OVERSIGHT HEARING ON THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S ENFORCEMENT POLICIES. HEARING BEFORE THE SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES OF THE COMMITTEE ON EDUCATION AND LABOR, HOUSE OF REPRESENTATIVES, NINETY- NINTH CONGRESS, FIRST SESSION, WASHINGTON, DC, JULY 18, 1985.


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This volume presents a transcript of discussion and statements presented at an oversight hearing before the House Subcommittee on Employment Opportunities. The hearing reviewed new enforcement policies of the Equal Employment Opportunity Commission (EEOC), which had the stated intent of increasing the litigation of individual cases of unlawful discrimination. Among the speakers were the commissioner of the EEOC, who described the policy revisions; the executive director of the Lawyers' Committee for Civil Rights Under Law, who discussed problems seen in the revisions and focused on the Stotts case; and two psychologists, who commented on the validity of policies affecting the uniform guidelines for selection procedures. (KH)
OVERSIGHT HEARING ON THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S ENFORCEMENT POLICIES

HEARING
BEFORE THE
SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES
OF THE
COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES
NINETY-NINTH CONGRESS
FIRST SESSION
HEARING HELD IN WASHINGTON, DC, JULY 18, 1985
Serial No. 99-27

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The subcommittee met, pursuant to call, at 9:30 a.m., in room 2261, Rayburn House Office Building, Hon. Matthew G. Martinez (chairman of the subcommittee) presiding.

Members present: Representatives Martinez, Williams, Gunderson, Henry, and Jeffords.

Staff present: Eric P. Jensen, acting staff director; Paul Cano, legislative assistant; Genevieve Galbreath, chief clerk/staff assistant; Dr. Beth Buehlmann, Republican staff director for education; and Mary Gardner, Republican legislative associate.

Mr. Martinez. This hearing will come to order.

Today's hearing will be an oversight review of EEOC's new enforcement policies. Next Tuesday, July 23, at 9 a.m., the subcommittee has invited the administration officials from the Justice Department, the EEOC, the Department of Education and the National Endowment of the Humanities to comment on the Federal collection of affirmative action plans and the enforcement of Federal EEOC complaints.

In September last year and February of this year, the Equal Employment Opportunity Commission announced new policy changes in its enforcement and remedial policies. The stated intent of the Agency was to increase the litigation of individual cases of unlawful discrimination. The witnesses today will comment in detail on these changes.

As chairman of the oversight subcommittee for the EEOC, however, I have received numerous messages of concern about the EEOC's perceived change in enforcement policies and commitment. These perceptions have, unfortunately, been fueled by comments in the press by the chairman and other Commissioners, which have parrotted the Justice Department's interpretation of the civil rights law in light of the Department's reading of the Stotts case.

Let me caution responsible EEOC officials that this Chair and the House of Representatives does not accept the Justice Department's careless reading of the Stotts decision, and wholly disapprove of the manner administration officials are using their inter-
pretation of the civil rights law to undo 30 years of hard struggle for equal opportunity in this country.

Quite simply, the Supreme Court has not fully and directly addressed the issue of prospective race and gender-conscious relief for unlawful discrimination. Let that be perfectly clear.

With respect to the perception problem at the EEOC, the agency has notified the Office of Management and Budget that it intends to modify current rules and policies on the uniform guidelines on employee selection procedures, a key device for monitoring discrimination in employee selection procedures; Management Directive 707 which governs the collection of Federal affirmative action plans; the equal pay for equal work portion of the Fair Labor Standards Act; the handicapped regulations; Federal EEO regulations; and regulations on costs and benefits under employee benefit plans.

This wholesale action by the Agency has raised considerable concern in the civil rights and labor community. This subcommittee and the public will be watching the EEOC activities closely to ensure that equal employment opportunity laws are not tampered with or reversed.

Mr. Henry, do you have a statement?

Mr. HENRY. Mr. Gunderson first.

Mr. MARTINEZ. Oh, Mr. Gunderson, I didn’t notice you came in. We have with us on the committee, Steve Gunderson, ranking minority member, and Mr. Henry.

Mr. GUNDESON. Thank you, Mr. Chairman. I want to begin my remarks by welcoming Commissioner Alvarez to our subcommittee. I think it is a good time for us to have some oversight in this whole issue of equal employment opportunities, the Commission’s enforcement, remedy and relief policies.

I would hope that as I begin, that I would caution, I guess, my colleagues on both sides of the aisle that if this is to be an oversight hearing, then we ought to begin with open minds.

If we are here with preconceived notions and closed minds and conclusions, I think frankly, we are wasting the time of this subcommittee and certainly the time of the Commissioner, if we are not interested in really finding out the facts are before we make up our minds, jump to conclusions.

I happen to be pleased that we have with us such a dedicated Commissioner here with us this morning to explain the polices and hopefully clear up any misconceptions that might exist in the minds of this subcommittee and perhaps also in the public as a result of—if I may be so blunt, some inaccurate press reports.

I also hope that the Commissioner will be able to explain to us in lengthy terms exactly what were the Commission’s motives in adopting the two new policy statements, and explain exactly what they mean to the Commission’s enforcement capabilities.

The adoption of these two new statements, the Commission’s statement of enforcement issued September 11, and its policy statement on remedies and reliefs for individual cases of unlawful discrimination, issued February 5, the Commission, I think, has committed itself to pursuing full and effective relief on behalf of every victim of unlawful discrimination, both through individual and class actions, and that seems to me to be appropriate.
Admittedly, this commitment reflects a shift in policy for the EEOC, and I truly believe that it is seen by the Commission as an effort to more vigorously enforce the equal opportunity laws in this country.

There has been a lot of criticism and skepticism of this Commission every since President Reagan took office and his appointees have begun to fill the various positions in the Commission.

I almost think that this Commission’s aggressive new policies are met with opposition, not so much because of their substance, but rather, because they are coming from this administration, and some people frankly find it hard to believe that this administration can be aggressive in any type of enforcement of equal employment opportunity.

And the statement of enforcement policy provides that every case which the District Director finds in violation of the statues the Commission enforces be submitted to the Commissioners for litigation consideration if conciliation fails.

Now, this policy has been criticized because, No. 1, cases loads are too big, and No. 2, it is interpreted as focusing on individual cases.

As I understand it, in all actuality, more pattern and practice cases are found through individual or small group complaints than through the systemic approach initiated by the Commissioners.

In terms of remedies and relief policy, this is also criticized because this policy, insisting on full relief for those discriminated against, is perceived as being too inflexible.

Well, while this is a tougher course than was initiated before, it makes sense, that if the Commission’s policy is seen as one of certainty and predictability in acting on cases, many more respondents will be willing to participate in a conciliation as they know litigation happens to be a real threat.

These are new policies, certainly. They ought to be given a chance, and they certainly ought to be given a chance to be defended and explained to this subcommittee before they are criticized.

Thank you, Mr. Chairman.

Mr. Martinez. Thank you, Mr. Gunderson.

Mr. Henry.

Mr. Henry. Thank you, Mr. Chairman.

I, too, would simply like to welcome Mr. Alvarez. I have to say that, quite frankly, there have been many concerns for 5 years now, as to the commitment of the current administration relative to its dedication to the active and aggressive enforcement, the whole panorama of civil rights legislation.

And it is in light of many of these concerns that, obviously, any change in policy is subject to a great deal of skepticism.

I do understand that you have every reason to believe that some of the actions of the Commission have been misinterpreted by the press, that you have responded in some respects with letters, which have not received the courtesy of publication.

So certainly, I want to hear the Commissioners’ side of the story, Mr. Chairman, but also to suggest that I share the concern about what I believe, quite frankly, has been a tendency to diminish the importance of aggressive civil rights enforcement.

And I think you bear that burden, and it creates a skepticism which makes it hard to deal, I think, sometimes constructively. I
hope we can put away that kind of prejudice, hear what you have
to say on the merits, and make informed, constructive comments
and engagement with you that will really strengthen civil rights
enforcement in the eyes of all.

Thank you.

Mr. MARTINEZ. We are joined today by Congressman Pat Wil-
liams from the great State of Montana. We are making opening
statement. Mr. Williams, before I ask for your opening remarks, I
would like to simply put Mr. Gunderson's mind at ease. My mind is
not prejudiced; it is not made up.

We had a very, I think, interesting conversation, Mr. Alvarez
and I, before the hearing. I understand you did, too. There were
some issues that were raised with him that will be raised today.

Hopefully, his statements today will cover the ground that we
covered.

Mr. Williams.

Mr. WILLIAMS. Mr. Chairman, no statement.

Mr. MARTINEZ. With that, we will introduce our first witness,
Commissioner Fred W. Alvarez, Equal Employment Opportunity
Commission, and let me state while he is sitting down that his
written statement will be entered into the record in its entirety,
so if you wish, you can summarize and highlight your testimony.

Also, we will be on the 5-minute rule for the questioning of the
witnesses.

Mr. Alvarez.

STATEMENT OF FRED W. ALVAREZ, COMMISSIONER, EQUAL
EMPLOYMENT OPPORTUNITY COMMISSION

Mr. ALVAREZ. Thank you, Mr. Chairman, thank you, members of
the subcommittee.

If I would, I would like to deliver a summary of my statement.
However, it will be because of the entire context of the package in
the enforcement program, it is necessary from our standpoint to
explain in more detail what our program is, and therefore, with
the Chair's permission, I would like to deliver most of my state-
ment to you so that I can explain it in its full context.

Mr. Kurrinzz. That is well and good.

Mr. ALVAREZ. Thank you.

I welcome the opportunity on behalf of the Commission to ad-
dress you on the issue of the new remedies policy and to discuss
with you what the impact of the remedies policy will be.

I need to make clear to you, however, that I will be discussing
unanimously adopted Commission policies, but only as a single
member of a five-member Commission. Your invitation also asked
us to be prepared to discuss any proposed revisions to the Uniform
Guidelines on Employee Selection.

Because I have less to report to you on that, let me talk about
that first.

Last July, the Commission approved a resolution to expand its
review of the guidelines from a review of the recordkeeping aspect
of it, to review the guidelines in their entirety.

In preparation for my testimony today, I was advised by our
Office of Legal Counsel that a general review for Commission study
and background is still under preparation. No proposals for any revisions to the guidelines have been presented to the Commission from the staff, nor am I aware that any have been developed by any Commissioner or any office within the Commission yet. Therefore, the status of the general review is at a staff level, so far as I can tell.

With respect to the enforcement program, it is important that I discuss the remedies policy with you in the context of the entire enforcement program. The remedies policy is the third part of a package of policies designed to implement this Commission's approach to more effective law enforcement.

The hope of the Commission is that through policies like this one, we can move the agency to a higher level of enforcement. Let me put this in context: The Commission believes, as does Congress, that the Equal Employment Opportunity Commission is a law enforcement agency.

The Commission believes that an effective law enforcement agency must do at least three things well. First of all, it must make decisions which are as accurate as possible on charges filed before it, alleging a violation of the laws it enforces.

Secondly, it must be predictable about bringing enforcement actions when the laws are violated, and third, it must seek the fullest relief available on behalf of those harmed by the violation as it can.

The package of enforcement policies I will describe for you addressed directly those components. First of all, the investigative policy. In December 1988, this Commission determined that it was ready to move toward a more complete and better quality investigations of charges by shifting more of its resources from the rapid charge processing system to a system which encouraged fuller investigations.

The rapid charge system was designed to offer the parties to the charge of discrimination an early opportunity to resolve the charge through a negotiated settlement with minimal investigations, and without a finding by the Commission on the merits of the allegation.

The Commission staff, in presenting the December 1988 resolution, acknowledged that the role of the rapid charge system had become primarily that of a facilitator or a claims adjuster. However, because the rapid charge system performed several distinct functions, the Commission's resolution did not abolish the system.

Rather, it eliminated the presumption in favor of the rapid charge system and directed that a case-by-case analysis be done to determine whether an incoming charge should be assigned to an extended investigation unit.

The principal concern was that the predominant reliance on the rapid charge system eliminated a large number of cases which, if fully investigated, would have more directly fulfilled the primary law enforcement mission of the agency.

The clear expectation of the Commission's staff was that a larger number of cases would be more fully investigated, and in those investigations which merit was found, the hope was that the full investigation would result in a more accurate decision and a better
quality case for the Commission's litigation program, should conciliation fail.

I was not a member of the Commission in 1983, but I would have supported that resolution, because in my view, it made a significant contribution toward the quality of our decisionmaking on charges.

I was a member, however, of the Commission in September 1984, when we adopted the second policy in this package, the statement of enforcement policy. That policy is relevant to both the accuracy and quality of determinations we make, and the predictability of our enforcement program.

The policy is a simple one. It states that once a field investigation determines that reasonable cause exists to believe that one of the laws the Commission enforces has been violated, conciliation efforts as the law prescribes will be fully pursued.

If, however, conciliation proves unsuccessful, all such cases should be submitted directly to the Commission for litigation authorization. Under the previous practice, a meritorious case was submitted to several layers of legal review, which asked the question, is this meritorious case worthy of our resources?

Sometimes the question was, should we litigate this meritorious case? Thus, even though a finding had already been made by our own agency that reasonable cause exists to believe that the law was violated, we continued to ask ourselves through several layers of lawyers whether we should pursue that violation.

In adopting the statement of enforcement policy, this Commission saw no reason to continue the process of picking and choosing from among meritorious cases unless some overriding reason existed not to pursue the case.

In effect, under the previous practice, a good reason had to exist to pursue a case in which we found discrimination, and under the new policy, a good reason has to exist not to pursue a case.

Encouragement of quality decisionmaking in the field is a principal goal of the enforcement policy. We hope that by bringing all unconciliated, reasonable cause determinations directly to the Commission, bypassing unnecessary layers of repeated legal review, our field investigators, our field attorneys, and our field decisionmakers, will have a stronger incentive to produce in the first instance a higher-quality product.

Under this policy, a much higher probability exists that the Commission will authorize field officials to act on the results of that reasonable cause determination.

In addition, field investigators, field attorneys, and district directors can now be assured that the Commission will directly review their investigative memoranda, legal analyses, and decisions.

Under previous practice, most meritorious cases never reach the Commission because a series of legal reviews, each with the effective authority to reject those determinations never reach the Commission.

Similarly and just as important, is the message we are sending to employers and unions. That message is that if our investigative policy produces a reasonable cause determination, they can expect that the EEOC will pursue enforcement action, unless a successful conciliation is achieved.
Simply stated, we have attempted to introduce a degree of certainty of enforcement that did not exist under our previous practice. In the past, the frequency with which enforcement actions were brought to back up our own reasonable cause determinations, caused many who dealt with EEOC to disregard our process, and to take us less than seriously.

We hope that the new policy will help us integrate the results of our investigative process into an effective enforcement program. We expect that predictable enforcement should promote more compliance and more conciliation.

Finally, the remedies policy arose out of a collective sense on the Commission that remedies should be sought to the full extent of the equitable power contained in title VII and its legislative history.

In addition, there was a feeling that a comprehensive statement on relief for individual cases of discrimination was necessary so that our field personnel would think in terms of more complete relief in cases in which cause was found, or about to be found.

In that connection, we have developed a five-point policy statement. That policy statement contains the following elements: A requirement that all employees in the affected facility be notified of their right to be free of discrimination, and assured that the particular type of discrimination won’t occur again.

Two, a requirement that corrective, curative or preventive action be taken or measures adopted to insure that similar violations of the law will not recur.

Three, a requirement that each identified victim of discrimination be unconditionally offered placement in the position that the person would have occupied but for the discrimination suffered by that person.

Four, a requirement that each identified victim be made whole for any loss of earning.

And five, a requirement that the respondent cease engaging in the specific unlawful employment practice found.

This collection of remedies was drawn from our own experience under title VII and the Age Act, and from practices used by the National Labor Relations Board to remedy discrimination against employees who exercised their rights under that Federal law.

The legislative history of title VII is very clear that the remedial section of the National Labor Relations Act was the model for the remedial section of title VII. Moreover, we assume that Congress intended victims of discrimination on the basis of race, color, religion, sex, national origin, age and handicap in the Federal sector to receive as complete relief as victims of discrimination on the basis of engaging in or refraining from union activity.

Certainly, the eradication of employment discrimination is as important a national goal as is the promotion of collective bargaining.

When the policy was formally announced, there was some confusion in the press concerning what the effect of this policy might be on the Commission’s pursuit of class action cases.

The Commission will pursue class actions. The Commission has confirmed its intentions in an April 28, 1986 letter to 43 Members of Congress. A copy of that letter is in my statement as well.
The Commission has plainly stated that accurate decisionmaking and full make-whole and preventive relief are the principal components of this Commission’s approach to enforcing the laws committed to it by Congress.

Preliminary results clearly indicate that there is a substantial increase in the number of cases approved by the Commission. This increase in our litigation efforts, coupled with our policy on remedies and relief, will improve the Commission’s ability to act quickly and strongly to vindicate the rights of any person suffering unlawful employment discrimination.

We will closely monitor our efforts to ensure that they provide the effective enforcement results which the Commission intended. We are encouraged by the reception these policies are receiving from our field employees, and the renewed sense of enthusiasm among those employees, as they view themselves more and more as part of a maturing law enforcement agency.

I will be happy to answer any questions on those foregoing policies.

[The prepared statement of Fred W. Alvarez with attachments follows:]


Good morning. My name is Fred Alvarez. I am a member of the Equal Employment Opportunity Commission. As a preliminary matter, I wish to express my thanks to the subcommittee for inviting me to appear at this hearing on the Commission’s policy statement on remedies and relief for individual cases of unlawful discrimination. I welcome this opportunity to describe to the subcommittee the new remedies policy and to discuss with you what impact the Commission expects the policy to have on our overall enforcement program.

I must make clear that while I will discuss unanimously adopted Commission policies, I am appearing before you and speaking as a single member of a five-person Commission.

I. UNIFORM GUIDELINES OF EMPLOYER SELECTION PROCEDURES

The invitation to the subcommittee also requested that I be prepared to discuss the status of any proposed revisions to the uniform guidelines on employee selection procedures. Because I have less to report to you on that issue, let me talk about that first. Last July the Commission approved a resolution to subject its review of the guidelines from a review of the record keeping requirements of the guidelines to review of the guidelines in their entirety.

In preparation for my testimony today I was advised by our Office of Legal Counsel that a general review for Commission study and background is still under preparation. No proposals for any revisions to the guidelines have been presented to the Commission from our staff nor am I aware that any have been developed by any Commissioner of office within the Commission yet. Therefore, the status of the general review continues to be at a staff review level so far as I can tell.

II. ENFORCEMENT PROGRAM

In order to discuss the impact of the new remedies policy on the Commission’s overall enforcement program it is important that I spend a brief amount of your time describing how the new remedies policy fits in to our overall enforcement program. The remedies policy is the third part of a package of policies designed to implement this Commission’s approach to more effective law enforcement in the field. The hope of the Commission is that through policies like the ones I will describe for you, we can move the Agency to a higher level in its development as a law enforcement agency.

Let me put this in context: The Commission believes, as does Congress, that the Equal Employment Opportunity Commission is a law enforcement agency. The Commission believes that an effective law enforcement agency must do at least three
things well: First of all, it must make decisions which are as accurate as possible on charges filed before it alleging a violation of one of the laws which the agency enforces; second, it must be predictable about bringing enforcement actions when violations of these laws are found; and third, it must seek the fullest relief available on behalf of those who were harmed by the violation of the law involved. The package of enforcement policies I will describe is designed to address directly these components of an effective law enforcement agency. We therefore have developed an investigative policy, an enforcement policy and a remedial policy to focus on each one:

A. The Investigation Policy

First, I will describe the investigative policy. In December 1988 the Commission determined that it was ready to move toward more complete and more accurate investigations of charges by shifting more of its resources from the rapid charge processing system to a system which allowed fuller investigations. The Rapid Charge Processing System was designed to offer the parties to a charge of discrimination an early opportunity to resolve the charge through a negotiated settlement with minimal investigation and without a finding by the commission on the merits of the discrimination alleged. The Commission staff in presenting the December 1988 resolution acknowledged that the role of the rapid charge processing system had become primarily that of a facilitator or a "claims adjudicator." However, because the Rapid Charge Processing System performed several disservices to the Commission's enforcement policy did not about the Rapid Charge Processing System eliminated the preoccupation in favor of having a system through the rapid charge processing system and directed that a case-by-case analysis be done to determine whether an incoming charge should be assigned to an extended investigation unit. The principal concern was that the predominant reliance on the rapid charge processing system eliminated a large number of cases, which if fully investigated, would have more directly fulfilled the primary law enforcement mission of the Agency. The clear expectation of the Commission staff and the Commission in adopting the December 1988 resolution was that a larger number of charges would be fully investigated. In those investigations in which merit was found to exist, the hope was that a fuller investigation would result in a more accurate decision and a better quality case for the commission's litigation program should conciliation fail.

I was not a member of the Commission in December 1988 but would have supported the Commission's resolution because in my view it made a significant contribution to the quality and accuracy of decisionmaking on charges.

I have attached, as exhibit A, a copy of the December 1988 resolution to this statement.

B. The Enforcement Policy

I was, however, a member of the Commission in September 1984 when we adopted the second policy in this package, the statement of enforcement policy. The policy is relevant to both the accuracy of determinations and predictability of enforcement. The policy is as follows:

The policy states that once a field investigation determines that reasonable cause exists to believe that one of the laws the Commission enforces has been violated, conciliation efforts should be fully pursued. If, however, conciliation proves unsuccessful, all such cases should be submitted directly to the Commission for litigation authorization. Under the previous practice, a meritorious case was subjected to several layers of legal review in which asked the question 'is this meritorious case worthy of our resources?' Sometimes the question was 'should we litigate this meritorious case?' Thus, even though a finding had already been made by our own agency that reasonable cause exists to believe that the law was violated, we continued to ask ourselves through several layers of lawyers whether we should pursue that particular violation. In adopting the statement of enforcement policy this Commission saw no reason to continue the process of picking and choosing from among meritorious cases unless some overriding reason existed not to pursue those cases. In effect, under the previous practice, a good reason had to exist to pursue a case in which we found reasonable cause. Under the new enforcement policy, a good reason has to exist not to pursue a case in which discrimination has been found.

Encouragement of quality decisionmaking in the field is a principle aspect of the enforcement policy. We hope that by bringing all unadulterated evidence to determinations directly to the Commission, bypassing unnecessary layers of repeated legal review which rework and filter meritorious cases, our field investigators, field attorneys and field decisionmakers will have a stronger incentive to produce, in the first instance, a high-quality work product. Under this policy, a much higher probability exists that the Commission will authorize field officials to act on the results.
of that reasonable cause determination than existed in the past when the layers of legal review produced an erratic pattern and small number of enforcement actions. In addition, field investigators, field attorneys and district directors now can be assured that the Commission will directly review their investigative memoranda, legal analysis and determination letters. Under previous practice most meritorious cases never reached the Commission because a series of legal reviews, each with effective authority to reject the product produced by that 'investigator, those lawyers and that field district director prevented those cases from receiving Commission consideration.

Similarly, and just as important, is the message we are sending to employers and unions who are subject to charges of discrimination. That message is that, if our investigative process produces a reasonable cause determination, a high degree of certainty exists that the EEOC will pursue enforcement actions against that employer or union unless conciliation occurs. We have attempted to introduce a degree of certainty of enforcement that did not exist under previous practice. In the past, the infrequency with which enforcement actions were brought to back up our own reasonable cause determinations caused many who dealt with EEOC to discount our process and to take us less than seriously.

We hope that this new policy will help us integrate the results of our investigative process into an effective enforcement program. The effect of predictable enforcement should promote more compliance with the law and less conciliation because of the credible and predictable threat of an enforcement action should a reasonable cause determination be made. A copy of the statement of enforcement policy is attached as exhibit B.

C. The Remedies Policy

Finally, the remedies policy arose out of a collective sense of the Commission that remedies should be sought to the full extent of the equitable power contained in title VII and its legislative history. In addition, there was a feeling that a comprehensive statement on relief for individual cases of discrimination would clarify the law. That is, that our field personnel would think in terms of just complete relief in those cases in which cause was found or about to be found. In that connection, we developed a five-point policy statement. That policy statement contains the following points:

1. A requirement that all employers in the affected facility where discrimination was found be notified of their right to be free from unlawful discrimination and be assured that the particular types of discrimination found will not happen again;
2. A requirement that corrective, curative, or preventive action be taken or measures adopted to insure that similar violations of the law will not recur;
3. A requirement that each identified victim of discrimination be unconditionally offered placement in the position that the person would have occupied but for the discrimination suffered by that person;
4. A requirement that each identified victim of discrimination be made whole for any loss of earnings the person may have suffered as a result of the discrimination;
5. A requirement that the respondent cease engaging in the specific unlawful employment practice found in the case.

This collection of remedies was drawn from our own experience under title VII and the Age Discrimination in Employment Act and from practices used by the National Labor Relations Board to remedy discrimination against employees who exercise their rights under that Federal law. The legislative history of title VII is very clear that the remedial section of the National Labor Relations Act was the model for the remedial section of title VII. Moreover, we assume that Congress intended victims of discrimination on the basis of race, color, religion, sex, national origin, age and handicap in the Federal sector to receive as complete relief for the discrimination suffered as victims of discrimination on the basis of engaging in, or refraining from, union activity. Certainly, the prohibition of employment discrimination is an important national goal as is the promotion of collective bargaining. A copy of the statement on remedies and relief is attached as exhibit C.

When this policy was formally announced, there was some confusion in the press concerning what effect this policy might have on the Commission's pursuit of class action cases. The Commission will pursue class action cases. The Commission confirmed its intentions in an April 28, 1985 letter to 43 Members of Congress, a copy of which is attached as exhibit D.

D. Conclusion

The Commission has plainly stated that accurate decisionmaking and full make-whole and preventive relief are the principal components of this Commission's approach to enforcing the laws committed to it by Congress. Preliminary results clearly indicate that there is a substantial increase in number of cases approved by the
Commission. This increase in our litigation efforts coupled with our policy of remedies and relief will improve the Commission’s ability to act quickly and strongly to vindicate the rights of any person suffering unlawful employment discrimination. We will closely monitor our efforts to ensure that they provide the effective enforcement results which the Commission intended in the adoption of these policies. We are encouraged by the reception these policies are receiving from our field employees and the renewed sense of enthusiasm among these employees as they view themselves as more and more as part of a mature law enforcement agency.

I will be happy to answer any questions of the foregoing policies.

Exhibit A

Resolution

Whereas, the Equal Employment Opportunity Commission is determined to fulfill its mission to vigorously enforce the equal employment opportunity statutes for which it has been given responsibility through an increased priority on the investigation of complaints of discrimination; and

Whereas, the Commission has determined that through some adjustment to the administrative compliance functions and through a case-by-case analysis and assignment of discrimination charges and complaints, as outlined in exhibit A, the Commission can achieve a more balanced approach to its administrative and litigation enforcement responsibilities.

Now be it therefore resolved:

(1) that the Office of Program Operations is directed to communicate interim guidance to the field for the immediate implementation of this Resolution; and

(2) that the Office of Program Operations and the Legal Counsel are directed to submit to the Commission the necessary compliance manuals and regulatory changes in conformance with exhibit A; and

(3) that the Office of Management is directed that appropriate budgetary allocations, training in investigative skills, and support services are to be allocated to meet these priorities.

Date.

Clarence Thomas,
Chairman.

Catherine Shattuck,
Vice Chairwoman.

Tony Galloos,
Commissioner.

William A. Webb,
Commissioner.

Exhibit A—Guidance on Modification of the Administrative Charge Process

INTAKE

1. The intake EOS will continue to elicit as much information as possible from the charging party during the intake interview concerning the merits of the allegations of personal harm. In addition, the EOS will elicit information from the charging party with respect to other potentially aggrieved persons in the protected class and/or the operation of discriminatory practices or policies by the respondent. Any class allegations or information as to similarly aggrieved individuals presented by the charging party which relate directly to the allegations of the charging party should normally be included on the face of the charge. Class discrimination information which does not directly relate to the allegation of the charging party should be documented separately and retained with the file.

Work-sharing agreements which require a 706 agency to automatically waive any charge which alleges class allegations may be modified based upon the workload needs and program objectives of both the 706 agency and the field office, if the addition of class allegations described above adversely affects the present work-sharing agreement.

2. Mail-in charges which constitute minimally sufficient charges will continue to be docketed in intake. It is within the discretion of the field office whether to redraft a minimally sufficient charge. The procedure for processing EPA and ADEA complaints and charges in Intake is presently being revised and should be in conformance with this guidance, except as the special provisions of those statutes may require.
3. It will be in the discretion of the District Office, based upon its litigation plan and enforcement program whether class allegations are investigated, and this will be explained to the charging party during the Intake interview. The present practice of allowing the charging party at the Intake stage to decide whether his or her charge is processed through rapid charge or extended investigation is eliminated. However, the EOC should note the charging party’s desires, if expressed, in the file which is submitted to the Intake supervisor for review.

4. The field offices will have latitude to dismiss charges which meet the present requirements for dismissal under Commission regulations in the Intake process. Charges which are to be dismissed for lack of merit at the Intake stage should be dismissed only after a review by the TMC, including the Regional Attorney, and the grounds for the dismissal should be clearly documented. (Any such dismissals should be retained in a separate file so that they can be easily retrieved during quality reviews).

SCREENING

1. The two will issue instructions and guidance for a determination as to whether a Title VII of ADEA or concurrent Title VII/ADEA or EPA charge should be assigned ADEA and EPA complaints. EPA charges and complaints which will be processed by the extended unit or the E/A/EU unit and to what extent an EPA complaint should be investigated. The Commission will also issue standards as to which processing unit should be assigned ADEA and EPA complaints; EPA charges and complaints which will be investigated will routinely be assigned to the extended unit since a proper investigation will in almost every case involve the need for an on-site investigation. The TMC must also be consulted routinely on retaliation charges for consideration for preliminary relief. Additionally, the TMC will be consulted regarding any charge or complaint the assignment of which is uncertain under existing guidance.

2A. Examples of standards which should be considered in assigning charges and complaints, whether individual or class in nature, for extended investigation are:

1. whether the allegations correspond to issues identified as priorities in local litigation plans, considering the status of the Legal Unit litigation portfolio;

2. whether several apparently meritorious charges with the same basis and issue have been filed against this respondent, and a full investigation is warranted (such consolidation should be coordinated with state and local FEA agencies);

3. whether the allegations are not OD/P, and a decision as to appropriate handling can only be made after a full investigation;

4. whether the respondent has evidenced a past recalcitrance;

5. whether the issues are necessarily class or there are a significant number of other potentially aggrieved persons;

6. whether the allegations involve the operation of a collective bargaining agreement, requiring participation of the union in the administrative process;

3. Examples of charges which may be referred to the Rapid Unit; in addition to those not covered in "A" above, are:

1. charges against State and Federal governments;

2. "Limited class" cases, typically involving only a few potentially aggrieved persons, and not involving issues identified for litigation;

3. charges on which the law is settled or which will require minimal assistance of an attorney or investigator in order to yield prompt litigation (e.g. mandatory retirement age statutes in some situations, retaliation);

3. Every Title VII, EPA and ADEA charge, and all EPA and ADEA complaints, will be screened by the Intake supervisor and may be screened by the Compliance Manager. In accordance with direction from the TMC an initial decision will be made as to whether the charge will be processed by the Rapid or Extended Unit. The TMC may elect to establish screening responsibility in an initial screening committee, to consist of at least one representative from the Legal Unit.

4. Charges received in the Area Office should be screened by the Area Director and supervisors in accordance with the guidance provided by the TMC pursuant to (1) above. In those Area Offices which do have Extended Units, a charge appropriate for extended Processing should be transferred to the District Office.

RAPID CHARGE PROCESS

1. An investigative plan and Request for Information should be prepared for the processing of almost all Title VII, EPA and concurrent charges referred to the Rapid Unit. The present standards for determining the appropriate method for processing ADEA charges should normally be the same as those under Title VII. However,
er, attempts at Section 7(d) conciliations without benefit of responses to Requests for Information from the respondent may be made when the charging party has evidenced a desire to proceed immediately to court or when the parties have expressed a clear desire to settle the charge. Exceptions to the necessity for preparing an RFI may be made, with the review of the Compliance Manager, only if the overall mission of law enforcement and informal resolution of discrimination complaints would be served thereby. Only charges which allege individual harm solely may be settled without the preparation of an RFI. The Investigative plan need not be overly formalistic. The RFI should be prepared primarily from a revised Document Assembly System.

The decision as to the appropriate processing of a charge assigned to the Rapid Unit will be made on a case-by-case basis. Therefore, the notice of the charge which is sent to the respondent should normally not include an invitation to settle a Title VII charge. A decision to pursue a Fact Finding conference and attempted resolution of a charge will typically be made only after the response to the RFI is received and analyzed.

2. Once a response to the RFI is received, and any necessary additional information from the charging party is obtained, the EOS will analyze the information and make a recommendation concerning the further processing of the charge and, in consultation with the supervisory EOS, and the Compliance Manager where appropriate, may pursue one of several options for the processing of the charge, including the following:

(a) issuance of a no cause decision (this option should be pursued only after the charging party has had an opportunity to respond to the information provided by the respondent);

(b) issuance of a cause decision (this option will probably be infrequently used given the burden of proof required in most cases);

(c) assignment for full investigation, including a possible on-site review;

(d) pursuit of a negotiated settlement; attempt, with or without a Fact-Finding conference (settlement attempts should include the exchange of all relevant information between the parties);

(e) referral to the Extended Unit through the TMC.

3. Limited class cases assigned to the Rapid Unit should normally be investigated, and settlement efforts should be made, for all aggrieved individuals.

EXTENDED INVESTIGATIONS

1. Each charge which is assigned to the Extended Unit as a possible litigation vehicle will be assigned to a “team,” including an attorney. An attorney need not be involved in those cases assigned to the Unit which are not considered as litigation vehicles, though an attorney’s advice on such cases may be sought. Cases with litigation potential should be given priority.

The District Director and Regional Attorney will be jointly responsible for assuring that the attorney’s involvement is timely and sufficient to assure a quality and “litigation worthy” investigation and that the attorney’s participation is an integral part of the investigative process. To the extent possible, the same attorney should definitely be involved in the critical decision points in the development of a case which has been selected as a possible litigation vehicle, and his or her concurrence with the recommended action should be noted in the file.

2. Requests for information in charges assigned to the Extended Unit will be tailored to the specific allegations in the charge. The development of a sound investigative plan, which is flexible and which is reviewed periodically, is essential.

3. Whenever possible, an extended investigation will include an on-site review, if such review has been determined to be necessary to collect from or verify information submitted by respondent and to interview witnesses for both parties. (EPA investigations will almost always include an on-site review). The District Office should schedule work to be performed during an on-site review in such a way as to assure the maximum utilization of travel funds.

4. Negotiated settlements prior to the completion of an investigation will normally occur only as an option in the Rapid Unit, unless special circumstances exist to justify such a settlement of a charge assigned to the extended Unit. Pre-determination Settlement attempts after an investigation has been completed and the evidence is sufficient to make either a cause or no cause determination are inappropriate in non-systemic cases.

5. In a case in which the Commission has performed a substantial investigation when the charging party seeks to withdraw his or her charge as a result of a settlement with the respondent, or when the charging party requests a Right-to-Sue
letter, the District Office may close the charge and determine to initiate a limited scope or directed investigation on the unresolved aspects of the charge. The TMC may also elect to continue its processing of a charge following the issuance of a Right-to-Sue notice on request.

LIMITED SCOPE INVESTIGATIONS

Limited scope Title VII Commissioner's charge investigations and directed investigations under the EPA or OEA should be initiated contingent upon the occurrence and the local litigation or investigation plans. Such investigations may be initiated in the Rapid or in the Extended Unit. The initiation of these investigations must be approved by the TMC. Pre-determination Settlement of these charges also must be approved by the TMC.

CONSOLIDATION OF CHARGES FOR INVESTIGATION

The supervisors of the Intake, Rapid and Extended Units and the TMC shall monitor charges to determine whether multiple charges on the same issue and related issues are being filed against one respondent. When these phenomena occur, the charges should be consolidated in one investigation, where appropriate. A listing of all charges assigned to the Extended Unit should be available to the Intake Supervisor in both the District and Area Offices.

THE ROLE OF TMC

The TMC shall be responsible for ensuring that proper guidance is given to the compliance units for the screening and assignment of charges and complaints following their receipt. Additionally, the TMC will make decisions regarding the assignment of charges from the Rapid to the Extended Unit or vice versa. The TMC should periodically review the status and progress of districts which have been assigned to the Extended Unit because they have litigation potential, and will work to resolve any problems involving conflicting processing priorities, relationships between the Legal and the Compliance Units, or similar problems, with respect to the processing of charges and complaints.

The District Director is responsible for making staff assignments within the Compliance Units which further the development of potential litigation vehicles and for ensuring that the inventory of pending cases is not unmanageable. The District Director should also assure that the staff and other support funds which have been allocated to the office are appropriately distributed to accomplish the goals of the administrative charge process and the litigation program.

MONITORING CONCILIATION AGREEMENTS

It is anticipated that the number of cause determinations and letters of violations will increase as a result of these modifications. With this increase, there is a probability that the number of conciliation agreements will also increase. Activity by respondent pursuant to such an agreement must be closely monitored. Because the Extended Unit will normally have executed the agreement, and because violations of conciliation agreements will constitute a possible litigation vehicle, the responsibility for monitoring conciliation agreements will be assigned to the Extended Unit (regardless of the unit in which the agreement was executed). Section 80 of the Compliance Manual will be revised.

[Exhibit B]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

MEMORANDUM

To: Johnny Butler, General Counsel; Odessa Shannon, Director, Office of Program Operations.

From: Clarence Thomas, Chairman; Tony E. Gallegos, Commissioner; William A. Webb, Commissioner; Fred W. Alvarez, Commissioner.

Subject: Statement of Enforcement Policy.

The Commission believes that two critical features of an effective law enforcement program are certainty and predictability of enforcement in those situations where the agency has reason to believe that a law it enforces has been violated. Those critical features have never been fully developed by this law enforcement.
agency. The Commission believes that Commission employees, charging parties and respondents should understand that the Commission has adopted the goal of pursuing through litigation each case in which merit has been alleged and conciliation has failed. The achievement of that degree of certainty and predictability in enforcement requires a unity of purpose as the part of all segments of the Agency. The purpose of this memorandum is to articulate this enforcement policy and to direct that you develop these mechanisms necessary to more effectively integrate and allocate the Commission's legal and investigative resources so that the agency can achieve that degree of certainty and predictability in, enforcement which will more directly carry out our law enforcement program.

In support of this goal, the Commission has determined that every case in which the District Director has found that one of the criteria has been violated should be submitted to the Commission for litigation consideration if conciliation efforts fail. In the implementation of this law enforcement policy, the Commission believes that the following points need to be clearly understood:

1. The Commission will review for litigation consideration all reasonable cause determinations and all letters of violation where conciliation has failed;
2. The reasonable cause determination or letter of violation requires input by the Agency's legal staff before the determination is made;
3. The District Director is responsible for forwarding all letters of determination and letters of violation. In so doing, the District Director will give careful consideration to the analysis, guidance and recommendation of all those providing substantive expertise in the Region;
4. One finding of discrimination is no more "worthy" of litigation than any other finding of discrimination. Accordingly, the Commission believes that an enforcement philosophy or operational system which attempts to determine which among several meritorious findings is "worthy" of governmental resources is inconsistent with our statutory obligations. The National Litigation Plan is designed to focus attention on additional areas of special concern for litigation consideration. It should not be interpreted as a limitation on the consideration of meritorious litigation proposals which may fall outside the defined parameters of the National Litigation Plan;
5. The Commission, in support of these principles, directs the offices of the General Counsel and Program Operations to develop jointly, for approval by the Commission, the appropriate administrative mechanisms which will implement the following procedures:

(i) The advice of attorneys should be sought, as appropriate, during the investigative process for all cases.
(ii) Before the issuance of a reasonable cause determination or letter of violation, the District Director shall obtain from the Regional Attorney an analysis of whether the evidence supports such a finding in accordance with the following standard:

It is more likely than not that the Charging Party(s) and/or members of a class were discriminated against because of a basis prohibited by the statutes enforced by the Equal Employment Opportunity Commission. The "more likely than not" standard is applied to evidence that establishes, under the appropriate legal theory, a prima facie case. If the respondent has provided a viable defense, evidence of pretext shall also be assessed.

If the Regional Attorney is of the view that the evidence does not support such a reasonable cause finding or letter of violation the Regional Attorney shall specify in writing to the District Director the reasons therefor and those reasons shall be transmitted to the General Counsel for review following failure of conciliation.

(3) The District Director, after considering the Regional Attorney's recommendation, shall:

(a) Issue a determination of reasonable cause or letter of violation; or
(b) Obtain additional evidence; or
(c) Issue a finding of no reasonable cause or of appropriate closure.
(4) Following the failure of conciliation in every case where a reasonable cause determination or letter of violation has been issued, the District Director shall forward the case to the Regional Attorney. The Regional Attorney shall then forward such information as required by the General Counsel to the Office of General Counsel (Headquarters) for review and submission of a presentation memorandum to the Commission, through the Executive Secretariat. The General Counsel's submission shall include:

(a) The General Counsel's recommendation and any additional legal analysis;
(b) The Letter of Determination or Letter of Violation;
(c) The Investigative Memorandum;
(d) The Respondent Position Statement (or an indication that such a Position Statement does not exist);
(e) Notice of Conciliation Failure where applicable; and
(f) Copy of the proposed complaint.
The Commission expects that each required analysis shall be succinct and completed in an expeditious manner.
Please ensure that all employees receive a copy of this Memorandum.

[Exhibit C]

POLICY STATEMENT ON REMEDIES AND RELIEF FOR INDIVIDUAL CASES OF UNLAWFUL DISCRIMINATION

On September 11, 1984, the Equal Employment Opportunity Commission announced its intent to achieve certainty and predictability of enforcement in those situations where the agency has reason to believe that a law is enforceable and has been violated. In keeping with this goal, the Commission recognizes that the basic effectiveness of the agency’s law enforcement program is dependent upon ensuring prompt, comprehensive and complete relief for all individuals directly affected by violations of the statutes which the agency enforces. The Commission also recognizes that, in appropriate circumstances, remedial measures need to be designed to prevent the recurrence of similar unlawful employment practices.

Predictable enforcement and full, corrective, remedial and preventive relief are the principal components of the method with which the Commission intends to pursue this agency’s mission of eradicating discrimination in the workplace. Henceforth, in negotiating settlements, in drafting prayers for relief in litigation pleadings or in issuing Commission Decisions or Orders, obtaining full remedial, corrective and preventive relief is the standard by which the agency is to be judged.

The Commission believes that a full remedy must be sought in each case where a Director concludes the case has merit and bad, or is prepared to, issue a letter of violation or a letter finding reasonable cause, to believe that one of the statutes the agency enforces has been violated. The remedy must be fashioned from the wide range of remedial measures available to this law enforcement agency which has broad authority under the statutes it enforces to seek appropriate forms of legal and equitable relief. The remedy must also be tailored, where possible, to cure the specific situation which gave rise to the violation of the statute involved.

Accordingly, all remedies and relief sought in court, agreed upon in conciliation, or ordered in Federal sector decisions should contain the following elements in appropriate circumstances:

1. A requirement that all employees of respondent in the affected facility be notified of their right to be free of unlawful discrimination and be assured that the particular types of discrimination found or conciliated will not recur;
2. A requirement that corrective, curative or preventive action be taken, or measures adopted, to ensure that similar found or conciliated violations of the law will not recur;
3. A requirement that each identified victim of discrimination be unconditionally offered placement in the position the person would have occupied but for the discrimination suffered by that person;
4. A requirement that each identified victim of discrimination be made whole for any loss of earnings the person may have suffered as a result of the discrimination; and
5. A requirement that the respondent cease from engaging in the specific unlawful employment practice found or conciliated in the case.

The components of these remedial elements are as follows:

(1) Notice requirement
All respondents should be required to sign and conspicuously post, for a period of time, a notice to all employees in the affected facility (or to union members if respondent is a labor organization), prepared by the agency on EEOC forms, specifically advising respondent’s employees or members of the following:
(a) That the notice is being posted as part of the remedy agreed to pursuant to a conciliation agreement with the agency or pursuant to an order of a particular Federal court or pursuant to a decision and order in a Federal sector case.
(b) That Federal law requires that there be no discrimination against any employee or applicant for employment because of the employee’s race, color, religion, sex, national origin or age (between 40 and 70) with respect to hiring, firing, compensation or other terms, conditions or privileges of employment (Federal sector notices will include handicap as an unlawful basis of discrimination).
(c) That respondent supports and will comply with such Federal law in all respects and will not take any action against employees because they have exercised their rights under the law.

(d) That respondent will not engage in the specific unlawful conduct which the District Director believes has occurred or is domiciliating, or which the Commission or a court has found to have occurred.\(^1\)

(a) That respondent will, or has, taken the remedial action required by the conciliation agreement or the order of the Commission or Court.\(^2\)

(3) Corrective, curative, or preventive provisions

In appropriate circumstances, a remedy must provide that the respondent takes corrective, curative or preventive action designed to ensure that similar violations of the law will not recur. Similarly, corrective, curative or preventive measures may also be adopted in those situations where such measures are likely to prevent future similar violations.

Thus, where a policy or practice is discriminatory, the policy or practice must be changed. Similarly, if a particular supervisor or other agent of the respondent is identified as knowingly or intentionally being responsible for the discrimination that occurred, the respondent must be required to take corrective action so that the discriminatory or similarlysituated employees are not subjected to similar discriminatory conduct. This corrective action may be accomplished, for example, by instructing employees from that individual for a period of time, or by requiring the respondents to discipline or remove the offending individual from personnel authority, or by requiring the respondent to address the offensive or other supervisor so that they may overcome their unlawful prejudices. These and any other appropriate measures, or any combination thereof, designed to meet the purpose should be considered when negotiating settlements or drafting decrees. If such relief is not to be designed for punitive purpose, then this relief is to be tailored to cure or correct the particular source of the identified discrimination and to minimize the change of its recurrence.

In addition, the respondent must be required to take all other appropriate steps to eradicate the discrimination and its effects, such as the expunging of adverse materials relating to the unlawful employment practice from the discriminators' personnel files.

(3) Nondiscriminatory placement

Each identified victim of discrimination is entitled to an immediate and unconditional offer of placement in the respondent's workforce, to the position the discriminatee would have occupied absent discrimination, or to a substantially equivalent position, even if the placement of the discriminated results in the displacement of another of respondent’s employees (“Nondiscriminatory Placement”). The Nondiscriminatory Placement may take place by initial employment, reinstatement, promotion, transfer or reassignment and must occur without any prejudice to, or loss of, any employment-related rights or privileges the discriminatee would have otherwise acquired had the discrimination not occurred.

If a Nondiscriminatory Placement position exists that the discriminatee should occupy no lower exists, then employment for which the discriminatee is qualified must be offered to the discriminatee in other areas of the respondent's operation. Finally, if none of the foregoing positions exist in which the discriminatee may be placed, then the respondent must make whole the discriminatee until a Nondiscriminatory Placement can be accomplished.

It is essential that victims of discrimination not suffer further and the respondents not gain by their misconduct. Accordingly, the contention by a respondent that

\(^1\) For example, the following types of assurances could be required of a respondent which committed several types of unlawful employment practices in a particular case:

- "XYZ, Inc. will not refuse to hire employees on the basis of their sex;"
- "XYZ, Inc. will not refuse to promote employees on the basis of their sex or their race; and"
- "XYZ, Inc. will not threaten to fire employees because they have filed charges with the Equal Employment Opportunity Commission."

\(^2\) For example, employees could be notified of the relief obtained in the following way:

- "XYZ, Inc. will promote and make whole the employees affected by our conduct for any losses they suffered as a result of the discrimination against them. Specifically, Mary Jones and Susan Smith will be promoted to the positions of shift supervisors and will be made whole for any loss in pay and benefits they may have suffered since the time that we failed to promote them to that position."

- "XYZ, Inc. has adopted an equal employment opportunity policy and will ensure that all supervisors in making selections for promotions abide by the requirements of that policy that employees not be discriminated against on the basis of their sex or race."
a discriminatee is no longer suitable for Nondiscriminatory Placement due to a loss of skill, a change in job content or some other reason, then the applicant  for a respondent's failure to accomplish a nondiscriminatory Placement of the discriminatee. The burden is on the respondent to demonstrate that the inability of the discriminatee to accept Nondiscriminatory Placement was unrelated to the respondent's discrimination such that the victim, rather than the respondent, should bear the loss. Similarly, the burden is on the respondent to demonstrate a conclusion that post-displacement contact by a discriminatee with a nondiscriminator was discriminatory unwise of Nondiscriminatory Placement.

In certain circumstances, the Nondiscriminatory Placement of a victim of discrimination may require the job displacement of another of the discriminatee's employees. If displacement of an incumbent employee is required, a nondiscriminatory Placement on the basis of a discriminatee is clearly infeasible in a particular setting or is unavailable as a remedy in a particular jurisdiction, then the respondent must make the discriminatee whole until a Nondiscriminatory Placement can be accomplished.

(4) Backpay

Each identified victim of discrimination is entitled to receive as backpay all the money he (or she) would have earned if the discrimination had not occurred. Each individual discriminatee must receive a sum of money equal to what would have been earned by the discriminatee in the employment he was barred from participating in ("Gross Backpay") less what was actually earned less what were deducted during the period, after normal expenses incurred in avoiding the loss of income employment have been deducted ("Net Interim Earnings"), plus the difference between Gross Backpay and Net Interim Earnings. Net Backpay, in turn, should be computed on all Net Backpay Due. Net Backpay Due accrues from the date of discrimination, except where the statute limits the recovery, unless the discrimination against the individual has been remedied.

Gross Backpay includes all forms of compensation such as wages, bonuses, vacation pay, and all other elements of remuneration and fringe benefits, such as pension and health insurance. Gross Backpay must also reflect fluctuations in working time, overtime rates, changing rates of pay, transfers, promotions, and other perquisites of employment that the discriminatee would have enjoyed but for the discrimination. In appropriate circumstances under the Equal Pay Act and Age Discrimination in Employment Act liquidated damages based on backpay will also be available.

(5) Cessation provisions

All respondents must agree or be ordered to cease from engaging in the specific unlawful employment practices involved in the case. For example, a respondent should agree to cease discriminating on the unlawful basis and in the specific manner alleged or a respondent might be required to cease giving effect to certain specific discriminatory policies, practices or rules. In circumstances where a particular respondent has committed or has conciliated several unlawful employment practices, consideration must be given to including board cessation language in an agreement or order which is designed to order the cessation of any further unlawful employment practices.

The Commission does not believe that the statutory requirement of cessation requires the agency to abate its principal law enforcement responsibility. Thus, cessation should not result in inadequate remedies. The possibility of pre-litigation conciliation does not constitute causes for unwarranted or undeserved concessions by a law enforcement agency when one of the laws it enforces has been violated. Rather, the concept of settlement constitutes recognition of the fact that there may be reasonable differences as to a suitable remedy between the maximum which may be reasonably demanded by the agency and the minimum which in good faith may be fairly argued for the respondent. Within this scope, cessation must be actively pursued by the agency. In this regard, in all cases in which the District Director believes that one of the statutes the agency enforces has been violated or in which litigation has been authorized, full remedies containing the appropriate elements set forth in this memorandum should be sought. In conciliation efforts, reasonable compromises or less than the full range of remedies described in this policy may be considered if those compromises or countervails adequately address fully the remedial concepts described in this policy. Conciliation should be pursued with the goal of obtaining substantially complete relief through the conciliation process. Any divergence from this goal must be justified by the relevant facts and the law.
HON. PAT WILLIAMS,
Chairman of Representatives,
Washington, DC.

DEAR CONGRESSMAN WILLIAMS: We are writing in response to the recent letter in which you and 42 other Members of Congress expressed your "grave concern about the recent change in policy announced by the Equal Employment Opportunity Commission regarding the pursuit and litigation of systemic and individual discrimination cases." Your letter states that the "Commission has voted to move away from the notion that classes of people are affected by discrimination as an appropriate base for the Commission to pursue," and that your "are concerned that this new direction may be a way for the EEOC to avoid pursuing class action cases."

It appears that there has been a grievous failure of communication between the Commission and the Congress, for we have not noted to move away from the notion that classes of people are affected by discrimination, and do not intend to avoid pursuing class actions. What we have done is adopt two policy statements (copies of which we enclose) that, taken together, commit the Commission to pursuing full and effective relief, on behalf of every victim of unlawful discrimination, through individual and class actions, as appropriate.

This commitment does reflect a shift in policy, but one that should be welcomed by all who support vigorous enforcement of equal employment opportunity laws. In the past, the victims of unlawful discrimination were largely ignored by the EEOC. Even when the Commission found that discrimination had occurred, only rarely did it commence litigation—individual or class actions—"as a secure relief for the victim(s)."

In the overwhelming majority of cases, the Commission decided that the violation was not "litigation-worthy," and the victim was left no better off than if the EEOC had never been created. Last September, however, the Commission adopted a "Statement of Enforcement Policy," which provides, in essence, that the Commission considers all unlawful discrimination "litigation-worthy," and will bring individual or class actions, as appropriate, to secure relief for each and every victim of such discrimination.

The Commission in the past also tended to settle cases, before or during litigation, without securing meaningful or effective relief for the victim(s). To correct this, on February 5, the Commission adopted a "Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination," in which we declared "that a full remedy must be sought in each case where a District Director concludes the case has merit and has, or is prepared to, issue a letter of violation or a letter finding reasonable cause to believe that one of the statutory enforcement agencies has been violated." Full relief is to include, as appropriate:

"(1) A requirement that all employees of the respondent in the affected facility be notified of their right to be free of unlawful discrimination and be assured that the particular types of discrimination found or conciliated will not recur;

"(2) A requirement that corrective, curative or preventive action be taken, or measures adopted, to ensure that similar found or conciliated violations of the law will not recur;

"(3) A requirement that each identified victim of discrimination be unconditionally offered placement in the position the person would have occupied but for the discrimination suffered by that person;

"(4) A requirement that each identified victim of discrimination be made whole for any loss of earnings the person may have suffered as a result of the discrimination suffered by that person;

"(5) A requirement that the respondent cease from engaging in the specific unlawful employment practice found or conciliated in the case."

In all cases—individual and class actions—the Commission will seek, through settlement or litigation, on behalf of each and every victim of unlawful discrimination, full and effective relief along the lines set forth above.

Furthermore, it has been, and continues to be, the policy of the EEOC to investigate and litigate "pattern or practice" charges and cases, under section 707 of the Civil Rights Act of 1964, as amended, in addition to pursuing other types of class actions. Indeed, in fiscal year 1984, the Commission spent approximately $10 million on the processing of "pattern or practice" charges, and we will be spending even more this year. Currently, there are 189 "pattern or practice" charges in various stages of processing in our field offices: 91 are in investigation, 19 of which were
authorized by the current Commissioners; 27 are in various stages of settlement; and we are monitoring 21.

We have dedicated 118 employment opportunity specialists, 20 clerical workers and six employment opportunity assistants (technical positions) to the development and investigation of "pattern or practice" charges in the field. In addition, 45 "pattern or practice" charges are in various stages of processing by our headquarters staff. We have dedicated 68 full staff years at Headquarters to investigate and litigate nationwide "pattern or practice" charges, and to provide technical assistance to our field systemic program.

We wish to note, however, notwithstanding this massive commitment of resources to our systemic program, that we do not agree with your suggestion that "pattern or practice" cases and other class actions "constitute the single most important deterrent to the discontinuance of discriminatory employment practices." We believe that the most effective deterrent would be a Commission prepared to act quickly and strongly to vindicate the rights of any person who suffers unlawful employment discrimination, and we intend to make the EEOC such a body.

We appreciate your concern "that the budget of the Commission is inadequate to practically implement a comprehensive policy of pursuing individual cases." We have, however, paid careful attention to this question, and have concluded that our resources are sufficient to do the job. The average caseload of our lawyers in the field is now less than three, and therefore we believe that a very substantial increase in our litigation would be manageable. Should we prove to be mistaken in this regard, we would not hesitate to request supplemental appropriation, and we are confident that the President and the Congress would support us.

Finally, we would like to express our regret that we did not inform the Congress directly about our new policies. This was an oversight, and we have taken steps to ensure that it will not recur. This communication failure was compounded, we believe, by articles misreporting these recent EEOC initiatives that appeared, among other places, in The Washington Post and Time magazine. We enclose a copy of the March 18, 1985, issue of Time containing a retraction.

We appreciate your interest in the Commission and we would be happy to discuss these matters with you further at your convenience.

Sincerely,

CLARENCE THOMAS, Chairman.

TONY GALLAGHER, Commissioner.

FRANK V. ALVAREZ, Commissioner.

WILLIAM A. WEBB, Commissioner.

ROSALIE G. SILBERMAN, Commissioner.

Enclosures.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,

HON. CLARENCE THOMAS,
Chairman, Equal Employment Opportunity Commission,
Washington, DC.

DEAR MA' THOMAS: We are writing to express our grave concern about the recent change in policy announced by the Equal Employment Opportunity Commission regarding the pursuit and litigation of systemic and individual discrimination cases.

The Commission has voted to move away from the notion that classes of people are affected by discrimination as inappropriate for the Commission to pursue and to focus primarily on individual cases where discrimination has been proven. We are concerned that this new direction may be a way for the EEOC to avoid pursuing class action cases. This would be in direct contradiction of the original intent of Congress as embodied in Title VII of the 1964 Civil Rights Act and the 1972 amendments to that act and subsequent court interpretation.

In addition this is in violation of the will of the 98th Congress as expressed when funding for the systemic program was earmarked and increased over the 1984 level to $10.5 million for systemic program and staff.

The systemic program represents the federal government's commitment to maintaining work environments free of discrimination. The systemic program handles "pattern and practice" discrimination cases, including but not limited to class action...
suits, in which an employer has discriminated against a group of employees because of their sex, religion, age, handicap, or national origin. Systemic or class action cases have the potential to help large numbers of employees and to serve as an important example to employers that the federal government will not tolerate employer discrimination. Of major importance is the fact that such actions constitute the single most important deterrent to the continuance of discriminatory employment practices.

Discrimination by its nature is systemic and affects entire classes of people. This makes the systemic program the most powerful tool of the EEOC and indicates how the recent shift in policy represents a significant deterioration of the enforcement program. Since the EEOC litigates fewer than 5% of the discrimination lawsuits in this country, it makes sense that the Commission turn its systemic cases.

In addition to representing an undesirable change in policy, we are also concerned that the budget of the Commission is inadequate to pragmatically implement a comprehensive policy of pursuing individual cases. Limited resources may be spread too thin to litigate every case. With the current budget and staff, it would seem difficult for investigators to handle the expanded individual cases load under the new policy.

We strongly urge the Commission to reconsider its change in policy. We remain committed to the adequate pursuit of the elimination of systemic discrimination and, of course, we will continue to follow its progress.

Augustus F. Hawkins, Chairman, Education and Labor Committee; Pete Williams, Chairman, Subcommittee on Select Education; Olympia J. Snowe, Co-Chair, Congressional Caucus for Women's Issues; Patricia Schroeder, Co-Chair, Congressional Caucus for Women's Issues; Madeleine Roger Edwards, Chairman, Subcommittee on Civil and Constitutional Rights; Matthew G. Martinez, Chairman, Subcommittee on Employment Opportunities; Claude Pepper, John Conyers, Jr., James M. Jeffords, Committee on Education and Labor; Sheldon Towsley, Claudine Schneider, Bob Edgar, Howard Wolpe, Jane Evans, Max Lewin, Berkeley Bedell, Bruce F. Vento, Ted Weiss, Silvio O. Conte, William Lehman, Sidney R. Yates, Barney Frank, Chairman, Subcommittee on Manpower and Housing; Fortney H. Stark, Bill Green, Thomas K. Foley, Marcy Kaptur, Vic Fazio, Jim Bates, John R. Mckean, Barbara B. Kennelly, Walter E. Fauntroy, Frank J. Guarini, Alan Wheat, Al Swift, Jim Moody, George Crockett, Barbara A. Mikulski, Mickey Leland, Chairman, Congressional Black Caucus; Charles A. Hayes, Bruce A. Morrison, Robert J. Jassek, James J. Howard, and James L. Oberstar.

Mr. MARTINEZ. Thank you very much, Mr. Alvarez.
Mr. Williams, do you have any questions?
Mr. WILLIAMS. I will reserve my time, Mr. Chairman.
Mr. MARTINEZ. Mr. Gunderson.

Mr. GUNDERSON. Thank you, Mr. Alvarez.
I would like to begin, there has been a lot of contention and concern about the Commission's general pursuit of discrimination in the area of civil rights, equal rights, et cetera. And there seems to be an indirect correlation or connection between concerns about the Commission and concerns about the Department of Justice on civil rights.

Can you explain to this committee what connection there is in terms of the policies of the civil rights actions of the Department of Justice and the policies of your Commission?

Mr. ALVAREZ. This Commission makes its own independent judgments on which actions to pursue on cases that come within our jurisdiction, except for cases in the Supreme Court, where the statute says that the Justice Department determines what cases to take to the Supreme Court.

But we make our own independent judgment on how to enforce title VII in the private sector and in the Federal sector. Title VII requires that the Justice Department make enforcement decisions
in the State and local sector, but we are independent in our decisionmaking in the area in which we have jurisdiction.

Mr. GUNDERSON. Has there been any discussion between the Department of Justice and your Commission to try to adopt similar philosophies or similar goals, anything of that sort?

Mr. ALVAREZ. Well, at various levels, including staff levels and from Mr. Reynolds' level, we have communicated with each other about these issues, because we both enforce title VII, so there is communication, we are part of the same government.

But that is a fairly—it can occur in fairly routine cases, because we investigate some cases we send over there, which they have the ability to enforce. Plus when the Justice Department represents us in the Supreme Court, we have to discuss with them what our positions are, but they have the last call on what position to take in the Supreme Court.

Mr. GUNDERSON. But during the ordinary operations of the Commission, they have no ability or authority to direct the philosophy of the Commission?

Mr. ALVAREZ. No, they don't, except with respect to which cases they choose to pursue in the State and local jurisdiction area, because that is where the Congress says they enforce the statute, but in the private sector, we make all those decisions, we the Commission, a five-member body.

Mr. GUNDERSON. Another area of concern, I think, to many people in the civil rights community has been the Stotts case. Would you care to comment on how your Commission has responded to that?

Mr. ALVAREZ. There have been three developments with respect to Stotts at EEOC. The first decisions that the Commission made, or the chairman made, was not to reopen any of our pending consent decrees to determine whether they were in compliance with whatever the Stotts decision held, and there is a tremendous amount of legal debate over what the effect of Stotts is, although it is fairly clear what they said.

We decided not to open our consent decrees up. Our general counsel did an analysis of the Stotts case, and determined, or recommended to the Commission that the Stotts case only applied—or didn't apply to any kind of prospective relief, but in fact, was limited to what the court called make-whole relief.

So, it adopted what might be termed the narrow reading of Stotts. And the Commission, as a body, has not moved to change any of that interpretation or has not issued its general policy statement about what it thinks the impact of Stotts is.

So that has been the development in the Stotts case, from the Commission's standpoint.

Mr. GUNDERSON. One of the other concerns raised by a number of people on the committee is whether or not the Commission, by undergoing the extent of view of different cases, individual cases, whether, number one, you can meet the workload that would be included in this.

Can you respond to that?

Mr. ALVAREZ. Sure.

We are working harder than we were a year ago. Let me just say a word about how the litigation authorization process used to work.
It used to be that we had these layers of lawyers who would shield the Commission from considering cases, but all cases that were authorized had to come to the Commission. It is not that we are saying that we are depriving anybody of pawsious authority to litigate.

We are trying to take out all the veto levels that used to exist at a staff level from pursuing cases where discrimination, or a reasonable cause that discrimination occurred, was found.

So, what we have done is we have opened up the pipeline from the field directly to the Commission. And we are saying—the policy was just adopted last fall: It takes a while for things to get going.

But in the last several months, we have had a lot of work at the Commission. But we are working harder, meeting twice a week, considering many more cases, and so far as we have been told, they are not creating a backlog of any kind. We are just doing more work on authorizing cases.

And a large number of new cases are coming in that would have been filtered out in the past through these layers of review. So, from my standpoint, and I think from my colleagues at the Commission's standpoint, I can say we are working harder, but it is not overwhelming us. If it does, we will have to come up with other ways to authorize or not authorize these cases.

Mr. Gunderson. There has been questions that your remedy and relief policies are too inflexible, due to the fact of the Commission's "full relief" for the victim of discrimination.

Could you define for us what the Commission means by "full relief" and respond to the charge that you are too inflexible?

Mr. Alvarez. The remedies policy was set forth and described, I think, very clearly, as what our field people should seek when they find discrimination, the basic elements of 'that we think full relief is.

But we do recognize that we have a statutory and a practical obligation to conciliate cases, and the remedies policy itself contains very flexible language about conciliations, because we have an obligation to both from a statutory standpoint and an operational standpoint.

So it is not an inflexible policy. We are just telling our field people, in response, in partial response to criticisms that we were seeking to wholly inadequate relief, that this is what we think the whole relief package should contain, and that is what they should seek.

In settlements, however, they need to keep their eye on those issues, but engage in reasonable compromises with the opposing party, between what the most we could ask for and the least we could get. And that is what the conciliation process is all about.

I, frankly, don't understand why this policy is being read as being so inflexible. The last paragraph of the policy has what I consider to be plenty of flexibility written into it.

But I do acknowledge that some people have read it as being too inflexible. We have communicated to our staff not to be inflexible about it, but it is a process of continuing to spread that word that we have to do, and I appreciate your question.

Mr. Gunderson. Thank you.
Thank you, Mr. Chairman.

Mr. Martinez: Thank you, Mr. Gunderson.

On that note, let me go over some of the conversation we had in my office. Mr. Gunderson's questioning was really based on a lot of our discussion that we had in our office. And I am glad.

But let's go over that again. Now, we asked you in our office, if a full offer is required for conciliation to be considered and in that conciliation a negotiation to a final resolution before any other action is to be taken. You said that was the intent of the valley, but you admitted that was the way it was being read. You said that if it were being that way, then there would have to be some clarification, even in changing the verbiage so that it wasn't interpreted that way.

And I had thought, and correct me if I am wrong, that we did have an understanding on that.

Mr. Alvarez: Yes, I think we did. I think you expressed trouble something that Congressman Gunderson raised, and that we have heard in other places, that this is too strong, and I expressed to you that we need to communicate to our staff people more that the policy is a goal, sets forth the five goals we wish to seek, and that they have plenty of flexibility.

So, I don't, I am saying anything different than what I said to you, Congressman.

Mr. Martinez: Then let's get specific. Is it not, right now, under the policy that exists, required that the employer make the full offer before conciliation?

Mr. Alvarez: No.

Mr. Martinez: All right, that is not the way it is. Well, do you have the passage that states that?

It says required. And that is the word, you see. We get hung up on words, and a lot of times it is very difficult to get away from a word, because a word means a certain thing and required means required.

Mr. Alvarez: Well, I will certainly review it, and if that implication is left by the words, then I will ask the chairman of the Commission to consider a clarification on that point, but as I recall it, it said this is what we should seek as we enter the conciliation process.

The last paragraph, I would point out to the subcommittee, I think contains plenty of flexibility in it, and it states, I think accurately, what our conciliation obligation is under the statute.

Mr. Martinez: Let's say you are a biased person, reading that, and you want to hang your hat on something. If there were contradictory statements in there, and one is "required," the other one is "giving flexibility," which one would you hang your hat on?

You are going to hang your hat on the one that is indicated first, and that is "required," and you'll stick to that, regardless of what the last paragraph states.

And that is why I say, you really have to—if you are going to be fair and objective, and if you are going to be effective in the enforcement of the agency, then you have got to understand that you can't have words in there that can be misinterpreted.

That is all I am saying.
Mr. ALVAREZ. I understand that. There is another consideration here, Mr. Chairman. We have been continually criticized over the years by this subcommittee and by the GAO for getting inadequate settlements in the conciliation process.

We attempted to write words that would raise the level of what our people would attempt to seek. That is the point behind the remedies policy. So, we needed—I mean, it is a little something. We needed to raise the level somewhat. But there is a difference there.

And if we are going to give flexibility to our people, when this thing was adopted, I considered the problems you are discussing, it seemed to me that there was enough flexibility there.

But I would be happy to go back and consider that if there are particular parts of it that you think give the wrong impression. I would be happy to consider that and raise it with my colleagues.

Mr. MARTINEZ. Well, it evidently does, because it is happening out there. People are getting strung out and sometimes ending up with nothing when they could end up with something if the wording wasn't so rigid. We discussed that in great detail.

One of the things that we have to understand is that, unlike a criminal case, where a complaint has been lodged by an individual, then the prosecution the Justice Department is that persons are not required by law to pursue whether that person wants to withdraw that complaint or not.

That is not the case here, which is for the satisfaction of that person who has been discriminated against for relief from that discrimination. It should be up to the victim to say when enough litigation is enough, despite how the EEOC feels about it.

You need to ensure that that practice does not occur by that company or employer again. I think that we need to consider the individual who is the victim here.

Mr. ALVAREZ. And I think we will and I think the policy permits that, Mr. Chairman. We also need to remember that we are a law enforcement agency, and the Federal Government has an interest in any discrimination that occurs, and we may have an interest that goes beyond that of what actually occurred to a particular person.

Mr. MARTINEZ. To assure that it doesn't happen to someone else.

Mr. ALVAREZ. That is true. That is what law enforcement is all about. And that is what we are attempting to do through the remedies policy.

Mr. MARTINEZ. Now, I am also concerned about the status of the adverse impact test within the framework of all discrimination laws under EEOC's jurisdiction. Can you tell me what the EEOC test is in evaluating discrimination, what their test is for evaluating?

Mr. ALVAREZ. Where there are several established theories of discrimination that the EEOC uses and applies, and the courts use and apply, one of which is called the adverse impact analysis, that arises out of an interpretation of one of the parts of our statutes in the Griggs case.

Beyond that, I am not sure what you would like me to say.

Mr. MARTINEZ. Well, I have heard that the only intentional discrimination standard of proof is now sanctioned by the EEOC—
Mr. ALVAREZ. I am not aware of that, that the Commission has abandoned the use—

Mr. MARTINEZ. Would you find out for us?

Mr. ALVAREZ. Sure. I meet with the Commission every week, and I am not aware that we are not using adverse impact analysis in the enforcement of this statute.

Mr. MARTINEZ. Mr. Henry.

Mr. HENRY. Thank you, Mr. Chairman.

I want to return very quickly to the full remedy issue, because I think this may be really, may be honest disagreement, or may be something sneaky going on here, so let’s just clarify it, because once it is clarified, I think if it is properly clarified we may have resolved one of two or three outstanding issues here.

In the present or previous conciliation process, you have four standards for—you had—in the affected facility where discrimination was found, be notified of their right to be free from unlawful discrimination.

Second, requirement that corrective, curative, protective actions be taken; third, accord each identified victim of discrimination be made whole; and fourth, a requirement that respondent cease engaging in specific unlawful employment practice.

Now, in past policy, did you take that—when that was the definition of full remedy, was full remedy the negotiating posture you went into, and in many of your cases, did you split the difference, or is a conciliated closed case based on all four of those principles consistently, past policy?

Or would you many times with both sides agreeing to negotiate the difference?

Mr. ALVAREZ. I think, unfortunately, more often than not, and we have been roundly criticized for that, we were willing to let cases settle for anything that the charging party, who was often has less bargaining power, would accept, including such things as clean up my personnel file.

Mr. HENRY. OK, so, in past policy, and we could get that clearly from the record just by reviewing determinations and closed cases, does the statute, say, require as the formal language that you have—you testimony says require—are we actually backing off from the statute?

If you once agreed this is filed, would you technically be latched into the requirement? Has we all kind of, on both sides facilitates dispositions and—do you understand what I am saying?

Mr. ALVAREZ. I am sorry, Mr. Henry, I just don’t. I don’t understand where the word “require” is coming from.

Mr. HENRY. Well, from your testimony, in the communication. I think this is really what has us concerned, because now we are adding a fifth requirement. Now, that can do two things, particularly if you are meaning require.

While on the one hand, you can say it increases the bargaining of the plaintiff, the person filing, and that for us would be very admirable, the likelihood of successfully closed cases will diminish tremendously.

That is a very real concern, and if we are shifting to—you said in your testimony it would strike the negotiating hand, but the word you used is a requirement. I think it is just as important. If it is
simply to increase the negotiating posture, the chairman might be very, very enthusiastic about this.

But if we are slipping into a situation where you can't get informal settlements agreement to by both parties, then we may be actually slowing down the whole process and forcing everything into formal litigation in the judiciary, and creating a real mess.

The other aspect that I have to raise on this is the requirement that an identified victim be offered a settlement. How situations would expect might even divide would lack a merit-based determination of the merits, because it would have repercussions on adversely affecting innocent third parties that are subsequently removed from positions and lose the benefits of settlement in open communities wherever adverse consequences are involved.

That is very, very difficult. There are cases that in our communities, in various affirmative action orders and so forth, but it is a very, very difficult issue, and it may be counter-productive relative to it.

Having said that, and since, obviously, you are not sure of your self, I won't pursue an answer, but I think it is an answer that has to be given to resolve the question, and maybe shall have got the formal legal language.

The other thing I wanted to point out, on the class action, I think you have clarified that issue somewhat, and I would suspect, and you may wish to comment, that one of the reasons for some of the class action—

Mr. MARTINEZ. Would the gentleman yield before you—

Mr. HENRY. Fine, if I may get on to the next point.

Mr. MARTINEZ. On that last point, I have before me the policy statement of remedies and relief for cases of unlawful cases of discrimination approved by the Equal Employment Opportunities Commission. There, it does provide, like you said in your statement a requirement that each identified victim of discrimination be made whole for any loss of earnings of the person, and that be given in the position he would have been if not for the discrimination.

Now, when you require that offer before a victim can go any further, and the only other remedy now to that is litigation, which is a long, drawn-out situation in which case the grieving complainant might lose, he may not get anything. Whereas on the other hand if you do not have that requirement you might be able to negotiate the case out, to achieve something that would be acceptable by the employer and to the employee.

Mr. ALVAREZ. Mr. Chairman, I understand your point we discussed about. But the remedies policy says the Commission that a full remedy must be sought in each case.

Mr. MARTINEZ. Must be sought.

Mr. ALVAREZ. And agreeing with Congressman Henry, this is what we want. Now, let's hear what the counterproposal is. And then if you look at the last paragraph, it says we encourage that settlement process. You are telling our people, ask for this.

Mr. HENRY. We could solve the problem very quickly if they would be willing to clarify that statement, I mean that would solve the problem.

Mr. ALVAREZ. Pardon?

Mr. HENRY. If you clarify this, that would sure solve the problem very quickly.
Mr. MARTINEZ. That is right, and that is what we discussed. You have got to clarify that problem. Because as long as it sounds like that person must be placed before any conciliation effort can take place, you are never going to get to that point without going to litigation, and thereby creating a longer, drawn-out process.

Mr. ALVAREZ. That really is not our policy.

Mr. HENRY. Then there would be no problem if you could work out the language.

Mr. MARTINEZ. I yield back the time.

Mr. HENRY. I am sorry to interrupt, but I really do think we may have a misunderstanding over nothing, but it is a very significant issue, in terms of the impact of your agency. And, if you have just suggested, that is seeking and putting you in a bargaining position of that past practice, you have negotiated settlements short of full remedy.

And that this would still allow for negotiated settlement short of full remedy, you are going to save yourself a lot of grief by very quickly getting that all clear.

The second—

Mr. MARTINEZ. Would the gentleman yield one more time?

Mr. HENRY. Yes.

Mr. MARTINEZ. And, two, it could really speed up the process in which your original part of your statement indicates you are trying to do.

Mr. ALVAREZ. Sure.

Mr. HENRY. If you do this you would be a hero to the chairman, quite frankly.

Mr. MARTINEZ. And a hero to the people you are trying to serve.

Mr. HENRY. You may also have to have a——

Mr. ALVAREZ. We would like to be.

Mr. HENRY [continuing]. Problem where you make whole the worker that is potentially relieved or lose his position and promotion under the requirement number three.

And you are going to have some findings very quickly there, that because an employee was illegally hired in violation of the civil rights statutes, was subsequently removed under one action, is going to come back to you for another one.

You may just want to look at that. I want to look at the class action issue. I would suggest that, I am assuming that one of the reasons class action came about was not because you could, obviously, combine and at least partially make whole vast numbers of people very quickly, but most of these suits, I would presume, are with major corporations, AT&T, IBM, I am thinking of some of the big ones.

Mr. ALVAREZ. Right.

Mr. HENRY. But, am I right in assuming that the major corporations, your larger corporations, probably are more sophisticated and in greater compliance, by and large, than smaller businesses?

And there may, in fact, be some positive aspects from the civil rights enforcement standard in moving further away from class action, in terms of getting into those employment communities that have, in fact, because of the emphasis on class action, been less willing to adjust employment practices.
I mean, I would think, in my community, and I think in most communities, the larger corporations, because they have been tagged and stung, and because the potential problems for themselves are so massive, I think if not out of good will, out of legal necessity, have moved much further than small and medium-sized businesses that still qualify for filing agreements.

And it may be that you would really be pushing yourself into a new frontier of civil rights enforcement.

Mr. Alvarez. I think that is a good point, Commissioner. We have talked on all the bigger ones in the country, and we are now, in essence, taking one on right now, but we are in a small company, in a pattern and practice, whether it is a small company, and small company, or a giant company, but we have an ongoing program against the big companies.

Some of those cases are currently in conciliation, and we are in litigation in one of them right now.

Mr. Henny. Mr. Chairman, I don't know if I have any time left but one more question.

Mr. Martinek. I was about to tell you your time was up.

Mr. Henny. OK, thank you.

Mr. Martinek. Mr. Williams?

Mr. Williams. Thank you, Mr. Chairman.

Commissioner, perhaps as has been indicated here, there is simply a need for better communications between the Commission and the Congress; that in fact, some of these concerns we have are just the result of our misunderstanding of the Commission's intention, but I must say that I don't think that is the case.

The Commissioners alluded to that in a letter which I appreciate you placing in your testimony, and referring to in your testimony. That was a response to me and the other Members of the House who joined me in expressing our concerns to Chairman Thomas and the Commission with regard to what we saw as a movement away from aggressive pursuit of systemic discrimination.

In your response to me, you indicate that there has been no movement away from pursuing systemic discrimination, but rather say there is a "grievous failure of communication" between the Commission and the Congress.

So let me try to wipe away that lack of communication here. Does the Commission accept what many of us believe to be the fact that discrimination affects, in this country, entire classes of people that is, it affects people in a given age bracket, or it affects people of a given skin color, or of a certain religion?

Does the Commission accept that throughout American history, and still today, discrimination tends to follow those lines?

Mr. Alvarez. I am almost certain that it is. I know that I do, in every discussion I have had with other Commissioners on this point, they understand that discrimination is based on a category based on the irrelevant classification like race or age, and therefore, the answer, I think, is yes.

Mr. Williams. Has the Commission made a conscious decision to pursue individual discrimination cases rather than aggressively pursue systemic discrimination cases?
Mr. ALVAREZ. Not that I am aware of.

Mr. WILLIAMS. Does the Commission, given the fact that it does accept the systemic nature of discrimination, believe that systemic action is the best way to thwart such discrimination?

Mr. ALVAREZ. The Commission believes in taking on discrimination wherever they find it. Sometimes we get individual claims that a particular person was denied a job through prejudice, sometimes it affects more than one person.

Sometimes it is what you might call a pattern and practice case. All three of those methods—sometimes there are policies that affect more than one person. All three of those methods are methods that we have an obligation to pursue.

Mr. WILLIAMS. Chairman Thomas has expressed to me his opposition to the use of statistical disparities in identifying discrimination cases. Does the Commission agree with his opposition?

Mr. ALVAREZ. Well——

Mr. WILLIAMS. To the use of statistical disparity?

Mr. ALVAREZ. The use of statistics is available in two separate analyses under title VII. One of them is pattern and practice, where statistics are used to show the trace and pattern of adverse treatment.

And statistics are also used under adverse impact or unless the Commission has not stopped using those forms of analysis. What would be my answer to you? I don’t know what the full context of your conversation was, or what the chairman said, but it would respond to you from the Commission level that way.

Mr. WILLIAMS. The chairman has also indicated that systemic suits or class action suits are not particularly effective. Does the Commission agree with him on that?

Mr. ALVAREZ. Well, assuming that that’s——

Mr. WILLIAMS. In pursuing systemic discrimination.

Mr. ALVAREZ. The Commission is currently pursuing a number of systemic cases, including one of the largest ever brought in the country, so I guess the answer is that we don’t agree with the statement as you have just recounted to Congressman.

Mr. WILLIAMS. I am attempting to recount the chairman’s statement to me a few months ago accurately, and I hope I am.

Well, let me just remind you that among the 19 Members who expressed, by signing my letter, some of the concerns which I have expressed to you this morning—are the chairman of this subcommittee, the chairman of the full Committee on Education and Labor, the ranking Republican member of the full Committee on Education and Labor, the chairman of the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, and the two cochairs, one Democrat and one Republican, of the Congressional Caucus for Women’s Issues.

If there is only misunderstanding between the Congress and your Commission, it is widespread among a number of very prudent, cautious, concerned, and dedicated Members of this Congress who have attempted, vigorously, to understand what it is you are doing with regard to vigorously pursuing systemic discrimination. We are unable to come to the conclusion that your pursuit is very vigorous.

I don’t know what more to say, Mr. Chairman, except express that opinion, but I would be pleased to hear you respond.
Mr. ALVAREZ. We responded, all five members took that letter that you sent to us, Congressman, very seriously. We responded to you as quickly as we could, considering that we are a five-member organization.

We attempted to deal directly with the concerns expressed in that letter, and we sent you that letter. I think that is a good-faith response to the concerns, and there may have been a legitimate misunderstanding about what our policy is, and we attempted to respond as clearly as we possibly could, to respond to that letter.

And I guess the question is, What was the basis for describing that letter? We have attempted every way we could to fulfill the mismotion that we are not pursuing any policy line of ours.

We have responded to the Time magazine, we responded to the other magazine, and we responded to the 43 Members of Congress. If there is any further information that we can give you, we would be happy to work on it.

But beyond doing what we have done, I just don't know what we can do.

Mr. WILLIAMS. Well, Richard Nixon used to be fond of saying, "Don't watch what I say, watch what I do." And that is what the Congress is doing with regard to the Commission's actions.

Thank you.

Mr. ALVAREZ. We welcome that review.

Mr. MARTINEZ. I think that is the best thing we can do, is watch what happens. We have had some discussion on some of the things that I felt were a little too restrictive in your pursuit of enforcement, such as not allowing the complainant to exercise some input into his own situation.

I have one last question to ask you. Will we be having input into what you are doing? We are wondering if the EEOC will be reversing any policy in these areas, and when those changes occur, will our subcommittee have an opportunity to comment on these rule and policy changes before the EEOC enacts them?

Mr. ALVAREZ. Well, I don't understand the process very well of the adoption of changes of policies, and the notice and publication, and this subcommittee certainly knows how to reach us, and has regularly communicated with us.

Mr. MARTINEZ. I am glad you brought that up.

Mr. ALVAREZ. I assume that you will.

Mr. MARTINEZ. Well, it seems like we have a problem. The Commission may be feeling one way, the four members and the Chairman another way. We have recently communicated with the Chairman in adequate time, according to his guidelines, for his appearance or the appearance of someone on the Commission to the hearings being held.

In response to me in the letter, totally ignoring his acknowledgment of the receipt on the date of that letter, he stated that the subcommittee had not complied with his advanced notice of 8 or 4 weeks. He got the letter 4 weeks before the scheduled hearings.

And yet, he says he wasn't given adequate notice in keeping with what he considered the proper notice procedures from our committee.
So we have a problem there, and it is one of communication, and maybe it is just with the Chairman.

Mr. Gunderson. Mr. Chairman?

Mr. Martinez. Excuse me, let me finish. But I am hoping that that will be eradicated, that we can then have a dialog and we can have an opportunity to have input without someone stating falsely that we didn't communicate. We are attempting to communicate in having these hearings that is one way.

For example, I just want to mention, I have the opportunity to introduce another Commissioner, Mr. Beane met with me, finished, then a friend and a fellow Commissioner, Mr. Gunn. Mr. Beane met with me a friend and a fellow Commissioner, Mr. Gunn.

Mr. Alvarez. Mr. Gunn.

Mr. Beane mentioned something that I also interjected, which is the mayor of Maumee, and is the assumption that you are going to agree that will be eradicated, that we are able to have an agreement on that.

Mr. Martinez. I agree with you that the major issue is the agreement on that. The Chair has indicated that we are going to continue to deal with the Committee and the Congress.

Mr. Gunderson.

Mr. Gunderson. I just think it is important that the record state, Mr. Chairman, that the concerns that the Chairman of the Commission had in regard to the scheduling of some Commissioners to testify before this subcommittee was not the question of adequate notice, it was a question of trying to work out especially agreed-upon dates.

That has been the practice in the past, we sit down and try to resolve that, and the Chairman would like that practice to continue. And I have to tell you, Mr. Chairman, with all due respect, the minority is having a great deal of difficulty getting advanced notice, and any cooperation in the scheduling of this subcommittee.

I have raised that issue with you time and time again, and if we are going to make the issue of scheduling a controversial issue that we are going to bring up at this hearing, then I am going to make it the entire issue.

Mr. Martinez. I look for a total clarification as far as negotiating the dates. We gave them several dates, any one of which of those dates he could have set. There wasn't a single date that was given. There were several dates given, and the letter indicates that several dates were given. No Commissioner could be present today except Mr. Alvarez, and all of the sudden we have three, I understand, at least three.

Let's be honest.

Mr. Gunderson. Let's be honest, Mr. Chairman. Let's get from their letter. In this particular case, the Commission's Office of Congressional Affairs received on June 20, that is less than 1 month ago—you said this was a long time ago—a letter only indicating that the committee wished the Commission to testify on July 11. There were no advance discussions between the Office of Congressional Affairs and the committee staff, no attempts were made by the committee staff to determine if the Commissioners would be available on that date.

Mr. Martinez. I don't want to get into a long, drawn-out debate about the letter, but if you look at the dates on the letter, he said 3 to 4 weeks. It was 3 weeks before the letter was actually received,
he said 8 weeks' to 4 weeks' notification, but 3 weeks' before that; we called his offices on the phone, not once but twice, so what my reference is, is to: the inaccuracy of the statement that he didn't have adequate notice before that July 41.

But we also notified him at the same time that there would be no future hearings, and in a letter that we sent him as a response to that letter, we indicated that we were disagree with his letter. We rebutted the statements in his letter, and he subsequently sent a letter that they would be happy to participate if future hearings.

Mr. Gunnerson. Mr. Chairman, I only wanted to come to this to speak for Mr. Thomas, but I can indicate to you that the subcommittee is having great deal of difficulty in working with the scheduling in this subcommittee, and if we are having the problem as colleagues, I have to assume that other people in the commission and elsewhere might also be having that same problem.

Mr. Martinez. Well, the subcommittee has made a request to give notice 4 weeks in advance, and we have pretty much stuck to that.

I would ask again today, if one of the Commissioners would be able to be here on the 28th, since several of them were able to make it today. I am hoping that one of them will be able to make it on the 28th.

Thank you, Mr. Alvarez, for your testimony. Would you like to say something else?

Mr. Alvarez. I just wanted to say, with respect to this particular hearing, I don't want to— not attempting to— t into the debate between you two, but with respect to the Commission, our invitation date is July 2 for this hearing, is addressed to the chairman; says, "I would like to extend the invitation to you, and if you are unable please ask Commissioner Alvarez or Commissioner Webb to present the Commission's position."

Commissioner Alvarez is here, and Commissioner Webb is here as well, so we have not declined to come to this particular hearing.

Mr. Martinez. No, I didn't mean to indicate that.

Mr. Alvarez. OK.

Mr. Martinez. Thank you, Mr. Alvarez.

Our next panel consists of William Robinson, executive director, lawyers' committee for civil rights under law; Nancy Kreiter, research director for the Women Employed Institute.

Your statements, if they are written, and received by us, will be entered into the record in their entirety. If you can summarize, again, the members will be under the 5-minute rule for questioning.

Mr. Robinson, would you like to begin?
STATEMENT OF WILLIAM ROBINSON, EXECUTIVE DIRECTOR, LAWYERS’ COMMITTEE FOR CIVIL RIGHTS UNDER LAW, ACCOMPANYING RICHARD T. SEYMOUR, DIRECTOR, EMPLOYMENT PROJECT, AND NANCY KREITNER, RESEARCH DIRECTOR, WOMEN EMPLOYED INSTITUTE

Mr. ROBINSON. Yes, sir. First, Mr. Chairman, I would like to thank you and members of the committee for the opportunity to be present this morning to share with you our views.

I have with me this morning Richard T. Seymour, who is director of the employment project of the lawyers' committee for civil rights under law. Mr. Seymour is one of the foremost experts on title VII in the country, and, with your permission, I would like to ask that he be allowed to assist me in the answering of questions.

Mr. MARTINEZ. Absolutely.

Mr. ROBINSON. With that, I would like to, then, summarize my testimony. I would like to touch only on parts of it, because it is lengthy testimony and I know that you do have other matters that you need to attend to.

First, I would like to address the EEOC's September 11, 1984 Statement of Enforcement Policy. In that policy, the EEOC stated that it intends to file suit in every case in which a finding of discrimination was found, and conciliation had failed, and that one finding of discrimination is more worthy of litigation than any other finding of discrimination.

Before commenting on that specific point, let me indicate that in that policy statement, they purpose to achieve that goal; in part by having the individual Commissioners personally review every failure of conciliation.

I understand that normally, there are approximately some 2,000 failures of conciliation that occur around the country each year.

So, my first comment about this new policy is that simply doesn’t make good sense as a matter of sound management. What happened previously was that the failures of conciliation were reviewed by lawyers pursuant to policy guidelines set by the Commission and the general counsel, and they were supervised and reviewed as to their pursuit of those policies. That makes sense.

It does not make good management sense to have Presidential appointees reviewing each and every failure of conciliation. I might add that the lawyers who review those failures of conciliation out in the field are looking for good cases. That is how they get promoted. That is how they develop a professional reputation as being competent lawyers.

They are not intentionally throwing away good cases. So it just doesn’t make sense for the EEOC to try to increase its enforcement of the statute by having Presidential appointees look on the junk heap of rejected cases that had been reviewed by GS-13 lawyers. That just does not make good management sense.

My opening salvo, then, is to suggest that the EEOC abandon that policy and rather establish an appropriate set of priorities, set of guidelines and instructions to the field for the implementation of those priorities, and have the Commission then oversee the development or pursuit of its policies, rather than have it do staff level
work of the lowest kind, or that can be done by personnel on lower echelons, I don’t mean the work is of a less kind.

Now, coming back to this goal of filing suit in every case in which reasonable cause was found, because one finding of discrimination is more worthy of litigation than any other. That just is not sound as a matter of common sense.

Some cases involve thousands of employees, while other cases involve either only one or a small handful of employees. The case involving the larger number of employees is obviously more important and more worthy of litigation than the case involving a small number or only one employee.

Moreover, some cases involve employment policies or practices set by a company, nationwide, or practices that are followed by numerous companies throughout the country. That case is clearly more important and more worthy of litigation than a case which involved the arbitrary and illegal action of the single supervisor against a single individual.

So, the statement of policy theory is just simply not sound. It should be reconsidered and replaced with a more sound policy.

Moreover, EEOC simply doesn’t have the capability of litigating every case in which reasonable cause is found and conciliation has failed. That is obvious from the number of cases that they are litigating now, or that the agency has ever been able to litigate.

To attempt to go from a couple of hundred cases a year, to a couple of thousand would risk the type of disaster that was exemplified by China’s great leap forward.

Next on this point, we fear that in pursuit of these policies, what the agency will do is look to attorneys in the district and regional offices to be handling individual cases and will look to the attorneys in the systemic unit to be the only ones handling systemic cases.

This would not be sensible. Many systemic cases involve local plants or facilities, and are best handled on a local basis. Every EEOC attorney, whether in a local office, or headquarters, should be looking for worthwhile systemic cases to file.

Let me next move to a few comments about EEOC’s February 5 policy statement on remedies and relief for individual cases of unlawful discrimination.

Some parts of the statement are quite well taken. And we commend the agency for making the effort. However, we fear that the statement, taken as a whole, will hamper the Commission’s effort to obtain compliance and will so intense racial and sexual dissension in the workplace.

The policy, for example, requires that a victim of discrimination be given an immediate, unconditional offer of placement in the position denied, even if this means the bumping of an innocent white employee or male employee.

First, this is relief that simply hasn’t been authorized by the courts, and in my opinion will not be made available by the courts. Indeed, in the Stotts case itself, which I will go into a little bit more in just a few minutes.

The Supreme Court expressly noted with favor the many lower court decisions denying relief in the form of bumping. If EEOC were to pursue this and actually obtain, what they are going to do
is have to pick black workers against white workers, male workers against female workers, quite unnecessarily so, because there are other forms of equitable relief which would achieve the ultimate goal, and would not create that kind of trouble.

That policy contained in their necessity and must be deleted and replaced with traditional court procedures.

Next, the policy statement indicates that will be modified. A component defines it, must be obtained in some cases where reasonable cause is made. While the relief under the policy statement, taken as a whole, gives employers an incentive to settle quickly and do not allow the Commissions' order to summarize the statement demands in light of the relative chances of success in the matter were to be litigated to trial.

I note that during the testimony of Commissioner Alvarez was some discussion as to whether or not the policy statement allowed for the kind of flexibility that would have necessary in compromise, whether he is talking about a length or any other kind of compromise.

After that, I merely make two comments. One, I refer to the statement itself on the first page, and I quote from the second paragraph, the last part of that concluding sentence in the second paragraph:

Obtaining full remedial, corrective and preventive relief is the standard by which the agency is to be guided.

Second, Commissioner Alvarez appeared on a panel last week out in Cincinnati with Mr. Seymour and there he said quite plainly that the relief outlined in the policy statement must be obtained in every case. Again, at the very least, there is ambiguity. That ambiguity ought to be corrected—I'm sorry. It was a month or so ago rather than just a couple of weeks when Commissioner Alvarez appeared with Mr. Seymour. But nonetheless, at the very least, there is ambiguity as to whether the EROC conciliators and attorneys have the requisite degree of flexibility that they need in order to be able to settle cases obtaining substantial relief, consistent with the facts of the case and the law applicable to these facts.

We urge that they go back to the drawing board and insert into the policy statement that required flexibility in a way that there is no ambiguity about it. Next, the policy statement does not mention one of the standard forms of relief in fair employment cases; that is, requirements that employers keep records sufficient to demonstrate compliance. The keeping of records is indeed one of the most important provisions, because that allows you to go back later on and to monitor your settlement and determine whether or not in fact, there has been compliance.

The fact that you can indeed monitor and tell whether or not there has been compliance is one of the strongest inducements to actual compliance. It is a terrifically important provision that is not present now. As they revise this document, it should be included. I mention there are some good things about it, but use just comment on a few of those. I don't want to seem entirely negative.

We support the idea of posting notices of violations found and of remedies provided. A number of the decrees we have obtained in-
clude such a relief and have worked quite well because of it. We support the idea of removing victims of discrimination from the supervision of individual perpetrators of subjective discrimination where such supervisors are identified. We support the enactment of discriminatory references from personal files. We support the back pay provisions of the policy statements.

We cautioned that the Commission should avoid what would be a compromise because one of those elements is lacking. We abhor the settlement package as a whole.

Next, I want to comment briefly on the Stotts case and my tentative view is that the Commission should not interpret the Department's overbroad reading of the Stotts case as providing guidance to its employees and those subject to its jurisdiction or to me views of Stotts which views about conform to the court decisions.

About Stotts, as you know, the Justice Department has read the Stotts opinion as barring all race and gender discrimination suits in the form of goals and timetables, numerically referenced relief, not only in the layoff context where there is a seniority provision, but also in the context of hiring and promotion. I want to suggest that that reading by the Justice Department of the case is simply wrong.

Prior to Stotts, all 11 of the circuit courts had expressly authorized the use of goals and timetables as one of the reasonable available under title VII, and the Supreme Court, in the Thompson case had also recognized that form of relief appropriately in Stotts. If the court, then, would be barring that relief, it would have had to overrule all 11 circuits. Typically when the court does that, it says so. It does not overrule 11 circuits sub silento. And there is no reason to believe that it did so here either.

Indeed, the decree at issue in Stotts contained goals and timetables and the court allowed them to stand. If it was barring that kind of relief, it would have eliminated them in Stotts. And had it done so, would not have had to go on to the other holding in Stotts. But more important than my interpretation of Stotts is the interpretation of the courts that have reviewed the case subsequently.

The case has been reviewed now by five circuits. All five of those circuits agree with my narrow reading of the decision and disagree with the Department of Justice's reading of the decision. Thus, it is appropriate now for EEOC to follow those decisions in the form of an interpretive bulletin published to the employers and unions and citizens subject to its jurisdiction and give appropriate guidance to its field employees. It is just simply not good enough to have the general counsel write a memorandum that goes to the Commissioners.

The legal advice of the general counsel should be shared much more broadly. EEOC, after all, does have a leadership responsibility here and they should proceed with it.

I next want to move to some of the current problems in EEOC's handling of charges and lawsuits. I would like to begin by noting that probably one of the biggest problems is the sharp reduction in the number of lawsuits being filed and the number of charges in their backlog or in their inventory of charges. I won't go into those in any detail. They are set forth in my written testimony, but the real expert on those matters is Nancy Kreiter, and so I want to
defer to Nancy on the details of the great falloff in EEOC enforcement activity.

I do want to make merely this comment, though. While I don’t question that Fred Alvarez or Clarence Thomas are prejudiced and will, and the other Commissioners as well. The great attitude today is in the writing. You can’t have all this discussion about the question of title VII and vigorous pursuit of systematic cases with the kind of reductions in litigation that we observed here on the cases which are, after all, provided by them.

I would like to summarize my next points about EEOC dealing with controlling case law which I want to be referring to something I said that Commissioner morning. He commented that there’s an issue of communication and a problem of perception. And he’s right. That is one of the problems. But let me artfully go with the Commissioners, including the one mentioned about Fred Alvarez, the Commissioner in Cincinnati compared with the comments that he made.

If you will look at the point blank statement, and then at his interpretation of it, but also by Clarence, the world they are making comments and then they come off the body and say, “But I am only an individual Commissioner is a collegial body and makes collegial decisions. That is how policy is made.”

Well, you can’t go out and make speeches that frankly misrepresent the law, and then say, “Well, there is a problem of perception. People don’t really understand.” You have got to reconcile your comments and your statements to what the law really is and your official policies really are, and resist the temptation to go beyond those in what can sometimes be a rather provocative and provocative statement.

Then I want to come to the question of the guidelines. The EEOC has indicated an intent to reconsider their guidelines, as part of that reconsideration. They, then, want to ask questions. I think in part you can assess the decision to reconsider the guidelines just by taking a look at the questions. They ask these whether the holding in Griggs has been eroded by Stotts.

The Stotts decision was a major decision by the Supreme Court, and has provoked already scores of law review articles. Even I have written one of them. No commentator in any of the journals has ever suggested that Stotts erodes Griggs at all. To have that in mind as you start to evaluate the guidelines is — don’t mean to be pejorative in saying this; I mean to be descriptive — silly.

Whether the Griggs holding that practices with disparate impact are unlawful unless shown by the employer to be job-related, it is consistent with the 14th amendment. Sure it is, and latter of courts have so held. It is just no question about that. A number of the cases have arisen under the 14th amendment standard. And the courts have uniformly so stated.

Whether employers should have the benefit of a cost-defense in seeking less discriminatory procedures — in other words, if it costs a lot, we ought to let them discriminate. I think you already decided that in passing the statute. Whether the EEOC testing guidelines should cut loose from the professional standards of the Amer
can Psychological Association; notwithstanding the fact that the exemption for tests in the act is only for "professionally developed ability tests."

First, it seems to me the answer is set forth in the injunction. The statute has decided that. But quite apart from that, the Supreme Court has considered the matter two or three times. It follows that if there was a decision in the

marle Paper Company v. Moody, when the court was considering the Court decision that constrains your guidelines, it asked [and the

proven them, why do you want to revise them?]

In the world, if it's been done, don't you just want to think that the guidelines are being revisited on just a quick review of them? We can finish on the guidelines point. I'd like point out how much the guidelines mean.

The guidelines are based on the premise that you have got an employee selection device, in the national requirement to whatever, if it doesn't discriminate against the race, why is it with the one that excludes a disproportionate number of people?—that is point No. 1. Principle No. 1, principle 3, have you got a concern and the principle would be there is an exclusion of a disproportionate number of people kicks in, and it requires only that the employee selection device test is reasonably related to the job.

In other words, it determines are you being included, can't do the work? Are you being excluded because of the test that it tests ability to perform, and you can be excused if you excludes. These two principles, it seems to me are bettered each by the courts as principles of law for reasons that they make a lot of sense. Expert psychologists and others can argue about the specificities of how you go about determining validation. And we frequently enter into that kind of a controversy, but to the first two basic principles which the EEOC seems to be ready to review, there shouldn't be any question about that, under any circumstances.

I want to conclude, then, by making the following suggestions. EEOC ought to, one, establish a sensible set of litigation enforcement priorities together with appropriate guidance in the field which they would publish, issue, be available to their own people and the rest of us who want to know how they are proceeding and get the commissioners out of the business of reviewing every failure of conciliation.

Two, they ought to revise their settlement guidelines in accordance with the kind of sensible suggestions I made earlier and court decisions. Three, they ought to go forward to provide an interpretation of the Stotts decision consistent with what the courts have said about it? And, four, the EEOC ought to terminate its unnecessary review of the testing guidelines.

[The prepared statement of William J. Robinson with attachments follow]
PREPARED STATEMENT OF WILLIAM L. BORONCICH, DIRECTOR, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AND RICHARD T. SYMENTUS, DIRECTOR, EMPLOYMENT DISCRIMINATION PROJECT OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW.

Mr. Chairman and Members of the Subcommittee, we appreciate the opportunity to provide testimony here today. Our testimony before the Committee will cover five main areas.

First, we will discuss the Commissioner's September 11, 1984 "Statement of Enforcement Policy" and its February 5, 1985 "Policy Statement Regarding Individual Cases of Unlawful Discrimination." We believe that the statement set in strengthening the remedies available under the Civil Rights Act of 1964, as amended, and the Uniform Guidelines on Employee Selection Procedures, by the findings of the firm, and the cases will have been cases made by the Commission. See pp. 12-20 of this statement.

Second, we will discuss the Commissioner's statement in Firefighters Local No. 791 v. Stotts, 462 U.S. 85, 103 S. Ct. 2259, 76 L. Ed. 2d 602 (1983), courts of appeals in six cases held that the Civil Rights Act of 1964, and none of them have acted with the Commission and the Department and by the Commissioner in a race-conscious and sex-conscious manner, and we do not understand that the Commissioner will act to change the future on the question whether to act on the following in Stotts, and in the Naturalization in the suitzv., we have no prejudice or evidence of the existence of a system or a system or a system, and the National Guidelines for the enforcement of the Civil Rights Act of 1964, and 10.20 of this statement.

Third, we will discuss direct race discrimination in employment, and laws, and practices, which we expect to have a dramatic impact on the investigation of the charges of discrimination, were true. See pp. 19-21 of this statement.

Fourth, we will discuss the cumulative nature of many of the Guidelines. The above statements concerning the standards of liability to be applied pursuant to the Federal Title VII of the Civil Rights Act of 1964, and as to the Uniform Guidelines on Employee Selection Procedures. It is our position that the Commissioner of the EEOC should immediately cease his misstatements of controlling guidance under Title VII, and should recognize that both he and his associates are forced by the rule of law. The unwarranted attacks by Commissioners on the use of statistical proof are not only unwarranted, but the Uniform Guidelines have not only suffered confusion in the EEOC's district offices, but are being meaningful enforcement activity impossible. See pp. 21-23 of this statement.

A. THE COMMISSION'S STATEMENT OF ENFORCEMENT POLICY AND RECOMMENDED SCHEDULE OF REMEDIES

1. The EEOC's September 11, 1984 statement of enforcement policy

On September 11, 1984, the EEOC issued its "Statement of Enforcement Policy," stating that it intended to file suit in every case in which race-neutral cause was found and conciliation had failed, and that "cases finding of discrimination is no more 'worthy' of litigation than any other finding of discrimination." Statement at 2.

As noted above, we do not consider this goal to be possible, practical, or even desirable. First, the Commission has informed its local offices, in consultation with the Board, that it will not consider for litigation any systemic charge of race discrimination, and will not consider any systemic charge of sex discrimination, if the EEOC investigation, in our own enforcement, has found that, that is, the identification of specific victims often requires the development of a full trial record. In many cases, such as those in which there are many more unexplained minority Segue experiences than there were vacancies which would have gone to minorities or women in the absence of discrimination, it is impossible to identify which specific individuals would have

2 At the June 21, 1985 hearing held by the Subcommittee on Employment and Housing of the House Committee on Government Operations, Chairman Thomas stated that he would support an amendment to Title VII to provide for treble back pay awards, in order to increase the monetary penalties for discrimination. The Lawyers' Committee agrees that awards of back pay have in practice been insufficient to deter some employers from discriminating, and that an upgrading of monetary relief would be appropriate.

The key to the above two cases, both marking a marked call to the class of the employee's hiring and the other cases of the charges by the class to the Commission and the amount too narrowly. For instance, if the case, as the case in point, $24,000 would have been presented in three years to screen the employee $2,000 in 1965, it is predicted as unfairly to screen the employee's claims.

For these reasons, that cause for action in the class of the complaint is, in many cases, resorted to, and all members of minority status are cast in the class, and are, therefore, presumably entitled to litigate to the class. Thus, the EEOC does not represent individual victims at the start of the commission's consideration. If the individual victims never be presented for litigating on their behalf.

Second, it is entirely unclear as to whether a "reasonable cause" is an injury of the latter type or, as cases like these, it is an injury of a "reasonable cause" is as worthy of litigation as an "actual cause". One finding may result in a case of an injury of the latter type and in which the earnings of women or men are at issue. The same injury of the latter type is already enshrined, and the EEOC is usually made to determine which of the cases is the proper case in the class, but this is not an injury of the latter type. In determining the class, the EEOC is usually made to determine which of the EEOC needs is not an injury of the latter type.

Discriminatory discharge is a form of action which reasonable cause is found and considered in the EEOC's three hundred cases a year in a form of the litigation determined by the Commission, the EEOC should be held to its own case standards and the Commission should be held to its own case standards. Therefore, in light of the erroneous drop in litigation standards in the EEOC, the EEOC needs is not an injury of the latter type.

Fourth, we fear that the EEOC will become so bifurcated into its major and regional offices that it will be too large to handle individual cases. The EEOC's complaint would not be sufficient. The EEOC is a single large office. Many systemic cases involves local plants or facilities, and are best handled on a local basis. Every EEOC attorney, whether in a local office or Headquarters, should be looking for widespread systemic cases to bring.

2. The EEOC's February 5, 1986 policy statement on remedial and relief for individual cases of unlawful discrimination

On February 5, 1986, the EEOC issued its Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination. Some parts of the statement are quite well taken. However, we fear that the statement, taken as a whole, will hamper the Commission's efforts to obtain compliance and will now interest racial, religious, and sexual harassment in the workplace.

First, the Policy Statement is extremely to be applied in "individual cases". The problem is that the Chairman considers systemic cases to be "individual" cases for purposes of this Statement. At an EEOC Law Seminar in Pittsburgh on May 2, 1985, Chairman Thomas criticized his "predecessors" for choosing to:

"... concentrate on remedial relief in the form of numerical goals and timetables, rather than full relief for the party actually filing the charge. As I noted earlier, the emphasis was not on securing full relief to charging parties, but getting rid...

Because of the nature of these claims, many of the most important systemic cases and age discrimination cases will involve discharge. There are also some extremely important instances of patterns of discriminatory discharges involving substantial numbers of minorities or women, which is extremely important for the Organization to challenge.
of cases. However, there was an emphasis on obtaining broad remedies for a theoretical group which had not filed charges.

"I find it ironic that anyone would get a policy in place which provides no relief for those who were actually hurt than for those who may have been hurt as a result of some historical events. To contact the insufficiency in policies, the Commission approved a policy statement which sets the remedies which any staff member can seek before charging parties..."

Speakers at 10-11: If the EEOC acts in accordance with the underlying policy of the EEOC, the EEOC will accept a case, in a case involving a discrimination act or other conduct alleging a violation of Title VII, except where such conduct has been filed a charge, and finding reasonable cause thereof.

If this is the trend to be followed, it is not the case of an employer who have gone in highlighting the cases with an only or a purpose of professional value.

Second, the Policy Statement indicates that "full relief", in the sense which the EEOC and the AETC agree to, is possible only if the employee or employer will accept an offer of settlement. Such a step means the "settling" of the instant case, and it is a step, in the context of a claim, in favor of a practical harm done to the employer or employee. Such a step means the "settling" of the instant case, and it is a step, in the context of a claim, in favor of a practical harm done to the employer or employee.

It is difficult to imagine the EEOC's rationale for such a distinction and—most importantly—widely accepted remedy of the Commission. The immediate, unconditional offer of settlement would offer immediate, unconditional relief to the employer and employee, whereas the "settling" of the instant case, and it is a step, in the context of a claim, in favor of a practical harm done to the employer or employee.

Third, the Policy Statement indicates that "full relief", in the sense which the EEOC and the AETC agree to, is possible only if the employee or employer will accept an offer of settlement. Such a step means the "settling" of the instant case, and it is a step, in the context of a claim, in favor of a practical harm done to the employer or employee.

Conciliation should be pursued with the goal of obtaining substantially complete relief through the conciliation process. Any divergences from this goal must be justified by the relevant facts and the law.

While there is some ambiguity in the Policy Statement, taken as a whole it suggests too much rigidity to give employers an incentive to condone the charges or settle a case, and it does not allow CEBS to adopt a "framework" of remedies only if the compressions "address fully the remedial statements of this policy." The Policy Statement concludes:

"It does not make one of the standard classes of relief in fair employment..." demonstrates that the employer's record is sufficient to demonstrate compliance, that the employer has a summary of information, to the EEOC and to the Court, and that the employer makes the full records available for inspection on reasonable notice. In our experience, such relief is essential in most cases involving patterns of discriminatory activity."

Fifth, the Chairman's remarks quoted above indicate that a number of cases involving class-type patterns of discriminatory activity will nonetheless be handled under this Policy Statement.

We support the idea of posting notices of violations found and of the remedies provided; a number of the Decrees we have obtained include such relief. We support the idea of removing victims of discrimination from the supervision of individual perpetrators of subjective discrimination, where such supervisors are identified. We support the expungement of discriminatory references from personnel files. We support the backpay provisions of the Policy Statement. We caution that the Commi-
tion should not reject reasonable compromises because one of these elements is lacking; the reasonableness of the settlement package as a whole should be the guide.

2. THE HOSPITAL SHOULD EXPRESSLY RESIST THE SOUTHERN EMPLOYER'S COMPLAINT.

The hospital should resist the employer's complaint about the settlement, emphasizing the fact that the hospital was not involved in the original discrimination. The hospital should also point out that the settlement was reached under the guidance and supervision of the Equal Employment Opportunity Commission (EEOC) and the court, and that it was in the best interest of the hospital and its patients to agree to the settlement.

The hospital should also emphasize that the settlement was not a result of any wrongdoing on its part, but rather an agreement to settle the claims of the five individuals who had been discriminated against. The hospital should state that it was committed to providing a fair and equal work environment for all employees.

In addition, the hospital should emphasize that it is committed to complying with all applicable laws and regulations, including the Americans with Disabilities Act (ADA) and the Equal Employment Opportunity Act (EEOA). The hospital should state that it is committed to providing a workplace that is free from discrimination and that it will take all necessary steps to ensure compliance with these laws.

Conclusion

The hospital should resist the employer's complaint about the settlement, emphasizing the fact that the hospital was not involved in the original discrimination. The hospital should also point out that the settlement was reached under the guidance and supervision of the Equal Employment Opportunity Commission (EEOC) and the court, and that it was in the best interest of the hospital and its patients to agree to the settlement. The hospital should also emphasize that it is committed to providing a fair and equal work environment for all employees, and that it is committed to complying with all applicable laws and regulations.

4 Section 707(b) provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-3(b).
right has been shown. Because members of minority groups are often denied access to employment opportunities and fail to obtain effective relief from these injustices, they have been required to turn to the courts for the orderly resolution of grievances. The courts, in turn, have relied on past practices and the prevention of such practices as a means to achieve the segregation goals and timetables. Only in this manner can the elimination of remedies of persons who have suffered injury by such remediation in particular be secured. The position of the Justice Department is in keeping with that of the EEOC to protect the interest of these persons.

On appeal, the court struck down the defendant's narrow view of the language of the Constitution. The Supreme Court reviewed the broad language of the Constitution which was interpreted to mean that the defendant would have to prove a violation of law, not the legality of the law. The court observed that the language of the Constitution concerning Section 706(g) is not the section. The Court's decision dealt with malpractice and relief which is not recoverable. The decision held that Section 706(g) is immunized the bona fide symmetrical systems of race reversal.

The Court went on to note that this result is based on the policy behind § 706(g) of Title VII, which affects the remedies available in Title VII, and the language of the Court concerning the policy of Section 706(g) is expressly limited to "make-whole" relief.

Stotts decision deals with make-whole relief and does not reach the issue of class-conscious relief which is the remedy challenged by the Justice Department. Consequently, Stotts cannot be stretched to bar class-conscious affirmative relief, as the Justice Department claims it does, especially since such relief has been widely recognized as the only effective method of remediating the present and future effects of discrimination.

Note: Justice White wrote the Opinion of the Court; Justice O'Connor filed a concurring opinion and Justice Stevens filed an opinion concurring on the judgement. Justice Blackman wrote a dissent, in which Justice Brennan and Justice Marshall joined.
of past discrimination. Respect for precedent should compel the Commission to reject the Justice Department's argument.  

2. Stotts Does Not Bar Race- and Gender-Conscious Relief

No majority of the Supreme Court has suggested, in Stotts or otherwise, that affirmative race- and gender-conscious remedies are impermissible.

On the contrary, the majority opinion of Justice Scalia maintains that Stotts does not preclude the use of race-conscious programs in *affirmatively furthering (denying) a protected class's access to a public facility.* A brief reference to *Stobbs v. State Bar of Florida,* 495 U.S. 925 (1990), in *Analysing the Inevitability* does not preclude Stated by any race-conscious remedy required by law. *Staford v. Illinois* and *Sunderland v. Illinois* have upheld the constitutionality of race-conscious processes. *Staford v. Illinois* is not *Staford v. Illinois* 

The Supreme Court has not held that race-conscious remedies are impermissible. The Justice Department's argument is premised on an impermissible set of assumptions. That these assumptions necessitate an important and controversial assumption. Justice Scalia seems to be saying that the Court would overrule its own decision in *Stotts* again without making its ruling explicit. But the Court would not overrule itself in such a sweeping decision without disposing of the mass of constitutional and statutory issues implicated in this case and in the array of presidential decisions that is what the Court did; it has never done so before in any state case in which we are aware.

Moreover, two of the six justices who agreed with the result in *Stotts* in an exchange stated that the race-conscious relief afforded by the layoff order and affirmative action sustained under appropriate circumstances does not interfere with the purposes of the Civil Rights Act. Justice Scalia's decision, after all, was based on the principle that *Stotts* Fire Department would have been justified if the plaintiff had presented a viable case of discriminatory animus in the adoption or application of the seniority system. Id. at 2592 (O'Connor, J., concurring). The opinion of the Court in *Stotts* in which Justice O'Connor joined, simply did not reasonably require race-conscious relief in a situation where a benefits plan against affirmative race- and gender-conscious relief.

In short, the use to which the Justice Department wishes to put *Stotts* is legally factually and legally based on the above assumptions reveals — violates the tension of judicial interpretation and of common sense.

3. The Justice Department ignores the well-established distinction between make-whole relief and affirmative relief under title vii and the fact that the Court in *Stotts* was addressing the requirements of make-whole relief.

The Justice Department's reading of *Stotts* ignores the distinction, commonly accepted in the law of employment discrimination, between retroactive, victim-specific "make-whole" relief and prospective, race- and gender-conscious remedies. At bottom, the Justice Department's argument must be, as noted above, that the Supreme Court's discussion of the policies limiting awards of "make-whole" relief was

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*The language of the majority opinion explicitly underscores the Justice Department's interpretation. The Court expressly recognized that in certain cases, a district court may award relief benefitting those who are not proven victims of discrimination. *Title VII precludes a district court from displacing a masculinity employee with minority under the contractually established seniority system unless the government finds that the minority race was adopted as part of a race-conscious plan to make whole a proven victim of discrimination." See *Boos v. Geary,* 485 U.S. 312 (1988) (Justice O'Connor concurring).


*The majority in *Stotts* did not reject this view. The opinion of Justice White and Justice Stevens' suggestion that *Title VII is irrelevant" is not about describing the administration of a consent decree, not with his statement that the relief involved would not violate the principles of Title VII; it is about the question of the retroactivity of the relief ordered by the district court's modification of the consent decree over the objection of one of the parties. The Court expressly withheld judgment on the question whether the race-conscious practices at issue would have been lawful if the defendant employer had adopted it voluntarily. Id. at 2590.*
designed to overrule an overarching body of case law wholly unrelated to "make-whole" relief and, what is more, that the Supreme Court did so without even referring to that case law or to the reasoning for it.

Section 708(b) of Title VII prohibits, in relevant part, as follows: "If the court finds that the respondent is unable to fulfill its affirmative obligations under Title VII, then, in addition to any other equitable relief to which the complainant is entitled, the court may order the respondent to (1) make whole the complainant for any losses suffered because of the respondent's unlawful employment practice, including lost wages and benefits, special and consequential damages, and any other forms of monetary compensation to which the complaining party is entitled to the extent provided in this subchapter; (2) reinstate the complainant to the position he occupied before the unlawful practice was engaged in, or to an equivalent position without loss of seniority, benefits, or other rights or privileges; and (3) order such further equitable relief as the court deems appropriate, including, but not limited to, attorneys' fees, costs, and reasonable compensation for expert witnesses.

In determining what relief is appropriate, Section 708(b) also recognized that "the scope of a make-whole remedy is not limited to the purpose of the Act." International Brotherhood of Teamsters v. United States, 431 U.S. 244, 284 (1977). It is equally well established that Title VII was enacted for dual purposes: "to achieve equality of employment opportunities and to eliminate barriers that have operated in the past to assure identifiable groups of persons the equal right to be free from unlawful employment discrimination." Griggs v. Duke Power Co., 401 U.S. 424 (1971), and "to make persons whole for injuries suffered on account of unlawful employment discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 425, 427 (1975). Thomsen, supra, 451 U.S. at 594; Stokes, supra, 104 U.S. at 2896 (1881) (controlling).

Not surprisingly, these dual goals have sometimes resulted in differing remedies for Title VII violations, tailored to the circumstances of the case. Thus, the "make-whole" policy of Title VII requires the employer to undo the discrimination "be, as far as possible, restored to a position equal to if it had not been for the unlawful discrimination." Grove v. Williamiston-Runnell Co., 424 U.S. 247 (1976) (quoting Section 7(b) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(b), accompanying the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-5(b)), Committee on Labor of the Senate Committee on Labor and Public Welfare, The Legislative History of the Equal Employment Opportunity Act of 1972 (1972) (hereinafter "1972 Leg. Hist."), 843, and "the remedial purposes of the Act are not to be served by making the wronged party whole.") Thus, "make-whole" relief may include not only the loss of wages or an award of constructive seniority with the same rights, privileges, and benefits as the complainant would have had if he had not been subjected to unlawful discrimination.

In the wake of Stokes, every court which has considered the issue has rejected the expansive interpretation urged by the Justice Department. Deavers v. Gentry, 253 F.2d 20 (5th Cir. 1957); Ivy v. Burch, 294 F.2d 1017, 1039-1039 (10th Cir. 1961); Jerrard v. United States, 375 F.2d 1037 (9th Cir. 1967); Bivens v. United States, 364 F.2d 270, 279-280 (D.C. Cir. 1966); cert. denied, 403 U.S. 901 (1971); United States v. United Mine Workers, 218 U.S. 178 (1911); United States v. United Mine Workers of America, 300 U.S. 261 (1937); cert. denied, 300 U.S. 705 (1936); United States v. BLW, Local No. 54, 348 F.2d 144, 141 (8th Cir. 1965); cert. denied, 382 U.S. 904 (1965); United Mine Workers Local 105, 326 F.2d 699, 703 (9th Cir. 1964); Vonderer v. United Mine Workers Int'l Ass'n, 705 F.2d 1172, 1186-1187 (3d Cir. 1983); Vangard v. Cleveland v. City of Cleveland, 713 F.2d 475, 485-486 (6th Cir. 1983), rehearing en banc denied; Van Aken v. 10 See, e.g., Boston Chapter, NAAACP, Inc. v. Boucher, 504 F.2d 1011, 1037-1038 (1st Cir. 1974); cert. denied, 422 U.S. 910 (1975); EEOC v. Federal Communications Commission, 322 F.2d 144, 152 (9th Cir. 1963); cert. denied, 382 U.S. 988 (1961); Haskins v. United Mine Workers Int'l Ass'n, 379 U.S. 642, 653 (1964); cert. denied, 379 U.S. 984 (1965); EEOC v. American Tel. & Tel. Co., 468 F.2d 105, 117-117 (2d Cir. 1972), and cert. denied, 409 U.S. 832 (1972); Giesl v. United States, 400 F.2d 368, 372 (2d Cir. 1968); Giesl v. United States, 409 F.2d 368, 372 (2d Cir. 1969); United States v. United Mine Workers Int'l Ass'n, 361 F.2d 569, 574 (2d Cir. 1966); cert. dismissed, 382 U.S. 904 (1965); United States v. BLW, Local No. 54, 348 F.2d 144, 141 (8th Cir. 1965); cert. denied, 382 U.S. 904 (1965); United Mine Workers Local 105, 326 F.2d 699, 703 (9th Cir. 1964); Vonderer v. United Mine Workers Int'l Ass'n, 705 F.2d 1172, 1186-1187 (3d Cir. 1983); Vangard v. Cleveland v. City of Cleveland, 713 F.2d 475, 485-486 (6th Cir. 1983), rehearing en banc denied; Van Aken v.

11. The purpose of race- and gender-conscious relief is to ameliorate the injuries to members of minorities and victims of prior discrimination, but to remedy the disadvantage suffered by members of a particular individual. Thus, the last mandate of Section 703(a)(2) (vi) is to order the "hiring, reinstatement, or promotion of any individual," if such individual was "qualified for the position for which he applies, or discharged for any reason other than" bearing on race- or gender-conscious relief, and merely precludes a court from ordering that a defendant "hires or promotes," or reinstates if an employer has refused to hire, a charged him, for nondiscriminatory reasons, for 506 F.2d 167, 176 (3d Cir. 1977) (cert. denied, 434 U.S. 1115); and general-conscious relief also requires the hiring of an individual, not of a particular individual. They do not create a "right to hire" or to promote any individual. Rather, they are designed to prevent discrimination. As Justice Blackmun observed in Scotts, "the constitutional or statutory right to a job is not a right to have a job as a member of a particular race or gender, but rather to remedy the present class-wide effects of past similar discrimination in the future. Because the discrimination that has occurred is not race-conscious, the employer, unlike the defendant in a case of race-conscious relief, is not charged with an intentional discriminatory purpose. The remedy is, therefore, not intended to benefit any particular individual. It is intended as a measure of equality to all." 104 S. Ct. at 3006 (Blackmun, J., dissenting) in the Havens Realty Corp. v. New York, 706 F.2d 69, 58-58-58 (2d Cir. 1983).

If Congress had meant, in Section 703(a)(2)(vi), to require the employer to hire blacks, Hispanics or females as a class to a particular job, it could have said so. But it did not. Indeed, such a provision presented itself (whether that's the consideration of the Equal Employment Opportunity Commission) as an amendment providing that no employer shall require any employer shall require any employer to hire persons as a preference variable numbers, proportions, percentages, quotas, or "more in the interest of the majority group." 1662 (1972), 1973 Leg. Hist. at 1072. The amendment was included in the "irregular" amendment. It is a constitutional amendment, but there is no indication that the amendment would be defeated by a vote of 44 to 22. 172, 1973 Leg. Hist. at 1972.12

11. In a law enforcement context, there is an additional consideration. The question of whether the law enforcement agency can or should be included in a larger class of people, race-conscious relief. The courts have ruled that such class of people would exclude the Afro-American community as a whole, and that such support will not exist if the black community perceives the law enforcement agency to be part of the white establishment with little interest in their problems." Detroit Police Officers Ass'n v. Young, 727 F.2d 74, 78 (6th Cir. 1984); (Jaffe, 1979), cert. denied, 462 U.S. 59 (1983); see United States v. Cleveland Police, 47 F.3d 1061 (7th Cir. 1991)(en banc); United v. F-4 Joe E. Henry, 651 F.2d 905, 907 (4th Cir. 1981); cert. denied, 464 U.S. 1146 (1980).

12. Justice Blackmun dissented from the more strict interpretation of the equal protection clause from its treatment of the standards for granting a pre-employment inspection. In Scotts, this was also an issue with the Court's decision of § 1985. Justice Marshall's interpretation of the majority opinion is that the pre-employment relief must be limited to discrimination from any such prosecution. See 104 S. Ct. at 3810 (Blackmun, J., dissenting).

13. Congress' rejection of the Ervin amendment must be understood as an endorsement of then-existing case law authorizing race-conscious relief benefiting others than individuals. Identifiable victims of discrimination. Whatever may be said about Congress' intent to costly and title VII case law as a general matter, see Scotts, supra, 104 S. Ct. at 3900 n.15, Congress plainly

Continued
The distinction between race-conscious relief and "make-whole" relief and the distinction between their policy underpinnings are matters of black or white. See R. Schieff & P. Greenman, Employment Discrimination Law 168 (1985) (unpublished manuscript). The Supreme Court has recognized the distinction as well. See, e.g., Washington v. Davis, 426 U.S. at 281. In Scott, therefore, the majority acknowledged that the districts in question could provide redress to the victim-specific limitations of the class on which they were based. See 104 S. Ct. at 529. Any attempt to extend that reasoning to the claim of a black employee to "make-whole" relief to the area of race- and gender-conscious relief is contrary to the Court's consistent views that the race-conscious relief was a "derivative title VII and prudential exception to federal judicial power to correct the effects of past discrimination is simply untenable. The position the Supreme Court did and did not decide is precisely the decision the Court is called upon to make.

4. The Justice Department's position would leave many such cases, including the cases involving racial discrimination, undetermined. The Court's position would allow the Department to decide, before theeka, whether a case is appropriate for a "make-whole" relief, or whether its "derivative title VII and prudential exception to federal judicial power to correct the effects of past discrimination is simply untenable. The position the Supreme Court did and did not decide is precisely the decision the Court is called upon to make.

5. Affirmative race- and gender-conscious relief does not violate the Constitution

The Supreme Court's treatment of race-conscious affirmative action in other contexts underscores the problems raised by the government's arguments here. The Court has steadfastly held that race-conscious actions by public entities are not only constitutional but an appropriate means of redressing the effects of past discrimination. E.g., Fullilove v. Klutznick, 448 U.S. 448 (1980) (certiorari granted Apr. 6, 1981), 126 U.S. at 855-870 (opinion of Brennan, White, Marshall and Blackmun, J.J.); University of Washington v. Wilson, 426 U.S. 514, 525-29 (1976), and the University of California v. Bakke, 438 U.S. 265, 330 (1978) (citations omitted). Similarly, the Court has held that gender-conscious relief may be appropriate. See, e.g., Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 41 (1971); as well as the current case.

Intended to continue in force the case law authorizing such race-conscious relief in appropriate circumstances. During the debate on the Erin amendment, Senator Ervin had held that the Congressional Record two decisions on the basis of the two decisions, 97th Cong., 1st Sess. 128ff. (1978), 128f. (1979), 128f. (1979).
C. CURRENT PROBLEMS IN THE EEOC’S HANDLING OF CHARGES AND LAWSUITS

The materials provided by the EEOC to the Subcommittee on Employment and Housing of the House Committee on Government Operations indicate that the EEOC filed 366 lawsuits in Fiscal Year 1963, the last year for which full statistics were available, the EEOC filed only 223 cases, a 39% decrease from the 366 cases filed three years earlier. In FY 1964, the EEOC filed only 180 Title VII cases, a 63% decline from the 223 Title VII cases filed three years earlier.

The figures for the first two quarters of FY 1965 show no improvement over FY 1964. Though the FY 1965 figures were not available as of the time of writing this report, the figures compiled by the EEOC are the best available as of the time of writing this report. The figures show that the EEOC filed 130 Title VII cases in the first two quarters of 1965, a 68% decline from the 396 cases filed in the first two quarters of 1964.

It is difficult to understand how the agency can sharply increase the number of lawsuits it can file, and handle successfully, if it cannot come close to matching its own performance two and three years ago. Moreover, the squandering of the agency’s resources in needlessly questioning established legal principles, as described below, and the confusion such efforts have sown in local offices, have added enormously to the difficulty of the EEOC’s meeting its announced goals.

Chairman Thomas has made a number of recommendations calling for the standards of liability to be applied in cases arising under Title VII of the Civil Rights Act of 1964, and as to the Uniform Guidelines on Employee Selection Procedures.¹⁸ It is our position that the Chairman of the EEOC should immediately cease his misstatements of controlling caselaw under Title VII, and should rescind the both his and his agency’s interpretation of Title VII. The Chairman should cease to disseminate the confused opinion created by the Chairman.

D. THE EEOC SHOULD STOP QUARRELING WITH CONTROLLING CASELAW, SHOULD CHARGE EFFORTS TO CHANGE THE UNIFORM GUIDELINES IN A MANNER INCONSISTENT WITH CONTROLLING CASELAW, AND SHOULD CONCERN ITSELF WITH ENFORCING THE LAW

Under Chairman Thomas, the EEOC seems to be contemplating wholesale departure from universally accepted, controlling caselaw interpreting Title VII and its requirements. For example:

(a) The EEOC’s “outline of Issues for the UGESP [Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1 et seq.] Review” expressly question Chief Justice Burger’s decision for a unanimous Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), holding that a test, an “essential requirement,” or “essential objective practice which discriminates a disproportionately large number of blacks”…or members of other minority groups, or women…must be shown by the employer to be job related, or else the requirement will be held to be in violation of Title VII. The EEOC’s Outline asks:

Whether the holding in Griggs has “been eroded by Stotts?”

¹⁸ The Uniform Guidelines are the joint effort of the EEOC, the Department of Justice, the Office of Personnel Management, the Department of Labor, and the Department of the Treasury. They are set forth at 29 C.F.R. § 1607.1 (1966).
Whether the Griggs that practices with disparate impact are unlawful unless shown by the e..., yer to be job related is "consistent" with the 14th Amendment?

Whether employers should have the benefit of a "cost defense" in making bias discriminating procedures?

Whether the EEOC's testing guidelines should be cut down from the professional standards of the American Psychological Association, notwithstanding the fact that they meet the extensive tests in § 1(90b) of the statute, 42 U.S.C. § 2000e-5(j), the "professionally developed job-related test" questions because they undermine the willingness to talk with established law?" "

(b) In November, 1964, Chairman Thomas offered the recommendation that any new proposal on the Guidance Guidelines will be an important document. The American Psychological Association has held in keeping the recommendation that this ignores the unanimous decision of the EEOC.

(c) Chairman Thomas has stated that the numerical remedial question is "a national remedy of goals and timetables, that is, rather than to encourage them "difficult to monitor." In practice, Chairman Thomas has dropped from the recommended schedule for persons who have been as "too slow a pace and slow in the practice the" or she is complaining of, or some other phenomena."

(d) Chairman Thomas has stated that the Guidelines do not have any possible proof, and that he wants the agency to draft such rules as will allow proof in the future. We are informed that, at least in the near future, we believe they are no longer allowed to rely on statistical predictions. If there is no reasonable cause to believe a change of discrimination, there must be some individual who has suffered losses due to discriminatory motivation, or the charging party must be able to show that the practice he or she is complaining of is not being understood by the EEOC. Determination of the decision of the lower court, 397 F. Supp. 124, 245 (M.D.N.C. 1971).

(f) Commissioner Webb has also criticised "the current guidelines' reliance on statistics.

"The Supreme Court has held that the Guidelines are "entitled to great deference" precisely because they are closely tied to the APA standards. In Alhambra Paper Co. v. Moody, 423 U.S. 252, 96 S. Ct. 1855 (1976), the Supreme Court stated that the Guidelines are "entitled to great deference.""

"(Footnote omitted). The Court concluded: The message of these Guidelines is the same as that of the Griggs case—that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be "predictive of or significantly correlated with important elements of work behavior which comprise, or are relevant to the job or jobs for which candidates are being evaluated."


"Id. at p. A-7. As our December 14, 1984 testimony before this Subcommittee pointed out, the abandonment of goals and timetables, and the insistence that no relief be accorded anyone who is not individually proven to be a victim of discrimination, ignores the essential fact that discriminatory employers do not discriminate because they want to exclude one or two particular blacks, Hispanics, or women, but because they want to exclude all such people or, failing that, as many as they think they can get away with excluding. Where the result of one case has taken years, many of the individual victims will no longer be available for the entry-level jobs at issue. To bar relief benefiting the groups formerly excluded means, in a very real sense, that the discriminatory employer has prevailed.


"Bureau of National Affairs, EEOC Compliance Manual, News and Developments Section for May 17, 1985, p. 4."
In point of fact, much of the Chairman's comments about statutes, adverse impact, and testing guidelines reflect a basic misconception of the law. His public statements refer to a parade of horribles which has no basis in reality—that courts and the Commission routinely find employers liable for violating Title VII on the basis of raw statistics, without ever giving the employer a chance to explain that the numbers are incorrect, or that there is; no rational basis to support them—such as, that many of the minority applicants are too young to have obtained adequate schooling. In reality, there is no such problem. As Judge Friendly of the Second Circuit observed twelve years ago:

"We must not forget the limited office of the statistician. When a supervisor reports adverse impact his task is to determine whether the employer's selection procedure is the cause of the disparity. He is not asked to decide the case; it simply passes to the defendant to prove that the selection procedure is not discriminatory."

Moreover, the Chairman's "concerns" for protecting minority groups from "serious adverse impact" is his insistence on dealing with the Griggs case in a manner which would render Griggs a dead letter. It is hard to understand how the Chairman, who made it clear that a test or other selection standard disqualifying minority groups or women unless evidence is presented to show that the standard is necessary to the employer's business, would make it hard ever to get a case to the courts if the employer would have to justify its practices. The Supreme Court, in observation in 1977, in the course of holding that unexplained adverse impact is proof of employment discrimination, without any necessary proof. In" Bld. of Trustees v. United States, 440 U.S. 472, 99 S. Ct. 1375, 59 L. Ed. 2d 578, the Court quoted a decision of the Eighth Circuit: "... in many cases an available avenue of proof is the use of racial statistics to uncover discrimination by the employer or unless involved." United States v. Local 86, 443 F.2d at 551, 451 U.S. at 399 n. 30.

For the Commission to turn its back, by a gesture, on such a reasonable avenue of proof blinks it to the discrimination actually revealed in its case, and unnecessarily hampers it in achieving its stated aim of more effective laws which are not useless and simply no occasion for the Commission to discount the use of statistics.

What disturbs us most about this pattern of activity is that we have the present desire to "fix" things which are not broken, and to substitute for judicial merit of the courts handling these cases, creating another level of standards in cases. We remark that the agencies would be better served by attacking cases in the serious, unreviewed business of eradicating discrimination.

Perhaps the most bizarre example of the tendency of senior officials of the EEOC to elevate their own preferences above the dictates of the law is the connection with the EEOC's lawsuit against a New York law firm. The Washington Post reported on July 9, 1985 that, while the case was under investigation and before the court, anonymous senior officials of the EEOC were telling lawyers that they hoped the agency lost the case because it would help forestall future cases type patterns and practice cases. A copy of the article is attached to this testimony.

Such actions are irresponsible. If the management of the EEOC believed that the types of statistical proof gathered for use in the case were insufficient to prove discrimination under the standards applied by the courts, the EEOC should have withdrawn the case on that basis. Everyone is familiar with cases in which the facts do not pan out, once a full record has been developed. Such a decision would have been professionally responsible, and would have demonstrated fidelity to the law's requirements.

CONCLUSION

Much work remains to be done to make the statutory promise of nondiscrimination a reality. The EEOC can best aid in this effort by rethinking its position on remedies, by expressly re-affirming the importance of raw statistics in proving discrimination, by making clear to local offices of the EEOC that cases may properly be based on statistical proof alone by expressly rejecting the Justice Department's strained interpretation of the Stokes decision, and by abandoning its attacks on the Uniform Guidelines and on the principles used by the courts in determining the presence or absence of discrimination. The Commission's resources are limited, and they should be used more wisely.
DESPITE CLASS-ACTION DOUTES, EEOC Presses Share Bias Case

CINCINNATI. A strange brew of politics, law and civil rights percolates here in a 21st-floor courtroom where the Reagan administration is pouring millions of dollars into a case it philosophically would prefer to lose.

The case is a federal suit against 16 national companies, including General Motors, General Electric, General Motors and Ford Co., in which the Equal Employment Opportunity Commission charges that the defendants have failed to hire, promote and keep women and minorities on the job and to keep them there. While the case is not a model for women and minorities, the Reagan administration is certainly not a model for women and minorities.

Now it has a quandary on its hands. It wants to lose. It wants to lose for women and minorities. It wants to lose because it wants to lose. It wants to lose because it wants to lose.

The Reagan administration's concern is to make sure that the companies who go to law are persons who can prove that they are not being treated fairly.

In this case, administration officials have urged the companies to settle the case in lieu of going to court. But the companies have refused to do so. The companies are in court, and the companies are in court.

The EEOC, which has been told by the companies that it is not a company

The EEOC has been told by the companies that it is not a company

That was my opinion and that continues to be my opinion... I do not believe that every statistical disparity between races or ethnic [groups] or the sexes in the work force results from discrimination.

Thomas is not alone. A high-ranking Justice Department official who has followed the Sears case, but who refused to be quoted publicly, describes it as a "saw man who would like to have beer to death to prevent future class-action cases" by the government.

Be that as it may, the administration continues to fight. It has fought at such high levels that EEOC officials issued a memorandum in May warning of the potential need for the agency to furlough all of its employees nationwide for one day to help pay for the case.

According to EEOC officials, the case has cost at least $25 million and at times has taken up more than a third of the agency's litigation budget. Yet the Sears case is only one of more than 800 cases the agency has brought in the last year.

That's not all. If Sears wins the case, the company may ask the court to require the government to pay its legal fees—which could run as high as $20 million, according to some estimates.

The potential damage to the agency as well as its own philosophical opposition to the case has put Thomas in a tight political spot. "I've been trying to get out of this since I've been here," he said in an interview. "It's a case brought by my predecessor during the Carter administration, and even those people had doubts about it..."

"But politically, how could I get out of it?" he said. "If I say because I don't like it I'm not going to put the money into it, then the liberals and everybody else would eat me alive. It's like the Vietnam war to me—"as long as we are in it, we should fight as hard as we can to win."

But even as the final arguments against Sears were presented here 10 days ago by EEOC lawyers, top agency officials in Washington were considering whether to ask Sears to agree to a settlement, Sears could pay no fines or back-pay awards; in return, the EEOC would be protected from the threat of having to pay Sears' legal fees.

"Even the most gun-who of the conservatives around here are concerned about the damage that will be done to the agency if we have to pay big money to Sears for its legal fees," said an EEOC lawyer. "There's some rethinking going on about keeping a lid on the cost of proving their point."
Sears has tried to make use of the great divide between top EEOC officials and the agency’s legal staff that has laborcd on the case. Sears’ lawyers tried to have Thomas travel here to give a deposition after Thomas told reporters he believed that the case, and others like it, are part of the “overextended and oversupplied” use of statistics.

The court ruled that Thomas’ opinion was not relevant. But Mary Scallon, a lawyer for the NAACP Legal Defense Fund, said a court should wonder how the lawyers . . . in Chicago and the Sears case feel about residing in the pro-commissioner’s comments about their excessive efforts.

The EEOC’s lead counsel in the case, James Scanlon, called Sears a “narrow band” that includes two other lawyers and two assistants.

Scanlon would not comment on Thomas’ remarks about the case, but of the implement that statistical proof of discrimination is not proof unless specific women can prove they are victims of discrimination, Scanlon said: “How many individual instances of discrimination would one need to show to offer meaningful evidence regarding the practices of a nation-wide employer like Sears?”

“Second, what does a person desired a position because of discrimination mean about the circumstances of that decision? . . . They don’t know whether there was a vacancy, much less anything about the qualifications of the person who was in fact hired.”

Scanlon added that a “pattern of discrimination” must be shown to mean a less competent male applicant was considered but only white men, or sometimes, women.

In the closing days of the trial, under pressure from his superiors, Scanlon presented two women who testified that they believed they had been discriminated against by Sears.

Despite their testimony, the heart of the EEOC’s case remains statistical: With 60 percent of applicants for sales jobs at Sears from 1973 to 1980 were women, about 27 percent of the persons hired were women. In 1973, before Sears began its affirmative-action plan, 9.5 percent of such jobs went to women.

The EEOC’s study of the women applying for the jobs also found that 40 percent of them had experience in the type of sales job they sought.

The government is also charging Sears with not promoting women on its sales staff to commissioned-sales jobs, which are potentially more lucrative. One Sears commissioned salesman testified that he earned about $15,000 a year.

The EEOC also contends that 73 percent of Sears commissioned sales staff were female but that fewer than half of the promotions to commissioned sales jobs—about 40 percent—went to women.

Sears has responded with testimony from economists, and with polls showing that women were not interested in commissioned sales jobs, which often are in fields such as house siding, plumbing and auto parts.

“Statistics can be helpful in the proof of some lawsuits,” said Charles Morgan, the former head of the Washington office of the American Civil Liberties Union, who now represents Sears. “The statistics must relate to the real world; however, and have relevance to what it is that is being measured . . . Men and women are not equally interested in selling men’s clothes and women’s clothes. Men and women are not equally interested in selling drapes, plumbing, heating, auto parts and truck tires.”

The legal fight has generated animosity between Sears’ senior managers and the EEOC. According to both sides, Sears officials have not wanted to settle the case but would rather defeat the EEOC and “celebrate”—a Sears official’s word—in return for being dragged by the EEOC through a decade of charges of racial and sex discrimination.

The animus between the two sides spilled into public light in 1979 when Sears filed suit against the federal government, charging it with creating a work force dominated by white males and thereby forcing Sears to hire white males. Sears said the government created that white male work force with veteran’s preferences and GI bill benefits. It contended that Sc, i al Security and welfare payments induced women not to work. It charged that federal age-discrimination laws had slowed the exit of white men from the company and thus the entrance of women and minorities. The suit was dismissed.

Since the Reagan administration took office, Sears has been on the offensive. The government has backedtracked on race-discrimination, charges filed against Sears during the Carter years. In that settlement, the government agreed to allow Sears to avoid all back payments for victims of Sears’ alleged practice of “restricting
blacks and Spanish-surnamed Americans to lower-paying, less desirable jobs, and not hiring minorities.

Although Sears settled that suit, it has allowed the sex discrimination charges to drag on.

"They don't want to settle," said an EEOC official. "They want to win and they want to rub our noses in it."

Sears officials note that they have had an affirmative-action plan requiring that women and minorities fill one of every two job openings—a quota—so that only the unfortunate that the Reagan administration is using to hide the use of quotas around the nation.

"They are fighting us over discrimination but they wouldn't even use a plan as strong as ours to do the job," said a Sears official. "Now that's hypocrisy."

Mr. Martinez: Thank you, Mr. Robinson.
Ms. Nancy Kreiter: Thank you. I am the research director of Women Employed which is a national organization of working women based in Chicago. We appreciate the opportunity to testify before you on the subject of EEOC's remedial policies.

We believe that these policies must take into account the history of the EEOC's current performance. As you know, Women Employed has consistently monitored the Agency through statistics and analysis of our work with complainants for over 12 years. We have always stressed on fair settlements, rapid resolution of cases, and an administration's commitment to strong enforcement that existed during the Norton administration. The commitment to strong enforcement that existed during the Norton administration has been replaced by inaction, inattention, and inactivity to the Agency's mandate to eliminate employment discrimination and provide reasonable remedies for victims.

First, the Rapid Charge Processing System established during Norton's tenure is, practically speaking no longer in operation. Admittedly not perfect, this system did reduce the average length of time for processing a charge to 3 to 6 months down from the previous average of 2 years.

Complainants and employers were brought together in a face-to-face fact finding conference, usually scheduled within 1 to 2 months after a charge was filed. These factfinding conferences facilitated prompt settlements and avoided extended investigations which are burdensome for charging parties, employers, and the Agency. Equal opportunity advocates, complainants, and most respondents with whom we dealt viewed this system as fair and expeditious.

However, during the current administration, charge processing has declined dramatically. In fiscal year 1984, less than 22 percent of all new charges filed resulted in some type of settlement. At the point that Reagan appointees took over the Agency, it was 48 percent of all new charges filed that were settled. Currently over 46 percent of all new charges filed are determined "no cause," compared with only 29 percent filed 4 years ago. In addition, it now takes an average of over 6 months to process one individual charge compared to between 3 and 6 months in the last full year of the Carter administration.

This administration's lack of commitment to strong enforcement can also be seen in its litigation record. As of the first half of fiscal year 1985, 40.8 percent, nearly 41 percent fewer cases were filed in court than in fiscal year 1981. This year only 91 cases were approved by the Commission for litigation, a decrease of 50 percent on an annual basis compared to fiscal year 1981.
The Chicago district office with which we have the most experience provides one of the most glaring examples of the Agency's deterioration. The Chicago office used to boast the best performance record in the Nation and was designated by Norton as one of three model offices when rapid charge processing was first attempted. In the final reporting period under the Carter administration, nearly 84 percent of all title VII charges in the Chicago district office were settled. Today less than 50 percent are settled, a figure even lower than the 20-percent nationwide rate.

Similarly, 49 percent of all charges now filed in Chicago are determined “no cause,” compared with only 30 percent in the years prior. Again, Chicago’s no cause rate is greater than the nationwide average. And finally, during the Chicago office’s performance years, charges filed with that office were processed in Chicago in a little time as 2½ weeks. Currently charge processing in Chicago takes between 6 and 8 months for all charges.

In addition, we are receiving increasing numbers of complaints of incompetence by district office staff from attorneys for complainants, as well as from complainants themselves. The growing case processing backlog is another indicator of the decline in the EEOC’s performance.

During Norton’s tenure the backlog of 180,000 cases which she inherited was reduced by approximately 70 percent over 4 years. The pace of reduction of the backlog has not only slowed under the Reagan EEOC, it has actually been reversed with added backlog. The EEOC itself currently estimates that it will have 65,000 unresolved charges in fiscal year 1986. This is a 96-percent increase in 4 years.

Moreover the EEOC itself reports that only 25,000 were settled by the Agency in fiscal year 1984, compared to about 28,000 in fiscal year 1982. So particularly when viewed in the context of EEOC’s poor performance, the Agency’s recent policy initiatives must be opposed by all those concerned about equal opportunity. These policies will further diminish the likelihood that the EEOC will have an impact on employment discrimination. And I would like to stress that my comments are based on what is really happening in the field, regardless of supposed intent of the policies.

In September 1984 the EEOC adopted its policy statement directing the Agency to litigate each and every charge on which it issues a reasonable cause. Implementation of this policy means that Agency attorneys must be involved during the investigative process in all stages in every single case. The regional attorney must assess the merits of each case and make a recommendation to the district director. The district director must then consider recommendations of all staff involved in the case and issue a statement of reasonable cause or no cause for each of the charges filed in the district office.

It is our view that this policy will not improve enforcement. Instead, it guarantees increased delays in the resolution of cases. It is overly bureaucratic and it shifts the emphasis toward the adversarial and away from conciliation. In any case, the Agency is ill-equipped to make this change. As Bill Robinson already stated, EEOC has claimed that under their new litigation policies a number of lawsuits filed by the Agency will increase from approximately 200 to 1,000 a year.
We, too, doubt that the current agency staff could handle any such increase in caseload. In February 1985, the EEOC announced its policy statement on remedies and relief. The policy does require each district director to obtain full relief where there is reasonable cause. The EEOC will not, and is not settling discrimination charges unless the respondent meets requirements that we believe are ill-conceived and counterproductive.

First, the employer is required to notify all employees of the affected facility of their right to be free of the unlawful discrimination that occurred. That is fine, but unlike the back pay remedy often used in NLRB settlements, the list of employees in the EEOC must include the names of individuals who filed the charge. It is feared that identifying victims by name serves no useful purpose and would have a chilling effect on potential complainants and others who wish to avoid any notoriety. In the absence of any suggested remedy for bringing a charge, the EEOC would in fact be penalizing the victim.

Second, the policy provides that the respondent must volun- tionally offer each identified victim the position that he or she would have occupied, albeit for discrimination even if the job has been filled by another person. Obviously, this policy punishes employers who are not responsible for the discriminatory act of management and it is guaranteed to sow discord and resentment, sometimes very sensible employer would strongly resist. This provision alone should be enough to show that the Commission has a dangerous lack of understanding of its overall mission.

Third, the statement on full relief must be obtained in every case in which there is reasonable cause. This requirement stands in the way of conciliation and settlement today. It provides no flexibility to obtain relief in cases in which full scale litigation is neither necessary nor realistic. Perhaps even more disturbing is the policy's emphasis on remedies for individual victims of discrimination as opposed to classes or groups of affected women or minorities.

Chairman Thomas and the Commissioners have gone to great lengths to assure you that the EEOC is indeed continuing to process pattern and practice charges. But the Chairman has come out against the use of statistical disparities in proving discrimination cases, both the new litigation and remedial policies for the agency focus only on individual victims. And the effective and widely accepted remedy of goals and timetables for filling future vacancies has been completely omitted from either of these policies.

Chairman Thomas has stated that he does not believe that class action suits constitute the most important deterrent to discrimination. It should not be necessary to point out that in most contexts, discrimination is systemic and there is a need for programs to remedy these practices that affect large numbers of women and minorities.

We know that the expanded opportunities women and minorities have achieved in the past decade are primarily the result of action against systemic forms of discrimination, not from tackling discrimination one charge by one charge. We also feel we must comment on the EEOC's recent decision in the area of sex-based wage discrimination, because we feel this is also a new policy pronouncement.
In this case, the charging parties allege that the employer paid its female administrative staff less than its male maintenance staff, even though the duties performed by these female employees required more or equal skill, effort, and responsibility than the male employees. They also allege that the employer implemented set wage increases for the female jobs at lower levels than the prevailing rate in the local municipal market while doing the opposite for the male dominated jobs.

We reject the Commission's reasoning that an employer's reliance on labor market data in setting wages is a neutral-based decision and therefore not proof of a violation of Title VII. The fact that the so-called market is a primary factor in setting salaries that the going rates for certain jobs are based primarily on the lack of supply and demand and nothing else, is false. The employer's reliance on the amount of money employers are willing to pay for jobs is not based partly on what other employers are paying for their own or on industry practices, who holds the jobs or old notions of what women should be paid.

The market is simply a reflection of employer decisions and historic practice. And it is not an adequate defense for wage-setting practices that assign lower salaries to jobs filled predominantly by women. The Commission failed to deal with the respondents' wage-setting practices in light of the disparate impact theory encompassed by Title VII.

Furthermore, in all the public relations attendant to the announcement of the Commission's decision in this particular case, Chairman Thomas made no mention whatsoever of an obvious aspect of the case; that is, extensive occupational segregation that was evident in the respondent's workforce if the case had been properly investigated. This case deserved more thoughtful treatment from the EEOC. Instead it was used as a vehicle for a publicity laden endorsement of the status quo.

Our statistical monitoring of the EEOC's performance and our work with victims of sex and race discrimination indicate that serious attention must be given to fulfilling the agency's basic enforcement responsibilities. To those of us in the field, it is though the clock has been turned back to the pre-1980 period when it was virtually useless to advise victims to expect assistance from the EEOC. This situation must be reversed.

For the most part, the recent policy changes have a get-tough tone, but are not likely to produce real progress. The EEOC needs effective and speedy charge processing for individuals that are designed to produce fair settlement. It needs an active program to combat systemic discrimination, a clear and thoughtful position on wage discrimination consistent with Title VII, and leadership committed to real progress toward equal employment opportunity.

Women Employed looks forward to working with this committee to achieve those goals, and we appreciate having the opportunity to express these views.

[The prepared statement of Nancy Kreiter follows:]
PREPARED STATEMENT OF NANCY KRIETE, RESEARCH DIRECTOR, WOMEN EMPLOYED INSTITUTE

My name is Nancy Kriete; I am the Research Director of Women Employed. We appreciate the opportunity to testify before this committee on the subject of the Equal Employment Opportunity Commission's remedial policies.

We believe that these policies must be evaluated in light of the EEOC's current performance. As you know, Women Employed has repeatedly advocated for the agency through statistical analysis and our work with apprenticeship in the past twenty years. We have documented the steady improvements that occurred at the EEOC during the tenure of Brian Holmes Norton, and we have documented the rapid resolution of cases.

The Reagan administration increased the agency's budget to allow for more staff to address the increasing caseload. This has allowed for more prompt and efficient handling of cases. The agency has continued to meet or exceed its goals for resolving cases within the required timeframes.

The agency has also increased its efforts to settle cases outside of court, which has resulted in reduced costs and increased efficiency. The agency has continued to use its enforcement powers to address discrimination and provide remedies for victims.

ENFORCEMENT

First, the Rapid Charge Processing System established during Norton's tenure is virtually unprecedented. The system effectively reduced the average time for handling charges from three to six months, down to the previous average of over two years. Charges and employers were brought together in face-to-face fact-finding interviews, and issues were resolved within one to two months after a charge was filed. These interviews facilitated prompt settlements and avoided extended investigations, which are burdensome for charging parties, employers, and the agency. Equal Opportunity advocates, complainants, and most respondents with whom we dealt viewed this system as fair and expedient.

EEOC—CHICAGO ENFORCEMENT STATISTICS

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<th>Settlement rate—overall (percent)</th>
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1 First half only.

Source: EEOC district office reports.

EEOC—ENFORCEMENT STATISTICS

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## EEOC—LITIGATION STATISTICS

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<td>Cases approved by Commission</td>
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<td>364</td>
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<tr>
<td>Cases filed in court</td>
<td>298</td>
<td>369</td>
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*First half only.*

Source: EEOC district office reports.

However, during the current administration, cases recommended for settlement increased dramatically. In fiscal year 1984, only 377 cases, or 3 percent of the total, resulted in some type of settlement. At the point that Reagan's administration took over, 49 percent of all new charges filed resulted in some type of settlement. Currently, only 40 percent of all new charges filed are determined to be cases in which the EEOC has some responsibility to file a charge. This six-month period has decreased by six months, to a total of 12 months, in the last full year of the Carter administration.

This administration's lack of commitment is reflected in its litigation record. In fiscal year 1984, 10,715 cases were filed in court by the EEOC; 10,686 cases were filed in court when 596 cases were filed. This year, only 123 cases were filed in court. Comparing these numbers for litigation, a decrease of 87 percent in 1984, to 1983, is striking. The decrease is even more dramatic when 574 cases were filed in fiscal year 1983, a decrease of 93 percent.

The Chicago District office of the EEOC, which is under the control of the new administration, has been the subject of much criticism. In the past, the office was known for its low levels below the current national average. In the past, the Carter administration, nearly 60 percent of all cases the Chicago District Office was settled. Today, less than 19 percent of Chicago's cases are settled. Their case settlement rate is below the national average. Similarly, 63 percent of Chicago's cases recommended to settlement were processed and closed in as little time as was usual one-and-a-half years ago, while 3 percent of all Chicago's cases were processed in 8 months, which is considered the national average. Currently, case processing rate in Chicago varies between 1 and 2 months for all cases, a decrease from the previous year.

In addition, we are receiving increasing numbers of complaints of misconduct by District Office staff on complaints as a result of their responsibilities themselves.

The growing case-processing backlog is another indicator of the staffing in EEOC's performance. During Carter's tenure, the backlog of 1980 was almost 50 percent lower than the backlog of 1984. This backlog is due to a backlog that has only slowed under the current administration. Currently, the EEOC has approximately 45,000 cases in its backlog, a decrease of 46 percent. The backlog of 1984—96 percent increases in four years. Overall, the EEOC reports that only 25,978 persons were assisted by the agency in fiscal year 1984, compared to 64,651 the previous year and 61,886 in fiscal year 1983.

These statistics from the EEOC's own District Office and Annual Reports and the experiences of complainants and their attorneys provide proof that the agency is neither competent nor committed enough to fulfill its responsibilities.

### POLICY

Particularly when viewed in the context of the EEOC's poor performance, the agency's recent policy initiatives must be opposed by all those concerned about equal opportunity. These policies will further diminish the likelihood that the EEOC will have an impact on employment discrimination.

In September of 1984, the EEOC adopted a policy statement directing the agency to litigate each and every charge on which it issues a "reasonable cause" finding.
Implementation of this policy will mean that agency attorneys must be involved in the investigative process at all stages; in all cases, the regional attorneys will assess the merits of each case and make a recommendation to the District Director as to whether the case is in further litigation, or the District Director must consider recommendations of all staff involved in cases involving “reasonable cases” or “no cases” in each case file in the restrictiveness of cases. It is overly restrictive and not necessary to step backward because it will have adverse effects on the Rapid Charge Procedure: Systematic review of cases to determine reasons for charges while protecting the respondent. Once Thomas proposed these litigation and enforcement, but it will have the same result on the number of lawsuits filed by the agency will decrease in the next year. We doubt that the current agency can be caselaw.

In February of 1986, the EEOC published a Final Rule on the Retaliation and Relief for Individual Cases of Discrimination. The EEOC is taking extensive and immediate enforcement already, the policy mandates each district director to take complaints, where he/she has found “reasonable cases” to begin an investigation of complaint occurred against an individual. The EEOC will not continue the investigation unless the respondent meets requirements that we believe are unnecessary and counterproductive.

Let us review some of the specifics of these policies. First, the policy requires that all employees at the affected facility of charge to be notified of the unlawful discrimination that occurred. Unlike the policies previously adopted, used in NLRB settlements, however, the EEOC’s policy requires the names of individuals who filed the charges. This provision appears be unnecessary and would have a chilling effect on potential complainants, many of whom want to avoid such notoriety. We know from years of counseling potential EEOC complainants that it is difficult enough for them to file and pursue their charges without this provision. In the process of supposedly remedying a charge, the EEOC would in fact be penalizing the victim.

Second, the policy provides that the respondent must unconditionally offer each identified victim of discrimination the position that person would have occupied if he/she had not been discriminated against, even if the job has been filled by another person. Obviously, this policy punishes employees who are not responsible for the discriminatory acts or management’s actions. It is guaranteed to any disgruntled and resentful individual, any susceptible employer would strongly resist. This provision alone would be enough to show that the Commission has a dangerous lack of understanding of its overall mission.

Third, the policy states that “full relief” must be obtained in every case in which a “reasonable cases” finding is made. This requirement will certainly stand in the way of conciliation and settlement, and it provides no flexibility to obtain relief in cases in which full-scale litigation is neither necessary nor realistic.

Perhaps even more disturbing is the policy’s emphasis on remedying the individual victims of discrimination as opposed to classes or groups of affected women or minorities. Chairman Thomas has gone to great lengths to assure policymakers and the press that the EEOC is indeed continuing to process “pattern and practice” charges. But Women Employed believes this new policy is just further evidence that the agency is moving away from systemic approaches. The Chairman has come out against the use of statistical disparities in proving discrimination cases both the new litigation and remedial policies for the agency focus on individual victims; the effective and widely accepted remedy of goals and timetables for filling future vacancies has been completely omitted from the new remedial policy; and Chairman Thomas has stated that he does not believe that class action suits constitute the most important deterrent to discrimination. All this leads us to believe that the EEOC’s systemic program is in severe jeopardy. In most contexts, discrimination is actually systemic, and there is a need for programs to remedy discriminatory practices that affect large numbers of women and minorities. We know that the expanded opportunities women have achieved in the past decade are primarily the result of action against systemic forms of discrimination.
We also want to comment on the EEOC's recent decision in the case of sex-based wage discrimination, a so-called pay equity case. It stands as further evidence of the agency's failure to enforce Title VII of the Civil Rights Act. In this case, the striking parties alleged that the employer paid its administrative staff (65 percent female) less than its maintenance staff (65 percent male). Even though maintenance work performed by these female employees required more physical strength and was performed under more hazardous conditions than the prevailing rate of increase for maintenance employees, the employer increased the wage rates for other jobs held by females. In contrast, the employer increased the wage rate for maintenance work, which had been historically the lowest paying job in the company. This resulted in the so-called "market" for all jobs being set at a lower rate for those sex-based "decisions" and therefore not proof of a "gender" bias. The result is that the "market" for all jobs is lower for women, and the "market" for certain jobs is based primarily on the fact that women do nothing else—is false. The "market" is the amount of money employers are willing to pay for jobs based partly on what other employers are paying and partly on historic practices. Women, who have been historically paid less, are held to these lower standards.

The market is simply a reflection of employer decisions that have been made. In other words, there is no adequate defense for wage-setting practices that favor men as a group. These are not "male" jobs filled predominantly by women, but are "male" jobs filled predominantly by men. The Commission failed to deal with the reality of an employer's paying wages and benefits
light of the disparate impact theory encompassed by Title VII.

Furthermore, in all the public hearings we have attended, the concentration on the Commission's role in the case Chairman Thompson made a statement was about the role of one obvious element of the case, that is, the excessive compensation packages evident in the respondent's workforce. This case deserved more thorough enforcement from the EEOC; instead it was used as a vehicle for a publicity-laden endorsement of the status quo.

COCLUSION

Our statistical monitoring of the EEOC's performance and our work with victims of sex and race discrimination indicates that serious attention must be given to fulfilling the agency's basic enforcement responsibilities. Rather than continuing to put resources into the development of new policies, the EEOC's leadership should return the emphasis to strong enforcement. To those of us in the field, it is as though the clock has been turned back to the pre-1980 period when it was virtually useless to advise victims to expect assistance from the EEOC. This situation must be reversed.

Once the agency is again fulfilling its basic mandate, we will gladly support policy changes that would make the agency more effective and str...
have gone through with the ups and downs of the EEOC and the terrible problems it has had especially in backlogs.

I would like to ask some specific questions on some of the figures that you gave us first on the backlog one. What you said seemed to be inconsistent with your testimony. I would like to pursue that. The backlog figures that I have listed in bold to you, Kreiter and right at the beginning it shows a decrease amount in the last 3 years down to a relatively small number. Eighty-five is not in there.

I am just curious as to your statement that there have been some backlog increases.

Ms. Kreiter. I can understand the confusion. There is a kind of a backlog and a backlog created by a mistake. We inherited a backlog, the traditional backlog that resulted from the mistakes from constituency groups. Congress, what have you to say of when Norton came in, and that is what these numbers on this chart refer to; that original $150,000 or thereabouts?

Unfortunately, what has occurred in the last 3 years or 4 years under the Reagan administration, the new charges under the Reagan administration, the frontloading, whatever you want to call it, has been so heavy that the charge processing is not keeping up with charge intake. So these overall numbers come from EEOC's own operations summary report, as to the total numbers they now anticipate being filed later.

Jeffords. Also, I don't want to argue with the statistics for the first 3 years or 4 years of the administration, but I am more concerned about what the situation is now, and my understanding from talking with EEOC is that although the recommendations from the district office of the general counsel may have diminished over the first years of the administration, that this year they have already referred, I believe, 441, which is for the 6 months of this through July 12, which would certainly be up or above those that would most likely exceed those that were referred to in 1981.

I wondered whether you have noted that trend in increase or are we talking about our present problem or past problem in that regard?

Ms. Kreiter. Are you speaking of the cases recommended to the general counsel?

Mr. Jeffords. Right.

Ms. Kreiter. And the first—

Mr. Jeffords. The district office of the general counsel?

Ms. Kreiter. The first three quarters of the fiscal year versus the first half.

Mr. Jeffords. That's correct.

Ms. Kreiter. Let me just say you obviously are privy to information that has not been released to public organizations under Freedom of Information Act requests. This has been an ongoing problem with this administration for our organization who has 12 years of history in obtaining on a regular basis from agencies all statistical information.

Under this administration we have had to go to court to get statistics. So the latest statistics which I have received on litigation was covering the first half. I also received, shortly before walking out of my office to come to Washington more current statistics on
closure settlement rate, no cause, et cetera. And I would like to submit next week an updated table with those numbers.

Mr. JEFFORDS. I am going to get to that in a second. First, through some others.

Mr. ROBINSON. Could I reply to that part of your question, Mr. JEFFORDS, because it seems to me that you might be comparing apples and oranges. Their figures that they are reporting this year would reflect their overall ability to do conciliation, which is different from the screening process.

A number of recommendations have been made that screening is not comparable to the referral of a claim for investigation without screening, so we have got an increase with apples and oranges. But given that, there, what you seen is the Commission reviewing some 400 odd charges and waiting for 91 lawsuits for fiscal 1985.

Mr. JEFFORDS. Well, let me get down to that.

The figure that gives me for this year—and I hope that they are honestly trying to improve on some of these problems that you have pointed out, that through the first three quarters, they have referred 163 cases for suit.

Ms. KAMER. Those are cases approved by the Commission?

Mr. JEFFORDS. That's right. That's 72 for the quarter, I guess, for the third quarter.

Ms. KAMER. On that basis it will still not get to the inadequate levels that we had in fiscal year 1980 and fiscal year 1981.

Mr. JEFFORDS. Well, assuming they add another 72, you are up to 335, which you may say is inadequate. I am not so sure that the answer to the question of whether that is good or bad necessarily is answered by statistics.

Ms. KAMER. Can I make a clarification? Did you say, 163 or 335?

Mr. JEFFORDS. One hundred and sixty-three, as of the end of June. Now if you added on to that, assuming they add as many as they did this previous quarter, then you are going to be up somewhere over 285, something like that.

Ms. KAMER. You are only going to be at 235, which is why under the, as I said, the inadequate levels of 1980 and 1981.

Is he talking about files or approvals?

Mr. JEFFORDS. We are talking about approvals, suits that are approved for filing or for bringing up.

Ms. KAMER. Right.

Mr. JEFFORDS. Well, that may be in that sense, but it is double what it was in 1982 and certainly a substantial improvement over 1983 and 1984.

Ms. KAMER. We appreciate that.

Mr. JEFFORDS. Yes; I just want to—certainty the trend is in the right direction. I think you would have to agree with that.

Now, as far as the—I would like a little bit more information on the determination of no cause statistics. Now that is, of course a judgment call. Now have you had or done any analysis of the nonjudgment cases? I mean the judgment of no cause was rendered such that there is a bias or problem, or is this purely a statistical difference which may be created by more enthusiastic, less enthusiastic people in the field or whatever.
a substantial number? significant number?

Ms. Kreiter. I am not sure I understand your question, but--

Mr. Jeffords. Let me put it this way. You said that the number of no cause relative to complaints had risen from 20 percent to some odd percent. My question is, you have the number of complaints in number, has there been analyses made about how many are really for- ing valid complaints? Or is this just a conclusion based upon statistics?

Ms. Kreiter. Well, it is both. If this, a statistician may be asked at no cause judgments issued on the basis of merit because of no cause because of no jurisdiction or not being able to find the complainant, or all those other reasons that a case gets closed. While this is strictly of the cases they close, the percentage that on the merits are judged to be no cause.

Now, we have anecdotal evidence from complainants that we have represented and other attorneys in the area have represented of charges being no cause when it became clear that the remedial relief may not be obtained under the new policies. And the investiga- tigator shows a definite time to figure out why this should be no cause and therefore gotten out of the inventory of reasonable cases that has to be looked at for litigation because, in fact, many charges are not as litigation worthy as other charges.

But this is a drastic departure from the opportunity to obtain some sort of settlement. It may not be what the charging party expected when he or she walked into the agency and said this is what I want; a, b, c, d, e. And it may not be what the employer said—in way am I giving anything. But there used to be an opportunity for both of those parties to walk out the door and feel that from the victim's standpoint that they had been aggrieved and from the employer's standpoint that they gave something up, but it was fair and it was an acceptable settlement to them. We don't have that anymore.

Mr. Jeffords. Well, I'm not sure you answered the question that I had. I mean I can't disagree that that is nice to occur, but my point is the charges—the implications from your statistical charges that a lot of people who deserve to have remedies given them are not. And that is the charge, and I would certainly appreciate it if you can, without utilization of names, you could give us the evidence that that is the significant reality. Thank you.

Ms. Kreiter. There is no evidence that the charges being filed today versus a year ago, versus 4 years ago are any different in nature. Discrimination hasn't changed, and the merits remain the same. The investigation and the determinations have changed.

Mr. Robinson. We have had some recent experience that Mr. Seymour could share just briefly.

Mr. Martinez. The time of the gentleman has expired, but go ahead.

Mr. Seymour. This concerns a case that we filed in court recently in a Southern State. I won't mention the name of the respondent or the names of the charging parties, but the experience is truly a horrifying one.
The local area has a very large black population. Among those looking for entry level factory work, figures maintained by the local State employment service, which is the only employment agency in the area, about 80 percent of the applicants are black. The company had a new plant manager come in a couple of years ago, and this is a very bigoted person from what the employees say. The rate of hiring blacks went down from about 75 to 80 percent to about 40 percent. The EEOC informed us it was not allowed to look at that falloff in the rate of hiring blacks because that is a statistic, and they are no longer allowed to look at statistics in determining whether there is reasonable cause to believe a charge of discrimination is true.

One of the claims we made in the case was that the company was also not giving out application forms to blacks who were trying to apply. The company was turning some people back at the gate. They managed to get inside the plant by coming in with employees. The company would tell them that it was not handing out application forms.

Black employees would see whites filling out application forms. They would fill them out in the employee break area. At the same time, they would say I want to get an application form for my wife or brother, whoever and they would be given the same deceitful statement. The company did allow some to file application forms, but again, it is a rate much lower than the figures that the area would suggest.

The position of the EEOC on that question was if they did not fill out an application form, their rights were not violated under Title VII so the discriminatory figure to give out the form immunizes the employer from reach under that area.

I was then asked the following question about some of the complaints that we have inside the plant. Sample complaint: a black employee was assaulted by a supervisor. There is one supervisor at the plant that routinely calls black employees working underneath his supervision on the production line “dumb,” or “black [deleted].”

The person in charge of this investigation for the EEOC said to me, “How are we supposed to investigate something like that?” I asked him whether he considered going out to the plant and talking with the people who work on the production line; taking a look inside employee folders and seeing this kind of information. It came as news to him that that kind of effort might be called for. That’s why we consider this a horrifying experience.

And I submit that there may be a misunderstanding by the local EEOC office as to the value of statistics. But when you have commissioner, after commissioner, after commissioner saying, “We disapprove of the use of statistics,” things like the Washington Post article a couple of days ago about the Sears case is attached to our testimony. You have to expect that there is going to be a pull-back in local offices.

They cannot enforce the law when they are doing this. They can’t have any meaningful increase in meaningful cases while they have these kinds of confusion while they are approaching charges in this manner. Thank you.
Mr. MARTINEZ. Would you state your name again for the record, please?

Mr. SEYMOUR. Richard Seymour, director of the employment discrimination project of the Lawyers Committee.

Mr. MARTINEZ. Thank you.

Mr. HENRY. Thank you, Mr. Chairman, I want to thank all the witnesses—I guess all three of the witnesses now for really what I consider a very helpful and excellent testimony.

I would like to ask the witnesses, does the EEOC have kind of an advisory panel that it refers to when it is promulgating new guidelines for remedy, for enforcement, that constructively works with them and advises them on establishing new policies and such that they are promulgating?

Mr. ROBINSON. I am unaware of an advisory committee that I know of, but I have to plead guilty to not being a terribly smart person. So when, for example, they decided to promulgate the guidelines and I saw that document, I called Clarence Thomas and I went over and sat down with Clarence Thomas and Fred W'right, and I just kind of told them the same things that I have told you this morning, in essence. I even took a peace offering to Clarence with me. I took him a bag of jelly beans.

Ms. KAMM. I am not aware either of any formal advisory panel. It used to exist.

Mr. HENRY. That was my next question. Did you have such an advisory panel that formerly existed that was well known to civil rights—

Ms. KREITNER. Well, it existed for women. Cher Norton set one up and the evolution of it came when the Equal Pay Act jurisdiction was transferred from the Department of Labor to EEOC. Women's groups advocates, of course, were very concerned with continued strong enforcement, and at our urging and that Norton's formation an ongoing advisory group of women's organizations was set up that met on a quarterly basis to discuss any policy initiatives, any enforcement matters, or whatever wanted to be brought to the floor. And that was a regular meeting.

Now, I don't think it was formally established in any record form. It was something that she personally put her hand stamped approval on.

Mr. HENRY. No; you know that existed for women.

Ms. KREITNER. Right.

Mr. HENRY. Did it exist for other areas during the Carter administration, for example?

Mr. ROBINSON. Not that I know of. But there was a great deal of informal communication and discussion during the Carter years much more than in recent years, both discussion and dialog with civil rights organizations and business organizations, and unions so that without having the formal advisory committee for groups other than women, there was still a considerable amount of dialog.

Mr. HENRY. And a breakdown of communication as a result if it makes your job not only harder, but also their own. And it might be important for them to recognize that.

Mr. ROBINSON. I would suggest that that is indeed the case, and I would be perfectly happy to share our assessment of things like the
two policy statements we have discussed this morning with them before we get to an oversight hearing.

Mr. HENRY. Thank you.

Mr. MARTINEZ. Thank you, Mr. Henry.

I have one question that I want you both to respond to. I find a little inconsistency in policies between two different departments, and it comes about because of the Stotts case. The inconsistency, in my mind anyway, comes from EEOC's new five point program which attempts to make the victim as whole as we can.

One of them, as required, is that each identified victim of discrimination be offered placement in the position that the person would have occupied had the discrimination not occurred. And that is bumping. I would call that a bumping policy, a policy that is stated by the Commission for Victim Relief.

I would like both of you to respond to that.

Ms. KEATON. Well, I think it is an example, I mean I said that the policy initiatives had a get tough tone. I think that is a good example of overkill rhetoric, where you introduce a concept that has neither practical nor legal sense to it to show that you are really strong enforcement so that you finally, you know, hold out something there in enforcement. And what you get are victim saying no, thank you. I mean that is not the way I want to get my remedies. And quite frankly we were absolutely appalled at that requirement within the policy statement.

Mr. MARTINEZ. Mr. Robinson.

Mr. ROBINSON. Yes, I certainly agree with Nancy, but that same policy statement omits any reference to the use of goals and timetables of which I would suggest, inappropriate. It should include the use of those remedies as well and simply skirt the problem in Stotts by not including goals and timetables as part of a layoff remedy where there is a seniority system. That would be much more important than a superficially get tough policy concerning bumping.

Mr. MARTINEZ. Well, thank you both for sharing your views with us. We appreciate it, and we look forward to communicating with you again. The record will be left open to accept the information that you wanted to provide us with.

Ms. KEATON. Thank you.

Mr. MARTINEZ. The next panel consists of Wayne Cascio, professor of psychology, University of Colorado, American Psychological Association and Benjamin Schneider, professor of psychology, University of Maryland, American Psychological Association. Mr. Cascio will begin. Did I pronounce that right?

STATEMENTS OF WAYNE CASCIO, PROFESSOR OF PSYCHOLOGY, UNIVERSITY OF COLORADO, AMERICAN PSYCHOLOGICAL ASSOCIATION AND BENJAMIN SCHNEIDER, PROFESSOR OF PSYCHOLOGY, UNIVERSITY OF MARYLAND, AMERICAN PSYCHOLOGICAL ASSOCIATION, A PANEL

Mr. CASCIO. Cascio, yes.

Mr. Chairman and members of the committee, I am pleased to testify today on the subject of the uniform guidelines on employee
selection procedures on behalf of the 76,000 members of the Ameri-
can Psychological Association.

I would like to begin by putting the issue into perspective and
pointing out that every public opinion poll based on representa-
tive national samples that have been conducted from 1960 on to the
present has shown that a majority of Americans—blacks, non-His-
apics and Hispanics, support the concept of equal employment
opportunities and rejects differential treatment based on race re-
gardless of its alleged purposes or results so there is agreement
about the ends to be achieved, but there is disagreement about the
means to be used.

Psychologists generally agree that the caliber of employment
practices and organizations has improved dramatically since publi-
cation of Uniform Guidelines, relative to the situation that existed
prior to their publication. There is also general agreement that
properly validated tests and other selection procedures can play a
very useful role in helping employers to choose better qualified ap-
plicants from less qualified applicants, and that the better match-
ing of people and their talents to jobs enhances the economic pro-
ductivity of a workforce or a nation.

But beyond these general areas of agreement there is consid-
erably less of a consensus among professional psychologists regarding
the proper course to pursue with respect to the Uniform Guide-
lines. And it seems to us that three alternatives seem plausible.
No. 1, abandon the Uniform Guidelines completely; No. 2, retain
them as is; and No. 3, revise them to reflect more recent research
findings and court rulings.

And I would like to just take a few minutes to summarize each of
these three positions. First let’s take a look at abandonment. Aban-
donment of the Uniform Guidelines receives virtually no support
among professional psychologists for two reasons. First, the history
of employment practice prior to the publication of the guidelines
suggests that if compliance with the generally accepted profession-
al standards is left to the discretion of employers that many will
choose not to comply. And this would represent a step backwards
with respect to equal employment opportunity.

Second, precedents that are embodied in case law that is based
upon the 1978 Uniform Guidelines will take on a permanent char-
acter and this will make it difficult for subsequent case law to re-
fect more recent scientific findings. The second option is retention
of the guidelines as is. Some psychologists feel that the Uniform
Guidelines should be retained as is. They feel this way because they recognize that revision is both a political as well as a scientific process, and that if revision results in a weakening of the guidelines rather than a strengthening of them, based on more recent research findings and court rulings, then revision might actually retard the progress of equal employ-
ment opportunity.

Besides, they argue that the present Uniform Guidelines do
allow for modification of their requirements based on subsequent
research findings. And I would like to point out that the introduc-
tion to section 14 of the Uniform Guidelines says that nothing in
these guidelines is intended to preclude the development and use of
other professionally accepted techniques with respect to the validation of selection procedures.

Now advocates of revision frequently cite two findings from research conducted after 1978. No. 1, that the job performance of blacks and English-speaking Hispanics is not systematically underpredicted by tests of mental or cognitive abilities and therefore the requirement that employers conduct studies of test fairness for these groups is unnecessary.

The second thing they argue is that tests demonstrating to be valid predictors of job performance in one employment situation will in all likelihood be valid in other similar employment situations; that is, validity generalization is the rule rather than the exception. Validity generalizes from one situation to another for similar jobs. So they argue that the case-by-case studies of the validity of employment tests are wasteful and unnecessary.

Now proponents for retention of the guidelines as is counter that the present guidelines don't require that a fairness study be done in each and every instance. Specifically they point to section 14.8(b) of the Uniform Guidelines which states that where the weight of evidence from other studies shows that the selection procedure predicts fairly for the group in question, and for the same or similar jobs, such evidence may be relied on in connection with the selection procedure at issue so the present guidelines seem to allow for the fact that fairness studies need not be conducted in each and every instance.

Now, with respect to the subject of whether or not validity generalizes across situations, proponents for retention argue that section 7(b) of the guidelines does allow employers to rely on validity evidence that has been developed in other situations as long as the jobs are similar and as long as that validity evidence does comply to the requirements of the present guidelines and that fairness evidence is available as well.

The final option is revision of the 1978 Uniform Guidelines and a number of psychologists do feel that revision of these guidelines is warranted by subsequent research findings. At the very heart of their arguments is the contention that the 1978 guidelines are based upon the discredited theory that the validity of a test varies across situations, and that hence a new validity study is required in each and every instance in which a given test is used; that is, the present guidelines make no provision for cumulative information.

The research evidence, on the other hand, as I pointed out indicates that if the test is valid in one situation for a given job such as computer programmer, it is likely to be valid in other situations where that same test is used to select computer programmers. The major reason why these validities appear to vary from one situation to the next is that different numbers of applicants or employees are used in the two or more situations, but when the effect of differences and sample sizes control statistically the validities, in fact, are very stable from one situation to another.

In other words, situation specificity is out, and validity generalization is in. Advocates for revision argue that the Uniform Guidelines should be revised to reflect this fact. I also cite several other arguments in support of revision. The most important of these is as
follows, and that is as they are presently written, they argue it is very difficult for employers to comply with the validity requirements of the guidelines.

Now the guidelines point out three strategies, or suggest three strategies that can be used to validate selection procedures. And I would just like to talk about each one briefly.

They identify: criterion-related validity, content validity, and construct validity. Criterion-related validity supports for any procedure that, in fact, criterion-related validity requires an examination of a statistical relationship between performance on the test and actual performance on the job, such that if an employer can show that people with higher levels of job-relevant ability are performing the job than people with lower levels of this job-related variable, then it is proper, entirely proper, to use that written test as a selection procedure.

Under a content validity strategy, the employer attempts to show that by a representative sampling of the tasks to be performed in a job, that a test fairly samples job requirements. And in fact, construct validity strategy requires that an examinee possesses psychological trait or the construct such as leadership abilities, is presumed to underly successful job performance, and then devise a selection procedure that accurate and fairly measures this construct.

Now, proponents of revision argue that criterion-related validity is appropriate when it is technically feasible, and the guidelines point that out in section 14(b)(1). A subsequent research has shown that for many employers, they can't use criterion-related validity because they don't have the numbers of employees orвали list to produce reliable statistical results. So then they are left with the choice between content or construct validity.

Now content validity, as it is described in the Uniform Guidelines, is appropriate only for work sample tests such as typing or arc welding. Generally, it is inappropriate for tests of job knowledge or of mental abilities, and according to section 14(c)(1) of the guidelines, a selection procedure that is based upon inferences about mental processes cannot be supported solely or primarily on the basis of content validity.

So in short, if the selection procedure focuses on work products, then content validity is appropriate, but if it focuses on work processes, then content validity is inappropriate. Now, advocates of revision argue that even work products like memory are determined by work processes like answers to questions. So if we begin to talk about mental processes, the Uniform Guidelines automatically interpret them as constructs, and therefore content validity is inappropriate.

Now, that leaves employers with the final choice, and that is to use construct validity to demonstrate the job-relatedness of some selection procedure. The Uniform Guidelines point out in section 14(d)(1) that construct validity involves a series of research studies that include criterion related validity and which may include content validity studies as well.

Now, earlier we noted that for most employers criterion related validity studies are technically not feasible so that also makes construct validity studies technically not feasible for employers. So ad-
vocates of revision argue that the net result is that there is almost no way for an employer to comply with the validation requirements of the guidelines for every approach is successively ruled out.

Several other arguments that are offered by opponents of revision and one of these we have already touched upon, and that is that employers find themselves in a sort of Catch 22 situation with respect to the use of construct validity. It is criterion-related validity is a less demanding strategy than construct validity. And in fact construct validity requires that criterion-related validity be used as a component of that effort.

So, if it is at all technically feasible, employers will use criterion-related validity. They will only use construct validity as a last resort. But in order to use construct validity, they have to do a criterion-related validity study as they are caught between a rock and a hard place, they argue.

Another argument for revision stems from the requirement of enhanced validity and utility for the use of top down ranking of candidates as opposed to grouping them in a pass/fail fashion. Section 5(g) in the guidelines points out that a higher standard for validity and utility is required in order to allow an employer to use top down ranking.

But there has been a massive amount of research in the psychological literature that shows that almost without exception higher amounts of a job relevant ability lead to higher levels of job performance, so the selection of people with higher levels of ability relative to those with lower levels of this job relevant ability leads to higher levels of job performance whether we look at it in terms of less waste, fewer accidents, or greater output. And that translates into improved economic productivity for an organization.

Now psychologists who argue that the guidelines ought to be revised say that the requirement for enhanced or a higher standard of validity evidence to justify top down ranking is both unnecessary and it is economically wasteful. They say it is unnecessary because in almost all instances higher levels of job-related abilities lead to improved performance. They say that it is economically wasteful because if we rely on pass/fail grouping of candidates, then their subsequent job performance will be lower than if we relied upon strict top down ranking, and that results in a cost in economic terms and in terms of productivity for organizations.

Now, the final argument that is advanced by advocates of revision pertains to the requirement in the guidelines that there be a search for alternative selection procedures where two or more procedures are shown to be equally valid. The guidelines point out that users should rely on the one that produces less of an adverse impact.

Well, since publication in 1978 of the Uniform Guidelines there have been three very well-controlled studies that examined the validity, the fairness, and the feasibility of actually using alternatives in practice, alternatives to standardize tests. In all three studies, there was no evidence that any alternatives met the criterion of having equal validity with less adverse impact. So this kind of evidence suggests that the requirement that employers continued to
search for equally valid alternative selection procedures as is currently required under the 1978 guidelines is unnecessary.

I would be pleased to provide additional information or answer any questions that you might have.

[The prepared statement of Wayne Cassio follows:]

PREPARED STATEMENT OF WAYNE CASSIO, PH.D., ON BEHALF OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION

Mr. Chairman, members of the Committee, I am Dr. Wayne Cassio, professor of Psychology at the University of Colorado at Denver. I am pleased to testify today on the subject of the Uniform Guidelines on Employment Selection Procedures as imposed by the 75,000 members of the American Psychological Association.

Every public opinion poll based on representative samples conducted between 1960 and the present shows widespread support for non-discrimination in hiring, and Hispanic, and Hispanic, support equal employment opportunity, and the Constitution and equal protection of the laws. There is general agreement about the ends to be achieved, but there is uncertainty about the means to be used.

Psychologists generally agree that the caliber of employment practices in organizations has improved dramatically since publication of the Uniform Guidelines, relative to the situation that existed prior to their publication.

There is also general agreement that in early validated tests and other selection procedures can play a useful role in helping employers to choose better qualified from less qualified applicants, and that better matching of people to jobs increases the economic productivity of a workforce and of a nation.

Beyond these general areas of agreement, there is considerable less of a consensus among professional psychologists regarding the proper course to pursue with respect to the Uniform Guidelines. Three alternatives seem plausible: (1) abandon the Uniform Guidelines completely, (2) retain them as is, or (3) revise them to reflect recent research findings and court rulings. Let's examine each of these in greater detail.

ABANDONMENT

Abandonment of the Uniform Guidelines receives virtually no support among psychologists for two reasons. First, the history of employment practice prior to the adoption of the Uniform Guidelines suggests that if compliance with generally accepted professional standards is left to the discretion of employers, many will choose not to comply. This would represent a step backwards with respect to equal employment opportunity.

Second, precedents embodied in case law that is based upon the 1978 Uniform Guidelines will take on a permanent character. This will make it difficult for subsequent case law to reflect more recent scientific findings.

RETENTION

Some psychologists feel that the Uniform Guidelines should be retained as is. They feel this way because they recognize that revision is a political as well as a scientific process. If revision results in a weakening of the standards, rather than a strengthening of them based on recent research findings and court rulings, then revision may actually retard the progress of equal employment opportunity.

Besides, the present Uniform Guidelines allow for modification of their requirements, based on subsequent research findings. The introduction to Section 14 of the Uniform Guidelines states: "Nothing in these guidelines is intended to preclude the discovery and use of other professionally acceptable techniques with respect to validation of selection procedures.

Advocates of revision frequently cite two findings from research conducted after 1976: (1) that the job performance of blacks and English-speaking Hispanics to not systematically underpredicted by cognitive ability tests, and therefore the requirement that employers conduct studies of "test fairness" for these groups is unnecessary; and (2) tests demonstrated to be valid predictors of job performance in one employment situation will, in all likelihood, be valid in other similar employment situations; that is, validity generalization is the rule rather than the exception. Case-by-case studies of the validity of employment tests are therefore wasteful and unnecessary.
Proposals to retain the Uniform Guidelines counter that the present guidelines do not require that fairness studies be done under all circumstances (specifically, Section 10B(3) of the Uniform Guidelines: "With respect to the selection of employment tests, the uniform guidelines do not require that fairness studies be done under all circumstances") and that they allow for more extensive reliance on studies that are "of proven value in promoting equal employment opportunity (EEO)" (Chapter 4 of the Uniform Guidelines). The guidelines do not require that job-related evidence be balanced in any way with the evidence of test fairness for the group to benefit from the test. Furthermore, the burden to conduct a study of test fairness for the group may be sidestepped if expert testimony shows that a test's reliability provides evidence of its validity.

With respect to point 2, the guidelines do not make it illegal to use tests that are "of proven value in promoting equal employment opportunity (EEO)" (Chapter 4 of the Uniform Guidelines). The guidelines make no reference to the need for any particular form of validity. The guidelines do not require that job-related evidence be weighed against evidence of test fairness. If expert testimony shows that a test's reliability provides evidence of its validity, there must be evidence of test fairness for the group to benefit from the test. If there is no such evidence, the test must be used.

A number of psychologists feel that revision of the Uniform Guidelines would be warranted by subsequent research findings. It is generally agreed that the Uniform Guidelines are based on the assumption that the validity of a test varies between occupations and that the guidelines required in each industry or occupation to ensure adequate validity of a test. If the guidelines were revised, it is likely that the validity requirements would more closely correspond to theweight of scientific evidence for job-relatedness. With the introduction of job-related evidence, the employer in Seattle would conduct a validation study of the test and use it to select competent personnel. The job-related evidence would be used to select competent personnel.

Research evidence indicates that if the correlation between the test and job performance is substantial, this finding will generalize to a variety of jobs and situations. Therefore, why validities appear to vary from one situation to another, might be explained in part by the fact that different studies vary to a great extent. However, recent studies indicate that sample sizes across studies are remarkably stable across situations. In other words, the concept of test validity generalization is in. The Uniform Guidelines should continue to reflect this fact.

Advocates of revision cite four other arguments for revising the guidelines. First, as presently written, it is extremely difficult for an employer to comply with the validation requirements of the Uniform Guidelines. The guidelines require that the validation strategies that employers may use to demonstrate the test's relationship (to the validity) of their selection procedures: (1) criterion-related vaidity, (2) content validity, and (3) construct validity. Each of these strategies is an extremely complex task, usually in accordance with the Uniform Guidelines (Overview; Section 16).

In criterion-related validity, a selection procedure is evaluated by its relationship between scores on a test and another important predictor of job performance. In content validity, a selection procedure is evaluated by whether and in what context the test measures the actual aspects of a job. Construct validity involves identifying the psychological traits (or constructs) which underlies successful performance on the job and then devising a selection procedure to measure the presence and degree of the construct. An example would be a test of "leadership ability."

Criterion-related validity is an appropriate strategy when "technically feasible" (Section 14B(1)). Research has shown, however, that for most employers this strategy is inappropriate since they lack the sample sizes (the number of employees or applicants) required to do a proper criterion-related validity study.

Content validity, as described in the Uniform Guidelines, is appropriate only for work sample tests (e.g., typing, welding), and generally inappropriate for job knowledge or cognitive ability tests. According to Section 16C(1), "A selection procedure based on inferences about manual processes cannot be supported solely or primarily on the basis of content validity."

In short, if a selection procedure focuses on work products, content validity is an appropriate strategy; however, if the focus is on work processes, then content validity is inappropriate. Advocates of revision argue that even work products like "memory" are determined by work processes, such as "answers to questions."

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talk about mental processes, the Uniform Guidelines specifically interpret these as constructs, and therefore construct validity is inappropriate. Yet, in the real world, employers attempt to measure characteristics such as personality and aptitude. Thus, when comprehension, they make judgments about candidates, and the use of personality and aptitude tests are simply not feasible for everyday personnel tests, and they are, in principle, technically infeasible for higher-level jobs.

Finally, a user is left with construct validity, and he must determine the job-relatedness of a selection procedure. But the Uniform Guidelines state in Section 4(d): "The user should be aware that the effort to obtain construct validity as a measure for construct validity is both expensive and often not possible. It is a reasonable assumption that no such construct validity study can be made in a justifiable manner for an employer to comply with the Uniform Guidelines, for every occupational area is unique." To some extent, we have already noted that advocates of revision believe that in this manner the Uniform Guidelines violate a section with respect to construct validity. The Uniform Guidelines' criterion-related validity is a basic concept in construct validity. Hence, if at all possible, construct validity can and should be used. This study is no other than a constructive validity study. The Uniform Guidelines state: "The type of construct validity study is a research-based approach that is based on the use of a valid selection procedure." The criterion-related study is infeasible to the extent that lower productivity results from the use of any strategy other than the top-down ranking of candidates. In turn, leads to a loss in economable utility to the organization.

The final argument advanced by advocates of revision pertains to the required search for alternative selection procedures that is mandated by the Uniform Guidelines, the so-called "cosmic search." Section 3(b) states: "Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact." Since the publication of the Uniform Guidelines in 1973, three y 1-controlled studies have examined the validity, fairness, and feasibility of operation 3 use of alternatives to standardized tests. In all three studies, there was no evidence that any alternatives met the criteria of having equal validity and lesser adverse impact. This kind of evidence suggests that any requirement that employers continue to search for equally valid alternative assessment procedures, as is currently required under the Uniform Guidelines (1973) is unnecessary.

I would be pleased to provide additional information or answer any questions you might have. Thank you.
Mr. Martinez. We will hear from the other witness before we ask the questions. Mr. Benjamin Schneider, would you like to give us your testimony?

Mr. Chairman, members of the committee, I greatly appreciate the opportunity to testify before the Subcommittee on Employment Opportunities regarding the uniform guidelines on employment selection procedures. I am Dr. Benjamin Schneider, professor of psychology at the University of Maryland, and I am here on behalf of the American Psychological Association and the Society for Industrial and Organizational Psychology, Inc., a division of the American Psychological Association, also known as APA.

As president of the Society for Industrial and Organizational Psychology, I thought it was important for the subcommittee to have the society's input because of the crucial role the uniform guidelines play in the science and practice of my field.

In brief, my sense of the field's opinion is that the present uniform guidelines fail to adequately represent contemporary scientific knowledge, and thus, do not represent good contemporary practice. It is not that the guidelines were poor, it is that the guidelines were written considerable progress in a number of areas that have been made. Indeed, progress in some areas, such as the society's "Principles for the Validation and Use of Personnel Selection Procedures," 2d edition, revised in 1980, "undergoes revision again. We expect to complete this second revision in the next six months. Copies of the current edition are available to the committee if they so request.

More specifically, I have chosen to present here four issues that are inadequately discussed in the uniform guidelines.

No. 1, validity generalization: there is now good scientific evidence to indicate that for broad classes of jobs and broad classes of cognitive ability tests the relationship between ability and performance is positive and generalizable across settings. This means that in many cases it is unnecessary to conduct new validity studies each time an ability measure is to be used as a basis for making hiring decisions.

From the standpoint of economics then, results from validity generalization studies have been obviously encouraging. Of at least equal interest has been the finding that the typical validity study, using small available samples, may yield incorrect inferences about selection procedure validity. Of course, it is necessary for us to define the conditions under which validity generalization is supportable.

No. 2, content validity: progress in building measures that tap into knowledge, skills and abilities—in our language, KSA's—required to perform a job indicates that wide range of selection procedures, including but not only job sample tests, can be useful in assessing job applicants; that is, there are a variety of ways to assess the extent to which applicants possess the KSA's necessary for effective performance, and these include simulations of jobs that require KSA's like the job, simulations that require applicants to learn tasks like those to be performed, and paper and pencil tests that assess the cognitive skills that jobs may require. The content,
is a measure, need to assess the KSA's required for job performance not the exact task behaviors the job may demand.

I should note here that actual job sample tests are frequently not feasible from an economic standpoint and they don't use documented capability to assess DSA's without having a physical representation of the job. Again, researchers in our field are now defining the conditions and procedures concerning the establishment of content validity.

No. 3, differential prediction: our scientific literature indicates that there are no grounds for assuming that selection procedures work differently for persons of different racial subgroups. The uniform guidelines, however, require assessments of differential prediction in each situation when feasible. Not only is there no evidence for differential prediction, but in each situation it is typically not feasible to make such an evaluation because of small sample sizes.

The National Academy of Sciences reports on ability testing put it this way:

The committee has seen no evidence of alternatives to testing that are equally informative, equally adequate technically, and also economically and practically viable, and little evidence that well-constructed and competently administered tests are more valid predictors for a population subgroup than for another. Individuals with higher scores tend to perform better on the job regardless of group identity.

No. 4, utility analysis: I have raised the issue of economic in each of the previous topics because our scientific literature now suggests that considerable financial benefits can accrue to organizations that employ competently developed employee selection procedures. My colleague today, Wayne Cascio, has been at the forefront of such research.

Simply put, the uniform guidelines do not take much cognizance of this literature or the procedures for conducting economic utility analyses. In a time when productivity in the work place is a national concern, the issue of utility is important enough to be present in a guidelines document.

I have been addressing some issues that science and practice in my field since 1978 suggests make the current uniform guidelines out of date. We thus feel the subcommittee has only two alternatives regarding the future of the uniform guidelines: revise them to take advantage of contemporary knowledge and practice, or drop them in favor of a professional practices doctrine.

In either case, the society for I-O Psychology, as I noted earlier, will revise its principles. We will do this as part of a continuing educational service to our members, acquainting them with the most up-to-date knowledge relevant to our professional practice. We hope that other users of employee selection procedures also find our principles useful.

Thank you for this opportunity to testify. I would be happy to answer any questions you have.

Mr. MARTINEZ: Thank you.

Dr. Cascio, in your testimony you stated that the current section 14 of the uniform guidelines already provides a vehicle to include the development and use of other professionally acceptable techniques with regard to the validation of selection procedures. Why do we need to change them or remove them?
Mr. CASCIO. Well, I think that—and I am speaking on behalf of members of the association and not myself and trying to put myself in the shoes of those who argue for retention of the guidelines as is. And one of the arguments that comes up is the fact that—

Mr. MARTINEZ. Excuse me. You mentioned the three groups. Which one do you belong to?

Mr. CASCIO. Well, I am a member of the APA's Committee on Psychological Testing Assessment. We are in the camp that argues for retention of the guidelines as is.

People argue that there are different ways—the same words are interpreted differently, depending on whether you happen to be on the plaintiff's side or on the defendant's side. And the arguments of those who argue for retention is that a careful reading of the guidelines doesn't rule out the newer methods that have been developed.

Mr. MARTINEZ. I see. But what would happen if the current guidelines were removed? Would there be adequate control of unlawful discrimination selection procedures?

Mr. CASCIO. Well, the only way to answer that, one, I believe, is by looking back at the history of what happened before we had guidelines and that history is a pretty sorry one, sir.

Mr. MARTINEZ. Do you agree that the job performance of blacks and English-speaking Hispanics is not systematically underpredicted—by cognitive ability testing?

Mr. CASCIO. Yes, sir; I do.

Mr. MARTINEZ. How do you explain poor minority performance on these test areas?

Mr. CASCIO. Well, it is important, I think, to point out that in looking at the issue of unfairness in testing, that we can't just look at the test itself. We have got to look at how people actually would do on the job. So to the extent that the test itself is an accurate predictor of what is likely to happen, if people do poorly on the test are hired, then poorer test performance by some group is an indicator of predicted poor job performance as well.

There is a real danger if unfairness were to exist where you have, for example, Hispanics and whites who score at the same level on a test, but the job performance of the white group is predicted to be higher than that of the Hispanic group, because then the Hispanic simply will not be hired in the first place. And the evidence to date indicates that that is not the case, at least for cognitive mental ability tests; that that is not the case.

Mr. MARTINEZ. Does adverse impact evaluation of selection practices have a proper place in assessing fairness of procedures?

Mr. CASCIO. They are two separate issues, sir. They are two separate issues. Clearly when adverse impact is demonstrated, it is critical that we be able to show that whatever procedures are being used are in fact job-related. Even if there is no adverse impact in the issue just on general moral and ethical grounds, it is important that employers use the most valid procedures available.

If the guidelines only require them to validate procedures if adverse impact is shown, I guess from our professional point of view, we argue that it is important that employers demonstrate the job-relatedness of their selection procedures whether or not they have adverse impact.
Mr. Martinez. Thank you, Mr. Cascio.

Dr. Schneider, do you agree that the selection procedures often, by intention or by structure, result in unlawful discrimination against workers?

Mr. Schneider. The testing procedures have been competently developed according to procedures like those in current Uniform Guidelines and like those in the society's principles do not tend to yield unlawful discrimination.

Mr. Martinez. Assuming that predicting unlawful discrimination is an important policy goal, how would these matters, selection procedures except by using appropriate controls and by using differential controls and comparisons?

Mr. Scirnir. The differential controls and comparisons are separate issue now. I am convinced, from what's been mentioned in discrimination in hiring. The issue of the selection procedures, that is the differential prediction issue, which has been fairly well resolved in our literature, and it shows that the issue of differential prediction.

Some organizations, however, continue to discriminate, and that is the separate issue as Dr. Cascio indicated. I think there are times in the current Uniform Guidelines where the issue of adverse impact and equal employment opportunity are inextricably confounded with the issue of selection validity.

Mr. Martinez. How do you explain the fact that minorities consistently score lower on ability tests than their majority counterparts? Or what is your explanation when it does occur?

Mr. Schneider. I think there are two different kinds of issues being raised by your question, sir. One question has to do with some generalized concept—maybe you refer to, for example, general intellectual intelligence tests. That I think, is a fairly distinct issue from whether or not different people in different subgroups perform differently on job relevant mental ability and job performance tests.

I think there is less evidence for the latter condition than for the former condition.

Mr. Martinez. How about criterion tests?

Mr. Schneider. I'm sorry, I don't understand the question, sir.

Mr. Martinez. OK, let me go on to a different one, then.

In this last sentence on page 8, you state the content in a measure needs to assess the knowledge, skills, abilities required for job performance, not the exact task behaviors the job may demand.

Can you explain why not?

Mr. Schneider. Yes, sir; frequently jobs require certain kinds of skills and abilities and we can assess those without having the physical representation of the job. We make a distinction between something we call psychological fidelity and physical fidelity. And the current emphasis in content validation and the development of selection procedures by professionals is to focus on the psychological rather than the physical fidelity.

There, in that case, we no longer need to actually develop physical representations of jobs.

Mr. Martinez. Well, thank you very much, both of you for coming and giving us the advantage of your expertise. We are going to make a couple of announcements, then we will adjourn.
I would like to insert into the record two letters: the letter of our response to Clarence Thomas, ptst. his response to our invitation letter. We w’ll insert the invitation letter and our response to his response to clarify the record as to what transpired between the chairman and this subcommittee.

[The letters follow:]

COMMITTEE ON EDUCATION AND LABOR
HOUR OF REPRESENTATIVES

HON. CLARENCE THOMAS,
Chairman, Equal Employment Opportunity Commission,
Washington, DC.

DEAR CHAIRMAN THOMAS: We are in receipt of your letter of July 8, 1985, expressing concerns regarding the Committee on Education and Labor's staff's attempts to secure an EEOC Commissioner's presence at the oversight hearings on July 11, 18, 25 and 31. As you know from the letters of invitation, these hearings will address issues of critical importance to the Commission, the Committee, and the nation. You further know that it is the responsibility of the Committees to seek the presence of these officials.

Your letter states that the Commission's Office of Congressional Affairs received no notice in advance of the June 17, 1985 letter of invitation requesting that you testify at the July 11 hearing. This information is incorrect. Members of your staff were verbally apprised of the July 12 hearing approximately two to three weeks in advance of this date. If your staff did not receive written notice of the September hearing on this matter, that is an issue you must resolve with them.

Secondly, you are undoubtably aware that July is one of the most crowded months in Congress, as it precedes the August recess. The Committee, whether you or your fellow Commissioners, nor your Assistant General Counsel, were available to testify at our hearings scheduled for July 11 or July 18. While we welcome the testimony of the Director of Public Programs for the July 18 hearing, we are dismayed that not one of the Commissioners, who, one may speak for the Commission, was available to be heard.

Please understand that the Committee staff was in no way aware of the reasons the Commission's motives when they found that none of the Commissioners would attend these critically important hearings. The Committee and its staff valued the expertise and historical cooperation extended by the Commission. Please understand, however, that, as the Commission's staff, know their commitments to this body, with whom they are required to meet in the month of July, the Committee on Education and Labor must honor its commitment to the public by holding these important hearings.

In the interest of promoting cooperation between the Commission and the Committee, we would like your assurance that the Commission will not vote on the revisions to the Uniform Guidelines on Employee Selection Procedures until the Committee has had an adequate time to review the proposed revisions and to conduct an oversight hearing. With this assurance, we will postpone the hearing on the Guidelines which is currently scheduled for July 31.

As you know, the Commission is the lead agency responsible for enforcing federal equal employment opportunity programs which is the focus of the July 25 hearing. It is imperative that a Commissioner be made available to testify on that date. We strongly urge that you and your fellow Commissioners review your schedules and select one among you to be present at that hearing.

We greatly appreciate Commissioner Alvarado's agreeing to testify at the July 23 hearing on the Commission's new remedial enforcement policies. His testimony will be very useful to the Committee's deliberation on this issue.

Please let us know at your earliest convenience whether you or the other Commissioners can accommodate the Committee during the July 25 hearing and whether the Commission will agree to delay action on the Uniform Guidelines until the Committee has had a chance to examine the proposed modifications.

Sincerely,

AUGUSTUS F. HAWKINS,
Chairman, Committee on Education and Labor.

MATTHEW G. MARTINEZ,
Chairman, Subcommittee on Employment Opportunities.
Mr. Martinez. We still would like it to be known that in his letter he referred to Commissioners not being available for a certain hearing, which is a regular Commission day, on the 23d. And apparently they were not going to be available here other than Mr. Alvarez, and then magically three of them appeared.

We will allow the record to be open for 2 weeks for additional testimony. With that the meeting is adjourned. Thank you again.

Mr. Cascio, Thank you, sir.

Mr. Schnieder. Thank you.

[Whereupon, at 12:06 p.m., the hearing was adjourned, subject to the call of the Chair.]