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Transcript of Proceedings

UNITED STATES COMMISSION ON CIVIL RIGHTS

Washington, D. C. 20425

Informal Hearing

on

"LOW HIRED, FIRST FIRED: LAYOFFS AND CIVIL RIGHTS."

Federal Government Panel

Washington, D. C.

Tuesday, 12 October 1976

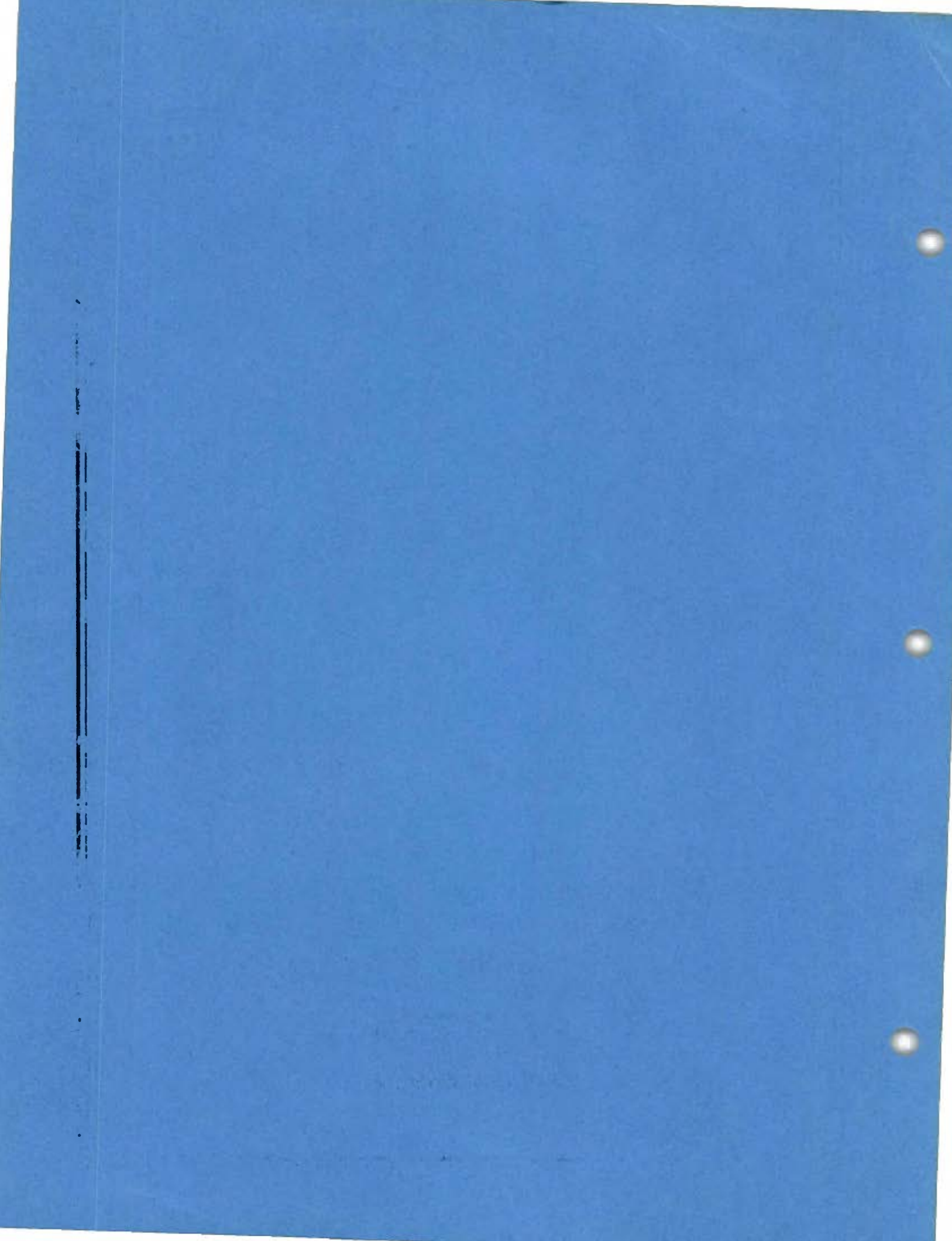
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UNITED STATES COMMISSION ON CIVIL RIGHTS

Washington, D. C. 20425

Informal Hearing

on

"LAST HIRED, FIRST FIRED: LAYOFFS AND CIVIL RIGHTS."

Federal Government Panel

Auditorium
Veterans Administration Bldg.
810 Vermont Avenue, N.W.
Washington, D. C.

Tuesday, October 12, 1976

The meeting commenced at 9:20 a.m., the Honorable
Arthur S. Flemming, Chairman of the Commission, presiding.

Members of the Commission in attendance were: Frankie M.
Freeman, Stephen Horn, Manuel Ruiz, Jr., and Murray Saltzman.

Staff present: John A. Buggs and Fred Routh.

C O N T E N T S

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STATEMENT OF:

PAGE

FEDERAL GOVERNMENT PANEL

David Mundel, Congressional Budget Office

4

Louis Ferrand, Jr., U. S. Department of Labor

14

Lutz Prager, Equal Employment Opportunity
Commission

28

P R O C E E D I N G S

1
2 CHAIRMAN FLEMMING: I will ask the hearing to come
3 to order.

4 As most of the persons in the hearing room know,
5 this is an informal hearing on the part of the U.S. Commission
6 on Civil Rights which is based on a draft document prepared
7 by our staff dealing with the issue of "Last hired and first
8 fired."

9 All of us recognize that this is one of the most
10 difficult issues confronting the nation at the present time
11 in the field of civil rights. The Commission felt that, before
12 it arrived at any findings or recommendations or conclusions,
13 that it would like to have the benefit of hearing from
14 persons inside and outside of government who have endeavored
15 to come to grips with this issue.

16 We have indicated that we would like very much to
17 have their comments on the draft document that is now before
18 the Commission. In addition, however, to their comments
19 on this draft document, if they have other comments that they
20 would like to make bearing on this particular issue, this
21 Commission would welcome hearing those comments.

22 Our first panel is a panel of persons who are
23 inside government: Mr. David Mundel, who is associated with
24 the Congressional Budget Office; Mr. Louis Ferrand, Jr., who
25 is with the U. S. Department of Labor; and Mr. Lutz Prager,

1 who is with the Equal Employment Opportunity Commission,

2 We can proceed very informally in connection with
3 the consideration of these issues. We have deliberately set
4 this up as an informal hearing. But at this time we would
5 be very happy to hear first from Mr. Mundel from the
6 Congressional Budget Office.

7 MR. MUNDEL: Thank you, Mr. Flemming. Let me keep
8 my comments relatively brief and to two aspects of the
9 problem. First, to deal with the current status of the
10 economy, and in other words the context within which the
11 problem is solved, and second, to deal with the problem, that
12 is, the basic differential between the unemployment
13 experiences of non-white and white Americans, between the
14 unemployment experiences of men and women in our economy.

15 First, there are two aspects of unemployment. There
16 is the cyclical aspect, the aspect caused by inadequate
17 demand in the economy, and the structural aspect, caused
18 by some people being on the end of the labor market queue,
19 for one reason or another.

20 I think sometimes when the cyclical problem is
21 high, when aggregate unemployment reaches sizable numbers --
22 it reached 8.9 percent and now stands at 7.8 percent -- we tend
23 to forget that the structural problem, the basic underlying
24 operations of the labor market, have not gone away. We tend
25 to forget about them.

1 And I think the Commission report explicitly con-
2 centrates on ways to redistribute the burden of unemployment.
3 It deals with work sharing, or you could call it unemployment
4 sharing, changes in the seniority systems, and the report
5 implicitly -- I think to some extent too much implicitly --
6 underlines the role that a strong and high employment economy
7 places in maintaining and improving the economic and
8 unemployment status of non-whites, minorities and women.

9 I think we shouldn't forget that, even if the
10 unemployment rate reached four percent, a rate that some
11 people have chosen as an appropriate target, for example in
12 1980, the gap between the unemployment rates of non-whites
13 and whites would still remain approximately 4.8 percentage
14 points.

15 This is not solely a cyclical phenomenon. We
16 have recently been through a very significant recession. Some
17 observers call it a depression.

18 In May of 1975, the unemployment rate reached
19 8.9 percent, and it has gone down substantially since then.
20 It now stands at 7.8 percent.

21 The first step following this very high unemployment
22 rate, we experienced at first rapid and subsequently more
23 slow and hesitant recovery. The unemployment rate went down
24 between May, 1975 and May 1976 from 8.9 percent to 7.3 percent.

25 Subsequently, it has increased, and then fallen

1 slightly, and stands at 7.8 percent. We are still way above
2 historical levels, and our growth rate has slowed down in the
3 most recent quarter to about 4.0 to 4.5 percent at an annualized
4 rate.

5 Some observers -- some macro-economic observers --
6 are predicting increased slow-down in the recovery, and, in
7 fact, a recession in the end of 1977. We project a slow and
8 moderate recovery, and we projected this in essentially mid-
9 August and early September. Our projections are based on the
10 current budget as passed by the Congress, and are really
11 conditioned on that kind of a macro-economic policy.

12 We project that, over the 1976 period, growth
13 will be at about 5.8 or 6 percent, and during 1977, growth
14 will slow down to 5.5 percent.

15 As a result of this slow recovery, we would project
16 that in about the fourth quarter of this year -- about December
17 unemployment will be 6.9 to 7.3 range. These projections
18 were done before the two recent months of data came out,
19 and we are currently, as of this week, rethinking whether or
20 not our fourth quarter estimates will be fulfilled.

21 We continue to project that in the fourth quarter,
22 or late fall, of 1977, unemployment will be down in the 5.8
23 to 6.4 percent range. Down from a level of 7.8 or 8.9, but
24 not down by long term historical proportions.

25 I think it's important to realize that, even though

1 the unemployment rates may go down -- as we project they will --
2 the implications for non-whites in terms of their rates of
3 unemployment are still, I think, substantial.

4 If the unemployment rate goes down to the 6.9 to
5 7.2 or 3 range, at the end of this year, the unemployment rate
6 of all non-whites will be in the order of 11.2 to 11.7 percent.
7 More than one out of every ten potential worker members of the
8 non-white labor force will remain out of work, even if
9 unemployment rates go down to the 5.8 to 6.4 percent level,
10 essentially 14 months from now. The unemployment rates of
11 non-whites will remain in the 10.0 or 9.5 to 10.5 percent
12 range. Still, one out of 10 non-white members of the labor
13 force will be out of work.

14 Whites will have substantially more unemployment
15 rates and women will still be above men in all categories.

16 And I think there are important reasons why -- a
17 wide number of reasons for this substantial differential, the
18 differential toward which the report, "Last Hired, First
19 Fired" is directed. And I think we have to think about all
20 of these reasons as we design a policy for reducing or
21 lessening this differential.

22 The first is the attitude of workers and employers.
23 Women are still disproportionately in a small number of
24 occupations. Women and some minority members still have very
25 narrow career paths, and they restrict themselves to particular

1 parts of the labor market. They both restrict themselves,
2 and, as a result of some employer decisions, hiring practices,
3 and either overt or implicit discrimination in the labor
4 market, they are restricted, to certain parts of the labor
5 market.

6 Second of all, women and minority members have
7 significantly different labor market behaviors and participa-
8 tion rates, and this affects their seniority. Women move in
9 and out of the labor market more frequently than do men,
10 and consequently they have less seniority.

11 Minority members, in part because of the low
12 status and low pay of their jobs, switch jobs, move from
13 employer to employer more often than do majority male members
14 of the economy. Consequently, they have lower seniority.

15 The third reason for this differential in the
16 unemployment experiences relates to education and training.
17 School enrollments and completion rates of non-whites still
18 lags substantially to those of whites at ever level --
19 especially the higher education level of the educational system.

20 I think a number of people in recent years have said
21 that we shouldn't be very disturbe-, we shouldn't be very
22 discouraged by these differential school enrollment rates.
23 There have been recent studies that show the returns of
24 schooling are declining and schooling is no longer the important
25 key determinate of labor market status, eventual wages and

1 eventual unemployment rates.

2 I think the sum results of these studies are that
3 education still does matter. The unemployment rates of
4 college-educated blacks and high school educated whites are
5 still substantially different. The wage rates are still
6 substantially different. The status in terms of the quality
7 of the jobs which college-educated and trained people occupy
8 is still substantially higher.

9 And I think the same sort of evidence goes on with
10 regard to manpower training programs. We instituted a wide
11 number of manpower training programs in the late sixties, and
12 then we saw the first research evidence which said that these
13 programs didn't work.

14 In fact, the evidence says something very different.
15 Manpower training programs do work. They do result in
16 earnings gains, in increased wages, in increased labor force
17 participation on the part of the people who go to them.

18 They do not, in six months, create Ph.Ds, and I
19 think it's important to realize that. We have expected and
20 were sold manpower training programs on the ground that
21 people suddenly, after they dropped out of high school and
22 went six months to a manpower training program, would be
23 effectively Ph.Ds or masters in business administration in the
24 labor market.

25 This they do not do. But they do substantial things

1 to improve people's own employment rate.

2 The fourth thing we have to realize is that
3 government fiscal policy can reduce unemployment, can reduce
4 unemployment for both males and females, for both non-white
5 and white, and there are important choices about the
6 instruments that we use in fiscal policy that result in
7 differential effects on non-whites and whites.

8 As part of a recent study that our office conducted
9 on the unemployment experiences of non-whites and whites,
10 we estimated how much,-- how many jobs would be created by
11 a variety of counter-cyclical or macro-economic policies, and
12 then, on the second round, we estimated how many of these new
13 jobs would be occupied by non-whites. We found that the range
14 of estimates vary significantly.

15 A tax cut would result in about 46,000 new jobs.--
16 this is a tax cut of about \$1 billion.-- about 46,000 new jobs
17 in the economy, and about 17 percent of those jobs would be
18 occupied by non-whites.

19 On the other hand, a public service employment
20 program similar to that supported by the Comprehensive
21 Employment and Training Acts, Title 2 and 6, would result
22 in about 97,000 new jobs and about 26 percent of these jobs
23 would be occupied by non-whites.

24 So that, depending on which macro-strategy the
25 government and the society chooses, you have both different

1 aggregate effects, different amounts of increased employment,
2 and also different effects on important population segments.

3 And I think that we should keep all these four
4 aspects of the reason for the differential unemployment
5 experiences in mind. Several of them relate to seniority.
6 Several relate to more macro and other sorts of instruments
7 that the government might introduce.

8 I think the causes result in two basic kinds of
9 things in the labor market. The first is the industrial and
10 the occupational mix of women and non-white and other
11 minorities is substantially different than that of white males.
12 The occupational mix has a significant effect on the unemploy-
13 ment experiences.

14 Over the weekend, using some of the data in your
15 report, I did a quick estimate that said that -- that seemed
16 to imply that if non-whites were distributed across occupa-
17 tions in the same way that whites were, and if within occupa-
18 tions they all suffered the same unemployment rate, the gap
19 between the unemployment rate of whites and non-whites would
20 decline by about 6.0 to 7.0 percent.

21 I think that is a substantial number, and my rough
22 estimates say that that would be a much more substantial
23 number than the number that would be -- than the amount of
24 the reduction that would occur as a result of work sharing
25 or similar ways to either share unemployment or employment.

1 The second thing that the four causes of differen-
2 tial unemployment result in is differences in job tenure,
3 differences in seniority.

4 During the recessions, we have observed that the
5 unemployment rates of non-whites increase much more rapidly
6 than do the rates of whites. The gap between the two rates
7 increases quite dramatically during recoveries, and this
8 recovery has followed exactly the same form of the five
9 that we have good data for.

10 The unemployment rate of non-whites declines more
11 slowly than does the rate of whites. They are the last hired.
12 I think it's in part because of seniority. I think it is also
13 in part because of their distribution in jobs and their
14 distribution across industry, and those are things which
15 would be affected more by long term strategies such as manpower
16 training or changes in the educational distribution.

17 I think the complex causes of the unemployment
18 differential ought to lead to a mixed strategy. If I have
19 one problem with your report, this is a weakness that I see
20 in it. We need a mixed strategy if we want to reduce this
21 unemployment differential and, moving on any single level,
22 any single lever, changing the unemployment compensation
23 system, changing the seniority system, changing education
24 rates and enrollment patterns and manpower training --'changing
25 any single lever in this complex system is unlikely to result

1 in a very efficient package of reduction strategy.

2 I think we need to change the people's places on
3 the unemployment and employment queue, and I think we could
4 use education, training, affirmative action, anti-discrimina-
5 tion and changes in the seniority system, in order to change
6 people's place on the queue.

7 I think we have to change the way in which the
8 queue is used, and I think work sharing -- and unemployment
9 sharing perhaps is a better way of putting it -- I think is
10 one way of doing that.

11 We also need to change the number of people on the
12 queue who are employed. At two points in the report, the
13 authors stress that the unemployment experiences of non-whites
14 are slightly connected with a full employment economy. There
15 is almost no way to reduce the differential and to have a
16 significantly lower grade of unemployment unless the economy
17 as a whole has increased the employment of all workers.

18 And I think we need to artfully design our macro-
19 policy to do that, and there are substantial differential
20 effects in terms of effects on employment and effects on
21 minority population, depending on which macro instruments
22 we take.

23 I think the choice of the mix of instruments is
24 inherently a political one. It is one in which members of
25 the Commission, one in which people in the Executive Branch,

1 and in which Members of Congress -- my employers -- quite clear-
2 ly participated.

3 I think it's clearly not a technical assessment,
4 and that is the realm over which people in the Budget Office
5 and other analytic shops play some role.

6 I think the report has provided an important focus
7 of attention, and I think the report has provided a very
8 logical and coherent argument and analysis of how one might
9 go about changing the seniority systems and how one might go
10 about changing the unemployment compensation system in order
11 to have some effect on this differential unemployment rate.

12 But I think, if the Commission and if others want
13 to reduce that differential, and I think that is an important
14 political one, I would think that a mix strategy using all
15 these mix of instruments -- not simply changes in one at a
16 time -- is probably a more effective and perhaps a more
17 appropriate strategy, but that's only a technical assessment
18 based on weighing some of the costs and benefits, it's not
19 a political one.

20 Thank you.

21 CHAIRMAN FLEMMING: Thank you very much.

22 I would like to recognize Mr. Louis Ferrand, Jr.,
23 from the U. S. Department of Labor.

24 MR. FERRAND: Good morning. I would like to state
25 for the record that the views which I express this morning

1 are my own and not necessarily those of the United States
2 Department of Labor.

3 I would like to just briefly summarize parts of
4 the Commission's report, or the draft, as a method of getting
5 into the basic focal point of my interest in regard to the
6 recommendations.

7 I think the report graphically lays out the
8 effect of the 1974 recession on recent affirmative action gains
9 by minority group persons and females, and shows quite clearly
10 how the fact that they have been excluded from the jobs and
11 they have very little seniority, that because of that, when an
12 employer lays people off or reduces its work force on the
13 basis of the last hired, first fired policy, that the effect
14 is to wipe out affirmative action programs, consent decrees,
15 court orders, what have you.

16 And it suggests that a major method of combatting
17 the last hired, first fired policy is something called
18 work sharing, which would include such things as employees
19 agreeing to less overtime, four day work weeks, payless
20 holidays, payless work days, what have you.

21 The report then goes on to discuss the Supreme
22 Court decision in FRANKS V. BOWMAN TRANSPORTATION COMPANY,
23 where the Court held that retroactive or constructive
24 seniority should have been granted to identifiable black
25 job applicants who had applied after the effective date of

1 the 1964 Act.

2 The court also ruled in that case that the
3 seniority expectations of white workers do not bar the
4 granting of this relief since the black applicants are
5 being placed basically in this rightful place, that is, where
6 they would have been but for the discrimination against them.

7 And the Court, in FRANKS, also went on to say
8 that there could be no argument that the award of retroactive
9 seniority to the victims of hiring discrimination in any way
10 deprives other employees of indefeasibly vested rights
11 conferred by the employment contracts, since the Supreme
12 Court had long held that employee expectations arising from
13 a seniority system agreement may be modified by statutes
14 furthering a strong policy interest.

15 The Commission then goes on to point out that the
16 FRANKS Court was not presented with questions of (1) whether
17 retroactive seniority is to be awarded to a person who is
18 denied a job on the basis of race, national origin or
19 religion or sex prior to the enactment of Title VII, or,

20 (2) whether it is to be awarded to a person who
21 did not initially apply for a job because it was well known
22 in the community that the employer did not hire minority or
23 female employees or workers.

24 Thus, according to the report, one question remains
25 after the FRANKS case; that is, what can and should be done

1 to make whole and put into their rightful place those minority
2 or female workers who might fit into the above-listed
3 categories.

4 The report recommends that both groups should fall
5 within the affected class entitled to constructive seniority
6 and other relief, and that equitable relief would depend
7 on the particular facts of each case, but would not turn on
8 when the discrimination occurred.

9 In other words, if it occurred prior to 1965 to
10 blacks or Chicanos, that it would still be actionable,
11 according to the report, under Title VII.

12 I am not sure that is necessarily the case,
13 although it certainly is something to look at.

14 Specifically, the Commission proposes, in regard
15 to those groups we have just been talking about, that,
16 in appropriate situations, retroactive or constructive
17 seniority and other relief should be granted to all incumbent
18 minority and female employees who are old enough to have been
19 hired prior to the effective date of Title VII, regardless
20 of whether they ever applied for a job with the company,
21 provided they lived in the general area from which the company
22 could have reasonably recruited.

23 The rationale is, people don't apply to a
24 company that has a reputation of not hiring because of race,
25 sex or national origin, and again, that discrimination in

1 1963 is as invidious as discrimination in 1965 or 1966.

2 The effect of this proposal, I think, would be
3 to grant so-called retroactive seniority or constructive
4 seniority pre-dating the effective date of Title VII to
5 persons hired after the effective date of Title VII, even
6 though at least some of these persons never previously applied
7 for a job with the company in question.

8 Presumably, one could compute each individual's
9 chronological age and then determine seniority from a date
10 in which a white male, for example, was hired.

11 For example, a black male, born in 1920 and hired
12 in 1967, might under the report's theory receive a seniority
13 date and pension and other rights from 1940-- he would have
14 been 20 years old at that time -- provided that a 20 year old
15 white male with approximately the same skills was also
16 hired in 1940.

17 I am giving my own hypothetical examples.

18 Although I would not completely rule out the
19 possibility of obtaining such relief, it is my belief that
20 the courts would have a great deal of difficulty in
21 finding that such relief was covered by Title VII, especially
22 where the person never evidenced any interest in applying
23 for a job with the company or in a related kind of job.

24 I understand that the report's theory is that
25 the individual is presently suffering from discrimination

1 against him or her, thus making a Title VII relief applicable.
2 But I would be very surprised to see relief granted in such a
3 case where there is no real evidence of pre- or post-Act
4 discrimination against the individual by the employer.

5 Further, I think that -- and this is just more or
6 less an aside -- that pension relief would probably not be
7 available for periods pre-dating 1965, because of the 1972
8 amendments, the limitations on back pay recovery under Title VII.
9 That is assuming that pension relief is something like back
10 pay and, therefore, you would go from two years of the time
11 of the charge or time of filing suit.

12 Arguably, a person might have a stronger case
13 where they actually applied for a job prior to the effective
14 date of the Act and then kept on trying for a job after its
15 effective date. Such a situation might be roughly analogous
16 to a situation where incumbent employees hired prior to the
17 effective date of the Act received retroactive seniority
18 from date of hire in order to assist them in reaching their
19 rightful place.

20 There are many examples. U.S. vs BETHLEHEM STEEL;
21 Georgia Power; Inspiration Copper Company.

22 The Commission also proposes that the EEOC should
23 issue guidelines stating that all seniority systems are
24 invalid as they apply to any work force that does not mirror
25 the relevant labor market and the composition of which cannot

1 be explained successfully by the employer.

2 In other words, let's say, for example, that an
3 employer had a 15 percent black work force and 20 percent
4 female work force, and the available labor market was 35 per-
5 cent black and, say, 42 percent female.

6 Under the proposal, as I understand it, all of
7 the existing seniority systems in the company, whether they
8 were company seniority, job seniority, what have you, would
9 be considered to be invalid unless the employer could show,
10 affirmatively prove, that this lack of females or lack of
11 blacks in his work force was not as a result of any employment
12 policy or any discrimination against them.

13 The report also suggests that EEOC should require
14 that where an employer is compelled to reduce production
15 costs, for example in a lay-off situation, that he should
16 do everything possible to limit the effects of that necessary
17 reduction, first of all through trying such things as work
18 sharing and suggesting, I think, a lot of good ideas, such
19 as reduction of hours, early retirement, rotation of lay-offs,
20 what have you, which could be tried.

21 But then it would take it a step farther and
22 require, if these are unsuccessful, that the employer would
23 have to make sure that he maintained the work force
24 percentages of minority group persons and females, regardless
25 of their seniority, as he was laying them off.

1 So, for example, an example where 85 percent of
2 an employer's work force was white male, and 15 percent was
3 minority group and female, that 85 percent of those laid off
4 would have to be white male and 15 percent would be minority
5 group and female, regardless of seniority.

6 The Commission also recommends that the Office
7 of Federal Contract Compliance should issue guidelines
8 similar to those issued by EEOC, which would cover Government
9 contractors who are subject to Executive Order 11246, as
10 amended.

11 I would like to start first with just a brief
12 analysis of Title VII and what it provides, as I understand
13 it.

14 Title VII, as we all know, outlaws employment
15 discrimination from its effective date -- for example,
16 July 2, 1965, in the case of race and national origin.
17 Section 706 of that Act provides in pertinent part that if
18 a court finds that an employer or respondent has intentionally
19 engaged or is engaging in an unlawful employment practice,
20 that the court may enjoin the practice, and, at the same time,
21 order affirmative relief, which may include back pay, re-
22 instatement of employees, or what have you.

23 The Supreme Court, in FRANKS V. BOWMAN, has also
24 held that, in appropriate circumstances, this may also
25 include retroactive seniority where you have identified

1 victims of discrimination since the effective date of
2 Title VII.

3 In attacking employment discrimination, or in
4 fashioning relief under Title VII, the traditional approach
5 was to look at the seniority system that an employer had, and
6 to see if it locked in blacks or females or other persons
7 into discriminatory patterns which pre-existed the
8 effective date of Title VII.

9 You have some very good language quoted in the
10 report from both the QUARLES case and the BETHLEHEM STEEL
11 case, where the idea is not to take a generation of blacks
12 or females and to hold them down or keep them in those
13 pre-existing patterns. If they were always in labor jobs,
14 that they should not always be behind white males who were
15 hired after them, who got a preference; and, if you didn't
16 change the system, would also be ahead of them.

17 Therefore, the normal relief that was gone after
18 was a plant or company seniority system. You already had an
19 incumbent group of black or female employees with a substantial
20 amount of seniority, and the theory was that what you would
21 do is, you would let them use their initial date of hire as
22 seniority in competition with other workers and that, as a
23 result of being able to use this seniority, they would be
24 able to eventually reach their so-called rightful place where
25 they would have been but for the discrimination against them.

1 Now, this has worked fairly well when you had a
2 group of incumbent employees with a substantial amount of
3 seniority.

4 The problem is, where you get into a situation
5 where an employer has not hired blacks or females, or has only
6 hired them recently, and you are in a lay-off situation, and
7 now you are looking around for some way to keep them in, to
8 protect the gains that have been made under the affirmative
9 action plans.

10 The Section 703(h) of Title VII provides that, not-
11 withstanding any other provision of this Title, it shall
12 not be an unlawful employment practice for an employer to
13 apply different standards of compensation or different terms,
14 conditions or privileges of employment pursuant to a bone fide
15 seniority or merit system, provided that such differences
16 are not the result of an intention to discriminate because of
17 race, color, religion, sex, or national origin.

18 Well, there's been a substantial amount of difference
19 of opinion about what that means, but the courts have been
20 consistent in holding that it does not protect a job
21 seniority system or line of progression seniority system
22 which locks people into pre-existing patterns of discrimination.

23 The question I guess before us today is whether or
24 not that would also outlaw a seniority system which lays people
25 off on the basis that they were hired. In other words, a

1 plant seniority system.

2 The Supreme Court in FRANKS doesn't reach that
3 issue, because it's not there. According to the Supreme Court,
4 in FRANKS, though, the Section 703(h) does not expressly
5 purport to qualify or proscribe relief otherwise appropriate
6 under the remedial provision of Title VII.

7 In other words, if you get something under
8 Section 706, 703(h) doesn't stop you from getting it. However,
9 taking that, you have to look at the Congressional debates
10 regarding Title VII, where Senator Clark specifically stated
11 that Title VII would not affect seniority rights such as the
12 last hired, first fired issue, and that this is also reiterated
13 in a series of questions which were submitted by Senator
14 Dirksen and made part of the Congressional Record, where it
15 was again stated that the concept of last hired, first fired
16 would not be affected by Title VII.

17 The Supreme Court stated, in FRANKS, that whatever
18 the extent or exact meaning or scope of Section 703(h), that
19 it is apparent that the thrust of the section is directed
20 toward defining what is and what is not an illegal discrimina-
21 tory practice in instances in which the post-Act operation of
22 a seniority system is challenged as perpetuating the effects
23 of discrimination occurring prior to the effective date.

24 In other words, the employer is doing something
25 now which is being challenged as continuing some pre-Act

1 kind of discrimination.

2 And the Court also said in FRANKS that there is
3 no indication in the legislative materials that 703(h) was in-
4 tended to modify or restrict relief otherwise appropriate
5 once an illegal discriminatory practice occurring after
6 the effective date of the Act is proved. Which is what you
7 had in FRANKS, which doesn't help us very much.

8 And if one can prove, as in FRANKS, that identifi-
9 able blacks, minorities or women, have been denied jobs since
10 the effect of Title VII.

11 However, FRANKS doesn't reach the issue of
12 whether 703(h) protects the seniority system in a situation
13 where a minority group or female employee slated for layoff
14 have not been individually discriminated against by the
15 employer but where the employer has few minority or female
16 employees because of its discriminatory prior refusal to
17 hire female or minority workers.

18 Which is what we are talking about in looking at
19 this issue. Because if you have got somebody who has applied
20 for the job after the effective date of Title VII, and they
21 weren't hired because of discrimination, if they met the filing
22 requirements under Title VII, they are clearly entitled
23 to retroactive relief, at least to the date when they applied
24 for the job after the effective date of Title VII.

25 I really don't know personally what the answer to

1 this is. I am not even, at this point, going to venture a
2 guess where the Supreme Court is going to come out.

3 But I think some of these issues ought to be gone
4 into in a little more depth in the recommendations.

5 Under Title VII, where prior discrimination is proven,
6 a discriminatory act against an identifiable person is not necessary in
7 order to obtain specific remedy, such as time tables.

8 If you can show a pattern in discrimination, you
9 have got them, as far as getting some kind of relief. That
10 also applies to the general principle of back pay. But you
11 can't get back pay for an individual unless you can show that
12 that individual has in fact lost money as a result of the
13 employer's discriminatory policies.

14 So you could talk about retroactive seniority,
15 you could say retroactive seniority is like back pay in
16 some instances, but it also is somewhat like this general
17 grant of goals and time tables, because you have a class of
18 people that you are giving relief to and if they qualify for
19 the class, they may get -- may be entitled to relief.

20 If you can have a preference in hiring and
21 promotion -- and here I'm throwing out my own thinking as I
22 am going back and forth -- if that is legal, if you can show
23 a pattern of practice of discrimination, why shouldn't it
24 also be that you can also have a preference in layoffs or
25 in recalls? If one is good, you can say, well, you should

1 hire one for one, or if you are going into an apprenticeship
2 program, a one for two basis, why isn't it just as legal to
3 have the same kind of thing for layoffs or recalls?

4 The Commission seeks to justify alteration of the
5 last hired, first fired principle on the ground that it blocks
6 the national policy enunciated in Title VII, which is aimed
7 at improving equal employment opportunity for all Americans,
8 regardless of race, national origin, or sex.

9 The Commission does not really address, though,
10 the issue of possible alleged discrimination claims. When
11 you are talking about an employee working for 20 years, who
12 also has his house and car and kids he's having to send to
13 school, and there's no proof that the people you are trying
14 to get relief for have been discriminated against, although
15 the employer may have discriminated against someone else,
16 you may have some substantial problems.

17 However, I would also state that, if any seniority
18 system is bone fide, it would seem that a company or plant
19 seniority system would qualify. If 703 (h) means anything,
20 then it must mean that some seniority system should be
21 bone fide, so you can make a very strong argument then that
22 last hired, first fired was not meant to be touched by
23 Title VII.

24 On the other hand, and as I said, just going
25 back and forth as I finish here, where a company has

1 discriminated in the past and thus has excluded dispro-
2 portionate numbers of blacks and females from meaningful
3 jobs, the Supreme Court could hold that a seniority system
4 which continues to exclude blacks and females from good jobs
5 thwarts Title VII and is not bone fide.

6 I leave you with that. I think that you have done
7 a good job in raising some issues and questions, but I would
8 also suggest that there needs to be some more investigation,
9 and I would also second Mr. Mundel's suggestion that there
10 may be other alternatives which also could be suggested, which
11 might alleviate some of the cyclical effects of unemployment
12 and what have you. Thank you.

13 CHAIRMAN FLEMMING: Thank you, very, very much
14 for this presentation.

15 Now I will recognize the last member of the panel,
16 Mr. Lutz Prager from the Equal Employment Opportunity
17 Commission.

18 MR. PRAGER: Thank you, Mr. Chairman.

19 To the extent that I speak for anyone, I speak
20 for the General Counsel's office at the EEOC, and I speak
21 primarily as a member of a prosecuting arm of an agency.

22 And so, my focus is fairly narrow, and it deals
23 with that part of the report which focuses on Title VII, and
24 legal solutions to sociological and economic problems.

25 I wanted to emphasize that I think that Mr.

1 Mundel has done a very great service in focusing attention
2 to the broader issues that are involved here, of how to solve
3 this problem in a way that does not deal with just the
4 technical perception of what constitutes unfair employment
5 practice, but deals rather with the more basic problems of
6 how do we deal with unemployment in society, and how do we
7 deal with it as it affects the broad spectrum of the
8 population.

9 And insofar as he talked about that, I should
10 emphasize that, of course, seniority systems, as such, play a
11 relatively minor -- still play a significant role, but a
12 relatively minor role.

13 Because when we are talking about seniority
14 systems, we are dealing primarily with industries that are
15 organized, that do have seniority structures, and much of the
16 unemployment in this country and much of the layoffs which
17 have occurred have been in industries which have no such
18 structures.

19 With regard to the perception of seniority systems
20 as a possible unfair employment practice, we agree fully with
21 the report -- the draft report -- with two relatively minor
22 exceptions.

23 We think that there is a tendency to disregard
24 Section 703(h) of Title VII a little more than the courts
25 would be willing to do. We think we come out the same place

1 that the report does, but with some reservations as to how
2 do we get there.

3 We think, for example, now that part two of the
4 FRANKS decision is out -- the Supreme Court decision which
5 has been talked about both in the report and by Mr. Ferrand
6 this morning -- that the Court did interpret 703(h) as
7 protecting, at least with respect to company-wide seniority
8 systems, all company-wide seniority systems where seniority
9 has accrued prior to 1965.

10 That is, unlike the report, which seems to say
11 that you can go back and look at what happened in 1963 and 1961,
12 we think that the FRANKS analysis prevents looking at that
13 where you have a company-wide or plant-wide seniority system.

14 That is not true, however, we think, with respect
15 to departmental seniority systems, primarily because you are
16 dealing with people who were impacted in a particular depart-
17 ment and who are now feeling the present effects of that
18 earlier impact.

19 We also believe that the report, by focusing, as
20 we think it should, on disparate effects -- that employment
21 practice has a disparate effect on women and on minorities,
22 that it's unlawful, that that, too, disregards a little bit
23 too much the impact of 703(h).

24 We can't believe that the courts will, or that
25 as prosecutors it would be a good idea even to suggest that

1 the courts will not or will disregard section 703(h).

2 So we think that, as Mr. Ferrand suggested, there
3 has to be some showing of post-1965 discrimination, discrimina-
4 tion in hiring or assignment, and that if such discrimination
5 is shown, the mere fact that the present victims of the
6 seniority system, the ones who are excluded by a layoff, are
7 not the same ones as the ones who were discriminated against
8 in 1965, 1966 or 1967, in hiring, that doesn't make that much
9 difference.

10 It's the seniority system itself which has been
11 tainted by the earlier discrimination, so that it permits
12 this later discrimination against another group of people, and
13 creates disparity; that if blacks had been hired in 1966 or '67,
14 or women had been, that the seniority system could not today
15 operate to create the disparity in layoffs.

16 With those two minor exceptions, however -- and
17 they are really minor; they are analytical, rather than
18 substantive -- we agree with the report.

19 The report suggests that the EEOC and also the
20 FCCC issue guidelines to indicate what the EEOC believes
21 employers must or can do under Title VII. We, speaking now
22 again for the General Counsel's Office, agree, and have urged
23 the Commission to adopt such guidelines.

24 As you know, Mr. Chairman, last year, the EEOC
25 did present its guidelines to the Equal Employment Coordinating

1 Council, where this Commission and the EEOC were the pariahs.

2 The Justice Department, the Labor Department, the
3 Commerce Department, the Civil Service Commission, and whoever
4 else is on the Coordinating Council, rejected the recommenda-
5 tions and since then the EEOC has not done anything to either
6 go it alone or to bring the issue up again.

7 There are a number of reasons. Part of it deals
8 with the question of leadership. Now we have lost two chair-
9 men in the past year -- year and a half. We now have an
10 acting chairman. The Commission has a bare quorum of three
11 commissioners, as opposed to five.

12 There is, of course, some political problem that
13 is inherent in the phrase, "reverse discrimination," and
14 some reluctance to come up with -- especially in an election
15 year -- guidelines that might have an emotional impact.

16 And there's also some disagreement in the Commission.
17 Some Commissioners do not in fact believe that the approach
18 we have taken, taken in our belief in the courts, is the
19 correct one and the one that the Commission should endorse.

20 I do not see that there is any hope that the
21 Commission will change and will adopt any guidelines of any
22 sort prior at least to January of next year, when possibly
23 Presidential appointments will fill up the Commission, but
24 until then, I don't think there's any hope.

25 I want to suggest one more matter, however, and

1 while the report deals primarily with layoffs and the effect
2 of the seniority systems on layoffs, and does so only
3 peripherally with the recalls, it seems to us that at this
4 moment, forgetting for the moment what may happen in 1977
5 and '78, there is perhaps less emotional content in issuing
6 guidelines and working with seniority systems when they deal with
7 recalls.

8 Recalls essentially mean that someone has job prefer-
9 ence, but to a job which is currently vacant, and the courts
10 have been somewhat freer in dealing with job vacancies than in
11 bumping people out of jobs.

12 The word bumping has a long precedent in Title VII
13 law, and the courts have always displayed a reluctance to
14 take someone from a job that the person currently has.

15 The staff has recommended -- that is, the staff
16 of the EEOC -- has recommended to the General Counsel and
17 to the Executive Director that they in turn recommend to the
18 Commissioners the adoption of guidelines which would deal
19 with the recall question, and that is deal with it in two
20 ways:

21 (1) To say that whenever a job is vacant by
22 layoff for six months or more, that in recalling into that
23 job, that the order of recall be modified so that, insofar
24 as possible, the racial proportions or the sex proportions
25 existing prior to the layoff be restored.

1 We have also suggested that, insofar as minorities
2 and women lose their recall rights after a certain period,
3 and most, if not all, collective bargaining agreements require
4 the loss of seniority rights after a certain period of
5 time, either a specified period or a period equivalent to
6 the time spent in the employment, that the recall rights of
7 women and minorities be modified insofar as they retain recall
8 rights prior to employment of anyone -- white males -- who do
9 not have such previous employment and, therefore, have never
10 been employed by the company.

11 CHAIRMAN FLEMMING: Thank you very much. I want
12 to express appreciation to all the members of the panel
13 for very helpful presentations.

14 As some have come in since the hearing has started,
15 I would like to reiterate one point, and I will probably
16 do this a number of times during the day. The report we are
17 discussing is a draft report. The members of the Commission
18 have not arrived at any conclusions relative to the material
19 in the report.

20 We have asked for the kinds of inputs that have
21 been made so far this morning to help us weigh the issues
22 that have been identified in the report, the draft report,
23 before we arrive at final conclusions.

24 I am sure our thinking is going to be affected
25 considerably by some of the inputs that will be made today.

1 We now have 15 minutes between now and the time the next panel
2 is scheduled to appear. I am going to turn to my colleagues
3 and ask them if they have what we hope will be brief questions
4 to address to one member or all members of the panel.

5 First of all, the Vice Chairman, Commissioner Horn.

6 COMMISSIONER HORN: I was interested, Mr. Prager,
7 you mentioned the staff guidelines in EEOC to try and solve
8 the problem of keeping racial and female proportionality after
9 the job vacancy is filled if it was vacant for more than
10 six months.

11 That leads me to an obvious question to Mr. Ferrand,
12 as to whether the Department of Labor has developed various
13 models and options in terms of work sharing plans or other
14 approaches to this seniority problem, which they could
15 encourage industry to discuss as possible solutions to this
16 problem.

17 Are you aware of any?

18 MR. FERRAND: I don't know. I have only been
19 at the Department of Labor about three months. That is
20 something I don't know.

21 I know the suggestion was made in the report,
22 and I think it's a good one, that the Department of Labor
23 make available recommendations or methods on work sharing.

24 Whether or not anything has been done in that area,
25 I don't know.

1 COMMISSIONER HORN: I would like our staff, Mr.
2 Chairman, to ask the Department of Labor what, if any, along
3 this line they have done and include it within the hearing
4 report.

5 CHAIRMAN FLEMMING: Without objection, that will
6 be done.

7 COMMISSIONER HORN: Mr. Ferrand, even though
8 you have only been there a short time, are you aware of any
9 studies in the Department of Labor as to the extent of
10 unemployment in those firms that do have seniority-based
11 contracts, as opposed to the extent of unemployment especially
12 in the smaller firms, as Mr. Prager implied, that do not
13 have seniority-based contracts?

14 Are there any data collected at BLS along this
15 line?

16 MR. FERRAND: I don't know. I would hope they
17 do things like that. But I have no idea. I am at somewhat
18 of a disadvantage, also, like Mr. Prager, my job basically
19 is to litigate and to enforce the Executive Order, and it
20 used to be to enforce Title VII. So I just don't know.

21 COMMISSIONER HORN: I would like, Mr. Chairman,
22 to pursue that also with the Department of Labor and put it
23 in the record at this point. If, without objection, that
24 is agreeable, we will go to the third point.

25 CHAIRMAN FLEMMING: Without objection, so ordered.

1 COMMISSIONER HORN: I wonder, Mr. Mundel, in terms
2 of the Congressional Budget Office staff analyses, is there
3 any staff paper there that gets into the problem of whether
4 people who receive unemployment compensation should perform
5 any work?

6 And the reason behind that question is that one
7 of our problems, I suspect, on why people are unemployed is
8 not simply racial discrimination or female discrimination or
9 low state of the economy, but somewhere along the line, work
10 habits and competencies have not been built up to enable one
11 to position oneself often for better job opportunities.

12 Is there any thought being given in the Congressional
13 staff as to whether we should have people work at least a few
14 hours a week as a condition of receiving an unemployment
15 check?

16 MR. MUNDEL: There are several studies that our
17 office has done on the unemployment compensation system,
18 including the possible requirement or the possible use of
19 either public service employment or other sorts of manpower
20 training activities for people who are receiving unemployment
21 compensation.

22 That was under some debate in the Congressional
23 deliberations about the changes in the unemployment compensa-
24 tion system. There was no title introduced in either the
25 House or the Senate which would make that kind of requirement.

1 Let me give you those.--

2 COMMISSIONER HORN: I would like to have those
3 studies for the record. How long are they?

4 MR. MUNDEL: There are a couple out on the order
5 of 60 to 70 pages, and there's one doing on long term right
6 now.

7 COMMISSIONER HORN: I would like them given to
8 each member of the Commission so we can review them prior to
9 making up our minds on this report.

10 CHAIRMAN FLEMMING: We would appreciate that
11 very much.

12 Commissioner Freeman?

13 COMMISSIONER FREEMAN: Mr. Mundel, I noted in your
14 statement that our report implicitly probably tends to put
15 too much emphasis on the role of full employment as a
16 possible solution and to changing the gap.

17 And I would certainly agree with that comment,
18 because it has been my experience that, even in periods of
19 economic expansion, the gap between the employment of
20 minorities and women was just as bad as it is in a period of
21 recession.

22 The other comment, however, comes to the definition
23 of the figures that were used by each of you. The unemploy-
24 ment rate, and that's one out of ten maybe, but I would like
25 to speak to that figure, that percentage that is never included

1 It is my understanding -- and perhaps Mr. Ferrand
2 could speak to this -- that the unemployment rate as given
3 by the Department of Labor speaks only to those persons who
4 are in the labor force. They do not include the "discouraged
5 worker." They do not include the person who is not seeking
6 a job because of having been unemployed for so long.

7 And if you would include those persons, what
8 would the figure be? And then what would your solutions be?
9 What would your suggestions be as to how we might deal with
10 the report?

11 MR. MUNDEL: Let me answer both your questions:
12 I did not mean to leave you with the impression that a movement
13 toward full employment or a movement toward reduced unemploy-
14 ment would not have a substantial effect on the differential
15 experiences between minority and majority people. It would
16 have a significant effect, and the gap between those unemploy-
17 ment rates would decline. But it would still exist.

18 It would not remove the gap, but the gap does
19 decline at fuller employment.

20 Second, with regard to discouraged workers, those
21 workers who leave the labor force believing that no jobs are
22 available, a much larger share of minority groups -- at least
23 non-white; we don't know about some of the differential
24 groups inside of that -- who lose jobs do leave the labor
25 force in comparison with whites. The discouraged worker

1 rate among non-whites is substantially higher.

2 And when you add the two and get something which
3 some people refer to as a jobless rate, the rate of joblessness
4 among non-whites is significantly higher than their unemploy-
5 ment rate. I don't know the latest numbers.

6 And the gap between the jobless rates of white
7 and non-whites is substantially higher than the gap between
8 the unemployment, the measured unemployment rates.

9 I think that the jobless indices don't really
10 change the kind of mix and policies that one might want, be-
11 cause you find that people with more training, people with
12 more attachment to the labor market, people with longer
13 seniority, stay in the labor force more, and if we moved and
14 we changed the education and training distributions, and
15 if we changed some of the discriminatory hiring practices
16 which exist in private and public market, you would find that
17 the job attachment, the labor force participation of
18 minority groups would become greater and become more like
19 majority groups, and we would observe that their unemployment
20 experiences and their jobless experiences would become more
21 uniform.

22 It doesn't change the kind of mix strategy that
23 I think you ought to implement if you want to solve that prob-
24 lem, but it does change the intensity with which you see
25 the problem existing.

1 The jobless rates are higher than the unemploy-
2 ment rates, and the difference between the jobless rates
3 of non-whites and whites is greater than, and substantially
4 greater than, the difference between the measured unemployment
5 rates of non-whites and whites.

6 MR. FERRAND: I think Mr. Mundel is correct that
7 they don't keep statistics on persons who have taken themselves
8 out of the labor market because they are discouraged, and
9 obviously these statistics would make the percentages larger
10 of blacks and Chicanos who are unemployed -- it would thus
11 be greater than depicted.

12 COMMISSIONER FREEMAN: Just one final question.
13 Would, in your opinion, it be appropriate public policy for
14 the government to speak to and concern itself with a jobless
15 rate in developing programs, and what such programs would
16 respond to that problem?

17 MR. FERRAND: I have also felt that would be a
18 more realistic figure to look at, and that if, in fact, there
19 is some kind of commitment to some kind of a full employment
20 policy, or a goal, that if you are talking about that, then
21 you obviously are talking about other people who would like
22 a job but are so discouraged they are no longer looking.

23 It's not enough to say that the people who go down
24 to the employment office and pick up their check are the
25 unemployed.

1 CHAIRMAN FLEMMING: Commissioner Ruiz?

2 COMMISSIONER RUIZ: I was interested in the analysis
3 of the FRANKS case made by Mr. Ferrand as it related to past
4 discrimination practices, both theoretically and realistically.

5 The problem was not only with us in the school
6 desegregation cases, but just last week, the California
7 Supreme Court decided an applicant to admission to a
8 medical school had been discriminated against, and in that
9 particular opinion, the decision was a narrow one in the
10 sense that there was no proof of past discrimination at this
11 particular university. The case

12 The case was remanded on the procedure question
13 of who has the burden of proof on whether the court could
14 presume past discrimination.

15 And all of this is tieing in with respect to
16 various facets. And now, Title VII.

17 Mr. Ferrand, can you try to second-guess the
18 next step the Supreme Court will take after the FRANKS case
19 along that line?

20 MR. FERRAND: Well, I don't know. I thought at
21 one time that -- well, I was convinced, I think, and I tend to
22 lean that way still, that the Court will find that the
23 concept of last hired, first fired is not a violation of
24 Title VII.

25 Now I don't know, though, because this is what I

1 talking about at the end. If you could convince the Court,
2 if you start out with the national policy considerations and
3 what Title VII is designed to do, to narrow the earnings gap
4 between blacks and whites among other things, and if
5 affirmative action is legal, assuming that you have shown a
6 pattern and practice of discrimination, then affirmative
7 action can also include layoffs, recalls, what have you.

8 The problem is, though, that you have workers who
9 have been around for a long time who do have expectations
10 and there is one thing to say you are not going to get that
11 promotion; there is another thing to say, "I'm sorry, you're
12 out on the street."

13 And I still think if I were going to bet on it, I
14 think they would probably hold that the last hired, first
15 fired is in most situations not a violation of Title VII.

16 CHAIRMAN FLEMMING: Mr. Saltzman?

17 COMMISSIONER SALTZMAN: Mr. Mundel, for the sake of
18 my own clarification, can I restate what I think I heard you
19 say?

20 You said that a tax cut as a national policy would
21 produce 46,000 new jobs and about 17 percent increase in
22 occupations by non-whites, while a Government employment
23 program would produce 97,000 jobs and a 27 percent increase
24 in employment by non-whites. Is that right?

25 MR. MUNDEL: Yes, those are estimates for equal

1 cost -- \$1 billion programs.

2 COMMISSIONER SALTZMAN: So that if we are to have
3 a more significant impact on the employment of non-whites,
4 then the more advantageous program would be the Government
5 employment program, would it not?

6 MR. MUNDEL: In terms of measured unemployment,
7 the public service jobs kind of program would have a more
8 significant effect, with equal cost to a tax cut.

9 COMMISSIONER SALTZMAN: On the non-white?

10 MR. MUNDEL: On the non-white.

11 COMMISSIONER SALTZMAN: And minority.

12 Would, therefore, your suggestion be, in terms of
13 many levers, that one of the significant levers for impacting
14 upon the problem would be a government employment program,
15 rather than just merely a tax cut, if we really want to advance
16 the employment of minorities?

17 MR. MUNDEL: In terms strictly of reducing the
18 differential between the unemployment experiences, the public
19 service employment programs, to the best of our estimates --
20 and any of these are really only estimates -- would have a
21 more significant effect on that differential than would
22 a tax cut -- a private sector tax cut.

23 COMMISSIONER SALTZMAN: And therefore, would the
24 Humphrey-Hawkins bill be more beneficial in this process?

25 MR. MUNDEL: Well, I think one has to be very

1 careful about going from a simple estimate of the performance
2 of a public sector program of the kind we are currently
3 operating, directly by inference to the effect of a very
4 broad ranging kind of Humphrey-Hawkins bill. I would be
5 reluctant to make that one for one connection.

6 COMMISSIONER HORN: Could we get for the record
7 any staff analysis you have on the public sector versus private
8 sector, \$1 billion but?

9 MR. MUNDEL: I will submit this for the record.

10 COMMISSIONER HORN: Is that in the short term
11 analysis or long term, five years down the line, in your
12 analysis?

13 MR. MUNDEL: The effect analysis is in the short
14 run, twelve months after implementing the program. It is
15 not a long run analysis.

16 COMMISSIONER HORN: Will there be a difference in
17 the long run? How often do you pour \$1 billion in in Government
18 revenue versus generating jobs in the private sector?

19 MR. MUNDEL: Well, I think there would be a
20 difference in the long run. In the long run, the effects
21 would probably even out as the economy adjusted to the
22 different kinds of stimulants. In the short run, the
23 effects would be different.

24 COMMISSIONER HORN: Thank you.

25 CHAIRMAN FLEMMING: Thank you, all three of you,

1 for being willing to think out loud with us on these issues,
2 because this is the kind of help that we need.

3 It's been extremely helpful to us to have you come
4 here this morning and present your various points of view.
5 Thank you, very, very much.

6 I will ask the members of the next panel if they
7 will come forward: Edith Lynton, Homer Fløyd, Galen Martin,
8 and Thomas Peloso.

9 We will take a break of about ten minutes while
10 they are coming forward.

11 (Short recess.)

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