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restoring the conscience of a nation



a report on the U.S. Commission on Civil Rights

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Executive Summary

For decades, the U.S. Civil Rights Commission played a crucial role in securing and protecting the civil rights of American citizens who had been historically disenfranchised and segregated from mainstream society, particularly African Americans and other minorities.

Established by the Civil Rights Act of 1957, the bipartisan, independent commission investigated and documented attempts to prevent access to the voting booth or to otherwise thwart the civil rights aspirations of American citizens.

In the process, it established a record that generated support for laws that secured and protected the civil rights of all Americans, including voting rights, public accommodations, education, and employment.

More than just a register of injustices, the commission served as the “conscience of the nation,” supplying the Civil Rights Division in the Department of Justice – also set up by the 1957 law – with the evidence to justify use of federal enforcement to protect civil rights.

For over 40 years, the eight-member commission acted as the bulwark on which landmark civil rights legislation rested.

Beginning with President Ronald Reagan’s administration in the 1980s, however, efforts were made to weaken and undermine the integrity and independence of the commission. These efforts continue to this day. For example, appointments to the commission by President Bush and the Senate Republican leadership struck at the very core of the commission’s independence. Two commissioners changed their party affiliation from Republican to Independent enabling Mr. Bush to add two more Republican members, now six, to a commission that is, by statute, supposed to be bipartisan.

Today, the commission is so debilitated as to be considered moribund. With a new administration, there is the opportunity to take a fresh look at this venerable institution and make the necessary changes to restore it to its former status as the “conscience of the nation.”

The following report chronicles the need for and the history of the commission over the years, building the kind of measured case it was noted for, a case that reflects the need for an entirely new entity that returns to the commission's original mandate and expands on it to preserve and protect the civil and human rights of all American citizens.

To do this we recommend:

- **Creation of a new commission, consisting of seven members.** The members will serve four year staggered terms. Each commissioner will be **appointed by the president, and subject to Senate confirmation.** The staff director and general counsel will be career Senior Executive Service positions.
- **Creation of a civil rights unit as part of the Government Accountability Office** to focus on monitoring federal agency compliance with and enforcement of federal civil rights laws.
- **Addition to the commission's mandate** (i.e., discrimination based on race, national origin, religion, gender, age or disability) **of an examination of discrimination based on sexual orientation or gender identity.**
- **Authorization of the commission to hold hearings across the country to better understand the landscape of equal opportunity involving various regions and protected groups.** Based on these hearings, and other information, the commission will have the responsibility to make policy recommendations to the president and Congress. The commission will retain the authority to subpoena witnesses to participate in such hearings.
- **The name of the commission shall be the United States Commission on Civil and Human Rights.** Changing the commission's name to reflect the human rights dimension of its work would make more explicit its authority to examine U.S. compliance with these international treaties as part of its existing mandate to examine compliance with legal obligations that affect civil rights.
- **Support for state and local governmental efforts.** The commission should support the work of state human rights and human relations commissions and other relevant state and local agencies. This support should include a federal grants program, education and training initiatives, and staff dedicated to coordinating state and local efforts with the commission's own work.

Introduction

Fifty years ago, President Eisenhower signed into law the first civil rights legislation since Reconstruction. Far from being elated, civil rights leaders and their supporters in Congress were ambivalent at best. The Leadership Conference on Civil Rights reluctantly supported the legislation, having seen the bill's strongest provisions stripped out in order to avoid a fatal Senate filibuster. Liberal senators were despondent, one of them characterizing the bill as "like a soup made from the shadow of a crow which had starved to death."¹ Even President Eisenhower – who had originally sent the bill to Congress urging its swift passage – considered vetoing it after weakening amendments were adopted in the Senate.²

History has shown, however, that the Civil Rights Act of 1957, though modest in scope, played a significant role in the evolution of civil rights issues over the next 50 years. The mere fact that legislation labeled "civil rights" not only came to a vote, but passed the Senate—controlled as it was by powerful southern committee chairs—was a significant accomplishment. But more than that, the bill set the stage for future, stronger laws and for effective enforcement of those laws. It did so in several ways: it strengthened voting rights protections for African-American citizens; it established a Civil Rights Division in the U.S. Department of Justice that had the resources and the mandate to enforce the laws that Congress was to enact over the next several decades; and it created a Civil Rights Commission to investigate allegations that Blacks were being denied the right to vote and to monitor the government's enforcement of its own civil rights laws and policies.

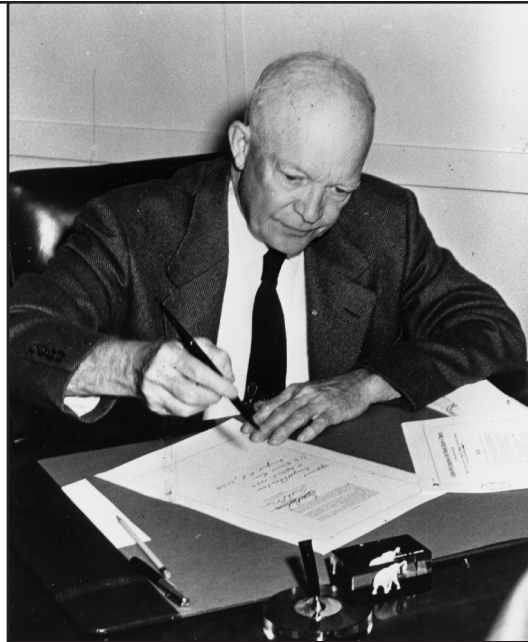
In its early years, the United States Commission on Civil Rights (USCCR) had three primary goals: to gather facts that would lay the foundation for civil rights legislation; to stimulate action by Congress and the executive branch; and to serve as the "conscience of the nation" by shining a spotlight on discrimination and segregation across the country. Over the years, as the commission was reauthorized by Congress, its statutory responsibilities expanded. The commission played an active role in shaping the country's civil rights agenda.

In the following report, we detail the historical context in which the commission was created. We describe its early challenges and its early work, particularly in the area of voting rights, and we discuss the role that the Civil Rights Commission has played in shaping the nation's civil rights agenda over the past 50 years. We outline its significant achievements, assess its challenges, and examine the roles that structural and political changes and the evolving complexities of civil rights issues have played in the work of the commission. Finally, we make recommendations for the future to begin a dialogue on the need for strengthening the commission's role as the "conscience of the nation."

I. Creating the Commission on Civil Rights

On September 9, 1957, President Dwight D. Eisenhower signed into law the Civil Rights Act of 1957, the first federal civil rights legislation to be enacted since Reconstruction. Part I of the Act created a Commission on Civil Rights within the executive branch. The duties of the commission were to:

- (1) investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote . . . by reason of their color, race, religion, or national origin;
- (2) study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution; and
- (3) appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution³



President Eisenhower signs the Civil Rights Act of 1957 into law on September 9, 1957

The statute set out the structure, rules of procedure, and compensation of the commissioners. There were to be six commissioners appointed by the president with the advice and consent of the Senate. No more than three members were to be of the same political party. The chair and vice chair were to be designated by the president.

The commission had no enforcement authority, but was empowered to hold hearings and to subpoena witnesses. The statute further required the commission to submit interim reports to the president and to Congress and to submit “a final and comprehensive report of its activities, findings and recommendations not later than two years from the date of enactment.” Sixty days after the submission of its final report the commission would, in the words of the statute, “cease to exist.”⁴

The Act contained several other provisions that were “designed to achieve a more effective enforcement of the rights already guaranteed by the Constitution and laws of the United States.”⁵ Part II authorized the president to appoint, with the advice and consent of the Senate, an additional assistant attorney general to head a newly created Civil Rights Division. Parts III and IV provided for federal enforcement authority to protect civil rights, in particular the right to vote in federal primaries and elections.⁶

What may strike us today as a seemingly modest proposal was the result of a long, and at times contentious, process. Indeed, the idea of creating an independent agency within the federal government charged with investigating and reporting on the status of civil rights had surfaced not within the Eisenhower administration in 1957, but more than a decade earlier.

President Harry Truman laid the foundation for the commission when he established the President's Committee on Civil Rights in 1946—a response to growing pressure from the African-American community following World War II.⁷ Newly returned African-American veterans were demanding the most basic of rights—the right to vote—that were being denied them in southern states.⁸ Truman hoped to rectify this discrepancy between the ideals these veterans had fought for and the reality that met them at home: “I created this committee with a feeling of urgency. No sooner were we finished with the war when racial and religious intolerance began to appear and threaten the very things we had just fought for.”⁹

No doubt there were political calculations involved as well. Although most African Americans in the South were disenfranchised, Black voters outside the South were showing signs of moving in larger numbers toward the Republican Party in response to inaction on the part of the White House and Congress on civil rights issues. At the same time, there were countervailing pressures from southern Democratic senators to keep civil rights legislation off of the agenda. Some have suggested that the creation of the committee was a way for President Truman to demonstrate leadership without endorsing any specific actions.¹⁰

The committee's mandate was to assess the extent to which current law enforcement measures at the federal, state, and local levels were adequate to safeguard the civil rights of all Americans. If the committee determined that current safeguards were inadequate, it was authorized to recommend appropriate measures, legislative or otherwise, “for the protection of the civil rights of the people of the United States.”¹¹

The 15-member committee included representatives from the legal profession, higher education, labor, and the corporate world. There was racial, religious, sectional, and political diversity.¹² Less than a year after its creation, the committee reported back to the president. Its 1947 report, *To Secure These Rights*, asserted that civil rights was not a regional issue but rather a national one that would require national solutions. It also concluded that minorities other than African Americans, including Native Americans, Mexican Americans, Asian Americans, and Puerto Ricans, were being denied civil rights as well. The committee's report contained several recommendations for federal executive branch action:

- the establishment—preferably through congressional enactment—of a permanent Commission on Civil Rights within the Executive Branch;
- the creation of a Division of Civil Rights in the Justice Department, to be headed by a newly appointed Assistant Attorney General; and
- the creation of a Joint Standing Committee on Civil Rights in Congress.¹³

The committee's legislative recommendations would be even more far-reaching.¹⁴

In explaining the need for a permanent Commission on Civil Rights, the committee noted:

Nowhere in the federal government is there an agency charged with the continuous appraisal of the status of civil rights. . . . A permanent Commission could perform an invaluable function by collecting data. . . . Ultimately, this would make possible a periodic audit of the extent to which our civil rights are secure. . . .

A permanent Commission on Civil Rights should point all of its work toward regular reports which would include recommendations for action in ensuing periods. It should lay plans for dealing with broad civil rights problems. . . .

The Commission should have effective authority to call upon any agency of the executive branch for assistance. Its members should be appointed by the president with the approval of the Senate. . . . A full-time director should be provided with an adequate appropriation and staff.¹⁵

Ten years later, this recommendation would form the basis for legislation establishing the U.S. Commission on Civil Rights.

That it took 10 years for even the more moderate of the committee's recommendations to become law is, in large part, a reflection of the political realities of the times. Important committee chairmanships in the U.S. Senate in particular were controlled by southern senators who saw any attempt to provide civil rights protections to Black citizens as a threat to the "Southern way of life." In addition, the need to garner a two-thirds vote in the Senate to defeat a filibuster was a nearly insurmountable hurdle.

However, within a few months of the release of the Committee on Civil Rights report, President Truman proposed legislation based on the committee's recommendations. These recommendations included abolishing the poll tax, protecting the right of all citizens to participate in federal elections, desegregating the armed services, withholding federal funds from entities that discriminate, outlawing discrimination in interstate transportation, instituting federal protection against lynching, and dismantling segregation and discrimination in Washington, DC. and the Panama Canal Zone. The president's proposal also included establishment of

a permanent executive branch Commission on Civil Rights, a Joint Congressional Committee, and a Fair Employment Practices Commission.¹⁶

Although Congress debated President Truman's proposal for the next several years, it failed to enact any legislation. Truman subsequently used his executive authority to make good on one of the recommendations of the committee. On July 26, 1948, he issued Executive Order No. 9981, ending segregation in the armed services. And in December 1951, Truman issued Executive Order No. 10308, establishing a Committee on Government Contract Compliance to seek compliance with non-discrimination provisions in federal contracts.¹⁷

Initially, the election of Dwight D. Eisenhower in 1952 did not seem to signal a more vigorous approach to civil rights issues. But other events would compel the involvement of the president and eventually Congress. Litigation brought by the NAACP^{18/} had gradually chipped away at segregation in educational institutions. The initial focus of the litigation was desegregating professional schools and universities, but the organization's success on higher education issues ultimately led to a direct challenge to the separate but equal doctrine in elementary and secondary schools. Finally, in 1954, in *Brown v. Board of Education*, the U.S. Supreme Court ruled that segregation of students by race was a violation of the equal protection clause of the Constitution.¹⁹

Meanwhile, other events around the country would mark the beginning of the modern civil rights movement, ultimately prompting a federal response on many levels. In 1955, the year-long Montgomery, Alabama bus boycott began when Rosa Parks, an African-American woman, refused to vacate her seat on a city bus so that a White man could sit down. The boycott ended after the Supreme Court rejected the city's last appeal of a court order requiring desegregation of the city's buses. In September

1957, just as the Civil Rights Act was on the verge of enactment, Arkansas Governor Orville Faubus used the National Guard to block the entrance to Little Rock's Central High School to prevent nine African-American students from enrolling. President Eisenhower was forced to send federal troops to Little Rock in order to assure that the Black students could safely attend school.

While the civil rights movement was gaining momentum throughout the country, there were renewed legislative efforts at the federal level. In his 1956 State of the Union message, President Eisenhower asked Congress to create a Civil Rights Commission to investigate allegations that African Americans were being deprived of their right to vote. Later that year, he submitted legislation that embodied several of President Truman and his Committee on Civil Rights' recommendations. The legislation created a temporary six-member bipartisan Civil Rights Commission, a Civil Rights Division in the Justice Department, and greater federal enforcement authority for the protection of civil rights, particularly voting rights.

Although the president's civil rights bill passed the House of Representatives later that year, it remained bottled up in the Senate. After Eisenhower's re-election in 1956, he resubmitted the bill to Congress and, in his State of the Union message in January 1957, urged its swift passage. Again, congressional support was in doubt, particularly in the Senate. Southern senators labeled the commission "repugnant to basic constitutional principles" and "a continuing threat to the welfare and security of every person in the nation as long as it exists."²⁰ The commission's subpoena authority was deemed especially objectionable. Senator Herman Talmadge, D. Ga., predicted "star chamber sessions" and the House minority report declared that "this Commission is nothing more or less than a national grand jury."²¹ The bill's Senate opponents

were able to eliminate a provision of the bill that would have authorized the U.S. Attorney General to seek injunctive relief against anyone who deprived a citizen of his/her civil rights. Sen. Strom Thurmond, D. S.C.,²² filibustered to prevent final passage of the bill, speaking non-stop for more than 24 hours. Sen. Thurmond's effort failed, and the bill passed in September 1957 with most of the senators from the southern states voting against it.²³

Despite the commission's limited two-year life, the agency did not become fully operational until nine months after enactment. Delays in nominating and confirming the commissioners – and in appropriating operational funds – all contributed to the slow start. The first step was nominating the commissioners, which President Eisenhower did on November 7. The president had been anxious to select individuals who might have an "ameliorating effect" on the passions aroused by the crisis in Little Rock that had occurred almost simultaneously with passage of the legislation establishing the commission. He wanted "to get the spectrum of American opinion on the matter" and sought men of "thoughtful mien" who would command full public confidence.

But many in the civil rights movement were disappointed that the nominations included former southern governors who were avowed segregationists. The original nominees were: Justice Stanley Reed, recently retired from the U.S. Supreme Court; Robert G. Storey, dean of the Southern Methodist University Law School; John Battle, former governor of Virginia; Doyle Carleton, former governor of Florida; Ernest Wilkins, assistant secretary of labor; and Father Theodore Hesburgh, president of Notre Dame University. Justice Reed withdrew his name from consideration soon after his nomination and was replaced by John Hannah, president of Michigan State University. Wilkins' term was short-lived as a serious illness forced him to retire in 1958. He was replaced by George M.

Johnson, dean of Howard University's law school. Hannah, Wilkins, and Johnson were Republicans; Storey, Battle, and Carleton were Democrats; Hesburgh was an independent. Wilkins, and then Johnson, were the only African Americans on the commission. Equally divided politically, the commission was also equally divided geographically between northerners and southerners. Hannah was named chair and Storey was named vice chair.

The overall media reaction to the nominations was positive. For example, a *New York Times* editorial stated:

"This first commission should inspire confidence by its membership. It is bipartisan, or even nonpartisan, since one member is. . . an "independent." It derives from both North and South, in appropriate balance. It has a most distinguished chairman, Dr. John A. Hannah, president of Michigan State University. The members are persons of distinction in public service. They are now continuing in that role."²⁴

However, some newspapers and magazines wondered whether the commission would break any new ground, given its makeup.²⁵

Despite the moderate, even conservative nature of the new commissioners—Battle was an avowed segregationist and Carleton, though less aggressive in expressing his views, occupied a similar place on the political spectrum—the confirmation process was not smooth. Sen. John Eastland, D. Miss., chairman of Senate Judiciary Committee, delayed scheduling hearings on the nominations, and once scheduled, subjected several members to sweeping cross-examinations. He continued his opposition through the debate on the floor of the Senate. Nevertheless, the committee and the full Senate ultimately confirmed all six nominees.²⁶

It was during the Senate confirmation hearings for the commissioners that the first clear legislative statements were made regarding the need for the commission to be independent. The exchanges were initiated by Senate Judiciary Chair Eastland and appear to have grown out of concern that the commission would be too closely tied to the Justice Department and subject to instructions, as Eastland expressed it, "of some high authority."²⁷ Southern fears about an overzealous Justice Department spilled over into concern about the use of the "Commission as a factfinding body for the benefit of the Department."²⁸ These fears proved to be unfounded; if anything, the reverse proved to be true. As later events showed, the Department of Justice often attempted to restrain the commission's zeal.²⁹

There were also delays appointing the staff director. President Eisenhower finally nominated Gordon M. Tiffany, a former attorney general of New Hampshire, in mid-February of 1958. Southern Democrats were again critical of the nomination, but Tiffany was confirmed in May and was sworn in the following month—nine months after the creation of the commission. The delay in appropriating the necessary funds further complicated the commission's ability to start work. Although the president had allocated some minimal emergency funds to get things started, Congress did not enact the president's funding request until late June 1958.³⁰

II. The Commission's Early Years

As the commission got to work—investigating complaints, drafting field surveys on the exercise of voting rights around the country, and planning hearings—the commissioners also made the decision to establish State Advisory Committees (SACs). Commissioner Storey declared this “the smartest thing we ever did.”³¹ While the headquarters staff undertook its inquiry into all federal and state laws bearing on civil rights, their enforcement and effectiveness, the SACs could take on a grassroots information gathering role. Because there was no regional staff at that time, appointments to the committees were necessarily handled at headquarters. Each commissioner took responsibility for recommending members for eight states, although all appointments were subject to approval by the full commission. By August 1958, SACs had been established in every state except Mississippi and South Carolina. The SACs would play a varied but often important role throughout the commission's history. As the agency expanded and began to establish regional offices around the country, in part to support the work of the SACs, the primary responsibility for recommending SAC members devolved to the field.

Although the commission's primary mandate was voting rights, plans for the first two years also included work in the fields of education and housing. To that end, the commission scheduled hearings in several southern states, a conference on education in Tennessee and investigations and public hearings on segregation in public housing in New York, Chicago, and Atlanta. Its first public hearing was to be a voting rights hearing in Montgomery, Alabama in December 1958. At that point, it had less than a year to complete its work, including its report to the president and Congress on its activities, findings, and recommendations.

The controversies that arose during the congressional debate over the establishment of the commission ultimately paled in comparison to the legal (and other) confrontations that occurred once the agency began its work in earnest. While preparing for the Montgomery hearing, the commission staff encountered obstruction and opposition from Alabama voting officials. Registrars withheld records upon orders of the state attorney general. Then-Circuit Court Judge George C. Wallace officially impounded all registration records in two counties. Wallace told one newspaper that “[t]hey are not going to get the records. And if any agent of the Civil Rights Commission comes down to get them, they will be locked up.”³² Nevertheless, the commission proceeded with the hearing on December 8, 1958, first listening to African-American witnesses who detailed their many frustrating and often unsuccessful attempts to register to vote. Later in the day, the commission began questioning county officials who had been subpoenaed to appear. The witnesses were uncooperative. They refused to answer questions, claimed ignorance of registration procedures, and failed to produce records. Transcripts from the hearing indicate an atmosphere of tension, exasperation, and frustration on the part of the commissioners and defiance on the part of the state officials.³³

Press accounts of the hearing, including reports from several southern newspapers, were highly critical of the Alabama officials' defiance of the commission. *The New York Times* commented on the “intolerable contempt for the law” displayed by the local officials in their “resistance to this ultra-moderate Presidential Commission.” President Eisenhower later characterized the conduct of the officials as “reprehensible,” decrying “this refusal of complying with the basic laws of the land.” The commission

had no intention of letting the matter rest. That night they decided, by a vote of 4 to 2, to seek enforcement of the subpoenas. Ultimately, Federal District Court Judge Frank Johnson issued an order requiring state officials to make their voting records available to the commission.³⁶

The commission met a similar challenge to its authority when it attempted to schedule a hearing in Louisiana in the summer of 1959 in response to numerous affidavits alleging voting rights violations. State officials refused to cooperate, going so far as to file a lawsuit challenging the constitutionality of the Civil Rights Act itself. Hours before the hearing was to begin, the state attorney general obtained a court order preventing the commission from holding the hearing.³⁷ The resulting legal battle ultimately led to a U.S. Supreme Court decision upholding the constitutionality of the 1957 Act and the commission's procedures for conducting hearings and subpoenaing witnesses and documents.³⁸ In delivering the court's opinion, Chief Justice Earl Warren stated:

[The Commission's function] is purely investigative and fact-finding. It does not adjudicate It does not indict, punish, or impose any legal sanctions. . . . The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.³⁹

The Alabama voting hearing served as a model for the commission's future activities. By thoroughly and irrefutably documenting the deprivation of civil rights, the commission showed the need for action and provided the record that Congress and future administrations could use to push for legislation to address the problems. Through its hearings and investigations, the commission would collect the facts; analyze and debate them; write reports that documented its findings; and make

recommendations for action. The commissioners would present their findings and recommendations to the president and Congress, as required by law, and would often testify before Congress in support of their recommendations.

In that first year, the commission held a conference on education in Nashville, Tennessee and hearings on housing in several cities around the country, both in the north and the south. The education conference revealed that public school desegregation was moving at a snail's pace, despite the Supreme Court's mandate. The housing hearings found that residents of all three cities—New York, Chicago, and Atlanta—lived in racial isolation, regardless of the legal status of segregation: in New York, laws prohibited discrimination; in Chicago, there were no laws on the books; and in Atlanta, rigidly enforced segregation was the custom.

The commission completed its work and submitted its report to the president and Congress in September 1959.⁴⁰ That first report, *With Liberty and Justice for All*, summarized the scope and effect of existing civil rights laws, described the results of the commission's hearings and investigations in the areas of voting, education, and housing, and presented the commission's findings and recommendations. The report reflected the differences of opinion and approach between the commission's northern and southern members. Nevertheless, there was unity on broad principles and on many specific recommendations.

For example, in the voting section, there were a number of unanimous recommendations, including a call for legislation to prohibit any action which would deprive, or threaten to deprive, any individual or group of individuals of their right to register and vote. However, other voting recommendations did not achieve unanimity, including the recommendation that the president

be empowered to appoint temporary federal registrars in areas where there was a pattern of discrimination. Commissioner Battle dissented, stating that existing laws were sufficient to protect the right to vote. His was a solitary dissent, however; the other two southern members of the commission voted with their northern colleagues. A more overt split arose in connection with another voting recommendation. Commissioners Hannah, Hesburgh, and Johnson called for a constitutional amendment declaring that the right to vote should not be denied for any reason other than the inability to meet state requirements regarding age, residency, or legal confinement. Commissioners Storey and Carleton dissented on the ground that there was no evidence that the federal government lacked the power to address the issue through other means. Commissioner Battle concurred with Storey and Carleton.

Nor were all the recommendations in the other sections of the report unanimous. Commissioners Hannah, Hesburgh, and Johnson recommended that the federal government withhold funds from any institution of higher education, public or private, that continued to practice racial discrimination. Commissioners Storey, Battle, and Carleton opposed any form of “economic coercion” and maintained that the commission had not done enough work on this issue. The recommendations for federal action in the housing section were more general, reflecting the magnitude and complexity of the issues. The report called for biracial commissions on housing to further study the issue and to investigate complaints, as well as for various other non-binding but ameliorative steps. There were no dissents to these recommendations, but Commissioners Storey, Battle, and Carleton were critical of the tone of this and other parts of the report.

The process of dealing with dissent within

the commission during these early years bears examination, especially in light of more recent years in the commission’s life which have seen greater tension and disagreements among the commissioners. Dissenting opinions were embodied in the text of the report, in separate statements or in footnotes, rather than in a separate minority report. And, where agreement was not possible, subgroups of commissioners—usually Hannah, Hesburgh, and Johnson and at least once, Hesburgh and Johnson alone—made proposals that were included in the main body of the report. Only Commissioner Battle included a specific dissent, not only on the recommendation to appoint voting registrars, but on the tenor of the report as a whole.

Given the commissioners’ different perspectives, it was not surprising that there were disagreements. The report addressed these differences head on:

Problems of racial injustice have been present in varying forms since the birth of the nation. . . . So it is still necessary for men to reason together about these questions and to continue to search for answers. This, the Commission has tried to do. Because reasonable men differ on the best remedial measures, it was agreed that the Commissioners should express these disagreements wherever deemed important, either in footnotes or in supplementary statements.⁴¹

Nevertheless, they were convinced that the country faced no more important problem than civil rights and that somehow it must be solved.⁴²

The release of the report coincided with the last stages of a lengthy debate over the future of the commission. Legislation extending its life had become bogged down in Congress. Although President Eisenhower had praised the work of the commission and called for its extension at the time of the Alabama hearing, opposition from southern

senators to civil rights legislation generally, and to the commission in particular, had led to stalemate. The report only served to increase their opposition. In a pattern that was to be repeated throughout the commission's life, staffing and morale problems developed due to the uncertainty of the commission's continued existence. Only through 11th hour parliamentary maneuvering were Senate supporters able to add an amendment to an unrelated bill extending the commission's life for another two years. Despite vocal opposition from powerful southern senators, the bill passed and was quickly agreed to by the House.

Even with ongoing uncertainties about its continued existence, the commission forged ahead with its work, following the pattern of investigations and hearings it had established in its early voting rights efforts. Upon Commissioner Battle's resignation in 1959, President Eisenhower nominated Robert S. Rankin, a political scientist from Duke University, as a replacement. More moderate than Battle, Rankin enabled the commission to move toward an increasing consensus on the civil rights issues confronting it.⁴³ Meanwhile, in 1960, Congress enacted a civil rights bill sent by President Eisenhower, again extending the life of the commission and incorporating commission recommendations to help secure voting rights for African-Americans citizens, including the appointment of federal voting referees and a prohibition on destroying registration and voting records.

III. The 60s: Laying the Foundation for Legislation

With the election of President John F. Kennedy in 1960, expectations were high that significant progress might be made in civil rights. Kennedy had run on a platform endorsing civil rights enforcement, but his narrow victory and his dependence on southern senators for enactment of his legislative programs led him to be cautious in his first few years in office.⁴⁴ Significantly, though, in his first year in office, he made several key appointments to the commission. He nominated Erwin Griswold, dean of Harvard Law School, and Spottswood W. Robinson, III, dean of Howard Law School, to replace resigning commissioners Doyle Carleton and George Johnson. While these appointments retained the bipartisan nature of the commission and the informal tradition of regional balance, they did change the commission's character. There was no longer any political representation; all the commissioners were now from the legal or academic world. Nor was there any member of the commission remaining who was an avowed advocate of segregation, as Carleton and Battle had been. Kennedy also nominated as staff director Berl Bernhard, a Yale law school graduate who had been with the commission from the beginning. The previous staff director, Gordon Tiffany, had come under fire not only for political reasons but also for his management practices. The new leadership was welcomed by the commission chair himself.⁴⁵



Civil Rights March on the National Mall
Washington, DC. August 28, 1963

During the 1960s, while continuing to focus primarily on African-American voting rights in the South, the commission expanded its focus to include other issues such as discrimination in health care facilities and the administration of justice. It also investigated discrimination against Mexican Americans in its hearings in Los Angeles in 1960. In addition, the commission began to explore the issue of unemployment in the African-American community.

In the commission's early years, interference with its activities came from hostile southern officials who refused to comply with subpoenas to provide documents or to answer questions at hearings. Congressional opposition to the commission's mission and criticism of its work also hampered its ability to function efficiently, as the continuing uncertainty over its future caused staff departures, morale problems, and difficulties in setting and carrying out agendas. Litigation resolved the question of the commission's legitimacy, but the latter challenges—the effect of its temporary nature and worries about funding—continue to plague the commission to this day. But beginning in the early 1960s, a new type of conflict began to emerge—conflict with the executive branch itself.

Though technically part of the executive branch, the commission viewed itself as an independent voice whose role was to examine the facts and make findings and recommendations based on those facts, regardless of how unpopular those findings and recommendations might be. Chairman Hannah set the tone in his opening statement at the commission's first hearing in Montgomery, emphasizing that the commission was not an advocate for any one view on civil rights, had no affiliation with the Justice Department, and was solely a fact-finding body. He told the audience that the commission had been established in the hope that through dispassionate evaluation and appraisal, "some sort of reason and light" could be brought to bear on issues that were "frequently and passionately debated but seldom soberly assessed."⁴⁶ Speaking at a SAC conference in Washington, President Eisenhower also stressed the importance of the commission's fact-finding function. Moreover, he said "I think [the Commission] holds up before us a mirror so that we may see ourselves, what we are doing and what we are not doing, and therefore makes it easier for us to correct our omissions."⁴⁷

But in the early 1960s, tensions developed between the commission on the one hand and the White House and the Justice Department on the other. The dispute arose over the scheduling of a long-planned voting hearing in Mississippi. The Justice Department had twice requested that the commission postpone the hearing because of concerns about the effect the hearing would have on its own legal proceedings. Twice the commissioners agreed. In 1962, as the commission began for the third time to develop plans for the Mississippi hearing, Governor Ross Barnett attempted to block the admission of James Meredith to the University of Mississippi. President Kennedy called the Mississippi National Guard and sent in federal troops, as President Eisenhower had done in Arkansas five years earlier. While the

Justice Department pursued criminal contempt proceedings against the governor, the commission proceeded with its own plans. Once again, the Justice Department felt the commission's presence would interfere with its enforcement efforts. The commissioners again agreed to postpone the hearings but also decided to produce an "Interim Report" on conditions in Mississippi. Their decision was based in part on a report from the Mississippi SAC documenting increasing violence against African Americans and civil rights workers in the state. The violence had even touched the vice chair of the committee, whose home had been bombed.

The commission's plan to release the report led to a confrontation with President Kennedy. Knowing that the report would be controversial, the commissioners had sent a copy to the president prior to publication with the understanding that if he did not release it, the commission would. During a meeting with Chairman Hannah and Staff Director Bernhard at the White House, Kennedy asked them to reconsider their decision to release the report. They declined. This would not be the last time the commission would incur the ire of a president, but in this case, Kennedy chose to defer to the commission's independence rather than suppress the report. In his biography of Kennedy, Arthur Schlesinger quotes the president as saying to Hannah and Bernhard:

I still don't like it. If the Commissioners have made up their minds, I presume they will issue the report anyway. I think they are off the track on this one, but I wouldn't try to suppress it. That would be wrong—couldn't do it anyway. It is independent, has a right to be heard, but I do wish you could get them to reconsider.⁴⁸

The dispute between the administration and the commission made the newspapers, with one presidential advisor later characterizing the commission during this period as "free-wheeling"

and “a somewhat uncomfortable ally in this struggle.”⁴⁹ Yet the recommendations in the report generated even more controversy. The commission suggested that the president consider legislation to assure that no federal funds be provided to any state that refused to abide by the Constitution and laws of the United States; and that he explore his authority to withhold federal funds from the state of Mississippi until it demonstrated its compliance with the Constitution and laws of the United States. Even northern newspapers and magazines thought the commission had gone too far. Soon after the release of the report President Kennedy made clear that he did not support a blanket withdrawal of federal funds.⁵⁰

However, events in the South continued to shine a spotlight on the problems African Americans were facing, which illustrated the need for stronger measures to address those problems. In May of 1963, Birmingham’s police commissioner, Bull Connor, reacted to demonstrations organized by Dr. Martin Luther King, Jr. by turning fire hoses and police dogs on the demonstrators. The photographs stunned the nation. In June, Medgar Evers was killed in front of his home in Jackson, Mississippi. Demonstrations and rioting occurred in numerous cities in the South that summer. Also in June, George Wallace, now governor of Alabama, blocked the enrollment of two African-American students at the University of Alabama. In August, the March on Washington brought 250,000 people to the Lincoln Memorial to demand justice.

By early summer, President Kennedy was prepared to take a more pro-active position. Using the confrontation with Governor Wallace as the catalyst, he took the opportunity to describe the need for strong civil rights legislation in a nationally televised address. He framed the issue in the strongest possible terms:

If an American, because his skin is dark, cannot eat lunch in a restaurant open to the public; if he cannot send his children to the best public school available; if he cannot vote for the public officials who represent him; if, in short, he cannot enjoy the full and free life which all of us want, who among us would be content to have the color of his skin changed and stand in that place?

Who among us would then be content with the counsels of patience and delay? One hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons, are not fully free. They are not yet freed from the bonds of injustice; they are not yet freed from social and economic oppression.⁵¹

A week later, he sent to Congress the most sweeping civil rights bill in nearly a century. The provisions of the omnibus legislation were derived from many sources and included the recommendation of the Civil Rights Commission calling for funding cut-offs for any state or local program that practiced discrimination. The bill also called for a four-year extension of the commission, whose current authorization was scheduled to expire that September. Members of the commission and its staff director testified in Congress in support of the bill. However, it became clear that Congress would not act on the legislation that year, thus putting the commission’s survival in jeopardy. Once again, planning for future activities was suspended and staff began to resign. Two commissioners also left: Dean Storey resigned for personal reasons and Spottswood Robinson was appointed to a federal judgeship. Staff Director Bernhard also resigned to return to private law practice. But yet another last minute rescue—in the form of a Senate amendment to an unrelated bill already passed by the House—provided for a one-year extension, in that Congress would reconsider the commission when it took up

the president's civil rights bill the following year.

The assassination of President Kennedy that fall shocked the nation. The commissioners felt even further adrift despite President Johnson's assurance that he would vigorously push for enactment of Kennedy's civil rights bill the following year. The new president acted relatively quickly in 1964 to fill the vacancies on the commission, appointing Frankie Freeman, an African-American attorney from St. Louis and the commission's first female, and Eugene Patterson, the editor of *The Atlanta Constitution*. They were not confirmed until the fall of that year. However, President Kennedy's omnibus bill was enacted in July after lengthy debate. Not only were strong civil rights measures finally adopted—including a prohibition on discrimination in public accommodations—the commission was given a four-year lease on life. In addition, the commission was given a new responsibility, to “serve as a national clearinghouse for information in respect to denial of equal protection of the laws because of race, color, religion or national origin.”⁵²

In early 1965, the commission finally held its Mississippi voting rights hearing despite continued resistance from the Justice Department. This time, Attorney General Katzenbach personally appeared at a commission meeting to ask for postponement on the ground that the commission's presence in the state would prejudice an important prosecution. The case involved the murder of three civil rights workers—James Cheney, Andrew Goodman, and Michael Schwerner—the previous summer. The commission decided to proceed with the hearing. Chairman Hannah believed that the commission's integrity was at stake and that canceling the hearing “would be a betrayal of all the Mississippi witnesses who had agreed to testify at great risk.”⁵³ While the hearing elicited some signs of positive change, there was considerable testimony about ongoing

obstructions and interference with the right of African-American citizens to vote. The hearing received broad press coverage and favorable editorial comment throughout the country.⁵⁴

In March, President Johnson submitted his voting rights proposal to Congress, with the commission's hearing and the publicity surrounding it providing needed ammunition to supporters of the legislation. The commission's report on the hearing was issued in May, as Congress debated the Voting Rights Act.⁵⁵ The report concluded that African Americans in Mississippi had been systematically denied the right to vote through official government action, fraud, and violence. The commissioners unanimously endorsed the president's bill, which included a requirement that jurisdictions with a history of discrimination “preclear” all changes in voting procedures with the Department of Justice. If the Justice Department determined that the changes were discriminatory, they could not be implemented. The legislation also called for the appointment of federal registrars—one of the commission's earliest recommendations in the area of voting. The commission report also recommended the abolishment of literacy tests and poll taxes (recommendations that did not become part of the 1965 legislation but were included in the 1970 Voting Rights Act extension) and the assignment of federal poll watchers.⁵⁶

The commission's work on voting rights—culminating in the 1965 Mississippi hearing and report and the report's role in the legislative process—represented a high point in the body's influence. Father Hesburgh testified extensively in support of the bill, while Senator Edward Kennedy, D. Mass., wrote Chairman Hannah to say that “your assistance in this matter was of real significance in our attempts to strengthen the bill.”⁵⁷ A year later, the Supreme Court rejected a major challenge to the

constitutionality of the 1965 Act, relying in part on data published by the commission.⁵⁸

Throughout the 1960s and 1970s, the commission diligently monitored the effectiveness of federal efforts to enforce the civil rights legislation enacted during the Johnson administration. The commissioners recognized that the struggle to enact strong laws was worth little if the laws were not vigorously enforced. This monitoring function became a significant part of the commission's agenda over the next two decades. The commission issued a number of reports during this time frame, continuing its work on school desegregation, as well as examining enforcement of Title VI of the Civil Rights Act of 1964, which prohibits federal funding of discriminatory programs. It began what became a multi-decade examination of the U.S. Department of Agriculture's role in administering farm programs in the southern states, finding an ongoing pattern of discrimination. In 1970, the commission published the first in a series of comprehensive reports, *The Federal Civil Rights Enforcement Effort*, which included numerous findings and recommendations affecting all aspects of civil rights enforcement. Over the next several years, it issued a series of follow-up reports critical of the federal enforcement effort and calling for stronger leadership and direction from the president.⁵⁹

IV. The 70s: School Desegregation and an Expanded Mandate

During the 1970s, as the commission continued to be authorized on a temporary basis, its jurisdiction was twice expanded. In 1972, it was reauthorized for six years and given authority to investigate and conduct studies related to sex discrimination. In 1978, it was again reauthorized for six years and age and disability were added to its mission. Though still a temporary agency, the commission seemed to have finally gained a measure of stability. But earlier in the decade, mounting tension between the White House and the commission led to the first real threat to its independence.

One of the structural anomalies of the commission was that its members did not have fixed terms. Some have speculated that this was a result of the temporary nature of the agency's charter and that commissioners' terms were to be coterminous with the agency's statutory life.⁶⁰ Nevertheless, commissioners had traditionally assumed that they were obliged to submit their resignations to new presidents. They had done so after the election of President Kennedy and the succession and election of President Johnson. Indeed, after the 1964 election, the White House specifically requested that the commissioners submit their resignations, purely as a formality. Though the acting general counsel expressed some surprise at this development, given the unique nature of the commission as both bipartisan and temporary, he nevertheless recommended that the commissioners comply with the request. Commissioner Erwin Griswold, a Kennedy appointment and dean of Harvard Law School, later solicitor general, strongly disagreed:

It is a mistake for us to be asked for our resignations, and . . . a mistake for us to offer them. It would be an acknowledgement that

we are not an independent agency, but are merely a part of the Presidential staff, holding office at the pleasure of the President. I do not think that that is either the legal or factual situation.⁶¹

When President Nixon assumed office, four commissioners did not tender their resignations and two did so for personal reasons. Soon after his inauguration, Nixon asked Father Hesburgh if he would take over the chairmanship of the commission. Hesburgh was prepared to resign, having been on the commission since its inception; however, he agreed to stay on as chair. Contemporaneous news accounts suggest that Nixon, then facing increasing opposition to the Vietnam War, including demonstrations in Washington and on campuses around the country, was impressed by Father Hesburgh's tough policy toward campus demonstrators at Notre Dame.⁶³ Over time, however, President Nixon became less enamored of the commission because of its ongoing critique of the federal government's civil rights policies. In the late 1960s, the commission had done significant work in the area of school desegregation, finding in a series of reports beginning in 1966 that desegregation was moving very slowly. Its 1969 report on school desegregation was highly critical of the federal government's efforts to require school districts to comply with federal law prohibiting use of federal funds in programs that discriminated. Earlier that year, the administration had de-emphasized cutoffs of federal funds to recalcitrant school districts in favor of enforcement in the courts, a lengthier and more cumbersome process. In addition, the commission criticized the administration's support for delays in desegregation in Mississippi, South Carolina, and Alabama. The commission charged that these policies amounted to a "major retreat."⁶⁴

After issuance of the 1970 report, which was critical of federal enforcement efforts across the board, *The New York Times* reported that the White House had asked the commission to delay release of the report until after the mid-term elections. Both Chairman Hesburgh and the White House confirmed the news story, although the White House denied that the reason for the request was political.⁶⁵

Despite a 1971 report recognizing progress in civil rights enforcement by the Nixon administration, the commission's position on school desegregation continued to be a thorn in the administration's side. The disagreement came to a head over the use of busing as a means to integrate public schools. Chairman Hesburgh testified in March 1972 at a hearing before the House Judiciary Committee against a proposed constitutional amendment to prohibit busing, even as the president was instructing his aides to draft such an amendment and the attorney general was advocating a statutory alternative that would restrict the authority of the courts to order busing.⁶⁶

Soon after the 1972 election, the president asked Father Hesburgh to resign. Originally, the White House contended that the resignation had been initiated by Father Hesburgh himself, but was forced to retreat from that position when Hesburgh denied it. News accounts of the conflict noted that while Hesburgh and the commission had been critical of the administration's civil rights enforcement efforts as they had of previous administrations, it was Hesburgh's "biting attacks on the Nixon busing policy that raised the ire of Administration officials."⁶⁷ According to at least one news story, "the speculation in Washington was that [the president] would pick someone less committed to... busing."⁶⁸

Several months later, in an interview with *The New York Times*, Father Hesburgh made a statement that

succinctly described the importance of the role of the commission as an independent voice on civil rights issues:

The people around the President . . . just don't realize that they can't fault the commission for doing its job.

The day the commission doesn't say anything unpleasant to Congress and the President, it ought to go out of business.

The Administration would be well-advised to get the best people it can find regardless of political parties to work on these problems.

I can understand the Administration being touchy about loyalty, all Presidents are. But the others merely expressed their disagreement with the commission without getting rid of commissioners.

After the commissioners said the Federal Government should cut off funds to states that violated civil rights, President Kennedy called a press conference and said he didn't have such authority and didn't want it.

The next year, President Johnson wanted it, and he got it [in the Civil Rights Act of 1964]. But nobody talked about firing anybody.⁶⁹

Unfortunately, by not following the earlier model of either handling disagreements behind the scenes or by publicly distancing itself from the commission's positions, the Nixon administration established a precedent that was to have even more significant repercussions in the future. In the short term, however, the changes in the commission's makeup did not result in a change in direction. The new chairman, Arthur Flemming, former president of Ohio Wesleyan University and secretary of health, education, and welfare in the Eisenhower

administration, was as strong an advocate for vigorous federal enforcement of civil rights laws as Father Hesburgh had been.

Throughout the years, the commission's staff and budget steadily grew. By 1970, it had a budget of approximately \$3 million and a staff of approximately 140. Regional offices had been set up around the country to support the all-volunteer SACs that continued to report to the commission on issues affecting their particular states. In addition to its new statutorily mandated responsibilities in the areas of sex discrimination and discrimination on the basis of age and disability, the commission's work included issues affecting Hispanics, Asian-Americans, and Native Americans.

The commission also continued to shine its spotlight on voting, issuing a report in 1975 that documented the need for extending the Voting Rights Act and recommended adding provisions to guarantee the voting rights of language minorities. It issued ongoing assessments of the federal civil rights enforcement efforts and, in compliance with its responsibility to act as a "clearinghouse" on civil rights issues, issued a series of informational reports on a wide range of subjects, including a series on racism "to promote discussion and understanding of the manifestations and costs of racism and, especially, to stimulate action, by groups and individuals to effect necessary change."⁷⁰ Similarly, early in the decade, the agency began to produce a series of reports on barriers to equal educational opportunities for Mexican Americans in the public schools of the Southwest.⁷¹ But its continuing work on school desegregation, new work on women's issues, and its support of affirmative action ultimately set the commission on a collision course with the White House.

V. The 80s: Dismantling the Commission

Several times during the 1970s, the commission issued statements and reports in support of affirmative action as a means to remedy past discrimination. And in 1981, in a report initiated before the 1980 election, the agency reiterated the legal underpinnings for affirmative action and its effectiveness in addressing the discrimination experienced by racial and ethnic minorities and women. The report noted that all three branches of government “had advanced the concept and practice of affirmative action” in the last decade.⁷² The report also pointed out that the newly-elected Reagan administration was re-examining the federal government’s support for, and reliance on, affirmative action, and that the Justice Department had decided not to follow the pattern of previous administrations (both Republican and Democratic) that had negotiated specific goals and timetables in settling complaints of illegal discrimination.⁷³ Other commission reports explicitly criticized the decline of civil rights enforcement budgets at government agencies and the lack of minority appointments to high-level administration positions.⁷⁴

Throughout the 1970s, the commission also advocated adoption of the proposed Equal Rights Amendment (ERA) – another measure that was becoming mired in controversy as the ratification period drew to a close in 1978. Chairman Flemming and Commissioner Freeman testified in favor of extending the ratification period for the ERA in 1978. The commission reiterated its support for the amendment in 1981.⁷⁵

In November 1981, the commission took the administration to task yet again in a report on school desegregation. The report, *With All Deliberate Speed: 1954-??*, expressed concern about the Justice Department’s actions in pending school desegregation cases. As just one example, the

department reversed its position in a case involving a voluntary school desegregation effort in Seattle, moving from opposition to support for a local initiative that would limit school assignments and thereby undercut the school districts’ desegregation efforts.

All of these views ran counter to those of the newly-elected Reagan administration. And, as the commission’s own *Dismantling the Process of Discrimination* report indicated, the administration began early on to put in place civil rights policies that were in direct opposition to the policies that had enjoyed support from previous administrations, Republican and Democratic alike. Through appointments and policy shifts, the administration put its stamp on the Department of Justice and other agencies with civil rights enforcement power. In the fall of 1981, it turned its attention to the Civil Rights Commission. In November, on the same day the commission issued its school desegregation report, the White House announced that Chairman Flemming and Vice Chair Steven Horn would be replaced.⁷⁶ The new chair, Clarence Pendleton, was a conservative Black Republican who had been head of the San Diego Urban League. Mary Louise Smith, a former chairwoman of the Republican National Committee, would replace Horn as vice chair. Pendleton’s views on civil rights were similar to those of the administration; and, as chair, he had considerable influence over the commission’s activities. Nevertheless, the two appointments did not result in an overall shift in outlook at the commission. Smith often sided with the other commissioners to produce 5 to 1 votes critical of administration policy.⁷⁷

Early the following year, in February of 1982, the White House announced that Reverend Sam Hart, a

Black minister from Philadelphia, would replace Jill Ruckelshaus, a moderate Republican appointed to the commission by former President Carter. Hart was far more conservative than Ruckelshaus; he opposed both the ERA and busing and had characterized homosexuality as “an abomination both to God and mankind.”⁷⁸ After both Republican senators from Pennsylvania, John Heinz and Arlen Specter—neither of whom had been consulted about the nomination—expressed misgivings, Hart withdrew his name from consideration.⁷⁹

The White House then sent three new nominations to the Senate, intending to replace Commissioners Mary Frances Berry, Blandina Cardenas Ramirez, and Rabbi Murray Saltzman. However, the full Senate failed to act on the nominations before adjourning at the end of 1982 so the three sitting commissioners stayed on the job. After Congress reconvened in 1983, the administration tried again to replace Berry, Ramirez, and Saltzman, nominating Catholic University law professor Robert Destro, John Bunzel from the Hoover Institute at Stanford University, and Morris B. Abram, a lawyer from New York. In addition, the White House nominated Linda Chavez as commission staff director. Chavez, a conservative Democrat who later became a Republican, held views consistent with the administration’s opposition to affirmative action and busing to desegregate public schools. Throughout this period, the media wrote that White House officials believed “the President felt entitled to have his own appointees on the panel.”⁸⁰ *The New York Times* reported that the recently appointed chair, Clarence Pendleton, claimed the nominations were in response to his direct appeal to the White House that “you need to appoint more conservatives over here” to put administration policies into effect.⁸¹

Many in the civil rights community and in Congress were alarmed at this unprecedented attempt to change the commission from an independent agency

into an instrument of administration policy and sought alternatives. The House of Representatives approved a bill that would have allowed removal of commissioners only for neglect of duty or malfeasance in office. The bill never became law, however, and over time, other legislative proposals emerged. But before Congress could act, President Reagan fired Commissioners Berry, Ramirez, and Saltzman. Berry and Ramirez sued, and, within a few weeks, a federal judge stopped the president from removing the two commissioners from office. In upholding Berry’s and Ramirez’s right to remain on the commission, the court stated:

[T]here is adequate evidence in the legislative record to support plaintiffs’ contention that Congress intended the duties of the Commission to be discharged free from any control or coercive influence by the President or the Congress. When performing its fact-finding, investigatory and monitoring functions, for example, the Commission is often required to criticize the policies of the Executive that are contrary to existing civil rights legislation.⁸²

As the controversy over President Reagan’s nominations unfolded, and with the commission’s authorization once again set to expire, Congress debated the future of the agency. Fearing for the commission’s autonomy, members of the Senate recommended taking the agency out of the hands of the administration and the executive branch altogether and creating a new entity whose members would be appointed by Congress. The proposal was introduced by Sens. Arlen Specter, R. Pa., and Joseph Biden, D. Del. Biden, an opponent of busing, was troubled by the White House’s attempt to remake the commission in its own image, which he likened to President Roosevelt’s 1935 attempt to pack the Supreme Court.⁸³ The House of Representatives went even further, voting not to continue funding the commission unless its independence could be assured.⁸⁴

Finally, Sen. Robert Dole, R. Kan., brokered an agreement that would assure the commission's survival. The commission would be reconstituted; the number of commissioners would be increased from six to eight, with four appointed by the President, two by the House of Representatives and two by the Senate. Commissioners would serve staggered terms of six years and could only be removed for cause. There would be no Senate confirmation process. The chair, vice chair, and staff director of the commission would be chosen by the President with the concurrence of a majority of the commissioners.

News accounts of the compromise reported that there was an unwritten agreement regarding appointments to the commission. The President would reappoint Mary Louise Smith and Clarence Pendleton and would appoint two new members as well. It was widely assumed they would be Abram and Bunzel. The House of Representatives would recommend reappointment of Jill Ruckelshaus. The other three congressional appointments would be Berry, Ramirez, and a Republican with a strong civil rights record. Details of the agreement were widely reported in the media in mid-November 1983.

However, the scenario that actually unfolded was quite different.⁸⁵ While Berry and Ramirez remained on the commission as congressional appointees, the White House denied the existence of an agreement and did not reappoint Smith. Moreover, House Minority Leader Robert Michel recommended Catholic University Law Professor Robert Destro rather than Jill Ruckelshaus. Amidst expressions of shock and anger from civil rights leaders and congressional participants in the negotiations, White House officials, when announcing the new appointments, made it clear they intended to shape the commission in a conservative vein more in line with the president's views.⁸⁶ With respect to Commissioner Smith in particular, it was reported

that Reagan felt no obligation to her "because... she voted in favor of busing and affirmative action and joined other commissioners in criticizing the civil rights policies of the Reagan Administration."⁸⁷ Later that month, the new staff director said that the policies of the old commission would be re-examined, given that "There is [now] a majority of five for the President's position" on school desegregation and affirmative action.⁸⁸ Many members of Congress and civil rights leaders who had supported the legislative compromise felt they had been double-crossed, but there was nothing they could do.

While the basic duties of the reconstituted commission remained the same under the 1983 legislation, the impact of the structural changes was significant. That impact manifested itself early on: the reconstituted commission wasted no time in backing away from previously adopted positions, practices, and procedures. In some cases, longstanding commission recommendations were reversed without benefit of hearings, studies, or reports. In January 1984, at its first meeting, the reconstituted commission reversed its predecessor's previous support for affirmative action without the benefit of a single hearing or study, adopting a position consistent with that of the administration.⁸⁹ The new staff director said in press interviews that she wanted the commission to establish the goal of a colorblind society and not support the race-based policies of the old commission. She described herself in a debate as speaking "only for myself and the Reagan Administration."⁹⁰

Ongoing projects were canceled and new projects were proposed, reflecting an approach to civil rights that closely paralleled the administration's. The new commission majority canceled a study of the impact of cutbacks in federal student financial aid on minorities in predominantly Black and Hispanic colleges, as well as a study on the employment of

women and minorities in high-tech industries. New studies were recommended by the staff director, including one that would investigate the link between “a general decline in academic standards” and the “advent of affirmative action in higher education.” A re-examination of the commission’s longtime support for busing was authorized, as was another study to explore whether discrimination was still an adequate explanation of inequalities in education and income.⁹¹ One media report of the initial meeting described harsh exchanges between the chairman and the commission’s minority, during which “Pendleton seemed to revel in the majority’s power, remarking that his opponents ‘forgot who won the fight.’”⁹²

The new commission also took steps to assert more control over the SACs. In late March 1984, the commission voted to tightly control the release of reports from the committees. Commissioner Berry, who opposed the measure, argued that the more conservative commission was “trying to muzzle the state organizations that disagreed with it.”⁹³ By the following year, the SACs had been completely reorganized. The reorganization process – begun during Linda Chavez’s tenure as staff director – resulted in a closer alignment between the SACs’ viewpoint and that of the new, more conservative majority of the commission. Acting Staff Director Max Green, who continued implementing the reorganization plan after Chavez resigned in 1985, acknowledged in a press interview that the SACs “now have more people who agree with the general thrust of the commission.”⁹⁴ The effort to reinvent the SACs may have stemmed at least in part from a 1982 letter sent by 33 of the 51 advisory committee chairs to President Reagan during his first term, protesting his civil rights policies. In the letter, the committee chairs asserted that the president was responsible for a “dangerous deterioration in the Federal enforcement of civil rights.”⁹⁵

Among other steps taken to exert administration control over the commission was a new directive from the Office of Management and Budget that required the commission to clear all reports and congressional testimony with the budget office in advance to assure “consistency with Administration policy.”⁹⁶ No such clearances had been required in the past according to two previous chairs, Arthur Flemming and Father Hesburgh. In fact, in 1966, the commission had been informed by the budget office that, because of its unique nature as a bipartisan agency, it was exempt from the requirement to obtain clearance for legislative comments.⁹⁷

Equally damaging to the commission’s reputation as an even-handed investigatory agency aimed at fact finding were the controversies surrounding Clarence Pendleton, the chair. Pendleton repeatedly made headlines with statements and comments about civil rights issues that even some of his fellow conservatives on the commission found intemperate. There were also reports of questionable financial practices during Pendleton’s tenure at the San Diego Urban League.⁹⁸ The media, as well as current and former commissioners, were blunt in their assessments of both Pendleton and the commission. In April 1986, *Newsweek* reported that there is “no doubt that the once proud Civil Rights Commission [is] in shambles.” Later that same month *The Washington Post* quoted former Chair Theodore Hesburgh’s view that the agency lacked leadership and integrity and ought to be dismantled. And finally, Commissioner Bunzel, a conservative Reagan appointee whose views on civil rights paralleled Pendleton’s, nevertheless called on Pendleton to resign. In Commissioner Bunzel’s view, Pendleton’s inflammatory rhetoric had diverted attention away from the work of the commission and undermined its credibility. Bunzel concluded that Pendleton’s opportunity to make a significant contribution to the work of the agency had passed.⁹⁹ However, Pendleton remained on the commission as chairman

until his death in June of 1988. When Commissioner Bunzel's six-year term expired, he asked not to be reappointed.

Concerned not only about the direction the commission was taking, but also about increasing controversies and tensions within the commission itself and about the quality and quantity of the commission's work, Congress began to more closely monitor the commission's activities. Various congressional committees conducted ongoing oversight hearings and initiated a series of Government Accountability Office (GAO) reports that looked into all aspects of the commission's operations. The first GAO report, issued in 1986, raised concerns about the commission's work product and management issues. With respect to the latter issue, the GAO found that productivity had declined: in 1982 and 1983, before the commission was restructured, it had issued nine reports in each year; in 1984 and 1985, it issued only three reports. Additional concerns came from a member of the House oversight subcommittee regarding the commission's failure to monitor federal civil rights enforcement efforts – one of the commission's statutory mandates. Rep. Patricia Schroeder, D. Colo., pointed out at a hearing in April 1986 that the agency had not issued a single monitoring report since it was reconstituted in 1983.¹⁰⁰

In response to the GAO report, Congress initiated a series of strong measures intended to re-focus the commission's attention on its original statutory mission and on the issues the GAO had raised. The commission's funding for fiscal year 1987 was substantially reduced from previous years and restrictions were placed on how some of its budget could be spent. For example, \$700,000 was specifically earmarked for monitoring federal civil rights enforcement efforts. Congress's original intent that the commissioners serve on a part-time basis was reinforced in response to the GAO finding that

Chairman Pendleton had been billing the commission at a nearly full-time rate. As a result of the budget cuts, the commission closed seven of its ten regional offices and significantly reduced its staff. Congress ordered additional reductions in the commission's FY 1988 and 1989 budgets. Despite previous calls from civil rights organizations, including the Leadership Conference on Civil Rights and the NAACP, to defund the commission, Congress was not prepared to take such a drastic step. Instead, it hoped that the funding limitations and earmarks would help to keep the commission focused on its statutory mission. The budget cuts were also an expression of congressional dissatisfaction with the commission's lack of output, particularly in the area of monitoring and evaluating enforcement efforts.

The commission's 1983 authorization was set to expire in November 1989. Many in Congress and in the civil rights community were reluctant to support reauthorization in the absence of some assurance that the commission's independence could be guaranteed. With several vacancies about to occur, such assurance was in doubt.¹⁰¹ There were strong feelings in Congress and in the civil rights community that the Reagan appointees had reduced the commission to a forum for partisan bickering.¹⁰² In addition, the commission was still suffering from the effects of a series of embarrassing episodes involving Commissioner William Allen during his 14-month tenure as chair in 1988 and 1989.¹⁰³ Allen, a Reagan appointee, had been rebuked by the commission for an October 1989 speech titled "Blacks? Animals? Homosexuals? What Is a Minority?"¹⁰⁴ In addition, he had been the center of a controversy regarding "his entanglement in an adoption case involving a 14-year-old Apache girl in Arizona."¹⁰⁵

The debate over reauthorization revealed sharp differences of opinion among the various participants. Some were prepared to see the

commission die. Others supported a short-term reauthorization. The administration sought a six-year extension. The civil rights community advocated a six-month extension, unwilling to support a longer life for the commission without knowing who would be nominated to fill the four vacancies that would occur at the end of the year. The debate continued as the agency's expiration date approached. Once again, at the 11th hour, the commission got a reprieve.

VI. The 90s: The Commission Devolves

In November 1989, just two days before the commission was scheduled to cease to exist, President George H. W. Bush signed a compromise bill extending the life of the commission for another 22 months, until September 30, 1991.¹⁰⁶

President Bush's support for the commission had helped the Senate and House to resolve their differences. Nevertheless, the reauthorization was considered by some in Congress to be a probationary period for the agency. Rep. Don Edwards, D. Calif., chair of the House judiciary subcommittee with oversight and authorization responsibility for the commission, stated:

By adopting this compromise, the Commission will have the opportunity to once again become strong, independent, credible, and effective. . . . The Commission has the opportunity to regain its respectability by conducting public hearings and issuing reports on major civil rights issues that affect our nation, instead of shooting personal opinions from the collective hip.¹⁰⁷

New commissioners were appointed, raising hopes that the commission would re-establish its independence and address the management issues uncovered by the GAO. Russell Redenbaugh, an investment banker from Philadelphia, was appointed on the recommendation of Sen. Robert Dole, R. Kan., and was the first person with a disability to serve on the commission. Redenbaugh brought a business background to the commission and throughout his tenure was a strong voice for management reform. In early 1990, President George H. W. Bush named Arthur Fletcher to chair the commission. Fletcher, a Black Republican, had been assistant secretary for labor in the Nixon administration and was a supporter of affirmative action. At his first meeting as chair, Fletcher stated that he wanted the

commission to once again be a voice of authority on civil rights. The other two appointments were Carl Anderson, vice president for public policy for the Knights of Columbus and former legislative assistant to Sen. Jesse Helms, R. N.C., and Charles Wang, a Democrat and president of the China Institute in America, Inc.

Despite the new chair's stated commitment to restoring the commission's authority and his occasional willingness to part company with the Bush administration on civil rights issues, Congress and the GAO continued to cast a critical eye on the agency. In a reauthorization hearing in late July 1991, the House Judiciary Subcommittee on Civil and Constitutional Rights took Chairman Fletcher to task for the paucity of work product during his tenure. At the time, the commission was requesting a 25-year extension, on the grounds that the constant uncertainty about the commission's survival was adversely affecting its ability to attract and retain quality staff and, in turn, to produce the kind of work that would restore the commission's credibility in the eyes of Congress and the American people.¹⁰⁸ Chairman Fletcher defended both the quality and quantity of the commission's work product during his tenure, even as he continued to seek increased resources, citing the severe budget cuts of the 1980s as the primary reason for the agency's inability to produce more. Fletcher pointed out that in 1983 the commission had more than 250 full-time permanent employees. By 1991, the staff had shrunk to 79, while the budget had been cut nearly in half.¹⁰⁹

In response to a question from the panel, Chairman Fletcher acknowledged that the commission's credibility had been destroyed by the Reagan administration, but that under his leadership the agency's credibility was being restored.¹¹⁰ The subcommittee remained skeptical, however,

primarily because of the commission's lack of tangible evidence to back up Fletcher's claim. The commission had failed to produce any reports on federal civil rights enforcement, despite a specific earmark of funds in its annual appropriation for this critical monitoring function. On the positive side, however, the commission had re-opened three regional offices that had been shut down after the initial round of budget cuts in the 1980s. And, in a demonstration of independence from the Bush administration, the commission endorsed the Civil Rights Act of 1990, which sought to overturn several U.S. Supreme Court decisions that had narrowed the coverage of civil rights statutes and to correct an anomaly in civil rights laws related to awards of damages to victims of discrimination.

Modest progress and evidence of re-emerging independence led Congress to approve a three-year reauthorization in 1991. The legislation represented a compromise between the Senate bill proposing a four-year reauthorization and the House bill proposing a two-year reauthorization provided that appropriations for the commission be authorized annually.¹¹¹ The first year's appropriation was pegged at \$7.2 million, although the administration had proposed a 10-year authorization and funding at \$10.8 million a year. The extension legislation required the commission to produce at least one annual report on federal civil rights enforcement efforts. Some congressional leaders, particularly in the House, cautioned that the commission was not out of the woods yet. House Judiciary Committee Chair Jack Brooks, D. Texas, stated that while the legislation would not "require the agency to cut programs or staff, it prevents the commission from expanding without first fulfilling its statutory mission to investigate discrimination. . . . These provisions oblige the agency to allocate its resources wisely and, I trust, will secure the Commission's return to its fact-finding mission." Rep. Edwards, who chaired the subcommittee with oversight responsibility for the commission, warned that if the

commission failed to perform adequately, it should be prepared to cease operations after 1994.¹¹²

Other congressional voices were already calling for the commission's demise. During the debate over the 1991 reauthorization, Rep. F. James Sensenbrenner, Jr., R. Wis., the ranking Republican on the subcommittee with oversight authority, argued that not only had the commission been unproductive during its previous reauthorization, but also that "the bickering and squabbling that marked previous commissions has continued." Rep. Sensenbrenner believed the time had come to put the commission out of business and perhaps start over "from scratch and set up a commission that is really relevant and that all of us are proud of."¹¹³ But a congressional majority was persuaded that changes had been made and that Chairman Fletcher and his new staff director should be given the opportunity to prove their claims that they were new brooms who would "sweep the place out."¹¹⁴

In fact, the commission initiated several new projects and completed several significant reports during Fletcher's tenure as chair. It produced a major report on the civil rights problems faced by the country's growing Asian-American population.¹¹⁵ It held a series of hearings examining racial and ethnic tensions across the country and adopted a report detailing the results of sessions held in Washington, D.C., in the wake of rioting in the largely Hispanic Mt. Pleasant section of the city. It also increased its monitoring function, releasing reports on the Fair Housing Assistance Program at the U.S. Department of Housing and Urban Development and on the performance of the U.S. Departments of Transportation and Labor in enforcing Title VI of the 1964 Civil Rights Act.¹¹⁶ Additional monitoring projects were also undertaken. Chairman Fletcher recognized the challenges that civil rights issues of the 1990s presented: "While blatant discrimination, the absolute and open denial of opportunity so pervasive in the past, has lessened over the years,

we find in its place subtler forms of discrimination... just as illegal but harder to detect... and harder to prosecute.”¹¹⁷ At the same time, he pointed to the rising number of racially provoked incidents across the country. Chairman Fletcher – and many in the civil rights community – argued for an increase in resources to better enable the commission to address these issues and to better fulfill its mission. At the outset of the Clinton administration, both congressional leaders and many in the civil rights community were cautiously optimistic that the commission was on the road to re-establishing its stature.¹¹⁸

In the final days of his administration, President Bush appointed Robert George and Constance Horner to replace William Allen and Esther Gonzalez-Arroyo Buckley, whose terms ended in December 1992. Both Allen and Buckley had been appointed by President Reagan. Bush’s appointments maintained the existing ideological balance on the commission. George, a professor of bioethics at Princeton, has been described as a leading voice for social conservatism. Horner had served in a variety of positions in the Reagan and Bush administrations.

President Clinton, although unable to fill any commission vacancies until the terms of Arthur Fletcher and Charles Wang expired in 1995, nevertheless had the authority to designate a new chair and vice chair, as well as to appoint a new staff director. In each case, the concurrence of a majority of the commissioners was necessary. In 1993, he appointed Mary Frances Berry, a current member of the commission, to chair. In 1994, President Clinton appointed Cruz Reynoso as vice chair. Reynoso, a former justice of the California Supreme Court, had been a Senate appointment to the commission in 1993. Both appointments were approved by a majority of commission members.

The president’s choice for staff director, however, was more controversial among some commissioners.

The conflict over this appointment marked the beginning of a new era of tension on the commission that has persisted to the present day. At the time President Clinton took office, the staff director’s position was vacant. One of the commission’s regional directors, Bobby Doctor, had come to Washington to serve as acting director at the request of the outgoing staff director. In June 1993, a majority of the commissioners wrote to the president to endorse Doctor for the position of staff director. However, in September 1993, Clinton named Stuart Ishimaru to the position. Ishimaru, a former counsel to the House Judiciary Subcommittee that had been critical of the commission in the past, was unable to win the approval of a majority of the commission as required by statute.¹¹⁹

Doctor’s temporary detail to Washington was terminated by the newly-confirmed chair, Mary Frances Berry. The president named Ishimaru to be Acting Staff Director. At least one commissioner questioned the legality of the termination of Doctor’s detail, and the day after Ishimaru’s appointment, a majority of the commission voted to reinstate Doctor. Commissioner Robert George, who had voted not to confirm Ishimaru, brought suit in federal court to challenge the president’s authority to name an acting staff director without subjecting that appointment to the approval of the commissioners. The judge agreed that Ishimaru was not validly appointed and enjoined him from continuing his tenure as staff director.

Although the commission’s life was again extended in 1994, this time until September 30, 1996, the lawsuit and the election of 1994 ushered in a new era of internal tensions and external congressional oversight. The midterm election in November 1994 brought a new conservative Republican majority to the House of Representatives, ending 40 years of Democratic control. Six weeks before the midterm elections, as part of its strategy for victory, the Republican Party released a document called “The

Contract with America.” The Contract, written by a team of conservative representatives, including Newt Gingrich, Robert Walker, Richard Armey, Tom DeLay, and John Boehner, described the actions the Republicans would take if they gained the majority in November. The document incorporated text from Ronald Reagan’s 1985 State of the Union Address and many of its policy recommendations originated at the Heritage Foundation, an influential conservative think tank. When the Republicans gained a majority of seats in the 104th Congress, the Contract was seen as a triumph for both the party leaders who had been involved in its creation and for the American conservative movement.

While the primary legislative focus on the Contract was on such issues as shrinking the size of the federal government, lowering taxes, tort reform, and welfare reform, it seemed clear that the new majority in Congress would also advocate limiting the role of the federal government in enforcing civil rights laws. Early in the 104th Congress, the renamed House Judiciary Subcommittee on the Constitution began a series of hearings on civil rights issues—including affirmative action. As one member of the subcommittee later stated, “[t]he hearings we’ve held on a number of issues, including the affirmative action issue and racial preferences and quotas, does [sic] get to the underlying issues. It gets to the issue of whether or not the problems described have been addressed by that policy [affirmative action] and it gets to the issue of whether or not those policies are, in fact, in some instance counterproductive.”¹²⁰

While congressional scrutiny of the commission was less frequent in the decade between the mid-1990s and the present than it had been in the previous decade, it was no less intense. In October 1995, the House oversight subcommittee began a series of hearings that were once again critical of the commission’s work and again relied on the GAO to document problems and make recommendations. The October hearing focused on a range of issues,

including the commission’s management practices and the process by which the commission voted on and released reports. Subcommittee members also voiced concerns about a hearing the commission had held in Miami as part of its ongoing study of the causes of racial and ethnic tensions in American society. Some individuals who had been called to testify had complained about allegedly heavy-handed tactics on the part of commission staff.¹²¹

The following year, the chair of the subcommittee asked the GAO to provide information on the commission’s management of projects from fiscal years 1993 through 1996. The results of the GAO’s investigation were released at a hearing in April 1997. The GAO found “broad management problems at the Commission” and characterized it as “an agency in disarray.”¹²² Many of the concerns raised by the GAO reflected long-standing problems dating back to the 1980s, but weaknesses in current management controls were also highlighted.¹²³ The GAO cited other contemporaneous reviews of the commission’s operations that were also critical, including, for example, a 1996 Office of Personnel Management (OPM) report concluding that the commission is “badly in need of managerial attention.” In addition, the Citizens’ Commission on Civil Rights, a civil rights advocacy organization, issued a report in 1995 concluding that the commission’s performance had been “disappointing.”¹²⁴ One concern of the Citizens’ Commission report was that projects were taking so long that changing conditions could render them outdated by the time the project was completed, reducing the effectiveness of the commission’s work.¹²⁵ Commission Chair Mary Frances Berry also testified at the hearing, acknowledging that there were management problems at the commission and pledging to implement the GAO’s recommendations.

VII. The Post-Millennial Commission

The commission's last authorization expired at the end of 1996. Although attempts were made to reauthorize the commission over the next several years, no legislation was enacted. Instead, the commission continues to operate through the annual appropriations process. An opinion from the comptroller general's office provides legal support for the commission to continue operating on this basis. However, without congressional authorization, the commission lacks a process for assuring its stability. The congressional debate in the mid-90s indicates that even the commission's supporters remained troubled by the agency's penchant for bickering over administrative matters in lieu of scholarly debate.¹²⁶

Despite the managerial challenges described by the GAO and tensions among the commissioners themselves, the commission produced a number of significant reports in the last years of the Clinton administration. In the mid-1990s, several SACs issued reports on a wave of church burnings that were occurring throughout the South. Other SACs conducted hearings and issued reports on racial and ethnic tensions in their states. The commission continued its own ongoing investigation into that subject as well, conducting hearings in Chicago, Los Angeles, New York, Washington, DC., and Miami. Several SACs examined police-community relations in their communities and the commission issued a report in 2000 on *Police Practices and Civil Rights in New York City*. That same year it issued a report on the effectiveness of the Americans with Disabilities Act and a second report examining police-community relations throughout the country, *Revisiting Who is Guarding the Guardians? A Report on Police Practices and Civil Rights in America*.

In 2001, the commission released a draft report on the controversy surrounding the 2000 presidential election and allegations of voter disenfranchisement in Florida. While the report and the process by which it was released generated criticism from some in the media and within the commission itself, many of its findings were validated by subsequent reports, including one jointly prepared by the Massachusetts Institute of Technology and the California Institute of Technology and another by a consortium of newspapers that subsequently examined many of the same issues.¹²⁷ Lost in the debate were some non-controversial recommendations, including better training for poll watchers, upgraded voting equipment, and better resource allocation for voter education. The state of Florida adopted some the commission's recommendations in time for the 2002 election cycle. During this same time frame, the commission continued to release periodic reports on federal civil rights enforcement efforts, including *Bridge to One America: The Civil Rights Performance of the Clinton Administration* in 2001 and *Funding Federal Civil Rights Enforcement: 2000-2003*.



August 6, 2005: Activists in Atlanta rally to urge reauthorization of the Voting Rights Act. The Commission on Civil Rights was largely absent from the VRA debate, compared to its key role in 1965.^a

However, congressional concern over the commission's management practices persisted. In April 2002, the House Judiciary Subcommittee on the Constitution held another oversight hearing to examine whether the commission had fully implemented management reforms recommended by the GAO in 1997. Tension among the commissioners had increased over the years with respect to how projects were selected, the length of time for completion of projects, communication between staff and commissioners, and handling of dissents from commission reports and recommendations.¹²⁸ By 2002, *The Washington Post* had concluded that the agency had become little more than a partisan battleground:

[the Commission's early moral] authority began breaking down during the 1970's, and the decline hastened during the Reagan administration, which sought to turn the commission's ideological direction around and make it a voice for conservative policies. The result was a pitched ideological battle. And the battle has continued....¹²⁹

Even some commissioners were skeptical about the agency's ongoing viability. In a statement submitted to the subcommittee for the April 2002 hearing, Commissioner Jennifer C. Braceras acknowledged that prior to her appointment to the commission by President George W. Bush, she had published an article in *The Weekly Standard* stating that the commission had outlived its usefulness. The article went on to express Braceras' view that "the politicization of the commission and its work has greatly compromised the Commission's integrity and intellectual honesty, thereby rendering the Commission irrelevant." Nevertheless, when asked to join the commission, she accepted on the grounds that she might "contribute to efforts to impose greater discipline and oversight to Commission management, and thereby help to promote a new era of civility and bipartisanship in discussions regarding civil rights."¹³⁰

Testimony submitted by Staff Director Les Jin addressed the criticisms aimed at the commission by pointing to the commission's recent record of accomplishments, including the reports on police-community relations, the Americans with Disabilities Act, and civil rights enforcement under the Clinton administration, as well as additional work on the racial and ethnic tensions project. He also placed the management issues in the context of long-standing congressional concerns dating back to the 1980s as well as the commission's budget constraints. The commission's appropriation had remained stagnant for nearly a decade. Commissioners and staff directors throughout this period testified in Congress about the impact that this "flat-line funding" had on the commission's ability to accomplish its mission.¹³¹

Although no further oversight hearings were held until March 2005, the GAO continued to look into the commission's activities and – according to one of the commission's congressional overseers – staff of both the House and Senate Judiciary Committees were actively conducting investigations as well. In October 2003, the GAO reported that the commission lacked good project management and transparency in its contracting procedures. A year later, the GAO recommended improved strategic planning and increased oversight. In early 2005, the GAO again found deficiencies in financial management and internal controls. The 2005 report contained 39 recommendations to the commission to strengthen its overall financial management and internal controls.¹³²

In March 2005, the House oversight subcommittee held a hearing on the most recent GAO report. By the time of the hearing, there had been major changes in the commission's membership and leadership. The terms of the previous chair and vice chair, Mary Frances Berry and Cruz Reynoso, had expired at the end of 2004. To replace Berry, President Bush had appointed Gerald Reynolds, a Black Republican who had formerly been assistant

secretary for civil rights in the U.S. Department of Education. *The New York Times* described Reynolds as a “bookish veteran of conservative policy groups,” including the Center for Equal Opportunity, which was headed by Linda Chavez – former commission staff director during the Reagan administration. The president appointed Abigail Thernstrom, already a sitting commissioner, as vice chair. Thernstrom had been a harsh critic of the commission’s policies, practices, and procedures throughout her tenure on the commission. She had been particularly critical of the agency’s management and decision-making practices under the leadership of former Chair Berry.¹³³ President Bush also appointed Kenneth L. Marcus as staff director. Marcus had been a deputy to Reynolds at the Department of Education. Other new commissioners included Michael Yaki, a Democrat appointed by the House of Representatives on the recommendation of then-Minority Leader Nancy Pelosi, D. Calif. Later in 2005, Arlan D. Melendez was appointed on the recommendation of then-Senate Minority Leader Harry Reid, D. Nev. Yaki, a lawyer in private practice in San Francisco, is a former member of the San Francisco Board of Supervisors. Melendez, the second American Indian to serve on the commission, is chairman of the Reno-Sparks Indian Colony and vice president of the Inter-Tribal Council of Nevada.

At the March hearing, the new staff director acknowledged the long-standing concerns with the commission’s management and pledged to “tackle the task of solving the problems that developed over a period of years and even decades.” He testified that the agency had already begun to implement a number of GAO recommendations. He also raised the issue of budgetary constraints that had been a consistent theme of commission personnel since the mid-80s. The staff director acknowledged that the GAO reports “are a wake-up call for this agency that we must implement substantial change and confidence in as ‘the conscience of the Nation’ on civil rights.” He then outlined several reforms

the agency had begun to implement to strengthen accountability and transparency and pledged to adopt a “lengthy series of reforms . . . to ensure that the Commission complies with all legal requirements and that its management is sound.”¹³⁴

But perhaps the most interesting testimony at the March hearing was that of Commissioner Russell Redenbaugh. Commissioner Redenbaugh, a Republican appointed by Sen. Robert Dole, R. Kan., in 1990, had recently announced his resignation from the commission. Redenbaugh had been critical of the commission’s performance and management throughout his tenure. Although he initially believed that the commission’s “problem was political or based on personalities,” by 2005 he had come to the conclusion that it was neither of those. Rather, he testified, “I became convinced that the problem with this commission is structural and unfixable.” He recommended that Congress “close this Commission and start another one.” He went on to say:

I’d take out a blank sheet of paper, and . . . ask the question: What is the purpose of the Civil Rights Commission today? Because when the Commission was originally constituted in the 1950’s, its purpose was a mighty one. It was to be the conscience of America, and America needed a conscience. And through the work of many people and this Commission in part, that conscience manifest and produced the civil rights legislation that we have today.

So the situations are very different [between then and now]. We still have discrimination and too much of it. But those of us who are discriminated against have many powerful remedies. We don’t need, as one of those remedies, the weak, inconsistent, anemic, conflicted voice of this Commission. We deserve better. The country deserves better.¹³⁵

The following May, the GAO issued yet another report, *The U.S. Commission on Civil Rights: The Commission Should Strengthen Its Quality Assurance Policies and Make Better Use of Its Advisory Committees*. The report had been requested by Sen. Orrin Hatch, R. Utah, and Rep. James Sensenbrenner, R. Wis., the chairs of the Senate and House Judiciary Committees, respectively, and by Rep. Steve Chabot, R. Ohio, the chair of the House Judiciary Subcommittee on the Constitution. In the course of its investigation, the GAO found that the commission lacked policies for ensuring that its national office reports were objective and that the commission was not sufficiently accountable for the decisions made on these reports. The GAO reported, for example, that the commission's leadership "has not consulted with all Commissioners at key points in the development of its reports." In addition, the GAO found that most of the SACs were unable to function because their charters had expired. Although the SACs were considered the "eyes and ears" of the commission and accounted for 200 of the 254 reports issued by the commission since 1980, the agency had not incorporated their work or their role into its strategic planning and decision-making processes.¹³⁶

In responding to the report, Staff Director Marcus outlined steps the commission had taken to implement prior GAO recommendations and to initiate other policies and procedures aimed at improving the agency's fiscal and program management. The staff director also described changes adopted by the commission regarding the operation of the SACs and the role commissioners play in project planning. In conclusion, he stated:

The Commission's recent reforms, including those mentioned in this letter, demonstrate an ongoing commitment to quality, balance and transparency.

Rest assured that the Commission remains committed to an ongoing process of reform and appreciates the contribution GAO has made to that process.¹³⁷

Commissioners Thernstrom and Braceras were less deferential. In a letter to the GAO, they were highly critical of the report, the investigations on which it was based, and its conclusions. They argued that the report was "lacking in balance" and labeled some of its conclusions "misleading and irresponsible."¹³⁸ Finally, they stated:

It is time that the previous leadership of this agency is held accountable for the mismanagement of the agency. It is they, and not the current Commissioners or staff who led this agency into chaos.

While we are committed to working with the Congress and take seriously the recommendations of the GAO in this process, we feel that this particular report is lacking in balance and undermines some of the efforts that are still in progress.¹³⁹

While continued congressional oversight and GAO investigations may bring about some needed management reforms, the status of the SACs continues to be an issue. The rechartering process described in the GAO report has proceeded slowly, and the SACs have been unable to meet or conduct studies or hearings in the absence of a charter. In addition, the process for selection of SAC members, which had largely been the responsibility of the regional office staff, has changed. While the regional staff continues to make recommendations, the role of the staff director in selecting members has increased dramatically. In addition, the commissioners approved a 10-year term limit for SAC members, and, by making it retroactive, precluded reappointment of many experienced members. Some commissioners and members of Congress have expressed concern that this process has resulted in SACs that are not representative of the communities they serve and dominated by individuals whose support for vigorous enforcement of civil rights is questionable. The commission's

response has been that its new membership criteria prohibit “racial preferences” and ensure that the committees represent a diversity of skills and experiences. These changes, according to the staff director, will ensure the representation of diverse viewpoints and improve the quality of SAC reports by making them more intellectually rigorous and data-driven.¹⁴⁰

It may be too soon to analyze the long-term impact of these changes on the work product of the SACs, but it is clear that the membership changes have been significant. Resource allocation is an ongoing impediment, both for the committees and for the regional offices that support them. Moreover, in addition to asserting greater influence over the membership of the SACs, the current commission’s practice of soliciting committee assistance for national projects has limited their ability to focus on local issues.¹⁴¹ But whatever the explanation—lack of resources, changes in membership, less freedom to initiate local projects—according to the commission’s own Performance and Accountability Report for FY 2007, the number of SAC meetings and briefings has decreased significantly in the last several years. The number of SAC reports released in that same time frame has remained relatively constant, but amounts to a fraction of the SACs’ output in earlier decades.

Not only are the majority of the SACs not functioning, but the commission’s own methodology for producing reports has also changed significantly. The agency now relies almost exclusively on monthly briefings as its primary fact-finding, investigatory tool. These usually consist of a two-hour forum in which several experts are invited to present testimony and discuss topics recommended by commissioners or by the staff director. Briefings are a more cost-effective way to gather information than the more labor-intensive hearing process, which requires, among other things, the issuance of subpoenas and the taking of testimony under oath.

Through the briefing process, the commission can explore a broader array of civil rights issues than might otherwise be the case. It is an alternative that has been relied on in the past for similar reasons. Chairs Fletcher and Berry relied on briefings as a way to explore current civil rights issues.¹⁴² However, during their tenures as chair, the commission also conducted a number of other studies, held hearings around the country on various issues, and produced a variety of reports. In addition, in the past, the commission did not issue findings and recommendations as part of a briefing report, on the ground that briefings did not provide an adequate basis on which to formulate findings.¹⁴³ The current commission has issued findings and recommendations with almost every briefing report it has published. In at least one recent instance, sufficient controversy arose within the commission over this practice to force the commissioners to eliminate the findings and all but one recommendation from one of its briefing reports.¹⁴⁴

Finally, appointments to the commission by President Bush and the Senate Republican leadership appear to have once again struck at the very core of the commission’s statutory mandate—to remain a bipartisan, independent agency insulated from political influence. On two occasions in recent years, sitting commissioners have changed their party affiliations from Republican to Independent, thus enabling President Bush to appoint additional Republicans to the commission. One of those commissioners, Russell Redenbaugh, who left the commission in 2005, publicly stated that he felt Bush’s use of his re-registration as an Independent to appoint a Republican was “inappropriate.”¹⁴⁵ The new appointments have brought into question the president’s commitment to maintain bipartisanship as required by the commission’s charter.

The appointment of Gail Herriot to the commission raised a similar issue. Herriot, appointed by

the Senate Republican Minority Leader in early 2007, had been a registered Republican until seven months before her appointment. Her re-registration as an Independent made her eligible to be appointed without technically violating the statutory requirement that no more than four of the commission's eight members be from the same political party.¹⁴⁶

In a January 2008 letter to Attorney General Michael Mukasey, the Leadership Conference on Civil Rights, Citizens for Responsibility and Ethics in Government, and several other organizations expressed their concern that, as currently constituted, the commission is politically unbalanced in violation of its charter. The letter took issue with, among other things, the practice of changing party affiliation by sitting commissioners that has allowed the president to fill vacancies with Republicans.¹⁴⁷

The day before President Bush's December 2004 appointment of two new Republicans to the commission (Gerald Reynolds, the current chair, and Peter Kirsanow), the Justice Department's Office of Legal Counsel (OLC) issued an opinion explaining the statutory requirement that "not more than four of the members [of the Commission] shall at any one time be of the same political party." The OLC memo determined that this provision required that the president assess the party affiliation of sitting commissioners and potential appointees only at the time any new member is appointed.¹⁴⁸ This statutory interpretation allows the president to appoint as many commissioners to the Civil Rights Commission of the same political party as he chooses, as long as a sufficient number of sitting commissioners switch their party affiliations prior to any new appointments.

Other legal experts who have examined this issue more recently disagreed with the Justice

Department's analysis. Peter Strauss, a professor of administrative law at Columbia University Law School, stated his view that a court would reject the administration's interpretation of the statute, especially if the court perceived that the re-registration took place "to manipulate the process."¹⁴⁹ In addition, a legal memorandum written by the American Law Division of the Congressional Research Service concluded that "it is likely that a reviewing court would find the OLC opinion unpersuasive and the recent appointments violative of the political balance requirements of the statute."¹⁵⁰ The CRS memorandum reviewed the legislative history of the commission, focusing particularly on Congress' reconstitution of the commission in 1983 in the wake of President Reagan's attempt to fire five of the six sitting commissioners. The memo describes in detail Congress' determination to re-establish the commission as an independent entity insulated from undue political influence. The requirement of political balance was a key element in implementing this ideal. The memo concludes:

The situation that precipitated Congress' 1983 revision of the Civil Rights Commission—the presidential firing of five of the six then sitting commissioners—is arguably indistinguishable from the changes in party registrations that has effectively allowed the President to establish a majority of his political party in control of the Commission. The intent of the 1983 restructuring...was to preclude similar juggling of the Commission's statutory appointments process. In light of that history...it is likely that a reviewing court would find the OLC opinion unpersuasive and the recent appointments violative of the political balance requirements of the statute.¹⁵¹

Whether promised management reforms and greater civility will bring about improvements in the commission's operations remains to be

seen. The past two decades of congressional oversight, GAO investigations, and OPM reports suggest that this outcome is doubtful. Since the mid-1980s, Congress, the GAO, and OPM have all raised concerns about the commission, which have ranged from poor management to politicization and partisanship. The quality of the commission's work during this same time frame has also come under scrutiny. The Leadership Conference on Civil Rights has often shared these concerns.

However, these issues may be secondary to the larger question: is the current commission living up to its statutory mandate and continuing to play a vital role in the debate on civil rights? Recent actions suggest that the answer may be "no."

One merely has to observe the role of the commission in one of the most fundamental civil rights issues it and the American people have confronted in the commission's 50-year life: voting rights. From its earliest days, the commission exposed the obstacles – even dangers – that African Americans in the South faced when they attempted to register to vote. The commission recommended strong federal measures to ensure this most basic of rights—measures that were often initially criticized or dismissed as "going too far," but that ultimately became law. The commission, the hearings it held in the South beginning in 1958, and the reports it issued based on those hearings, all played a key role in the process leading up to the enactment of the Voting Rights Act of 1965. It continued to have an impact on the debate as Congress took up extensions in 1970, 1975, and again in 1982. In 1970, recommendations the commission had made in its 1965 report for the abolishment of literacy tests and poll taxes were adopted. In 1975, the agency issued a major report that documented the need for extension and recommended enactment of provisions to guarantee the voting rights of language minorities—a provision that was included

in the 1975 extension. And finally, in 1982, the Mississippi State Advisory Committee testified before the House Judiciary Committee about ongoing challenges confronting African Americans in that state, particularly their difficulty in securing representation at the local level because of long-standing election practices that diluted the impact of their vote. The commission itself testified before both the House and Senate Judiciary Committees in support of extension.

By contrast, the commission was largely absent from the 2006 debate on the reauthorization of the Voting Rights Act. No commissioner testified in the House of Representatives. The commission's voting rights report was released late in the legislative process, in part because congressional hearings began earlier than the agency anticipated. Although the report contained some discussion of other provisions of the Act, it focused primarily on Section 5, the provision requiring covered jurisdictions to submit proposed voting changes to the Department of Justice for preclearance. The report contained no findings or recommendations. Instead, it posited various options for policymakers to consider. For example, the report suggested that the low number of Justice Department objections to local voting changes could show that Section 5 was no longer needed. The report also suggested that the existence of any objections could be proof that preclearance of these changes was still necessary.

Commissioners Thernstrom and Kirsanow testified before the Senate Judiciary Committee, but were speaking on their own behalf, not for the commission. Neither commissioner testified directly in support of, or opposition to, the extension legislation, although their testimony was critical of specific provisions of the statute. Commissioner Thernstrom stated that the Voting Rights Act, rather than protecting the rights of minority citizens, had become an instrument

for partisan gerrymandering and had distorted our constitutional structure in the process. Commissioner Kirsanow testified on the language minority provisions of the Act, suggesting that the costs of implementation were disproportionate to their utility. Interviews with individuals knowledgeable about the 2006 reauthorization process suggest that the commission's involvement was marginal. The contrast with the role the agency played in the original enactment of the Voting Rights Act in 1965 and subsequent reauthorizations is stark, thus raising questions about the commission's continued relevance.

Nonetheless, many of the individuals interviewed for this report argue for the continuing need for an independent fact-finding agency dedicated to illuminating the ongoing civil rights issues this country continues to face.

Conclusion

In its early years, the U.S. Civil Rights Commission served as the “conscience of the nation” on some of the most challenging issues of the times: guaranteeing the right to vote and achieving equality of opportunity in our schools and in the workplace. By shining a spotlight on discrimination and segregation around the country, the commission helped define the nation’s civil rights agenda for several decades. Without the commission’s ability to engage in thoughtful and independent examination of these issues, our progress would have been harder, slower, and less effective.

Congress, at the urging of Presidents Truman and Eisenhower, created an independent civil rights commission because we needed one. That need arose in part from the sense that civil rights issues should be above partisan politics because fairness and equal opportunity are core American values that transcend party. The commission was created to have its own independent voice, separate from any given administration, and separate from Congress. Appointments to the commission would have the stature and credibility to be that voice; and they would be empowered to use it.

As this report reflects, at some point the commission lost its way. It became a political voice, not an independent one. In recent years, its members have often been advocates for the views of the administration or party that appointed them, rather than independent thinkers and constructive critics. Issues of race, gender, and opportunity have become just another set of political footballs, with the commission often quarterbacking for a given administration or party.

But while the commission has changed, our need for an independent voice on civil rights issues has not. Legal barriers have fallen, but other more subtle obstacles remain. We still need committed and creative minds and independent voices to address those issues. Our challenge going forward is to identify those voices and create institutions in which they can be heard. A new administration provides the perfect opportunity to work toward building an institution that meets the civil and human rights challenges facing the nation in the 21st century. The following recommendations attempt to achieve that goal.

The central recommendation is to create a new commission that will serve once again as the conscience of the country on civil rights issues. The new commission would focus on identifying and illuminating important issues of race, gender, national origin, class, disability, age, sexual orientation, and religion that still have so much currency in our society, while ensuring that civil rights policy is not made in a fact-free world. The remaining recommendations focus on the core missions of the original commission and how best to implement them. They also reflect today’s broader understanding of civil and human rights.

Recommendations for Reform

- **The commission will consist of seven members.**

The members will serve four-year staggered terms. Each commissioner will be **appointed by the President, and subject to Senate confirmation.** Staff director and general counsel will be career Senior Executive Service positions.

As this report outlines, since its inception, there have been attempts by advocates and some in Congress to insulate the commission from political manipulation. These efforts have been intermittently successful. However, the change in the 1980s from commissioners appointed by the president with the advice and consent of the Senate to the current model of split presidential/congressional appointments without oversight through a public hearing has dramatically eroded the commission's real and perceived independence. This recommendation, to restore the advice and consent system, reflects a realization that while no system of appointment is perfect, the prior system is generally better at ensuring more independent and less polarizing appointments, in large part because of the requirement that each nominee and the selection process be subject to a public hearing.

- **Create a civil rights unit as part of the Government Accountability Office** to focus on monitoring federal agency compliance with and enforcement of federal civil rights laws.

When the civil rights commission was created, there was no federal civil rights infrastructure. The commissions work over the years helped establish that. Federal laws were passed and agencies and agency departments were created in whole or in part to address the vexing issues of civil rights and equal opportunity. Over time, the commission took on the role of monitoring federal agency compliance with and enforcement of federal civil rights laws, in

addition to its role of fact-finding and reporting on emerging issues and substantive needs. The work of monitoring the federal government's work to meet its legal obligations to protect civil rights is very resource intensive, requires a high level of expertise, and is easily susceptible to political manipulation.

At the time of the commission's creation, there was no entity at the federal level charged with fact-finding and investigation of agency compliance with any federal laws. All that changed in the 1970s with the creation of the Government Accountability Office (GAO). The GAO was established to be an outside, independent, credible watchdog for the federal government. It is, and is perceived to be by both Congress and by advocates, an objective and honest broker on factual questions regarding enforcement, policy, and accountability. They are what we need: credible, non-partisan researchers who can make sure that federal civil rights policy is not made in a fact-free world.

This recommendation would harness the expertise, credibility and independence of the GAO to carry out the fact-finding and monitoring functions of the current commission; i.e., (1) study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, gender, sexual orientation, age, disability, or national origin, or in the administration of justice and (2) monitor the enforcement of federal anti-discrimination laws by the various federal agencies, including the issuance of periodic reports on the status of such compliance. This new focus would fit well within GAO's existing mandate to "report on how well government programs are meeting their objectives," and "performing policy analyses and outlining options for congressional consideration." GAO also has offices across the country to assist with their fact-finding function.

- **Add to the commission’s mandate** (i.e., discrimination based on race, national origin, religion, gender, or disability) **an examination of discrimination based on sexual orientation or gender identity.**

Discrimination on the basis of sexual orientation or gender identity has long been a problem in almost every sector of American life, from employment to housing to education policy. At the same time, there is not enough research, fact-finding, and focus on these issues by the federal government. It is long overdue that the commission’s mandate be amended to include examination of the state of equality for these groups and better ways to ensure protection of their civil rights.

- **The commission shall continue to have the authority to hold hearings across the country to better understand the landscape of equal opportunity involving various regions and protected groups.** Based on these hearings, and other information, the commission will have the responsibility to make policy recommendations to the president and Congress. The commission will retain its authority to subpoena witnesses to participate in such hearings.

An important goal of this reform is to ensure that there remains a high level government agency with both the ability to utilize its subpoena power and conduct hearings on important civil and human rights issues and the stature to have that voice effectively heard. The public hearing was long a powerful education and public awareness tool for the commission, and served to bring civil rights issues from around the country into clear relief for national policymakers. Thus, the reformed commission must retain this important fact-finding role and authority. The new commission will also continue to serve as a clearinghouse for reports and other information from across the country on civil and human rights, and

will be in a position to make recommendations to policymakers on ways to improve enforcement and oversight.

- **The name of the commission shall be the United States Commission on Civil and Human Rights.**

The primary focus of the civil rights movement in the United States has been on strengthening and enforcing domestic laws to achieve equal opportunity here at home. However, part of the longstanding tradition of the movement has been to see our domestic civil rights agenda as part of the larger global movement for human rights. For example, in 1947 U.S. civil rights groups, led by the NAACP, presented one of the very first individual human rights appeals ever submitted to the United Nations. They understood then what we see clearer now: civil rights and human rights have always been intertwined.

At the heart of the civil rights movements is the basic human dignity of all people and their right to live in freedom with justice and equal opportunity. In this global age, the interdependency of nations, economies, and people is growing exponentially. Events in other parts of the world affect all of us, just as events here in the United States affect the rest of the world.

The connection between civil and human rights has been made clearer in recent years with the ratification by the United States of the International Convention on the Elimination of Racial Discrimination and the International Convention on Civil and Political Rights. These treaties apply fully to our domestic life and therefore must be part of our government’s civil rights agenda.

Changing the commission’s name to reflect the human rights dimension of its work would make more explicit its obligation to examine U.S.

compliance with these international treaties as part of its existing mandate to examine compliance with civil rights laws. Also, a United States Commission on Civil and Human Rights could help bolster the United States' leadership role in protecting human rights around the world.

Our national monitoring body for civil rights must explicitly recognize, understand, and cultivate the human rights dimension to its work. The name change is a good first step.

- **The commission shall provide support for state and local governmental efforts.**

To be most effective, the commission should work in close coordination with, and support, civil and human rights efforts in the states, including collaboration with state and local human rights and human relations commissions. All but three states have at least one human rights or human relations commission, and many have commissions operating in their cities and counties. These agencies can play a critical role in ensuring civil and human rights compliance at the state and local level. Thus, the commission should have the mandate of supporting their work and the work of other relevant state and local agencies, including through education and training initiatives and by designating staff to coordinate state and local efforts with the commission's own.

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a “Your Voice is Your Vote.” Keep the Vote Alive March in Atlanta, August 6, 2005. Courtesy D. Ryan



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