered by those confined to institutions, and we intend to ensure that every safeguard available under CRIPA is and continues to be fully realized by the statute's intended beneficiaries.

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