"Last Hired, First Fired"

Informal Hearing Before the United States Commission on Civil Rights, Washington, D.C.,

October 12, 1976

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PREFACE

In the mid-70s, this Nation was faced with a most unusual situation: concurrently, the American economy suffered from inflation, recession, and unemployment. Recent gains of minorities and women in the work force were eroded as seniority-based layoffs soared. The national unemployment rate reached 8 percent, but for minority workers, it was roughly twice that amount, and for black males between 16 and 21, it is estimated that the unemployment rate reached more than 40 percent. Once again, minority and women workers bore an unfair share of the burden; once again, the practice of "last hired, first fired" took its toll.

The Commission's Office of National Civil Rights Issues, under the supervision of William T. White, Jr., Assistant Staff Director, prepared a report entitled, *Last Hired, First Fired: Layoffs and Civil Rights.* Before publication, the Commission invited a group of knowledgeable persons to comment on the draft of that document.

An "informal hearing" was held on October 12, 1976, in Washington, D. C. and persons representing a broad spectrum of interests and viewpoints were heard. Their presentations influenced the final version of the report, which was released in February 1977.

These proceedings were developed by Frederick B. Routh, Director, Special Projects Division, Office of National Civil Rights Issues. Editorial Assistance was provided by Evelyn Chandler of the Publications Management Division, Office of Management; preparation for publication was the responsibility of Audree Holton, Deborah Harrison, Vivian Hauser, and Rita Higgins under the supervision of Bobby Wortman, of the Commission's Publications Support Center, Office of Management.

Mr. Routh served as coordinator of the informal hearing.

U. S. COMMISSION ON CIVIL RIGHTS

The United States Commission on Civil Rights is a temporary independent, bipartisan agency established by the Congress in 1957 to:

- Investigate complaints alleging denial of the right to vote by reason of race, color, religion, sex, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to the denial of equal protection of the laws because of race, color, religion, sex, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information concerning denials of equal protection of the laws because of race, color, religion, sex, or national origin; and
- Submit reports, findings, and recommendations to the President and Congress.

MEMBERS OF THE COMMISSION

Arthur S. Flemming, *Chairman*
Stephen Horn, *Vice Chairman*
Frankie M. Freeman
Manuel Ruiz, Jr.
Murray Saltzman
John A. Buggs, *Staff Director*

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UNITED STATES COMMISSION ON CIVIL RIGHTS

Tuesday, October 12, 1976

The informal hearing of the U.S. Commission on Civil Rights convened at 9:20 a.m. in the Veterans Administration Building auditorium, 810 Vermont Avenue, N.W., Washington, D.C., Arthur S. Flemming, Chairman, presiding.

PRESENT: Arthur S. Flemming, Chairman; Stephen Horn, Vice Chairman; Frankie M. Freeman, Commissioner; Manuel Ruiz, Jr., Commissioner; and Murray Saltzman, Commissioner; John A. Buggs, Staff Director; Frederick B. Routh, Director of Special Projects.

PROCEEDINGS

CHAIRMAN FLEMMING. I will ask the hearing to come to order.

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

All of us recognize that this is one of the most difficult issues confronting the Nation at the present time in the field of civil rights. The Commission felt that, before it arrived at any findings or recommendations or conclusions, that it would like to have the benefit of hearing from persons inside and outside of Government who have endeavored to come to grips with this issue. We have indicated that we would like very much to have their comments on the draft document that is now before the Commission. In addition, however, to their comments on this draft document, if they have other comments that they would like to make bearing on this particular issue, this Commission would welcome hearing those comments.

Our first panel is a panel of persons who are inside Government: Mr. David Mundel, who is associated with the Congressional Budget Office [CBO]; Mr. Louis Ferrand, Jr., who is with the U.S. Department of Labor; and Mr. Lutz Prager, who is with the Equal Employment Opportunity Commission [EEOC].

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

STATEMENT OF DAVID MUNDEL, CONGRESSIONAL BUDGET OFFICE

MR. MUNDEL. Thank you, Mr. Flemming.

Let me keep my comments relatively brief and to two aspects of the problem: first, the current status of the economy—the context within which the problem we are discussing today will be solved—and second, the problem itself—the differential between the unemployment experiences of nonwhite and white Americans and between the unemployment experiences of men and women in our economy.

There are two basic aspects of unemployment. There is the cyclical aspect caused by inadequate demand in the economy, and the structural aspect caused by some individuals being at the end of the labor market queue, for one reason or another. When cyclical unemployment is high, i.e., when aggregate unemployment reaches sizable numbers—it reached 8.9 percent and now stands at 7.8 percent—we tend to forget that structural problems—the basic underlying operations of the labor market that result in inequalities—have *not* gone away.

The Commission report explicitly concentrates on ways to redistribute the burdens of unemployment. It deals with the effects of work sharing—or you could call it "unemployment sharing"—and possible changes in the seniority systems. The report also underlines—I think to some extent much too implicitly—the role that a strong and high-employment economy plays in maintaining and improving the economic and unemployment status of nonwhites, minorities, and women.

We shouldn't forget, however, that, even if the unemployment rate reached 4 percent, a rate that some people have chosen to be an appropriate target, the gap between the unemployment rates of nonwhites and whites would still remain at approximately 4.8 percentage points.

The size of this inequality is not solely a cyclical phenomenon. We have recently been through a very significant recession. Some observers call it a depression. In May of 1975, the unemployment rate reached 8.9 percent, and it has gone down substantially since then. Following this very high unemployment rate, we at first experienced rapid and subsequently more slow and hesitant recovery. The unemployment rate went down between May 1975 and May 1976 from 8.9 percent to 7.3 percent. Subsequently, the rate has increased, and then fallen slightly, and now stands at 7.8 percent. The unemployment rate is above historical levels, and our growth rate has slowed down in the most recent quarter to about 4.0 to 4.5 percent at an annualized rate. The hestitancy or slowness of the economic recovery is increasingly apparent.

Some observers are predicting a further slowdown in the recovery and, in fact, a recession by the end of 1977. The CBO projects a slow and moderate recovery. Our projections are based on the current budget as passed by the Congress and are really conditioned on the macroeconomic policy implied by that budget.

As a result of this slow recovery, we would project that in the fourth quarter of this year—about December—unemployment will be in the 6.9 to 7.3 range. These projections were done before the 2 recent months of data came out, and we are currently, as of this week, rethinking whether or not our fourth-quarter estimates will be fulfilled. We are also projecting that in the fourth quarter of 1977, unemployment will be down in the 5.8 to 6.4 percent range—down from a level of 7.8 or 8.9, but still high by long-term, historical standards.

I think it's important to realize that, even though the unemployment rates may go down—as we project they will— the unemployment rates of nonwhites will be high, substantially higher than those of whites. If the unemployment rate goes down to the 6.9 to 7.3 range at the end of this year, the unemployment rate of all nonwhites will remain at approximately 11.2 to 11.7 percent. More than 1 out of every 10 potential worker members of the nonwhite labor force will remain out of work, even if the aggregate unemployment rate goes down to the 5.8 to 6.4 percent level, as we predict it will 14 months from now. Nonwhites will have substantially higher unemployment rates, and the rate for women will still be above men in all categories.

There are a number of reasons for these substantial differentials, toward which the report, "Last Hired, First Fired," is directed. We have to think about all of these reasons as we design a policy for reducing or lessening these differentials.

The first is the attitude of workers and employers. Women are still disproportionately in a small number of occupations. Women and some minority members still have very narrow career paths, and they restrict themselves to particular parts of the labor market. Furthermore, as a result of employer decisions, hiring practices, and either overt or implicit discrimination in the labor market, these groups of workers are restricted to certain parts of the labor market.

Second, women and minority group members have significantly different labor-market behaviors and participation rates, and this affects their levels of job seniority. Women move in and out of the labor market more frequently than do men, and consequently they have less seniority. Minority members, in part because of the low status and low pay of their jobs, switch jobs and move from employer to employer more often than do majority male members of the economy. Consequently, they too have less seniority.

A third reason for the differentials in the unemployment experiences is related to education and training. School enrollments and completion rates of nonwhites still are substantially below those of whites at every level—especially at the higher education level—of the educa-

tional system. A number of people in recent years have said that we shouldn't be very disturbed or discouraged by these differential school-enrollment rates because recent studies have shown that returns of schooling are declining and that schooling is no longer an important or key determinant of labor-market success, wages, or unemployment rates. The results of these studies are, in fact, somewhat different than most casual observers believe. The unemployment rates of college-educated nonwhites and high school-educated nonwhites are still substantially different. The wage rates are still substantially different. The status—in terms of the quality—of the jobs which college-educated and trained people occupy is still substantially higher than those held by less educated individuals.

Similar misreading of the evidence also exists with regard to manpower-training programs. The Government instituted a wide variety of manpower-training programs in the late sixties, and the first evaluations of these programs said that they didn't work. In fact, newer and more reliable evaluation evidence says something quite different. Manpower-training programs do work. They do result in earnings gains, in increased wages, in increased labor-force participation on the part of trainees in comparison with control groups.

Manpower-training programs were "sold" on the ground that with 6 months of training high school dropouts could effectively compete with Ph.Ds or individuals with masters' in business administration. Training programs do not do this, but they do have substantial effects on individual's employment experiences.

The fourth thing we should realize is that Government fiscal policy can reduce unemployment, for both males and females and for both nonwhites and whites. The instruments used in fiscal policy can have substantially different effects on nonwhites and whites.

As part of a recent study that the CBO conducted on the unemployment experiences of nonwhites and whites, we estimated how many jobs would be created by a variety of countercyclical or macroeconomic policies and how many of these new jobs would be filled by nonwhites. We found that the estimates vary significantly among the different types of programs. A tax cut of about $1 billion would result in about 46,000 new jobs in the economy, and about 17 percent of those jobs would be occupied by nonwhites. On the other hand, a public service employment program similar to that supported by the Comprehensive Employment and Training Act, (CETA) Titles II and VI, would result in about 97,000 new jobs and about 26 percent of these jobs would be occupied by nonwhites. Depending on which macroeconomic strategy the Government and the society chooses, the results may be different aggregate effects, different amounts of increased employment, and also different effects on important population segments.

During recessions, we have observed that the unemployment rates of nonwhites increase much more rapidly than do the rates of whites. The

gap between the two rates decreases during recoveries, and this recovery has followed this same form. The unemployment rate of nonwhites declines more slowly than does the rate of whites. They are the last hired. I think it's in part because of seniority. I think it is also in part because of their distribution in jobs and their distribution across industry, and those are things which would be affected more by long-term strategies such as manpower training or changes in the educational attainment levels.

I think the complex causes of the unemployment differential ought to lead to a mixed strategy. We need a mixed strategy if we want to reduce this unemployment differential, and moving any single lever—e.g., changing the unemployment compensation system, changing the seniority system, changing educational completion rates and enrollment patterns, or increasing manpower training—in this complex system is unlikely to result in a very efficient reduction strategy.

I think that if we want to change people's places on the unemployment and employment queues, we could use education, training, affirmative action, antidiscrimination policy, and changes in the seniority system, in order to produce these results.

Work sharing or unemployment sharing is one way of changing the way in which the labor queue is utilized. We also need to change the number of people on the queue who are employed. At two points in the report, the authors stress that the unemployment experiences of nonwhites are slightly connected with a full employment economy. There is almost no way to reduce the differential and to have a significantly lower grade of unemployment unless the economy as a whole has increased the employment of all workers. We need to artfully design our macro policy if we are to do that. There are substantially different effects on employment and the minority population resulting from alternative macroeconomic instruments.

The choice of the mix of instruments is inherently a political one. It is one in which members of this Commission, one in which individuals in the executive branch, and in which Members of Congress—my employers—quite clearly participate. It is clearly a technical choice.

The Commission's report has provided an important focus of attention, and it has provided a very logical and coherent argument and analysis of how one might go about changing the seniority systems and the unemployment compensation system in order to have an effect on the differential unemployment experiences. But if the Commission and others want to reduce this differential, a mixed strategy would probably be a more effective and perhaps a more appropriate strategy.

Thank you.

CHAIRMAN FLEMMING. Thank you very much.

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

STATEMENT OF LOUIS FERRAND, JR., U.S. DEPARTMENT OF LABOR

MR. FERRAND. Good morning.

I would like to state for the record that the views which I express this morning are my own and not necessarily those of the United States Department of Labor.

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

I think the report graphically lays out the effect of the 1974 recession on recent affirmative action gains by minority-group persons and females, and shows quite clearly that because of the fact that they have been generally excluded from better-paying jobs until recently and, thus, have very little seniority when an employer lays people off or reduces its work force on the basis of the last hired, first fired policy, that the effect is to wipe out gains achieved through affirmative action programs, consent decrees, court orders, what-have-you. And it suggests that a major method of combating the last hired, first fired policy is something called work sharing, which would include such things as employees agreeing to less overtime, 4-day work weeks, payless holidays, payless work days, etc.

The report then goes on to discuss the Supreme Court decision in *Franks v. Bowman Transportation Company*, where the Court held that retroactive or constructive seniority should have been granted to identifiable black job applicants who had applied after the effective date of Title VII of the Civil Rights Act of 1964.

The Court also ruled in that case that the seniority expectations of white workers do not bar the granting of this relief, since the black applicants are being placed basically in their rightful place; that is, where they would have been but for the discrimination against them. And the Court, in *Franks*, also went on to say that there could be no argument that the award of retroactive seniority to the victims of hiring discrimination in any way deprives other employees of indefensibly vested rights conferred by the employment contracts, since the Supreme Court had long held that employee expectations arising from a seniority-system agreement may be modified by statutes furthering a strong policy interest.

The Commission then goes on to point out that the *Franks* Court was not presented with questions of, one, whether retroactive seniority is to be awarded to a person who is denied a job on the basis of race, national origin, or religion or sex prior to the enactment of Title VII; or, two, whether it is to be awarded to a person who did not initially apply for a job because it was well known in the community that the employer did not hire minority or female employees or workers.

Thus, according to the report, one question remains after the *Franks* case; that is: What can and should be done to make whole and put into their rightful place those minority or female workers who might fit into the above-listed categories? The report recommends that both

groups should fall within the affected class entitled to constructive seniority and other relief, and that equitable relief would depend on the particular facts of each case, but would not turn on when the discrimination occurred. In other words, if the discrimination in failing to hire occurred prior to 1965 to blacks or Chicanos, it would still be actionable, according to the report, under Title VII.

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

Specifically, the Commission proposes, in regard to those groups we have just been talking about, that in appropriate situations, retroactive or constructive seniority and other relief should be granted to all incumbent minority and female employees who are old enough to have been hired prior to the effective date of Title VII, regardless of whether they ever applied for a job with the company, provided they lived in the general areas from which the company could have reasonably recruited. The rationale is that people don't apply to a company that has a reputation of not hiring because of race, sex, or national origin, and, again, that discrimination in 1963 is as invidious as discrimination in 1965 or 1966.

The effect of this proposal, I think, would be to grant so-called retroactive seniority or constructive seniority predating the effective date of Title VII to persons hired after the effective date of Title VII, even though at least some of these persons never previously applied for a job with the company in question. Presumably, one could compute each individual's chronological age and then determine seniority from a date in which a white male, for example, was hired. For example, a black male born in 1920 and hired in 1967 might, under the report's theory, receive a seniority date and pension and other rights from 1940—he would have been 20 years old at that time—provided that a 20-year-old white male with approximately the same skills was hired in 1940. I am giving my own hypothetical examples.

Although I would not completely rule out the possibility of obtaining such relief, it is my belief that the courts would have a great deal of difficulty in finding that such relief was covered by Title VII, especially where the person never evidenced any interest in applying for a job with the company or in a related kind of job. I understand that the report's theory is that the individual is presently suffering from past discrimination against him or her, thus making Title VII relief applicable. But I would be very surprised to see relief granted in such a case where there is no real evidence of pre- or post-act discrimination against the individual by the employer.

Further, I think that pension relief would probably not be available for periods predating 1965 because of the 1972 amendments to Title VII which place limitations on back pay recovery. That is assuming that pension relief can be recovered on a back pay theory, it could, like back pay only be recovered from 2 years prior to the time of the charge or time of filing suit, whichever was earlier.

Arguably, a person might have a stronger case where they actually applied for a job prior to the effective date of the act and then kept on trying for a job after its effective date. Such a situation might be roughly analogous to a situation where incumbent employees hired prior to the effective date of the act received retroactive seniority from date of hire in order to assist them in reaching their rightful place. There are many examples of that kind of relief—*U.S. v. Bethlehem Steel Corp.; U.S. v. Georgia Power; and U.S. v. Inspiration Copper Company.*

The Commission also proposes that the EEOC should issue guidelines stating that all seniority systems are invalid as they apply to any work force that does not mirror the relevant labor market and the composition of which cannot be explained successfully by the employer. In other words, let's say, for example, that an employer had a 15 percent black work force and 20 percent female work force, and the available labor market was 35 percent black and, say, 42 percent female. Under the proposal, as I understand it, all of the existing seniority systems in the company, whether they were company seniority, job seniority, etc., would be considered to be invalid unless the employer could show, or affirmatively prove, that this lack of females or lack of blacks in his work force was not as a result of any employment policy involving discrimination against them.

The report also suggests that EEOC should require that where an employer is compelled to reduce production costs, for example in a layoff situation, that he should do everything possible to limit the effects of that necessary reduction, first of all through trying such things as work sharing and suggesting, I think, a lot of good ideas, such as reduction of hours, early retirement, rotation of layoffs, etc.

Then the report would go a step further and require, if these attempts are unsuccessful, that the employer make sure that he maintained prelayoff work force percentages of minority-group persons and females, regardless of their seniority, as he was laying off his employees. So, for example, where 85 percent of an employer's work force was white male and 15 percent was minority group and female, 85 percent of those laid off would have to be white male and 15 percent would be minority group and female, regardless of seniority.

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

I would like to start first with just a brief analysis of Title VII and what it provides, as I understand it. Title VII, as we all know, outlaws employment discrimination from its effective date—for example, July 2, 1965, in the case of race and national origin. Section 706 of that act provides in pertinent part that if a court finds that an employer or respondent has intentionally engaged or is engaging in an unlawful employment practice, that the court may enjoin the practice and, at

the same time, order affirmative relief, which may include backpay, reinstatement of employees, or what-have-you. The Supreme Court in *Franks v. Bowman*, has also held that, in appropriate circumstances, this relief may also include retroactive seniority where there are identified victims of discrimination since the effective date of Title VII.

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

You have some very good language quoted in the report from both the *Quarles* case and the *Bethlehem Steel* case, where the idea is that a generation of blacks or females should not be held down or kept in those preexisting patterns. If they were always in labor jobs, they should not always be behind white males who were hired after them, who got a preference, and who, if you didn't change the system, would also be ahead of them for the remainder of their employment.

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

Now, this has worked fairly well when you had a group of incumbent employees with a substantial amount of seniority. The problem is that when you get into a situation where an employer has not hired blacks or females until recently, and you are in a layoff situation, you are looking for some way to keep them employed to protect the gains that have been made under the affirmative action plans.

Section 703(h) of Title VII provides that, notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. There's been a substantial amount of difference of opinion about what that means, but the courts have been consistent in holding that 703(h) does not protect a job seniority system or line of progression seniority system which locks people into preexisting patterns of discrimination.

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

The Supreme Court in *Franks* doesn't reach that issue, because it's not there. According to the Supreme Court in *Franks*, section 703(h)

does not expressly purport to qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII. In other words, if you get something under section 706, 703(h) doesn't stop you from getting it. However, taking that, we must look at the congressional debates regarding Title VII, where Senator Clark specifically stated that Title VII would not affect seniority rights such as the last hired, first fired issue. This is also reiterated in a series of questions which were submitted by Senator Dirksen and made part of the *Congressional Record*, where it was again stated that the concept of last hired, first fired principle would not be affected by Title VII.

The Supreme Court stated in *Franks* that, whatever the extent or exact meaning or scope of section 703(h), that it is apparent that the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date. In other words, the employer is doing something now which is being challenged as continuing some pre-act kind of discrimination.

The Court also said in *Franks* that there is no indication in the legislative materials that 703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the act is proved. Which is what you had in *Franks*, which doesn't help us very much.

And if one can prove, as in *Franks*,that identifiable blacks, minorities, or women have been denied jobs since the effect of Title VII, there's no problem.

However, *Franks* doesn't reach the issue of whether 703(h) protects a seniority system in a last hired, first fired situation where a minority-group or female employee slated for layoff has not been individually discriminated against by the employer, but where the employer has few minority or female employees because of its discriminatory prior refusal to hire female or minority workers. I really don't know what the answer to this is. I am not even, at this point, going to venture a guess where the Supreme Court is going to come out. But I think some of these issues ought to be gone into in a little more depth in your recommendations.

Under Title VII, where prior discrimination is proven, a discriminatory act against an identifiable person is not necessary in order to obtain specific remedy, such as goals and timetables. If you can show a pattern and practice of discrimination, you have got them as far as getting some kind of relief. That also applies to the general principle of backpay. But you can't get backpay for an individual unless you can show that that individual has in fact lost money as a result of the employer's discriminatory policies. You could argue that retroactive seniority is like backpay in some instances, but it also is somewhat like the general grant of goals and timetables because you have a class of people that you are giving relief to and if they qualify for the class, they may be entitled to relief.

If you can have a preference in hiring and promotion, if that is legal, once you can show a pattern of practice of discrimination, why shouldn't it also be that you can have a preference in layoffs or in recalls? If one concept is good, such as hiring on a one-for-one basis, or if you are going into an apprenticeship program, a one-for-two basis, why isn't it just as legal to have the same kind of thing for layoffs or recalls?

The Commission seeks to justify alteration of the last hired, first fired principle on the ground that it blocks the national policy enunciated in Title VII, which is aimed at improving equal employment opportunity for all Americans, regardless of race, national origin, or sex. The Commission does not really address the issue of possible alleged reverse discrimination claims. When you are talking about an employee working for 20 years, who also has his house and car and kids he's having to send to school, and there's no proof that the people you are trying to get relief for have been discriminated against, although the employer may have discriminated against someone else, you may have some substantial problems.

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

On the other hand, and as I said, where a company has discriminated in the past and thus has excluded disproportionate numbers of blacks and females from meaningful jobs, the Supreme Court could hold that a seniority system which continues to exclude blacks and females from good jobs thwarts Title VII and is not bona fide.

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

Thank you.

CHAIRMAN FLEMMING. Thank you very, very much for this presentation.

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

STATEMENT OF LUTZ PRAGER, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

MR. PRAGER. Thank you, Mr. Chairman.

To the extent that I speak for anyone, I speak for the General Counsel's office at the EEOC, and I speak primarily as a member of a prosecuting arm of an agency. And so my focus is fairly narrow, and

it deals with that part of the report which focuses on Title VII and legal solutions to sociological and economic problems.

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

Insofar as he talked about that, I should emphasize that, of course, seniority systems, as such, play a relatively minor—still play a significant role, but a relatively minor role. Because when we are talking about seniority systems, we are dealing primarily with industries that are organized, that do have seniority structures, and much of the unemployment in this country and most of the layoffs which have occurred have been in industries which have no such structures.

With regard to the perception of seniority systems as a possible unfair employment practice, we agree fully with the report—the draft report—with two relatively minor exceptions. We think that there is a tendency to disregard section 703(h) of Title VII a little more than the courts would be willing to do. We think we come out at the same place that the report does, but with some reservations as to how do we get there.

We think, for example, now that part II of the *Franks* decision is out—the Supreme Court decision which has been talked about both in the report and by Mr. Ferrand this morning—that the Court seems to have interpreted 703(h) as protecting, at least with respect to companywide seniority systems, all companywide seniority systems where seniority had accrued prior to 1965. That is, unlike the report, which seems to say that you can go back and look at what happened in 1963 and 1961, we think that the *Franks* analysis may prevent looking at that where you have a companywide or plantwide seniority system.

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

We also believe that the report by focusing, as we think it should, on disparate effects—that an employment practice which has a disparate effect on women and on minorities, is unlawful—that that, too, disregards a little bit too much the impact of 703(h). We can't believe that the courts will, or that as prosecutors it would be a good idea even to suggest that the courts should disregard section 703(h).

So we think that, as Mr. Ferrand suggested, there has to be some showing of post-1965 discrimination, discrimination in hiring or assignment, and that if such discrimination is shown, the mere fact that the present victims of the seniority system, the ones who are excluded by a layoff, are not the same ones as the ones who were discriminated

against in 1965, 1966, or 1967 in hiring, that doesn't make that much difference. It's the seniority system itself which has been tainted by the earlier discrimination, so that it permits this later discrimination against another group of people and creates disparity; that if blacks had been hired in 1966 or '67, or if women had been, that the seniority system could not today operate to create the disparity in layoffs.

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

The report suggests that the EEOC and also the OFCCC[P] [Office of Federal Contract Compliance Programs] issue guidelines to indicate what the EEOC believes employers must or can do under Title VII. We—speaking now again for the General Counsel's Office—agree and have urged the Commission [EEOC] to adopt such guidelines.

As you know, Mr. Chairman, last year, the EEOC did present its guidelines to the Equal Employment Coordinating Council, where this Commission and the EEOC were the pariahs. The Justice Department, the Labor Department, the Commerce Department, the Civil Service Commission, and whoever else is on the Coordinating Council rejected the recommendations, and since then the EEOC has not done anything to either go it alone or to bring the issue up again.

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

There is, of course, also some political problem that is inherent in the phrase "reverse discrimination," and some reluctance to come up with—especially in an election year—guidelines that might have an emotional impact. And there's also some disagreement in the Commission. Some Commissioners do not, in fact, believe that the approach we have taken, taken in our briefs in the courts, is the correct one and the one that the Commission should endorse.

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

I want to suggest one more matter, however, and while the report deals primarily with layoffs and the effect of the seniority systems on layoffs, and does so only peripherally with the recalls, it seems to us that at this moment, forgetting for the moment what may happen in 1977 and '78, there is perhaps less emotional content in issuing guidelines and working with seniority systems when they deal with recalls.

Recalls essentially mean that someone has job preference, but to a job which is currently vacant, and the courts have been somewhat freer in dealing with job vacancies than in bumping people out of jobs. The word bumping has a long precedent in Title VII law, and the

courts have always displayed a reluctance to take someone from a job which the person currently encumbers.

The staff—that is, the staff of the EEOC—has recommended to the General Counsel and to the Executive Director that they in turn recommend to the Commissioners the adoption of guidelines which would deal with the recall question, and that is deal with it in two ways: One, to say that whenever jobs are vacant for 6 months or more, because of layoffs that in recalling into those jobs, the order of recall be modified so that, insofar as possible, the racial proportions or the sex proportions existing prior to the layoffs be restored.

We have also suggested that, insofar as minorities and women lose their recall rights after a certain period—and most, if not all, collective bargaining agreements require the loss of seniority rights after a certain period of time, either a specified period or a period equivalent to the time spent in the employment—that the recall rights of women and minorities be modified so that they will indefinitely retain recall rights which will give them priority over persons who have never been employed by the company.

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

As some have come in since the hearing has started, I would like to reiterate one point, and I will probably do this a number of times during the day. The report we are discussing is a draft report. The members of the Commission have not arrived at any conclusions relative to the material in the report. We have asked for the kinds of inputs that have been made so far this morning to help us weigh the issues that have been identified in the report, the draft report, before we arrive at final conclusions. I am sure our thinking is going to be affected considerably by some of the inputs that will be made today.

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

VICE CHAIRMAN HORN. I was interested, Mr. Prager, you mentioned the staff guidelines in EEOC to try and solve the problem of keeping racial and female proportionality after the job vacancy is filled, if it was vacant for more than 6 months. That leads me to an obvious question to Mr. Ferrand, as to whether the Department of Labor has developed various models and options in terms of work-sharing plans or other approaches to this seniority problem, which they could encourage industry to discuss as possible solutions to this problem. Are you aware of any?

MR. FERRAND. I don't know. I have only been at the Department of Labor about 3 months. That is something I don't know.

I know the suggestion was made in the report, and I think it's a good one, that the Department of Labor make available recommendations or methods on work sharing. Whether or not anything has been done in that area, I don't know.

VICE CHAIRMAN HORN. I would like our staff, Mr. Chairman, to ask the Department of Labor what, if any, along this line they have done and include it within the hearing report.

CHAIRMAN FLEMMING. Without objection, that will be done.

VICE CHAIRMAN HORN. Mr. Ferrand, even though you have only been there a short time, are you aware of any studies in the Department of Labor as to the extent of unemployment in those firms that do have seniority-based contracts, as opposed to the extent of unemployment especially in the smaller firms, as Mr. Prager implied, that do not have seniority-based contracts? Are there any data collected at BLS [Bureau of Labor Statistics] along this line?

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

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

CHAIRMAN FLEMMING. Without objection, so ordered.

VICE CHAIRMAN HORN. I wonder, Mr. Mundel, in terms of the Congressional Budget Office staff analyses, is there any staff paper there that gets into the problem of whether people who receive unemployment compensation should perform any work? And the reason behind that question is that one of our problems, I suspect, on why people are unemployed is not simply racial discrimination or female discrimination or low state of the economy, but somewhere along the line work habits and competencies have not been built up to enable one to position oneself often for better job opportunities. Is there any thought being given in the congressional staff as to whether we should have people work at least a few hours a week as a condition of receiving an unemployment check?

MR. MUNDEL. There are several studies that our office has done on the unemployment compensation system, including the possible required use of public service employment or training activities for people who are receiving unemployment compensation. There has been some debate within the Congress about these and other possible changes to the unemployment compensation system.

VICE CHAIRMAN HORN. I would like to have those studies for the record. How long are they?

MR. MUNDEL. There are a couple of studies of about 60 to 70 pages.

VICE CHAIRMAN HORN. I would like them given to each member of the Commission so we can review them prior to making up our minds on this report.

CHAIRMAN FLEMMING. We would appreciate that very much.

Commissioner Freeman?

COMMISSIONER FREEMAN. Mr. Mundel, I noted in your statement that our report probably tends to put too much emphasis on the role of full employment as a possible solution and to changing the gap, and I would certainly agree with that comment because it has been my experience that even in periods of economic expansion, the gap between the employment of minorities and women was just as bad as it is in a period of recession.

The other comment, however, refers to the definition of the figures that were used by each of you. It is my understanding—and perhaps Mr. Ferrand could speak to this—that the unemployment rate as given by the Department of Labor speaks only to those persons who are in the labor force. They do not include the discouraged worker; they do not include the person who is not seeking a job because of having been unemployed for so long. And if you would include those persons, what would the figure be? And then what would your solutions be? What would your suggestions be as to how we might deal with such in the report?

MR. MUNDEL. Let me answer both your questions. I did not mean to leave you with the impression that a movement toward full employment or a movement toward reduced unemployment would not have a substantial effect on the differential between the unemployment experiences of minority and majority people. It would have a significant effect, and the gap between those unemployment rates would decline. But the gap would still exist.

Second, with regard to discouraged workers, those workers who leave the labor force believing that no jobs are available, a much larger share of minority groups—at least nonwhites—who lose their jobs leave the labor force in comparison with whites. The discouraged worker rate among nonwhites is substantially higher. Consequently, when you add the two rates, the rate of joblessness among nonwhites is significantly higher than their unemployment rate, and the gap between the jobless rates of white and nonwhites is substantially higher than the gap between the measured unemployment rates.

I think that using the jobless indices as opposed to the unemployment rates don't really change the kind of mix and policies that one might want. People with more training, people with more attachment to the labor market, people with longer seniority stay in the labor force more when unemployed. If we increased education and training and reduced discriminatory hiring practices, the labor force participation and attachment of minority groups would become greater and more like that of majority groups. The jobless rates are higher than the unemployment rates, and the difference between the jobless rates of nonwhites and whites is greater than the difference between the measured unemployment rates of nonwhites and whites.

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

COMMISSIONER FREEMAN. Just one final question. Would, in your opinion, it be appropriate public policy for the Government to speak to and concern itself with a jobless rate in developing programs and how such programs would respond to that problem?

MR. FERRAND. I have also felt that would be a more realistic figure to look at, and that if, in fact, there is some kind of commitment to some kind of a full employment policy, or a goal, that if you are talking about that, then you obviously are talking about other people who would like a job but are so discouraged they are no longer looking. It's not enough to say that the people who go down to the employment office and pick up their check are the unemployed.

CHAIRMAN FLEMMING. Commissioner Ruiz?

COMMISSIONER RUIZ. I was interested in the analysis of the *Franks* case made by Mr. Ferrand as it related to past discrimination practices, both theoretically and realistically.

The problem was not only with us in the school desegregation cases, but just last week, the California Supreme Court decided an applicant to admission to a medical school had been discriminated against, and in that particular opinion, the decision was a narrow one in the sense that there was no proof of past discrimination at this particular university. The case was remanded on the procedure question of who has the burden of proof on whether the court could presume past discrimination. And all of this is tying in with respect to various facets, and now, Title VII. Mr. Ferrand, can you try to second guess the next step the Supreme Court will take after the *Franks* case along that line?

MR. FERRAND. Well, I don't know. I thought at one time that—well, I was convinced, I think, and I tend to lean that way still, that the Court will find that the concept of last hired, first fired is not a violation of Title VII. Now I don't know, though, because this is what I was talking about at the end. If you could convince the Court, if you start out with the national policy considerations and what Title VII is designed to do, to narrow the earnings gap between blacks and whites among other things, and if affirmative action is legal, assuming that you have shown a pattern and practice of discrimination, then affirmative action can also include layoffs, recalls, what-have-you.

The problem is, though, that you have workers who have been around for a long time who do have expectations, and there is one thing to say, "You are not going to get that promotion"; there is another thing thing to say, "I'm sorry, you're out on the street." And I still think if I were going to bet on it, I think they would probably hold that the last hired, first fired is in most situations not a violation of Title VII.

CHAIRMAN FLEMMING. Mr. Saltzman?

COMMISSIONER SALTZMAN. Mr. Mundel, for the sake of my own clarification, can I restate what I think I heard you say? You said that a tax cut as a national policy would produce 46,000 new jobs and about 17 percent increase in occupations by nonwhites, while a government employment program would produce 97,000 jobs and a 27 percent increase in employment by nonwhites. Is that right?

MR. MUNDEL. Yes, those are estimates for equal cost—$1 billion programs.

COMMISSIONER SALTZMAN. So that if we are to have a more significant impact on the employment of nonwhites, then the more advantageous program would be the government employment program, would it not?

MR. MUNDEL. In terms of measured unemployment, the public service jobs program would have a more significant effect than an equal cost tax cut.

COMMISSIONER SALTZMAN. On the nonwhite?

MR. MUNDEL. On the nonwhite employment rate.

COMMISSIONER SALTZMAN. And minority.

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

MR. MUNDEL. In terms strictly of reducing the differential between the unemployment experiences, the public service employment programs, to the best of our estimates—and these are only estimates—would have a more significant effect on the differential between the unemployment rates than would an equal size tax cut.

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

MR. MUNDEL. Well, I think one has to be very careful about inferring from a simple estimate of the performance of a public sector program, of the kind we are currently operating, directly by inference to the effect of a very broad-ranging kind of Humprey-Hawkins bill. I would be reluctant to make that one-for-one connection.

VICE CHAIRMAN HORN. Could we get for the record any staff analysis you have on the public sector versus private sector, $1 billion but—

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

VICE CHAIRMAN HORN. Is that in the short-term analysis or long-term, 5 years down the line, in your analysis?

MR. MUNDEL. The effect analysis is in the short run, 12 months after implementing the program. It is not a long-run analysis.

VICE CHAIRMAN HORN. Will there be a difference in the long run? How often do you pour $1 billion in Government revenue versus generating jobs in the private sector?

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

COMMISSIONER HORN. Thank you.

CHAIRMAN FLEMMING. Thank you, all three of you, for being willing to think out loud with us on these issues because this is the kind of help that we need. It's been extremely helpful to us to have you come here this morning and present your various points of view. Thank you very, very much.

I will ask the members of the next panel if they will come forward: Edith Lynton, Homer Floyd, Galen Martin, and Thomas Peloso. We will take a break of about 10 minutes while they are coming forward.

[The hearing recessed until 10:40 a.m. the same day.]

CHAIRMAN FLEMMING. The hearing will come to order.

The next panel is a panel of persons who are having day-by-day experiences with this issue at the State and local level.

Ms. Edith Lynton is here from New York City, the Commission on Human Rights; Homer Floyd, from the Pennsylvania Commission on Human Rights; Galen Martin, from the Kentucky Commission on Human Rights; and Thomas Peloso, the Michigan Department of Civil Rights.

I do not know what staff have said to you in terms of the length of your presentations, but I will just ask you to take note of the fact that there are four members of the panel, that we are due to recess at 11:45, and that I would like to leave some time for questions on the part of the members of the Commission. Having said that, that's all I will say as far as length of presentation is concerned.

First of all, I recognize Edith Lynton of the New York City Commission on Human Rights.

STATEMENT OF EDITH LYNTON, NEW YORK CITY COMMISSION ON HUMAN RIGHTS

MS. LYNTON. Thank you, Chairman Flemming. Good morning, Commissioners.

I am representing Eleanor Holmes Norton, who unfortunately left today on an official mission to the Soviet Union, where there are no layoff problems but others of concern to leaders in human rights. I regret that the timing of this hearing coincided with her departure because she most certainly is a leader, if not *the* leader, in focusing civil rights agency attention to the issue of layoffs.

Mrs. Norton carefully reviewed the Commission on Civil Right's report and made some suggestions that I will present. These suggestions are neither major nor substantive, but rather matters of emphasis. And the Commission's report, because of its breadth of analysis, should be released at the earliest possible date. Court cases are pending and civil

rights agencies are struggling with the layoff problem without guidance. This document provides the background and technical expertise that judges have relied on in the past and, therefore, could be instrumental in shaping judicial policy. It also could help civil rights agencies in their daily problems arising from layoffs.

This is the first recession during which Title VII has been sufficiently developed to begin to be utilized in reference to a difficult problem, namely, how to deal with economic retrenchment as it affects affirmative action.

As a city agency plagued with this problem on every front—and the national figures obscure the problems of big cities—we just have been searching for an interpretation that would not only affect the courts but help us in our every day activities. We tend to consider the confrontation between affirmative action goals and seniority an undesirable one. First, a focus on seniority rules probably will be limited in outcome because court decisions will vary and probably apply only in cases where particular facts exist. Second, we consider seniority a valid principle, essentially neutral and fair, and one we hope ultimately will protect women and minorities. We have no wish to set it aside or tinker with it, nor do we wish to see the burden of unemployment shifted from one group to another who did not construct discriminatory policies.

For these reasons, instead of looking at the problems of seniority, we have been studying alternatives to layoffs. Although our interest arose out of the concern over the disparate effect layoffs were likely to have on minorities and women, it extended far beyond that issue. Our study revealed that, compared with advanced Western European countries, we in the United States are lagging in constructive manpower policy. U.S. responses to unemployment were fashioned in the 1930s, and 40 years later we still rely on unemployment insurance and public employment, both 1930s developments. Clearly it is time for a fresh look at the whole problem of unemployment, perceiving it in a larger social perspective.

The New York City commission's concern with this problem began in the early 1970s. The 1970s recession made it apparent that the burden of unemployment is borne disparately. During that relatively mild recession Department of Labor figures showed that white employment actually increased. The rise in unemployment was borne entirely by nonwhites.

In 1974, the city commission alerted all city agencies and all city commercial associations to be sensitive to the possibility that indiscriminate layoffs might have a disparate impact. We believe that subsequent effects were mitigated by that early alert because the civil service commission in New York City did take cognizance of the problem. But as the recession and fiscal crisis of the city intensified, the problem worsened.

In January 1975, Mrs. Norton requested advice from the EEOC, and sent to them a proposed model for quidelines. The model did not propose to direct employer action, nor did it conflict in anyway with seniority rules. Based on the *Griggs* principle, it suggested that if a proposed layoff plan would have disparate effects, employers would be obliged to search for possible alternatives.

In April 1975, we held major hearings on women in the labor market, and we were beseiged by women's organizations and women union leaders because of a growing concern among women over the impact of layoffs on white-collar workers, who were proving more vulnerable than in past recessions, and by women who only recently gained access to jobs in the police department and other nontraditional areas.

Meanwhile, the layoffs of municipal employees were increasing and the economic outlook was bleak. It was then that we determined to convene a series of high-level conferences to explore the aternatives. The response was overwhelmingly positive. Top executives of some of the largest corporations, major union leaders, public employment representatives, legal scholars, economists, mediators, and arbitrators agreed to give a full day on relatively short notice.

The report of these conferences has been well received. The conferenee discussions indicated a strong interest in work sharing and more receptivity to it than might have been anticipated, especially on the part of unions. It is noteworthy that among the models presented in that report many were initiated by union action and seldom generated by the disparate effect of the proposed layoff on women and minorities. More often, it was concern with the trauma of unemployment and the possible damage to the employer's financial condition that stimulated innovative planning. Work sharing was favored because it would not only "spread the pain," but also permit a company to retain its work force, instead of losing valued employees, and thus be able to respond quickly to any upturn.

We suspect that more experience exists around the country that has not yet been documented, studied, or publicized, and strongly recommended further research.

Following the conferences, the city commission directed its attention to the three jurisdictions, the city, the State, and the Federal Government. As a result of our conferences and our urgent appeals to the city government, a task force was created to propose remedies for the obvious disparateness of layoffs in city employment. This task force made many recommendations which were adopted and announced in June 1976 by Mayor Beame as the first systematic approach to the problem of layoffs in any jurisdiction. The program called for all layoff plans to be submitted in advance to the commission on human rights for assessment of their effects, and to allow the commission to determine what steps could be taken to reduce the impact on minority and female employment.

The commission's study of municipal layoffs' impact, as of April 1976, showed dramatically how much of the gains made in recent years can be reversed by layoffs. Twenty-two percent of all city employees were laid off, but this represented 35 percent of blacks, 40 percent of black males, 51.2 percent of Hispanics, and 30 percent of Asians. And 33 percent of women employees were terminated.

The importance of those findings is that if layoffs proceed without any care to their effects, the entire minority component of New York City's public work force would be eliminated and female representation would be damaged irreparably. The hope is that subjecting proposed layoffs to commission scrutiny will mitigate any future consequences.

With respect to State government, the most practical remedy that emerged from our conferences was to alter unemployment insurance coverages. Unemployment insurance, it was suggested, could be expanded to provide incentives for using alternatives, to keep people employed rather than only subsidizing the unemployed. Extending unemployment insurance coverage to provide partial compensation for any reduction in earnings caused by work sharing would increase worker receptivity at a cost that would be less than payments to the unemployed. In addition, reducing the rate of contribution for employers who adopt alternatives would serve as an incentive to avoiding layoffs, if possible.

These proposals are particularly timely. Only a few weeks ago, the New York State welfare burden increased tremendously because those for whom unemployment insurance coverage expired were transferred to the welfare rolls. The city commission has actively supported executive and legislative State action to bring about long-overdue reforms in unemployment insurance.

With respect to the Federal Government, there is much that can be done. The promulgation of guidelines remains a major need. In 1975, that terrible year, the city commission on human rights was able to secure $20 million worth of jobs for women and minorities. And we would hate to see those jobs jeopardized by Federal inaction.

If the EEOC abdicates its responsibilities, Title VII will be reduced to a temporary palliative in good times. Future forecasts still project high levels of unemployment. And fluctuations doubtless will continue. It would be unrealistic to take comfort in modest declines in total unemployment figures.

The guidelines promulgated in the past by the EEOC with respect to testing, selection, and on sex as a bona fide occupational qualification contributed significantly to the progress made in the past decade. We cannot afford to see those hard-won gains eradicated.

Thank you.

COMMISSIONER RUIZ. By way of an exhibit, Edith Lynton made reference to some New York City statistics on layoffs as reducing to a disastrous wipe-out level the minority workers.

MS. LYNTON. Yes.

COMMISSIONER RUIZ. I would like that marked as an exhibit next in order.

CHAIRMAN FLEMMING. I would like to recognize now Homer Floyd of the Pennsylvania Commission on Human Relations.

STATEMENT OF HOMER FLOYD, EXECUTIVE DIRECTOR, PENNSYLVANIA HUMAN RELATIONS COMMISSION

MR. FLOYD. Thank you, Chairman Flemming. Good morning, Commissioners.

I am Homer Floyd, the executive director of the Pennsylvania Human Relations Commission [PHRC]. Our commission has long been concerned during the last couple of years about the problem that you have addressed yourselves to—last hired, first fired.

Let me say that, first, we applaud the effort of this Commission for moving into the vacuum. There has been an absence of leadership at the Federal level in dealing with this question, and for you to take it on in such a sophisticated way and provide a document upon which we hope some national leadership can emerge on this issue, we applaud you for that. We hope the report will be issued with some dispatch.

It is our own feeling that you can argue and differ with some minor provisions of the report; the difference is hardly significant enough, in our own judgment, to argue about. You have analyzed the problem. Although it concentrated more in terms of your own direct comments about the problem, there was a great emphasis on layoffs and so forth, which certainly is not the only approach, obviously, with respect to the problem.

I think you made some distinctions that we may not be willing at this point to agree, or at least it would not be our emphasis. A person who has already secured a job, or who had been a denied a job, the constructive seniority business, the difference between that and a person who is a member of class who has been excluded from employment opportunity—it is our view that it is not sufficiently different to make a major legal point. We can talk about that a little later.

But in Pennsylvania, our experiences have been somewhat similar to the documentation that you submitted in your report. In 1972 we initiated some broad pattern complaints against some of the largest industries in our State on the basis of underutilization of minorities and women, and in 1973 and '74 we picked out 17 instances where we signed conciliation agreements or consent orders involving the hiring under these affirmative action programs of 1,107 employees in these 17 companies. For the portion of the year that they were employed, that amounted to, in terms of salaries and benefits, over $5 million—close to $6 million. And as we went back about 10 months later, in August of 1975, we found that over a third of the women and minorities who were employed in these companies, as a result of the consent order and decree that we had issued, had been laid off.

In one company in central Pennsylvania, of 123 women who had been employed, only 28 remained as a result of the layoff that they initiated, which went along the lines of the seniority basis. Again, we have similar statistics in some of the companies dealing with blacks and other minorities as well.

So, generally, we feel that you have laid out the data fairly carefully, that you have documented the effects to a great extent. The major emphasis that we have to deal with is, how do you solve the problem? And I think that, basically, that's what you were trying to adjust yourselves to, and you laid out a lot of options and a lot of possibilities.

Let me say that, as far as the many alternative suggestions that are presented in terms of alternatives to layoff, it is our view that certainly these alternatives are important to pursue. The truth of the matter is that, in our judgment, if they are voluntary, they are not going to work very effectively.

We had a series of meetings in Pennsylvania—in Philadelphia, Harrisburg, and Pittsburgh—in January of 1976, to deal with this very question, and we drafted some proposed guidelines as well as regulations that our commission was considering initiating, and we refined them, incidentally, since then. I have a copy available that I would like to share with you.

Since there was an absence of leadership at the Federal level, we felt that we would have to get into it in a more substantial way.

CHAIRMAN FLEMMING. May I interrupt and say, without objection, I would like to have your draft of guidelines inserted in the record at this point.

MR. FLOYD. Indeed. We will make that available to you.

The recurring theme, in terms of these meetings that we held, was that the union representatives did not want anything that would in any way affect seniority and the last in, first out theory. Management felt as though the question was unresolved at the Supreme Court level, and that PHRC—our agency—should do nothing until the Supreme Court renders a decision ultimately, even though there is not a case up before it on this precise issue. In addition to that, the minority groups, the community groups felt as though they were long overdue, that something should be done.

As we began to pursue the question, we tried to look at the various groups that were affected. You have the question of persons who may have applied for a job in the first place and been denied that job. That is the constructive seniority. There's no question, in our judgment, as to how you deal with that.

The other area dealing with individuals who are members of a class who have been discriminated against, we tried to deal with that. And basically, let me kind of identify how we dealt with the unlawful discriminatory practice in dealing with this question, and in which we first identified any layoff or system of layoff and/or recall which is designed or implemented with direct or indirect intent to circumvent the purposes of the act, and so forth. That was important.

We also then tried to deal with any method of layoff or recall where there is a *prima facie* violation of the act, notwithstanding the racial neutrality, which is the spirit effect theory.

Now, in addition to that, we added another category where any layoff or system of layoff or recall whose design or implementation has a direct or indirect effect where, one, discrimination between employees on the basis of classification has taken place, or maintaining or extending or perpetuating the effect of prior unlawful discrimination present in potential employees, their potentiality; and a third category is preventing or substantially impeding remedial action to cure or redress the effects of unlawful discrimination.

These were the broad categorical areas that we tried to deal with. And then we provided in our proposed regulations, which our commission will be considering during the next 45 to 60 days, the next category, which is what is the defense that the employer can offer. And the first thing that we point out is—and I don't think the report goes into this enough—which is what is the economic necessity for the layoff in the first place. You address yourselves to that, but in my judgment, not only agencies like our agency or EEOC should try to deal with that. I think it's a broad legal question that the whole Federal effort should deal with. In my judgment, I don't think there's been enough emphasis on that.

We have all kinds of regulatory agencies in operation at the Federal level. For example, if an airline decides that it wants to cut out one line or its air traffic to a particular city, they have to petition the Federal Government to submit data and all kinds of information in order to justify that. Then the agency may decide that it is not in the best interests of the Nation, in effect, the citizenry, and so therefore deny the request, irrespective of some of the economic consequences that exist.

Too much of the time, our agencies have found ourselves in a position of where the company has already acted and has never justified the action in the first place, so we find ourselves trying to share the poverty. At one of the meetings that we had, emphasis was placed that we are just trying to equalize the misery. And I think there has to be some emphasis in the first place on whether or not there is a need for some kind of economic cutback. In addition to that, companies have to justify that the layoff or recall—the layoff—is unavoidable, that there are no other alternatives available to them.

In addition to that, we felt that, in looking at the whole question, it's a sophisticated question. When our agencies were created, oftentimes we were not designed to deal with some economic issues of the kind where there is a national policy creating high unemployment, and therefore we are then called in to deal with discrimination which is the fallout effect of that national policy.

And I think it's important that the total picture be looked at in dealing with this question. I would point out that the majority of employers

in this Nation are not under a union contract or union agreement, so, therefore, there's great latitude on the part of many employers in dealing with this question, given the motivation and given the emphasis.

In addition to that, there has to be regulatory activity that is, indeed, going to protect the gains that have occurred over the last several years and not wipe them all out, as it has occurred thus far.

Thank you.

CHAIRMAN FLEMMING. Thank you very, very much. I appreciate it.

Next I recognize Mr. Galen Martin of the Kentucky Commission on Human Rights.

STATEMENT OF GALEN MARTIN, KENTUCKY COMMISSION ON HUMAN RIGHTS

MR. MARTIN. I am pleased to be with you. I do commend the U.S. Commission on Civil Rights for taking a forthright position on this, as we in Kentucky think you have with considerable success on the matter of school desegregation. I know you have been taking a lot of heat, and we have been coming to your defense daily and weekly lately, for a while. But we think it's very clear that the leadership that you have shown on the school desegregation issue has paid off. I think most particularly your report, based on the hearings you held, has contributed significantly to the solution of the problem, and I think particularly the most telling point about the report is that you said that, where there was supportive leadership, that few problems resulted. And I think that's been borne out very clearly this fall in our community and throughout the country.

And I don't know that I want to try to draw a lot of heavy analogies between that subject and this, but, on the other hand, I'm not sure they aren't analogous. And certainly there's a tremendous vacuum of leadership in both areas, and we hope that you can help fill the vacuum on last hired, first fired in the way that we know you have in terms of school desegregation.

I think your draft report on this subject addresses the economic, political, and legal realities of being black, brown, red, yellow, female, or both, in the United States in 1976. A longstanding practice of firing those persons most recently hired, which appears at the outset to be equitable, neutral, and nondiscriminatory, must be measured against the Nation's moral and legal obligation to eliminate the last vestiges of employment discrimination. As Circuit Judge Wisdom said so accurately in *United States v. Local 189*, the issue is "How to reconcile equal employment opportunity today with seniority expectations based on yesterday's built-in racial discrimination."

There are a lot of momentous economic issues that surround the answer to that proposition, and we believe the Commission has done an excellent job of placing in perspective and explaining the significant issues that are involved. And it's important that the conscience of

those at the Federal level and the conscience of the American people on questions of civil and women's rights be kept aroused and raised to the highest level of sensitivity. This is particularly important in light of confusion and lack of leadership from many other agencies with Federal civil rights responsibilities.

Our only specific suggestion with regard to the draft report is the need to do more to fully articulate and support the "make whole" remedy concept of Title VII as central to the resolution of the disparity impact of layoffs on minorities and women.

And I think our experience in Kentucky would suggest that you try to make these things as digestible and understandable to the general public. A lot of times it seems like we are being clobbered very successfully by the use of these code terms and these things in the Kentucky papers. It's just like "court-ordered forced busing." They are beating us to death on that. And the same thing they are doing with terms like "super seniority" and "reverse discrimination." I think what you are talking about is rightful place, and we have to keep in mind trying to deal with that aspect of the thing.

I would like to cite our most distinct experience, more than some others, perhaps, with the Kentucky legislature in 1976, to show one of the dangers of continuing Federal drift in this area. In 1976, an amendment was added to the Kentucky civil rights act by the Kentucky General Assembly, and I find a lot of time people in the North kind of look down their nose at those of us in the South, and I just want to say, very briefly, that we have a model civil rights act in the Commonwealth of Kentucky. The Federal Government has nothing like it, and it's questionable whether any other States have.

When we got the bill, it contained the best features of laws in 30 other States and 20 years' experience in those, and we have had 10 years' experience with that law since 1966. But this is the first time that we have suffered any real effort at hobbling it. And we did get this amendment tacked on as a rider to another bill the day before the last day when the general assembly adjourned. It's a rather simple provision, and it was one that was sold to people in the legislature as curbing this business of super seniority. But the trouble with the thing is that, while people were told that that's what it was going to do, it's written in such broad terms that it deals with a whole lot of other things that have nothing to do with last hired, first fired.

Here's what it says: "No employer shall establish employment practices affecting the terms, conditions, and privileges of employment in derogation of an established seniority system or which contravenes an existing collective bargaining agreement."

And, of course, this and other legislation that threatened our commission in the last legislature came about, we think, because of our deep involvement in the local school desegregation efforts. And some of the people who led the effort to get this provision passed were the same people that were backing all the antibusing efforts in the legisla-

ture, and some of them at least were backing a bill to get our commission abolished, and so on.

We also had real serious support for this provision by the Kentucky State Federation of Labor, the AFL–CIO unit in Kentucky, and maybe you will recall that that is the same group that fought us in 1976 and 1974, to repeal our coverage against age discrimination in apprenticeship programs. We managed to beat them on that both times, but they beat us on this one.

They tacked this provision that I have read onto a bill dealing with taxi drivers, and we were unsuccessful in our efforts to get the Governor to veto it. We were told—and we don't have any hard information to support this, and probably there isn't any, and I don't really believe it—but we were told, nevertheless, that Kentucky labor groups were supporting this amendment as some kind of national effort for similar efforts in other States.

But I think what we have here is a problem that, if laws like this are passed in other States, we are going to have the kind of hodgepodge legal development that is very firmly established in this country, and I think is not totally without comparison to the right-to work laws that exist in a lot of the States.

I would like to give you two examples of actual cases that have been before our commission in which this wording, this broad-brush wording, is so bad as to really hobble us if it were constitutional. And we certainly don't think these provisions are constitutional, but they would create real problems for us if it is upheld.

We had a case involving a Kentucky employer who paid women employees 13 cents less per hour than men who were doing similar punchpress work. The practice was in part defended in our case on the basis that the contract between the union and the company provided for the wage differential. Well, under crazy provision, theoretically we couldn't change that, because it was part of the collective bargaining agreement. Of course, the commission has ordered a change in that case.

In another case, an older case, it involved a railroad, where the railroad and the union had established a series of seniority rosters which resulted in blacks being placed on a racially segregated roster from whites. They were not given the opportunity to bid higher jobs, because their roster was closed, and it would have involved starting off at the bottom of another seniority roster for them to bid into machinist or other jobs. And the white roster offered much more potential for job advancement.

Again, both the company and the union defended this suggestion as part of the collective bargaining agreement, and of course, long before the current session, the commission did order that they cease and desist in that practice.

Our commission members and staff believe that this new amendment is obviously unconstitutional. The case has not yet emerged which

would enable us to test it. But as one supportive respondent's attorney wrote, in an effort to try to get the Governor to veto this bill, he said, "Its consequences will be to put an employer in the untenable position of violating either Federal or State law, and seeking to challenge the constitutionality of one or the other."

In our view, this kind of provision can have no effect on Title VII, and we will have to see what happens and how we can get it beaten.

Our relative experience in Kentucky is not that different, really, from other areas, in terms of what happens under the last hired, first fired concept. Probably you members are familiar with our employment situation in Louisville, our diverse manufacturing, from the evidence you got when you were there in June. I might quickly cite for you our examination of four large employers in terms of what their experience has been.

One company has laid off in the last several years approximately 3,600 employees between September 1974 and September 1976, reducing its work force from 4,300 to 700. Most of these employees were union people, covered by labor agreements, which included seniority provisions concerning layoffs. This employer has always had a significant number of female employees, but the minority utilization had not quite reached the population parity. In 1974, 58 percent of the work force was female, 17 percent black. More recently, women account for 34 percent of the work force, and 6 percent of the work force is black.

Employer number two has remained more stable at 1,100 employees throughout the past 2 years. The work force is 75 percent female and 10 percent black, and no real loss or turnover during this period, except for retirements, and the company has utilized those retirements to hire more blacks.

The third employer has experienced numerous layoffs of extended and short duration. The company has, to an extent, attempted to share available work by laying off substantial numbers of employees for brief periods. At the present time, the employer still has 5,000 persons on layoff, upwards of 60 percent of which are black females. This group was hardest hit by company layoffs which have been carried out on a strict seniority basis. In 1976, 12.3 percent were minority and 19 percent, female. The present work force is 10.7 minority and 21 percent females. A strong union at this company virtually assures no flexibility on last hired, first fired.

The fourth employer has attempted to forestall layoff of many employees by working all employees during only 3 weeks of a given month. Such a work-sharing plan has benefited recently hired minorities and women.

Reduction in sales have been reported as the reason for the layoffs in the case of both above employers. Several of our industries—whiskey, cigarettes, and baseball bats—have been unaffected or less affected by these general trends. But there is no question that the

overall picture suggests that minorities and women have been severely affected because many of them were hired in the early sixties.

In summary, the general rule applied in laying off persons in the Louisville area from 1974 to 1976 has been last hired, first fired, particularly among employers who are unionized, and others where nonunion, blue-collar positions are involved.

We very much support your leadership on this vital issue.

Thank you.

CHAIRMAN FLEMMING. Thank you very much, Mr. Martin. We appreciate it.

Next, Mr. Peloso from Michigan.

STATEMENT OF THOMAS J. PELOSO, JR., MICHIGAN DEPARTMENT OF CIVIL RIGHTS

MR. PELOSO. Chairman Flemming and members of the Commission, I will try to stick to the text and get through as quickly as possible. I know we are running behind schedule.

In October of this year, the U.S. Civil Rights Commission will send a report to the President, the Senate, and the Speaker of the House of Representatives which examines the effects of the 1974–75 economic recession on the effort to ensure equal employment opportunity for the Nation's minority groups and women. We are all aware that one of the results of our Nation's economic decline has been the layoff of disproportionately large numbers of minority and female workers, because they had earned little seniority. Thus, the recession acts to nullify the affirmative action gains of recent years, frustrating the intent of Title VII of the Civil Rights Act of 1964, Executive Order 11246, as amended, and various other programs which were designed to help minority and female workers entering the mainstream of our economic system.

The State of Michigan has suffered a greater economic decline in 1974 and 1975 than the rest of the Nation. We were experiencing an unemployment rate of 12.5 percent in 1975, approximately twice the national average, with minorities and women within the unemployed at almost double that rate, so from this standpoint we come out quite a bit different from the statistics indicated in your proposed report for the country as a whole. At the present time, although there have been some gains in the automotive industry and some of the related and supplier industries in Michigan, we still have large numbers of people laid off as a result of the recession that have not been recalled.

In that portion of the labor force who are no longer actively seeking employment are many minorities and women who are not counted in the statistical information supplied by the U.S. Department of Labor, thus giving a false impression of high unemployment in Michigan. Complicating this problem is a seniority system which, in terms of economic decline, results in those last hired, who are often women and minorities, being the first laid off.

Faced with the harsh realities of an economic downturn and the inevitable layoffs of hundreds of thousands of our citizens, the Michigan Department of Civil Rights moved quickly to assess the problem and its impact on equal employment opportunities. The result was a policy statement by our agency, dated August 1, 1975, articulating a stand that we believe is in full agreement with the U.S. Commission on Civil Rights with regard to layoffs and affirmative action programs of employers. The purpose of issuing the policy statement at that time was to set a tone in Michigan and also to put employers and unions on notice as to how the Michigan Civil Rights Commission would deal with these questions as they came up through the investigation of complaints filed with the commission.

The policy of the Michigan Civil Rights Commission was set forth as follows:

The commission believes that employers and minority and women employees share a desire to make necessary work force reductions as equitable as possible without destroying the equal opportunity gains so recently made. Where, however, layoff results in disproportionate impact on minority and women employees and perpetuate past discriminatory practices, the burden is on the employer to demonstrate compelling business necessity and the absence of alternatives which would have a less adverse impact. Failure to meet that burden can result in findings of unlawful discrimination and orders to cease such practices, providing compensatory relief, including back pay where appropriate.

Courts have not hestitated to modify a seniority system where they found that it perpetuated the present effect of past discrimination in hiring and promotion of workers. This commission will carefully review any case where it is found that a layoff-recall system perpetuates the present effects of past discrimination. It should be understood that the approach to remedy in such instances is likely to be made from the standpoint of modifying a seniority system rather than the abolition of the concept of seniority.

The notion of modification was introduced into the operation of the seniority plan by unions themselves, and they have from time to time provided for certain modification as special needs demanded. For example, a common modification occurs in the provision of special layoff arrangements for union officials. The seniority concept offers a manageable and orderly plan governing the relationship of workers and employers.

The commission's concern is with those manifestations of discrimination which may result from the application of seniority, but where a seniority system operates without perpetuating past discrimination, the commission sees no need to suggest changes.

In Michigan the industrial community is heavily unionized, and although there are large sectors of the commercial establishment and some of the automotive supplier industries that are not unionized,

unions play a significant role in determining the application of the seniority system affecting large numbers of people. During the time the commission was holding hearings on the effects of mass layoffs on equal employment opportunity, the union spokesmen were very vehement in their position that seniority systems must be maintained. They were willing to consider some possible modifications of the system. This was true of both black and white union representatives who testified in these hearings, because where in many seniority systems blacks and women are low in seniority, in many sections of the automative industry, women and blacks carry high seniority.

Some employers assume that layoffs made in accordance with contractual seniority provisions are fair. This presumption will not always be accurate. An analysis of the effect of layoffs should be the first question addressed by both an employer and concerned employees or employee representatives.

These are the kinds of questions that we should look at carefully. The first question: Will the planned reduction result in a disparate impact on minority or women employees? The principle enunciated by the U.S. Supreme Court in *Griggs* is that any employment practice which has an unequal effect on women and minority workers may be unlawful, regardless of intent. If a planned reduction, even though consistent with a contractual seniority system, results in a disproportionate percentage of minority and women workers displaced, disparate effect occurs. If an employers finds this result will occur, further analysis is needed.

The second question: Does the layoff procedure and seniority system perpetuate past discriminatory practices?

Application of the seniority layoff formula to minority and/or women workers who were previously denied employment or placed in lower-level jobs or restricted to certain departments or lines may well perpetuate the effects of past unlawful practices, even though the practices themselves may have been eliminated. Employers must carefully review layoff procedures which will produce disparate effect from this perspective. If seniority systems have their roots in past discrimination, agencies and courts can find them suspect. If an employer finds a disparate effect on layoff growing from such past practices, other questions must then be addressed.

The third question: Is there a compelling business necessity, and is there no alternative which will accomplish the purpose equally well with lesser impact?

Where the layoffs will produce a disparate effect, the employer must show it has a compelling—not simply desired—need and reason for reducing the work force, that the planned layoffs will accomplish the business purpose, and that no acceptable alternatives, with less disparity, are available.

Several approaches which may represent acceptable alternatives are possible. Where an employer uses line or departmental seniority, and

where the opportunities for women and minorities were previously restricted, the application of plantwide seniority may often lessen disparate impact. If a planned reduction will affect only certain operations or departments, an across-the-board reduction may create less disparity. Application of a percentage reduction separately to women and minority workers may also lessen the impact. Use of plantwide seniority or original hiring dates to develop broader transfer rights may be another alternative. The cessation of overtime work will be particularly helpful, for it often seems paradoxical to lay off workers at a time that they are insisting that those retained in the work force work unusual and excessive hours.

The challenge to workers, labor organizations, and employers to meet the needs for reduced operations and equal employment opportunity can and often does produce creative and innovative solutions. Some employers have offered senior workers advanced vacations and scheduled layoff opportunities because of the better range of benefits available to them. Some employers have reduced overall work hours, and some unions and employees have voluntarily reduced work hours, and employees have voluntarily reduced both work hours and wage increases to retain greater numbers of employees within the work force. Others are developing shared-work and shared-layoff concepts, where all employees may work a minimum of hours and all will share equally their equalized layoff periods.

There are no universal solutions to specific situations. Each employment situation must be individually considered in its own context. There is, however, an opportunity through creative and cooperative efforts to meet business and equal opportunity demands.

The fourth question: What rights will laid-off workers have to recall?

Where existing policies or contracts contain recall provisions, it is esential that these rights be clearly explained to those workers who must be laid off. It is equally critical that procedures recalling workers be administered carefully and conscientiously. If there is no scheme for recalling employees, employers are strongly urged to formulate such plans and clearly explain them. Employers have additional options here, for even though contracts may not require recalls or recall obligations may expire, employees can still receive recall consideration and employers can credit previous time served in helping such employees attain future senority. Other opportunities, such as transfers to other positions and locations, should also be explored.

The Michigan Civil Rights Commission believes, as does the U.S. Commission on Civil Rights, that viable alternatives that avoid or minimize layoffs should be implemented. The approches outlined in the Michigan commission's statement offer such reasonable alternatives. In summary, they are as follows:

1. Plantwide seniority rather than line or departmental seniority.

2. If a layoff will impact only specific operations or departments, an across-the-board reduction may create less disparity.

3. Application of a percentage reduction separately for women and minority workers may lessen the impact.

4. Use of plantwide seniority or original hiring dates to develop and broaden transfer rights may alleviate cutbacks among women and minority workers also. And

5. The cessation of overtime during a period of cutbacks can also lessen this impact.

Ladies and gentlemen, I thank you for the opportunity to appear before you, and I will make a copy of this testimony available to the U.S. Civil Rights Commission.

CHAIRMAN FLEMMING. We appreciate it very, very much.

We can take about 10 minutes on questions. Commissioner Freeman?

COMMISSIONER FREEMAN. Mr. Martin, first of all, I would like to say to you, on behalf of the Commission, to express our appreciation for the remarks that you made concerning the desegregation report.

Your first company example was one that reduced its workload from 4,300 to 700. That's about 84 percent reduction in force. So my first reaction was whether this company had gone bankrupt, or the extent to which this reduction reflects the recession or technological change, such as going to a computer instead of people. Would you comment on this?

MR. MARTIN. It's a munitions plant. Peace caught up with them, hopefully.

COMMISSIONER FREEMAN. So this is going from a war economy to a peace economy?

MR. MARTIN. Yes—however you want to call Vietnam. But I think that is—recollection is that that is what that one reflects; it's a munitions industry. It's not necessarily typical of anything.

COMMISSIONER FREEMAN. It does not reflect the present recession, then?

MR. MARTIN. Well, I'm sure you could find other parts of the country where there would be similar cutbacks in other industries, but it doesn't necessarily show a whole trend.

COMMISSIONER FREEMAN. My next question, and this is only one, but it would speak—I guess the response would come from Mr. Peloso of Michigan and from Mr. Floyd of Pennsylvania. I think both of your comments indicated the desirability of having the employer, prior to a cutback where there would be a significant negative economic impact, that it would be reviewed and subject to approval of a governmental body. Are you proposing that this would be subject to a Federal approval or a State approval?

MR. FLOYD. In my remarks, I was addressing it to the Federal level, although we have built that component into our proposed regulations. The extent to which we can enforce it at the State level is not yet clear. Obviously, the first time we would apply it, we would be immediately into court. And if our commission goes with this regulation, and we think they will, we are prepared to litigate that question.

But it seems to me that we are talking about a Federal solution on a broad-scale basis, and I was trying to draw on the analogy that built into Federal law now. For various kinds of industries there are certain regulatory requirements in which companies have to submit something to the regulatory agencies prior to doing anything. And I am suggesting that the necessary legal analysis should be developed to indeed determine at what pressure point does that exist at the Federal level. Does it exist under Federal law now, or does it require congressional action in order to do it, and, if so, the necessary research be done so that a legislative or executive or whatever proposal can be submitted to build that in.

COMMISSIONER FREEMAN. Thank you.

CHAIRMAN FLEMMING. Mr. Horn?

VICE CHAIRMAN HORN. No questions.

CHAIRMAN FLEMMING. Mr. Ruiz?

COMMISSIONER RUIZ. Mr. Martin, you suggested that we could fill the vacuum as well in last hired and first fired as we filled the vacuum in school desegregation in Kentucky. You also suggested that we make more specific the remedies available under Title VII, that the report should be set out in understandable laymen's language, and since you are apparently a public relations man, in the sense of the word that you want laymen to understand, which title for the report would you prefer—"Last Hired, First Fired" or "How to Obtain Full Employment During a Recession"?

VOICE. How about "Equal Poverty"?

COMMISSIONER RUIZ. I want a sincere answer. Which would be more catchy and comprehensive to the general public?

MR. MARTIN. I trust you don't want me to try to answer that today.

CHAIRMAN FLEMMING. As I recall it, Mr. Martin did not criticize the title of our report.

COMMISSIONER RUIZ. No, no, but I was taking advantage of—

CHAIRMAN FLEMMING. I want to protect the witness a little bit, Commissioner Ruiz.

MR. MARTIN. I don't have any easy answers to this, and I don't mean to imply that you all have either.

I do think there is a real problem though in the civil rights people being put in a constant hole by the newspapers. And I'm not suggesting there's any easy answer to that, but I think the only answer is just to bull right ahead and provide leadership for the country like no one else is likely to.

And I am not able to help much in great detail about the document and how you ought to do this, but I just speak to that need.

And you are not the EEOC, I am well aware of that. On the other hand, I think you have your thing going now more than they do, and so maybe you can provide some leadership for them. Maybe they will have it together better in a few months from now, but—

CHAIRMAN FLEMMING. Commissioner Saltzman?

COMMISSIONER SALTZMAN. One question, Mr. Martin. How would you respond to a recall program with separate seniority lists with affirmative action implications? I heard some reservations in your statement about separate seniority lists and the implication in it of discriminatory impact. How about separate seniority lists for recall with affirmative action efforts?

MR. MARTIN. Well, I don't have any trouble with that at all. I think to any extent that that can be accomplished, I think that is very solid.

The reference I made was to a totally different situation in which separate seniority lists existed in a most ridiculous kind of circumstance. This railroad had a distinction made between the black men who were wheel rollers, who dealt with the wheels for railroad cars, weighing 500 and 600 pounds, and there were very few of them. They had them on a separate seniority list from the white wheel rollers, and the whites could move on to be machinists and other things and maintain their seniority, and the black men couldn't. And under this ridiculous provision that's been laid on us, if you tried to follow the letter and spirit of that, since that's a seniority system and is in a collective bargaining agreement, our commission could no longer order a correction of that situation.

But I don't see that as analogous to the situation you are coming at. It's the other side of the thing.

COMMISSIONER FREEMAN. You did state that it had been changed, didn't you?

MR. MARTIN. Yes, the provision of the railroad was changed. The commission ordered them to change it years ago; after 9 days of hearing we ordered it, and they did not appeal.

VICE CHAIRMAN HORN. Wouldn't that fall in any simple court action? Because it's a racially discriminatory list.

MR. MARTIN. Yes.

CHAIRMAN FLEMMING. But the point Mr. Martin is making is the latest legislation Kentucky has to contend with could be used by people to support something of this kind, even though, in all probability, as he indicated, it would fall in a court action.

May I just express appreciation to the jurisdictions that are represented here for your leadership in dealing with what is a very tough issue and the kind of leadership that has been reflected in some of the presentations that have been made will help us in trying to point up the areas for leadership, not only on the Federal level but also on the State and local level. It's been a very productive session, from my point of view, and we are grateful to you. I'm sorry time doesn't permit us to continue the dialogue, but we are going to have to dialogue with other persons in order to round out this picture later on this afternoon.

And in that connection, we are going to recess until 1:15, and I have been asked to call your attention to the fact that you have been issued a visitor's pass, and if you will just hold onto that, that will enable you

to get out and get back in again after you have had lunch. But when you leave for the last time, please return it at the entrance to the auditorium.

All right, let's all try to be back at 1:15.

[The hearing recessed for lunch at 11:55 a.m., to be reconvened at 1:20 p.m, this same day.]

AFTERNOON SESSION

CHAIRMAN FLEMMING. I will ask the hearing to come to order, please.

Our first panel this afternoon is: Arthur Jefferson, National Urban League; Jane Chapman, Center for Women Policy Studies; Pete Reyes, Mexican American Legal Defense and Educational Fund; and Barry Goldstein, NAACP Legal Defense and Educational Fund, Inc.

We appreciate all of you being here very, very much, and I will proceed in the order given me on the list that I am working from, and ask Mr. Arthur Jefferson of the National Urban League to give us the benefit of his views relative to the draft report that we have under consideration here today.

I will emphasize at the beginning of the afternoon session, as I have throughout the morning session, that this is a draft report. The Commission itself has not arrived at any conclusions as yet, relative to the report. We asked and have invited people to come in and make presentations today because we are very anxious to have their input before we make up our minds as to the content of the report.

Mr. Jefferson, we are delighted to have you with us.

STATEMENT OF ARTHUR JEFFERSON, ASSISTANT DIRECTOR FOR FEDERAL PROGRAMS, WASHINGTON BUREAU OF THE NATIONAL URBAN LEAGUE

MR. JEFFERSON. I am glad to be here, Chairman Flemming, and the other Commissioners. Just for the record, I would like to identify myself. My name is Arthur Jefferson, and I am assistant director for Federal programs for the Washington Bureau of the National Urban League.

My presentation will be very brief. It will be basically a reaction to the paper interspersed with certain suggestions I might have for areas that might be included in anther draft.

My general reaction to the paper was that it is truly an excellent presentation of the facts regarding seniority layoffs and their effect on minority and female employees. Certain sections jumped out at me, and I will particularly react to them. However, I want to strongly urge the Commission to release this paper and the facts that this paper speaks to because we, the Urban League, think it is crucial that these facts on layoffs and on the disproportionate effect these layoffs have on minority and female employees—that these facts get to the public's attention because of much of the rhetoric going on now about reverse discrimination, the effect that layoffs have had on minorities just do not get to the public's attention, and we think the Commission could serve a very, very important role in bringing these facts to the public's attention.

The section dealing with the effects that seniority layoffs have on female and minority employees in the private sector is particularly good. I found the facts presented very persuasive. However, to me, the best impact in this section came from the facts and discussion surrounding the effect that layoffs have on public employees. Particularly persuasive were the facts surrounding the layoff of female and minority employees by the New York City Police Department.

I have had some experience in dealing with minority and female police officers around the country, and as you may know, police departments generally have simply excluded females from membership and had very, very restrictive barriers to the employment and promotion of minority males up until this time. And it is most distressing that the gains which we have fought so hard for over the last few years in municipal police departments, an example of which would be the New York City Police Department, are being just almost totally eroded by the financial crisis in that city and by, in fact, the Federal Government's and other governments' failure to step in and pick up the load in such cases.

In terms of the general effect that unemployment has, I hope that the Commission will look to the effect that underemployment and unemployment has on minority communities. It's clear to us at the Urban League that unemployment, especially youth unemployment, is having heavy effect in minority society. For instance, youth unemployment is the most direct cause for the enormous crime rate in minority neighborhoods. Youth unemployment is also a significant cause for what we now see as another rise in narcotics addiction in our country. Unemployment and underemployment have also been a long-standing cause behind the breakup of black families.

Another section which I found very persuasive—was the one which calls for the use of Federal funds to lessen the need to lay off public employees. In some instances, LEAA [Law Enforcement Assistance Administration] funds have been used to stop the work force reductions which would cause minority and women officers to be laid off. We think this is one example of a way in which police forces particu-

larly could be saved from the devastating effects that municipal work force reductions cause on newly hired minority and female employees.

CHAIRMAN FLEMMING. Could I interrupt to ask you whether or not you have identified communities where LEAA funds have been used for this purpose?

MR. JEFFERSON. My understanding—and I was not able to check this before I came—is that that might have been used in New York City. But I am under the impression that it was used in other areas as well.

But the massive amounts of money that LEAA spends each year, so much of it on police gadgetry, as I call it, could certainly be better used in trying to protect the employment patterns which we fought so hard to attain.

CHAIRMAN FLEMMING. Without objection, I am going to ask the staff if they will contact LEAA to determine whether or not they have identified communities where the funds have been used in this particular way.

MR. JEFFERSON. There is one more significant factor in terms of the layoff of public employees, particularly police employees, that comes to light as a result of the figures cited by this study. Layoffs of key public service personnel, such as police, not only go to the question of equal employment, but also directly touch the issue of the quality of municipal services provided minority communities and women.

One reason blacks, women, and Hispanics were added to the police force around the country was to increase the quality of services these forces provide to minority and female communities. Loss of such personnel will cripple these police forces' ability to deal with the problems facing minorities.

The most obvious example in the study is the Hispanic police officers that were added to the New York City Police Department. One of the crucial needs for those Hispanic officers was the fact that in many Hispanic communities nonbilingual officers simply can't communicate with the populace.

What this study indicates is that, tragically, these forces will be knocked back to where they were before; that minority communities will again suffer the same kind of disproportionate impact, in terms of municipal services that they faced before minority officers were added to municipal police departments. And this is another strong argument, that isn't presented in the paper, for the retention of minority and female employees on these public service forces.

In the section dealing with alternatives to layoffs, the paper seems to argue—and I think correctly—that the best alternative is work sharing. I think this is correct. Although the *Frank* case which you cite moves in the right direction in terms of protecting the rights of female and minority employees, it simply doesn't deal with what I think are the toughest cases. And your statistics state the same.

In today's judicial climate, with the Federal courts increasingly accepting the defense of reverse discrimination, work sharing seems to

me like the best idea. It is clear to me that in public employment, work sharing must be adopted and it must be mandatory. Any failure to do so will not only affect equal employment, but will severely impact on the deliver of municipal services, as I have indicated earlier.

However, the final conclusion, although not stated actually but I think stated by inference in the paper, is the one which I think is most important. That is that the only real answer to the problem of layoffs is a national commitment to full employment.

The facts in this paper clearly show that minorities and women have been traditionally the most severe victims of economic downturn, and that fact continues today. Clearly, the best hope for women and minorities is, number one, full employment, and number two, a Federal commitment to cushioning the effects of economic recessions whenever they occur.

The Urban League experience is the same as this paper. We have labored hard and long to put minorities into jobs that they have not been in before, and now we see our labors becoming undone by the latest economic recession. We have fought hard, for instance, to see police departments seek to hire minorities and women, and to reach out to communities which they were unable to serve. We now see this effort coming undone.

I, on behalf of the Urban League, have two immediate remedies that I think the U.S. Civil Rights Commission should adopt. The first is that this paper is adopted with necessary revisions and be given wide public distribution. The points made in the paper are very important, and the public desperately needs to know them. Secondly, I would recommend that the Civil Rights Commission state unequivocally that the only real hope for equal employment opportunity in this country is full employment.

CHAIRMAN FLEMMING. Thank you very much. I now recognize Jane Chapman from the Center for Women Policy Studies.

STATEMENT OF JANE CHAPMAN, CO-DIRECTOR, CENTER FOR WOMEN POLICY STUDIES

MS. CHAPMAN. I am Jane Chapman, co-director of the Center for Women Policy Studies, a Washington-based organization founded in 1972. It is a nonprofit group which reviews policy and analyzes issues affecting the economic and legal status of women. We are interested in this particular issue because of prior involvement in the employment problems of women. We have in the past undertaken two lawsuits on behalf of women in the military establishment, and one of these was a suit to gain admission for women to the Naval Academy. We have also conducted a legal review of women in policing, which is one of the areas in which layoffs have had impact on women who have finally gained some admission to this nontraditional field. We are also a member of the Committee for Alternative Work Patterns, which has

given national attention to the issue of flexible schedules, part-time employment, and shared jobs.

Our current interest is in the area of women in nonprofessional jobs—blue-collar service and clerical jobs. For blue-collar women who have been fortunate enough to secure "nontraditional" jobs, low seniority and the threat of layoff is a very serious problem. And that brings me to the draft report. I thought it was a very, very good effort, and I particularly liked the attention it gave to the economic plight of women and the high incidence of poverty among women, and the low income of women who head families.

Generally, I think there's too little understanding of the fact that almost 80 percent of working women are in nonprofessional jobs. They are concentrated in low-paying, low-skill jobs, and these are very sensitive to economic conditions. I think perhaps that the portions of the report that deal with the situation of women in the nontraditional occupations perhaps could be expanded or strengthened in some way, and I wanted to comment on that.

Our organization, and others that work on issues affecting the economic condition of women, are convinced that women can never achieve economic equality or parity with men unless occupational segregation is reduced. What this means is that significant numbers of women must leave these overcrowded, low-paid, "female" occupations and enter what are now nontraditional, "male" occupations. Over the past years the fact is that even with considerable effort only a few women have made it into these nontraditional fields, and the layoffs caused by our current recession have reduced even these very small numbers drastically.

There is a recent study published by the Conference Board in New York that I think would be quite relevant and should receive the Commission's attention. It is a very thorough work on employment projections for the 1970s and 1980s, and it offers some gloomy news for working women. It says that, despite the fact that women will continue to flood into the labor force, most employment gains for women are expected to be in the low-paying jobs that they have traditionally held, and the skilled crafts, for example, are expected to account for only about 3 percent of women's employment growth during the next decade. So this is the nature of our concern, that these really pitifully small gains made by women in the nontraditional jobs will just be eliminated through layoffs.

Our organization is not here really to endorse a specific remedy or alternative to layoffs, but we certainly want to encourage the exploration and development of a group of remedies, and we think it's important that those situations where alternatives to layoffs have been utilized should be evaluated carefully, perhaps through Department of Labor-sponsored projects.

One final point. It seems that the country faces a number of years of slow growth or perhaps a no-growth economy, and there are signs

of dissatisfaction within the work force. There have been a number of studies of people's attitudes toward work, and this dissatisfaction with the structure and the conditions of work could bring some rather widespread changes in how, when, and under what conditions people work in the next decade. And I should think the effort to minimize layoffs should be always kept in mind as an important goal in the context of what may be some more widespread social change.

CHAIRMAN FLEMMING. Thank you very much. I appreciate it.

Next I recognize Mr. Pete Reyes, Mexican American Legal Defense and Educational Fund.

STATEMENT OF PETE REYES, ATTORNEY, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

MR. REYES. Thank you, Mr. Chairman.

For the record, my name is Pete Reyes, and I am an attorney with the Mexican American Legal Defense and Educational Fund, currently working in Denver, Colorado, in the employment discrimination area.

I am looking at the problem from the standpoint of a litigator involved in these types of cases. I thank the Commission for the opportunity to make these comments on this paper, which I feel is very good, and I urge its release.

In looking at the problem of layoffs in a society experiencing a recession, while at the same time trying to remedy past acts of discrimination, I believe the law only provides a partial answer to what the proper course is to follow. As the case of *Franks v. Bowman Transportation*, which is mentioned in the paper, this case places in proper perspective the role of the employer and the employee, where a discriminatory situation has been found to exist, and places a burden or places the burden upon the employer to make whole the minority class. While this provides us with some guidance for those employers adjudicated as practicing discrimination, it still only addresses a specific situation in a general sort of setting.

With a great number of minority and female workers, its practical applications have yet to be felt. The dilemma is further compounded, since workers now employed perceive the approach as a threat to their jobs and status. The Court was extremely aware of this as the dissent in the *Franks* case points out. However, the result was inevitable, since the *Franks* Court could go no other way. The development of Title VII law over the years, especially the "make whole" provisions of the law, was heading straight for a clash with the use of the seniority system.

Unions and employers both have realized benefits from the system. The employer desires to keep the most reliable and experienced workers on the job, and the union secures security for the members who have participated in the system the longest. However, a balance must be reached between these interests and a firm national policy of ending discrimination and making whole those injured by it.

A seniority system, by its very nature, resists change to the workplace as regards its workers. The balance that has to be achieved must keep intact the benefits of the seniority system and integrate the work force so that minorities and women may take their rightful place. In the long run, the integration of the workplace may result in a work force that is heterogeneous. However, before the long-run effect can be contemplated, the immediate problem of seniority and layoffs has to be addressed.

The situation that existed in the *Franks* case cannot be litigated in every factory in America. While significant progress has been made in various parts of the country, situations still exist that require years of litigation with no money or lawyers to do it. These cases are long, time consuming, and expensive. A case in point is a lawsuit brought against the telephone company in Denver, Colorado, alleging that recent layoffs had a disparate effect on women who had recently been integrated into the skilled labor force. It is questionable whether or not the telephone company had deliberately picked those sections that had recently been integrated to take the full effect of all the alyoffs, but that was the result.

The award of a judgment favorable to any plaintiff requires monitoring by the court to ensure an integration plan. In this respect, the courts are plainly hard pressed to oversee the relief. The *Franks* Court awarding retroactive seniority is a victory, but only a fairly recent one, and comes 12 years after the passage of Title VII. Those industries that have signed consent decrees in some cases did not award retroactive seniority and have, as a result, laid off minority and female workers first.

In effect, in a lot of these industries, we are going to have to start all over again with the benefits of the law as enunciated in *Franks*, to make employers realize the necessity for a look at seniority in the context of a make-whole situation.

However, with the great bulk of employers, it is impossible to determine who should receive the retroactive seniority. Records do not exist, and exact determinations are impossible. Every individual situation cannot be taken to court for a judicial ruling.

While the *Franks* decision was an equitable determination, it probably signals the furthest extent that the Court will go to modify existing employment systems, in my opinion. It is out of the Court's reliance on a national policy that Title VII represents—that is, a national policy to eradicate employment discrimination. What is needed now is a national effort to implement that particular policy with the mechanisms for making determinations on the proper relief in any given particular situation.

The EEOC can perform these functions, but with the necessity to enforce its order in court, it becomes very time consuming. The EEOC has to be able to function similar to the National Labor Relations Board, where it can make determinations in each case in an adversary

type of hearing if necessary, in orderly fashion, consistent with its findings, with a right of appeal to the courts necessary, where a review of administrative record is a standard.

Enough precedent exists at this point to enable an agency to look at the particular situation and order corrective action. That this type of system is feasible is shown by the experience of NLRB in its long history of adjudicating labor disputes. Also, remedies could be fashioned that would be tailored to different situations. Alternatives, such as attrition or labor force reduction, could be mutually agreed upon or, failing that, plans ordered for implementation.

It has also been advocated by some that NLRB now has authority to take complaints of employment discrimination based on race, sex, national origin, in some situations, and adjudicate them. However, the Board has been reluctant to pursue these complaints.

What I am mostly concerned about is a mechanism for enforcement of plans to integrate the work force. But these mechanisms must necessarily look at the layoff problem as a factor in the perpetuation of a discriminatory situation. Eventually, all these types of problems get to that point. While it is mostly agreed that the employer, where possible, pay for the effects of his past discriminatory policy, the nonminority worker must share the damages and burdens, since they share the benefit.

I believe the Government should, through its economic policies, encourage companies to adopt equitable plans, by awarding, or not awarding, contracts to those employers, all other requirements being equal, who do adopt these equitable plans. Also, the use of supplemental unemployment compensation should be used in conjunction with work sharing or inverse seniority lists.

However, in summary, there is no way that the problem can be remedied without someone being affected to the extent that they suffer some economic loss. The best thing that can be done is to spread out the impact, while at the same time ensuring the burden of equally distributing among all workers, so that minority and female workers don't disproportionately accept a share of the burden, but all workers accept a share of the burden.

Thank you, Mr. Chairman.

CHAIRMAN FLEMMING. Thank you very much.

Now I will be happy to hear from Mr. Barry Goldstein, NAACP Legal Defense and Educational Fund.

STATEMENT OF BARRY GOLDSTEIN, STAFF ATTORNEY, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND

MR. GOLDSTEIN. Thank you, Chairman Flemming, and members of the Commission. It is a pleasure to come here and discuss this excellent report.

Let me first state for the record that I am a staff attorney with the Legal Defense Fund. I have been on the staff for 5 years, and during that time I have worked almost exclusively on fair-employment litigation and have worked on some of the cases mentioned in the report.

I would like to discuss briefly some of the reasons why I think this is an excellent report and should be issued, review some of the technically positive or beneficial aspects of the report as we see it, make a couple of minor suggestions on related matters of law, and then discuss generally the effect that litigation may have on this problem—and by "this problem" I would like to broaden it a little bit—well, a lot—the last hired, first fired problem, which is really just an aspect of the general problem of a substantial black unemployment. And I would like to talk generally about the effect that litigation can have or has had on this problem, and also on the need for additional administrative or legislative action to complement the effect that litigation may have.

First, I would like to discuss briefly some of the positive aspects of the report. This report should serve as a welcome antidote to the rhetoric of reverse discrimination that has somehow captured the media. To think of the tremendous space and time and discussion that has gone to the problem of reverse discrimination, although there are problems that need to be worked out in that area, when there is such substantial and basic disproportionate unemployment in the country is beyond me.

I think that a report that carefully lays out, as this one does, the facts of unemployment once again to the public, is in itself a justification for the report to be issued. I think that not only will it be important to the courts, but it will be important to those of us who litigate to be able to present some background to the courts that, when we try to place an individual problem in a plant within a general severe problem nationwide, this report will be very helpful in allowing us to do that.

I think in the statement of the law—let me mention some of the positive perspectives in this report—I think this statement is absolutely correct, that it doesn't matter that the discriminatory denial happened on July 1, 1965, or July 3, 1965. The effects continue now. The courts should be empowered, or should assume the power, to remedy that continuing effect of employer denial of employment.

I would just like to mention, parenthetically, that the precise issue is being appealed in the Fifth Circuit, and the case is *Delay v. Carling Brewing Company*, which is listed in one of the footnotes to the report; the notice of appeal has been filed, and the brief is due in November.

A second positive aspect is emphasizing that it is not only those who apply and were unlawfully or discriminatorily denied employment who should be given constructive seniority or affirmative belief, but also those who were discouraged from applying. The law shouldn't require a futile gesture, and this report makes that point very strongly.

On the alternatives to layoffs, I think the list of alternatives is good. I think that it's important not to endorse just one alternative. I think that courts and companies should be allowed flexibility in tailoring the remedy to their specific situation. Work sharing might be feasible and preferable in one situation, but in another, perhaps some type of proportionate layoff would be appropriate.

There are a number of other areas that I could touch on in the report, but I think that, in the interest of time, I will just go on to some other aspects of law that might be mentioned, although they are not particularly within the narrow question of layoffs.

The first one is that the flip side of last hired, first fired is affirmative action to hire in the first place. I think that there has been, under the reverse discrimination banner, an attack on affirmative action. Affirmative action and affirmative recruitment is essential to get people into the work force, and if you don't get the people into the work force, the problem of layoffs will not even come up. I think that a positive statement on affirmative action is related to the last hired, first fired, and may be positively mentioned in this report.

A second aspect may sound somewhat technical, but I think it may have an important effect in future litigation, and that is the problem which has recently come up in a case decided by the Fifth Circuit called *Robinson v. Union Carbide*. It was decided a couple of weeks ago.

Let me just state the facts in that case and generalize from the problem, if I may. Briefly, Union Carbide gave a test which disqualified or deselected four blacks for every white applicant. However, a great number of blacks applied for jobs at Union Carbide, and Union Carbide was able to hire a number of blacks in proportion to the number of blacks in the population in Mobile—this case came up in Mobile. The Fifth Circuit held that, even though the test excluded four blacks for every one white, since Union Carbide hired in proportion to the number of blacks in the community, that test could not be challenged under the law.

I think this is an approach that is being argued in a number of cases, and I think it would have a terrible effect on solving the problems of black unemployment. I think the Commission might take a look at this problem and specifically deal with the problems of what is the proper work force in analyzing the number of blacks who were selected for employment in a company.

What this will really do is place an upper-limit quota on black employment, as particularly severe in a number of industries around the country. Blacks have always been hired traditionally in a percentage which is higher than the percentage of blacks in the work force. They may not have had the opportunity to rise to the higher jobs, but they have been in the industry in substantial numbers. These industries would then, under this standard, be immune from any challenge to their selection practices, even though they might deselect a substantial number of blacks.

Lastly, I would like to echo the statements of Mr. Jefferson and say that no matter how successful we are in litigation, the courts are not going to be able to solve the problems of black unemployment. There is substantial need for affirmative administrative and legislative action.

The courts by nature have to deal with individuals who have been specifically discriminated against. They can deal much more effectively with denial of promotional opportunities, denial of training opportunities.

There are many, many thousands of blacks who would like to enter the work force but are unable, because of many different types of historical barriers to black employment, but which barriers cannot be blamed specifically on a particular company or government jurisdiction. The courts will not be able to deal with that problem. That is a problem for legislative or executive action.

Thank you.

CHAIRMAN FLEMMING. Thank you very much.

Mr. Ruiz, do you have any questions?

COMMISSIONER RUIZ. No, I was just interested in that last comment as to how far the courts can go and the necessity for legislation relative to administrative procedures, etc.

The EEOC is making regulations, I have heard, with relation to that specific problem—affirmative action and other things. And we have had some indication as to what reference we might be able to make in connection with our report that is coming up, but that observation was a very important one.

Thank you very much.

CHAIRMAN FLEMMING. Mr. Horn?

VICE CHAIRMAN HORN. Mr. Reyes, I was curious in your testimony just how far you would attempt to go in helping minority workers by placing the economic burden on the nonminority or majority workers who might be employed in a particular firm and who themselves were not responsible for the discriminatory acts which might be prevalent in any particular system adopted by the firm. What are the limits of where the economic burden should be placed on innocent workers?

MR. REYES. Well, assuming that everybody is innocent except the employer, the burden should be distributed, I think, among all workers. And with the employer, I think, bearing primarily the greatest burden, but he can only bear it up to a point. After that, I think workers have to be looked at in a colorblind sense, I think, as far as distributing the burden.

I think that the problem becomes that it is too easy to generalize about these types of things because each particular situation demands its own particular type of remedy. And that's why I'm advocating in a sense that each particular factory or workplace or whatever you are involved with—firm—has to be looked at in terms of its work force, make some determination as to the acts of the employer, some determination as to how the nonminority workers benefited from these discriminatory acts, if any, and then the relief adjudicated accordingly.

As to how far that is going to hurt the nonminority worker, I don't know. Or how far he's going to have to take the burden, I don't know.

VICE CHAIRMAN HORN. By adjudicated, are you talking about an administrative agency, a court, a labor-management contract?

MR. REYES. I think I am talking about an administrative agency approach.

COMMISSIONER HORN. This is at the Federal or State level?

MR. REYES. Federal level. Such as—similar to the NLRB.

COMMISSIONER HORN. Would you do this within EEOC?

MR. REYES. EEOC, I think, has the expertise, and I would do it within EEOC, except that EEOC, of course, doesn't have the legislation nor the money, for that matter, or the time. But it has to be, it seems to me, done by someone who can deal with discrimination directly and who has a history of having dealt with discrimination directly.

VICE CHAIRMAN HORN. I can see your approach, if you are talking about work sharing, where, if a firm hires X number of people and a recession comes, or changes in demand, a certain number have to be let off, that perhaps if the whole employment force goes to a 4-day work week or something, this might be a useful public policy. I guess I worry when you go beyond that to hit innocent workers that had nothing to do with the situation that the firm finds itself in. So that's why I'm hoping for further discussion.

MR. REYES. Well, I don't honestly know if I'm hitting innocent workers in that sense; by distributing the burden, I am trying to remedy the past discriminatory acts, and we get down to the basic economic problem. All you are really doing is trying to have each worker share in that to some extent, instead of saying, "Well, all the minority workers are going to have to be laid off; that's all there is to it." Because then you are disproportionately putting the burden on them.

VICE CHAIRMAN HORN. Maybe the solution is to have the society, as reflected through the government, share in any economic burden that you need to assess in order to remedy past discriminatory acts, rather than willy-nilly pick isolated plants, people, individuals, who it might be very unfair to impose that burden on. Maybe society as a whole should carry it.

MR. REYES. Society ultimately shares it anyway, if you have a situation where minority workers are laid off and go on welfare and unemployment compensation.

VICE CHAIRMAN HORN. No question about it. We are paying the bills right now.

MR. REYES. That's correct. I'm not trying to come up with a solution that is not ultimately going to have an economic impact on somebody, because, regardless, somebody is going to have to pay somewhere along the line. We have had just too many years of it.

But as a short-term effect, I think it should be shared equally among all the workers, and that's what I'm advocating. A situation exists

where government laid off workers and closed down a plant in Pueblo, Colorado, and laid off a 10th or a 12th or a quarter of the Mexican American work force. That was very disproportionate.

COMMISSIONER FREEMAN. Mr. Reyes, it has been my experience that you cannot assume that the nonminority male employee is innocent. This Commission held hearings in Chicago about 2 years ago on the problems of women in poverty, and we received testimony from a number of women who had taken positions, nontraditional positions, and their experiences that they related to us about the harassment that they received from their coworkers—not the employer, but their coworkers—in trying to drive them off the job, was something that certainly would not be identified as innocent. And the experience that we have encountered in the apprenticeship program, which is a combination of the employer, to the employee, and the Federal Government, whereby certain practices have been promulgated and are still being perpetuated, represents kind of a conspiracy. So I would think we would certainly not want to say that there is innocence.

I would like to speak to a recommendation you have made with respect to the possibility that LEAA and other governmental agencies give contracts sort of as a carrot approach, and suggest whether you have considered or whether you think this Commission ought to consider suggesting that the Office of Federal Contract Compliance or the contracting agencies might incorporate this. Would you speak to this?

MR. REYES. I would advocate that type of policy. But from a historical perspective, the Government has not been integrating its own work force—

COMMISSIONER FREEMAN. Certainly, we recognize that the Government needs to start at home. But I am saying that the President—could the President now, in your opinion, issue an Executive order that would in any way respond to the problem?

MR. REYES. Similar to 11246?

COMMISSIONER FREEMAN. Yes.

MR. REYES. Yes, I believe. I would advocate that type of approach. But again, we get back to the enforcement types of problems. [Executive Order] 11246 has been enforced in the courts by private parties, but hasn't been enforced by the Government. EEOC hasn't taken a stand. It's point out there is a great lack of enforcement, but as a matter of policy, I think this would put those factories, those firms, on notice that private parties could possibly sue—and I'm not saying the law says they can't bring suits to have the Government enforce its own Executive order, but I think, as a matter of national policy, it should be accepted through an Executive order and I agree with you.

COMMISSIONER SALTZMAN. Mr. Jefferson, earlier this morning we were told that full employment, while it does help to narrow the gap between the minority and women employees and the white employees, that still a significant gap would remain between the employment of

minorities and the employment of majorities. I would like to ask two questions: One, do you have any suggestions relative to the achievement of full employment? And two, under full employment, how do we continue to deal with that continuing gap?

MR. JEFFERSON. Let me answer the last question first.

I hope nothing I said today will diminish the importance of affirmative action. I think my problem, frankly, with affirmative action in a society that's terribly underemployed is that the political realities are very, very tough, and I think Commissioner Horn's questions, for instance, indicate that. And that it's very tough in a less-than-full-employment economy to put people to work. But once they are to work, there must be affirmative action to make sure that they don't just get to work, but they get up the rung of the ladder.

What's the first question? I'm sorry, I forgot your first question.

COMMISSIONER SALTZMAN. How do you get full employment? What do you suggest?

MR. JEFFERSON. Well, I frankly don't have a tablet with the answer to that question on it. But I know one thing; you have got to have a heck of a lot more than we have been having. There seems to be a Government acceptance of unemployment and underemployment. There seems to be a lack of Government ability to attack the problem of unemployment.

As I mentioned earlier, and I will kind of carry this over to another statement that was made, we are paying a hell of a price for unemployment and underemployment in this country, particularly the blacks, Spanish-surnamed individuals, and Indians are paying the price. Because, you see, it's our communities that have 50 and 60 percent youth unemployment, and the resultant crime, the resultant drugs, the resultant breakup of families. The burden of unemployment not only falls financially on the minority community, but it also falls indirectly in terms of crime and other things in the minority community.

We have got to have a better employment policy than we have now, which stresses the fact that everyone needs a job. And this is not a revolutionary concept in the world today.

COMMISSIONER SALTZMAN. Mr. Reyes, with respect to the seniority program, this morning we were also told that we should not bring the seniority program into a fundamental conflict, or discredit it, because a seniority program is of benefit to workers across the board, once it overcomes the problem of past discriminatory effects. Would you think that it might be a good idea to say that seniority should begin with the enactment of Title VII, that we should abandon all seniority implications prior to Title VII since they were probably discriminatory?

MR. REYES. No, sir, I certainly wouldn't advocate anything like that.

COMMISSIONER SALTZMAN. Not abandonment of seniority, but abandon the use of seniority prior to the introduction of Title VII, when it probably was discriminatory in its impact, and begin with seniority programs following the year that Title VII was enacted?

MR. REYES. Well, essentially, that's what we are doing in *Franks*. *Franks* is a hiring situation with a make-whole principle, in a sense, remedying—

COMMISSIONER SALTZMAN. Well, would it be good to do this across the whole board?

MR. REYES. No, I don't think so.

COMMISSIONER SALTZMAN. Why not?

MR. REYES. We are dealing with really several types of situations. We address these—each particular situation, depending on what occurred in that particular place. Perhaps that's the problem with it. There's no across-the-board type of solution.

CHAIRMAN FLEMMING. I have been very much interested in the comments that a number of the members of the panel have made relative to the fairly recent cases dealing with reverse discrimination, and I think this morning we had some comments relative to those cases. I gather that you have a feeling that it would be desirable for the Commission, in this particular report, to reaffirm the positions that it has taken on affirmative action and to relate the principle that underlies affirmative action, the constitutional principle that underlies it, to the question of layoffs and also to the question of recall.

Is that a fair summary of the position? At least two of you have raised this question of the use now of the term reverse discrimination, and I know one of you indicated that some of the statistics, I believe, included in this draft report might operate as an antidote to that. And someone else suggested that, in effect, maybe you would better start from the principles underlying constitutional principles, underlying affirmative action and move from there to the consideration of the constitutional issues that are at stake on layoffs and also at stake on recalls. Is that a fair summary?

MR. GOLDSTEIN. Yes, Chairman Flemming. I think it's very helpful for the EEOC, who recently published their guidelines on affirmative action on local and State government level—I think that's going to be very helpful. I think a report that, as you put it, underlies the basic policies and constitutional reasons for affirmative action, would be very helpful.

CHAIRMAN FLEMMING. Was it in your testimony that reference was made to the Federal court case involving operations in Mobile, Alabama?

MR. GOLDSTEIN. Yes, sir.

CHAIRMAN FLEMMING. I was very much interested in what you had to say about that. You didn't put it this way, but I am—in effect, that kind of a decision was upheld and that kind of a decision became rather troubling in the country. I gather your fear is that, in effect, the court would be saying that if employment is—minority employment is equal to the representation of the minorities in the population, then in effect, you can't challenge successfully an employment practice that in effect discriminates against individual members of minority groups?

MR. GOLDSTEIN. That's correct. And also may discriminate against a class of minority individuals.

In this particular case, blacks comprised, I believe it was 50 percent of the applicant pool and approximately 20 percent of the work force, and that was directly related to the fact that there was a test given for employment; and the court never reached the question of the manifest relationship of the test and also the use of interviews, because they said, since there was 20 percent black employment in the company and 20 percent in the work force, we don't need to reach that question.

CHAIRMAN FLEMMING. In effect, they are saying we don't need to reach the question of what happened to individuals.

MR. GOLDSTEIN. That's right.

CHAIRMAN FLEMMING. Is that a U.S. district court?

MR. GOLDSTEIN. That unfortunately was a decision of the Fifth Circuit.

CHAIRMAN FLEMMING. Is it on appeal, or is it going to be on appeal?

MR. GOLDSTEIN. We have just filed a petition for rehearing in this case.

CHAIRMAN FLEMMING. So you are going to stay with it as long as you can?

MR. GOLDSTEIN. As far as we can.

VICE CHAIRMAN HORN. In other words, this is an example of where quotas work adversely to the minority employment opportunities?

MR. GOLDSTEIN. That's right. I would distinguish this from goals and timetables or quotas that are used in affirmative action. This is the old pernicious form of quotas in which there is an upper limit of the number of blacks or Jews, or whatever, that you will tolerate in your university or work force.

VICE CHAIRMAN HORN. But how do you distinguish between goals and timetables? We have had a lot of language, somewhat sophistry, that quotas are not timetables. We have engaged in that ourselves.

But in reality, administration people are looking at proportionality of given racial and ethnic groups in given labor markets, either a local firm in recruiting secretaries or, in my case, if you are recruiting administrators and professors in a national labor market. And this is the way every affirmative action plan in America is being redevised. I'm wondering now, when you get at the other aspects, as in this Fifth Circuit case, how does one differentiate?

CHAIRMAN FLEMMING. Could I just try to clarify the situation, as I understand it at least? In this case, the circuit court is relating to the number—

VICE CHAIRMAN HORN. —The number in the population or the work force? I don't know which it was. Which was it?

MR. GOLDSTEIN. That is one of the other problems with the case, that it was the population.

CHAIRMAN FLEMMING. We have consistently opposed that. And take our affirmative action monograph, as I read it and understood it, we consistently oppose that because we do believe that that gets you into the realm of quotas, and we have talked about the employer taking an inventory of his employees in a particular job classification and then determining the number of qualified persons within that labor market area, and then determining whether or not he, as an employer, is underutilizing the qualified person from the minority group in that particular area, and then, on the basis of that determination, setting some goals designed to correct the underutilization, which, to me, I think is quite different than in proportion to the population, and I think in that sense there is a distance between quotas and, in my point of view, you defined what I understand to be the quota, the upper limit. And, in effect, the court is kind of moving in that particular direction in this instance.

VICE CHAIRMAN HORN. I would like to pursue this with the NAACP, then. What is the policy of the NAACP in terms of the basic principle from which these employment decisions should be made? Is it population? Is it work force in a particular category? What is it? You know, some of us here, the Chairman and myself, as administrators of rather large budgets and thousands of people, have to live with reality as to what does one fairly and equitably and appropriately use as a basis for these decisions. I am curious as to what the NAACP's current thinking is.

MR. GOLDSTEIN. Let me say, first, that I am from the NAACP Legal Defense Fund, before I get the NAACP coming after me.

VICE CHAIRMAN HORN. But there is some correlation between policy and legal defense?

MR. GOLDSTEIN. We are two separate organizations.

VICE CHAIRMAN HORN. I know.

MR. GOLDSTEIN. But I think we are talking about several different issues here, and I think it helps to clarify what I see as two different issues.

The first question is, what I have been involved in, and that is litigation concerning discriminatory employment practices and their use of population really for two different reasons. The first reason is to create a *prima facie* case of discrimination. It has nothing to do with remedy, and that's what we are dealing with in *Robinson v. Union Carbide* case.

The question there is whether or not the company's use of white supervisors, unguided by any written principles in making initial selection of employees, was discriminatory. And that the courts have held that when you have such unguided discretion used by all-white, male supervisory staff, and it results in an adverse racial impact, that you have got a *prima facie* case of racial discrimination. The company can then come forward and present defense evidence as relating to qualifications, etc. Now, in *Robinson v. Union Carbide*, the *prima facie* case was not made because the company hired in proportion to the number of

blacks in the population, even though the practice itself excluded four times as many blacks as whites.

That's the first question. And I think that we would say that you have got to look at the most appropriate work force data and as to applicants, and what could be more appropriate than to get the applicant pool themselves. Those are the people who are directly available for the job. There is no question about that.

CHAIRMAN FLEMMING. Could I interrupt you there for clarification of my point of view?

In other words, as I see it, you could have—an employer can have an affirmative action program, and one that is perfectly acceptable, and let's assume that the employer is exercising good faith in attempting to apply that affirmative action program. You really don't have too much of a quarrel with the record.

But it seems to me that it's dangerous to assume that if an employer has a good affirmative action program, and is implementing it in good faith, he can then indulge in employment practices, testing or some other, that will continue to discriminate against individuals who are members of minority groups. And it seems to me that this, as I listened to you, this was the issue that has been raised in this Fifth Circuit case.

MR. GOLDSTEIN. That is precisely correct, Chairman Flemming. I think, in order to return to Commission Horn's question on affirmative action, the second part of it is when you are using population or work force data—whichever is the appropriate one in a specific case—is after you have found an incident of discrimination, the question then becomes, how do you remedy it?

And at that point, courts have used goals and timetables. And I think there have been many distinctions between the use of goals and timetables, or if you want to call them quotas—I prefer goals and timetables in order to distinguish from the old fashioned type of rigid, upper-limit quota—that the goals and timetables affirmative action plan is specifically designed to remedy those past discriminatory practices.

As soon as those practices are remedied, a given proportion of blacks or women are in the jobs from which they had previously been excluded or limited, that the plan cuts off. You go back to employing however you so desire, as long as you don't reinstate the old discriminatory practices.

Also, it's geared upon the fact of finding qualified minorities or women to fill those jobs.

COMMISSIONER RUIZ. Mr. Jefferson said something that aroused my curiosity. I may have misunderstood. And I'm not talking about the Polish situation now. The administration apparently hasn't conceded that there is an unemployment problem. Did I get that correct? Somebody said something along those lines.

MR. JEFFERSON. I didn't use the term the administration, but I think it's clear, if one looks at recent American history, that certain people

have said that we need certain economic downturns to have resultant falls in inflation or other economic consequences, and that these are good for the country. And what I am saying is that, from the point of black community, this last one, and probably every one in the history of the United States, have not been good for minority communities. They have been disastrous.

And frankly, the results most people don't see. Most people don't go to Philadelphia, as I do, and go down to North Philadelphia and walk through areas that look like there's been a war—whole square blocks with only one or two houses that aren't boarded up. Or sections of Northwest Washington, you see the same thing, or Southeast Washington.

You know, these are people, not just statistics. And, as this report clearly shows, the impact falls most heavily on minority communities. And that's just clear from this report, and it's clear from walking around, if you get off the Beltway.

COMMISSIONER RUIZ. I understand it now.

CHAIRMAN FLEMMING. I am very much interested in the comments that you just made, and other members of the panel made this morning.

Apparently, this is the first bringing together of this impact—I mean, the draft report is the first bringing together of this impact. And I certainly agree with you that it's very, very desirable to bring it together and turn the spotlight on it.

Thank you very, very much. It's been very helpful. We appreciate your being with us and sharing your points of view on this.

CHAIRMAN FLEMMING. Could I ask the hearing to come to order again. I would like to recognize Mr. George W. Strugs, Jr., of the United Automobile Workers.

I would like to make—before you join us up here—I would like to make a couple of statements relative to this part of the hearing.

First of all, Mr. William Pollard of the AFL–CIO had planned to be here, but he has been taken ill today and has gone home, and consequently, at this particular point, there isn't any way for him to arrange for a representative—another representative—from the AFL–CIO. We will invite Mr. Pollard to file a statement with us, so that we will have the point of view of the AFL–CIO on this matter.

Also, the members of the staff who developed the plans for the hearing, on our behalf extended invitations to the U.S. Chamber of Commerce, to the National Association of Manufacturers, and to the Business Round Table to have representatives here to deal with this very important issue from their point of view. None of them were able to arrange to have anyone here this afternoon.

Mr. Strugs, as far as the hearing itself, you are going to have to carry the burden here for all of organized labor, and maybe you might even want to suggest some of the problems that confront it in this particular issue. We are very, very happy to have you here with us, and

very happy to have you here, particularly in light of some of the more current developments in this field, because, as I have been reading the newspapers, it seems to me your union has been dealing with some aspect, at least, of the problem that confronts us.

MR. STRUGS. Yes, sir.

CHAIRMAN FLEMMING. We do appreciate your being here. You may proceed in any way that you so desire, commenting on the report, and if you think that there are issues we have overlooked in the report, then I hope you will identify those issues also.

STATEMENT OF GEORGE W. STRUGS, JR., INTERNATIONAL REPRESENTATIVE, UNITED AUTO WORKERS FAIR PRACTICES AND ANTIDISCRIMINATION DEPARTMENT

MR. STRUGS. Thank you, Mr. Chairman, to you and the Commission. The UAW commends you for a very comprehensive report. Likewise, we are indeed appreciative of this privilege to make a brief response.

As the Chairman has pointed out, I did anticipate sharing this particular time with other panelists, to hear their point of view. Offhand, it would seem a good time to put my paper aside, state the position of those from industry and business who are missing, and attempt to rebut it. That perhaps would be somewhat one-sided.

In any event, regrettably, as addressed in the Commission's report, the 1974–75 recession did impact adversely on minorities and women who had made employment gains through affirmative action and other positive means. We would add, however, according to some studies, because of seniority systems minorities and women had earned sufficient seniority in many instances to either avoid layoffs entirely or to incur layoffs of only limited duration. Moreover, those who were employed in firms having bargaining agreements with the UAW, for example, retained a substantial percentage of their purchasing power while on layoffs by means of supplemental funds. These supplemental unemployment-benefit funds, when added to one's unemployment compensation, provide a laid-off worker 95 percent of his take-home pay, less $7.50 per week.

Ideally, however, had employers heeded earlier efforts of unions, various governmental agencies, and other groups to get them to discontinue their discriminatory hiring practices, the disproportionate impact of that recession on minorities and women could have been avoided. As further cited in the Commission's report, UAW regards the Federal Government's 30-year failure to fulfill its commitment to maximize employment, production, and purchasing power under the Employment Act of 1964 a dismal one.

UAW firmly believes that full employment is the real solution to this problem. Full employment must become this nation's immediate objective. Every effort should be made to reduce unemployment to the point where the only unemployed individuals are those voluntarily so

between jobs. Increased employment opportunities for all who are willing and able to work will allow minorities and women to earn seniority and related benefits that are likely to cushion, even more, the impact of layoffs as severe as those during the 1974–75 recession.

Governmental fiscal policies calling for unemployment rates at or near 7 percent until 1980 have greatly influenced unemployment in recent years. In 1968, 2.8 million persons were unemployed. In 1975, 7.8 million persons were unemployed. This nation in the last 3 years has suffered the highest rates of unemployment since the Great Depression. Costs to society in both economics and in human terms have been devastating—lost production, large public deficits, lost job skills, mental health problems, family breakups, etc. Moreover, in the last 3 months, approximately 700,000 persons have been added to the unemployed ranks. Statistics released last weekend show that while unemployment dipped from 7.9 percent in August to 7.8 percent in September, 192,000 jobs disappeared also.

A quick analytical comparison of 1976 statistics to those of 1967 provides ground upon which to base a reasonable assumption that the hardest hit in these unemployment and job-loss figures were probably minorities, including women. In 1967, 2.9 million persons, or 3.8 percent of the work force, were unemployed. Nonwhite employment was 7.4 percent. In July 1976, 7.4 million persons, or 7.8 percent of the work force, were unemployed; nonwhite employment was 13.3 percent.

Therefore, UAW supports proposed legislation such as the Full Employment and Balanced Growth Act, commonly referred to as the Hawkins-Humphrey bill, which, as a general economic-policy measure, required basic reform of the management of our economy.

In addition to essentials that are obviously necessary to the implementation and perfection of such a bill, by which the low level of employment for minorities and women and other workers may be eliminated, of necessity there must be skill training for the unemployed, as contained in the Job Creation and Training Act of 1976. There is a special need for programs to address the employment needs of our youth—especially nonwhite youth. Recent figures show that unemployment for minority youth is 40.3 percent. Since 1954, the percentage of increase in minority youth unemployment compared to white youth unemployment has risen sharply. For black youth, the unemployment rate was 16.5 percent in 1954; for white youth, 12.1 percent. In 1975, however, unemployment for black teenagers had risen to 38.2 percent, an increase of over 110 percent. Rising slightly less than 25 percent, unemployment for white teenagers was 16.8 percent in 1975.

Direct attention must be given also to the problem of underemployed women who, as heads of households, are often forced to work at low-skill, low-paying jobs with minimal job security.

Finally, in this regard, the UAW also supports passage of legislation to amend the Fair Labor Standards Act, to require notification of employees and communities affected by disruption caused by plant closings and to provide assistance, including retraining, to employees who suffer unemployment because of such plant closings. Plant closings are an established, integral part of the broad scope of problems that confront organized labor. Primarily, they have a disastrous impact on minorities because of discriminatory housing practices that prevent them from following jobs that move from the central cities to the suburbs. A strong and effective Federal plant-closing bill that would make it more difficult for employers to "walk away" from their obligation to these workers and the community is desperately needed.

As the union representing more than 1.4 million workers whose bargaining contracts invariably contain seniority-based layoff provisions, UAW has a profound interest in that part of the Commission's report which states: "The continuing implementation of layoffs by seniority inevitably means the gutting of affirmative action efforts in employment and the scrapping of the guarantees explicit in Title VII of the Civil Rights Act."

Historically, the UAW has fought against job discrimination both at the hiring gate and in the work place. Indeed, there have been serious clashes over UAW's insistence that companies with which it has bargaining agreements respect and implement antidiscrimination clauses in those agreements, and company rebuttal that the management's rights clause should always prevail.

Also, the UAW vigorously supported and campaigned for passage of State FEP [Fair Employment Practices] laws with teeth—as well as the Civil Rights Act of 1964 and Title VII. The UAW reaffirms, here, its commitment to the principle that equal employment opportunity must become a fundamental right of all American workers, explicit and implicit under Title VII.

With respect to the continuing implementation of layoffs by seniority, during the last 5 years, public comment concerning the impact of such layoffs on minorities and women has been orchestrated. Suggested solutions to ease this impact vary. Some would suggest a complete or substantial change in the seniority system—whether it perpetuates past discriminatory-hiring practices or not. Others, complaining of "reverse discrimination," would have affirmative action abandoned entirely. With regard to the latter, despite more than 10 years of Title VII, minorities and women are still disproportionately employed and where employed, still hold less attractive jobs.

Recent studies prepared by the National Planning Association here in Washington predict increased minority-majority competition for jobs over the next 10 years. The study projected an increase in availability of workers for higher-status and white-color jobs and substantial reduction in the proportion of workers available for lower-level jobs under full employment conditions. Minority workers and women, seeking a

fair share of the preferred jobs, will face increased competition from majority workers, with a danger of increased confrontation on equal employment opportunity issues, according to the study.

As previously implied, UAW would suggest that, rather than substantially changing the seniority layoff system, other means be found whereby job opportunities for minorities and women can be increased.

In addition to increased job opportunities that full employment would obviously provide, provisions in bargaining agreements that would permit inverse seniority layoffs—during which last-hired minorities and women would continue working and earning seniority while more senior workers take voluntary definite layoffs—is another means. As the Commission's report points out, however, inverse seniority would require modification of most State unemployment compensation laws. To this end, UAW would pledge its support.

In a strict seniority-based layoff situation, however, UAW suggests there is no easy, short answer to the question whether such layoffs should be allowed to impact on minorities and women who have gained employment through affirmative action. In an organized work place, these workers would enjoy greater protection than in a nonunion shop, including seniority recall *rights* to their jobs. Nonunion workers, of course, would not have such recall rights, regardless of seniority. Thus, some enforceable measure of protection should be devised for them.

In effect, in the organized shop affirmative action remains viable. Although laid off, minority and women workers remain employees of their employer, with enforceable contractual rights not only to recall but to certain fringe benefits that accrue with seniority as well—SUB [supplemental unemployment benefits] insurance, hospital medical benefits, vested pension and vacation rights, for example.

The next and last issue in the Commission's report the UAW will address is the problem of a remedy where seniority layoffs clearly perpetuate past discrimination. Again, there is no short, easy answer. But where workers are clearly victims of hiring discrimination, then UAW suggests such workers be entitled to jobs and back pay from the employer *and* all retroactive seniority rights, *except* those usable in other employees, in layoff-recall situations. What we are suggesting is *benefit seniority*, not competitive seniority. Where such discriminatee is caught in a layoff situation because of the employer's past hiring-rate discrimination, that person should continue to be paid full wages and fringes for the layoff period or that portion clearly attributable to the employer's original refusal to hire. UAW calls this remedy "front pay"—an amount a discriminatee gets *in addition* to back pay—limited solely to questions involving the discriminatee's economic rights against the *employer*.

In summary, the UAW believes that full employment opportunities, replete with job and skill-training measures for the unemployed and underemployed, are vitally needed to end the staggering economic and human costs of unemployment.

Uniquely, for the last several years UAW, through 26 centers in 13 States under the auspices of the U.S. Department of Labor, has conducted classes and other programs that enabled minorities and women to secure gainful employment, initially, and upward mobility in the work place, including apprenticeship in skilled trades.

Further, the UAW proposes that any remedy fashioned to lessen the impact of layoffs on minorities and women be directed toward those who caused the wrong and not to innocent fellow workers.

In closing, on October 7, 1976, the *Detroit Free Press* had an editorial entitled, "Dilemma of Affirmative Action," which, although it deals with promotion, I think is relevant. I would call for a copy to be put in the record.

In a literal interpretation of the law, a U.S. district court held that a black man who failed to meet criteria for the city charter and fire department rules was not entitled to an affirmative-action-based appointment as deputy chief.

A significant part of that editorial reads as follows:

> If racial discrimination and hiring had never occurred, there would be no need for affirmative action programs. But it did. And the need to rectify the past was and still is necessary.
>
> At the same time, though, employers must make sure that they did not put the rights of those who were *not* previously discriminated against ahead of those who were. [emphasis added]
>
> It is a task something like trying to walk a tightrope with a squirming tiger on both arms.
>
> And it looks as if there is not going to be an easy way out of it. *Minority groups will have to earn their seniority and play the game rules the same as everyone else, even though they only lately were allowed onto the field.* [Emphasis added.]
>
> It's an inherently unsatisfactory solution, one that only time itself will repair.
>
> *But in time, the whites and the blacks, men and women, who are being hired today, will be equally available candidates for promotion.* It is only sad that the past mistakes cannot be corrected today. [Emphasis added.]

UAW suggests that what is written here relative to seniority and promotions has applicability, it seems, to seniority and layoffs.

Thank you.

CHAIRMAN FLEMMING. Thank you very much.

Mr. Horn?

VICE CHAIRMAN HORN. Were you here this morning when Mr. Mundel of the Congressional Budget Office testified?

MR. STRUGS. I was here. He was the gentleman to my far left? I believe so.

VICE CHAIRMAN HORN. Let me cite one of the things he said, which I would like to know if the UAW has a position on this. He noted that analysts of the Congressional Budget Office said that a tax cut of $1 billion would result in 47,000 new jobs, 17 percent of them occupied by nonwhites. A $1 billion Government-sponsored employment program, such as the CETA program, would result in 97,000 new jobs and 27 percent of them occupied by nonwhites. In brief, the analysis shows that for the same $1 billion, you would get twice as many jobs under the Government sponsorship and 10 percent more occupied by minorities and female workers.

In the question period, I asked if that was a short- or long-run analysis. His response was that those figures held up for the 12-month period. He would agree that, in the long run, they would even out.

I would like to know what is the UAW's position on at least these two alternatives of job creation in our society, working through the private sector versus working through Government-paid employment which would go on and on, year after year?

MR. STRUGS. A short answer to that, I think, is we would be interested in both.

VICE CHAIRMAN HORN. In other words, you would favor both approaches?

MR. STRUGS. We would favor any approach that would increase job opportunities in both the public and the private sector.

VICE CHAIRMAN HORN. Okay.

Now let me move to another question. You might have been here also when I raised the question with Mr. Reyes, and I think it's particularly interesting to hear what the UAW position would be on this, as to how far would the UAW be willing to go to help minority and female workers by placing the economic burdens on either your existing workers—and I realize the UAW has many minority and female existing workers—but let's say on the nonminority, the majority, workers who might be employed in one of your plants and who themselves were not responsible for discriminatory acts that are being complained of when layoffs come. What is the UAW's position on that?

MR. STRUGS. I think that answer is explained in our "front pay" concept, in which we say the burden of any past discriminatory practice should be placed on the one causing the wrong.

For example, in most, if not all, of our bargaining agreements, historically we have included an antidiscrimination clause. As I pointed out in my response, we have had serious clashes with certain companies over the years about the implementation of those clauses. Our position is that if those companies had adhered to the clauses, in all probability, where discriminatory patterns may be found, they could have been avoided.

What I am suggesting is that where it can be shown that we made such efforts as negotiating these clauses and then followed up—trying to persuade companies to implement them and to practice nondiscriminatory hiring—it would seem to me that workers in the shops were but incidental beneficiaries. Nothing was negotiated for them, nor was there anything *owed* them as a result of any agreement between the union and the company. Therefore, we would think that those incumbent employees should not share the burden of the employer's wrong.

VICE CHAIRMAN HORN. Well now, you say the employer's wrong. Your earlier statement was the burden should be placed on the one causing the wrong.

MR. STRUGS. That's right.

VICE CHAIRMAN HORN. And in answering that, I assume the UAW position would be that if the employer caused the wrong, he or she should bear the burden, but if the union caused the wrong, the union should bear the burden in terms of discrimination. I assume from your initial response that the UAW would agree that if the union caused the wrong, the union should bear the damages. You know, what's sauce for the goose is sauce for the gander.

MR. STRUGS. An honest answer is, where the wrong is shown, that's where the liability should be placed.

VICE CHAIRMAN HORN. All right. Which I would assume includes that premise.

Now, let me lead then to a program that has long concerned me ever since I was assistant to the Secretary of Labor in 1959 and 1960. One of the problems in positioning minority workers and female workers is to get them to the position where they can qualify for openings in a plant. Now, you can do this in several ways. You can have government-sponsored manpower programs which sometimes relate to specific jobs, but more generally do not relate to specific jobs. You can have on-the-job training where the employer bears the burden, as is true of many governmental agencies after you admit people, or you can have the apprenticeship program, which is particularly true in the building trades. I'm not sure to what extent it exists in the UAW.

But generally, this is, as you know, where labor and management cooperate, work together on a joint labor-management apprenticeship program. I am curious how extensive in the UAW-type industrial union are joint management-labor apprenticeship programs?

MR. STRUGS. Rather extensive.

VICE CHAIRMAN HORN. Would you say half of your employees come up through the apprenticeship route, or less?

MR. STRUGS. I don't think I could give you a precise figure. I really don't know.

VICE CHAIRMAN HORN. Well, what I'm getting at is, what is the responsibility of both union and management to set criteria for admission to those programs which are affirmative action based and would

assure getting them in that initial takeoff position so that this could be employed by a particular industry, that the individuals had had the type of training that is needed to qualify for openings or upward mobility within an industrial plant and an industrial union? What are you doing to assure access, in brief?

MR. STRUGS. These plans are jointly administered, and we helped to develop them. Administering these plans is not done unilaterally or arbitrarily by the company. We make an input and have our say.

VICE CHAIRMAN HORN. How much input? If you disagreed—well, I'm trying to get at how these things work. Let's say if you were concerned that an insufficient number of minorities and women were securing access in the labor force as represented by the UAW, could the UAW insist and have the power under these joint plans to assure that there would be a sufficient number of minorities and women in that apprenticeship level?

MR. STRUGS. Yes. A recent case comes to mind that we are handling in our department. Annually, a particular plant gives its employee-applicants a series of tests and establishes a list of candidates for skilled trades. That list remains alive for 1 year. Whenever a vacancy occurs, the ranking candidate is selected from the list.

Blacks have made it, but women have not. A particular woman took the test over several years, never placing high enough to be an entrant initially, nor high enough to be selected during the life of that list.

Examining elements of the test, we discovered that there are certain areas in which women do not get exposure. We have proposed that a dual listing of, say, "qualified-best qualified," from which candidates may be drawn, first from one classification, then from the other. An alternative is to take a look at the tests to see if they can be reorganized in a way that they will be more meaningful and will allow women to gain access.

Then, too, through our OJT or Project Outreach, we may provide classes or training for such persons, to help bridge the gap or eliminate shortcomings they may have in a given testing area.

VICE CHAIRMAN HORN. I take it the union would be following the *Griggs* case, where they feel the test should be job related? Were these tests job related?

MR. STRUGS. These tests would be considered, I would say, on the surface as being job related. The only thing we were able to put our finger on was that there were certain work areas to which women had never been exposed—like job experience, shop experience. They had never worked in given departments to have the necessary experience. Discounting work experience, where testing areas dealt with fundamental education, they could compete.

VICE CHAIRMAN HORN. In other words, you could really only succeed if you were already in.

MR. STRUGS. That's right, or you had that kind of exposure in a shop where a man normally works, as opposed to where women had worked.

VICE CHAIRMAN HORN. In the university, we call that the "buddy system." You are telling me that it applies also in industry?

MR. STRUGS. You can find it.

VICE CHAIRMAN HORN. Okay. But getting back to the apprenticeship program, I take it the position is that the union does have the power in these joint programs, certainly an equal amount of power, and in financing and administration certainly, with management; therefore, if discrimination occurs in the apprenticeship programs, the union should bear some of the burden?

MR. STRUGS. We'll be looking very hard to see if there is a potential liability on our part, especially in that we do have joint say-so.

COMMISSIONER HORN. Have you examined the apprenticeship program to see if there is a liability?

MR. STRUGS. We have a skilled trades department, as you may know or may not know, and each of our major departments, like Ford, General Motors, Chrysler, have skilled trades representatives, persons who service skilled trades within their respective departments. We had a meeting with those departments recently, including the skilled trades department, the legal department, and our department, and discussed this very question.

VICE CHAIRMAN HORN. Thank you.

CHAIRMAN FLEMMING. Mr. Ruiz?

COMMISSIONER RUIZ. I believe the UAW is to be commended. In looking forward, in providing for supplemental compensation in addition to unemployment insurance, vacations, benefits for senorities, layoffs, you noted that full employment was the committed ideal of the UAW. And then I heard you use a word that I hadn't heard for a long time. Jobs are disappearing. I recall not too long ago, on the phenomenon of the disappearing jobs, that the unions were attempting to do what they call featherbedding, and things like that. Now, how extensive are the disappearing jobs? What is the position of the UAW with respect to jobs that are disappearing? Or what did you mean by disappearing jobs?

MR. STRUGS. Those statistics I used were, if I mistake not, released by the Bureau of Labor Statistics in its report last week on the drop in unemployment. As I stated, in addition to going from 7.9 percent down to 7.8 percent, the report also said that there were 192,000 fewer jobs available during that period of time.

Now, the choice of words in saying "disappeared" may have thrown you somewhat. "Disappeared" might imply that those jobs are gone forever and may not return. I can understand that.

COMMISSIONER RUIZ. That's what I meant. Has no analysis been made with respect to our technology as to what proportion or how many jobs disappeared? You can't have an affirmative action on a job that's disappeared. You can't replenish a job that's disappeared. And I know the union has been concerned in the past with respect to disappearing jobs in the sense of the connotation that I just made. Is there any analysis of how many jobs are gone forever?

MR. STRUGS. No, those statistics came across my desk on Friday. I am not prepared to give you any analysis to say if, in fact, they disappeared temporarily or indefinitely. But they were lost during that period of time.

COMMISSIONER RUIZ. It would be interesting to know, for purposes of fulfilling some statistical data here, if possible, and if you could supplement the record with your findings on that we would be most grateful.

MR. STRUGS. I will call upon the services of our research department.

COMMISSIONER RUIZ. Thank you very much.

CHAIRMAN FLEMMING. Mr. Saltzman?

COMMISSIONER SALTZMAN. Mr. Strugs, you pointed to the immense load falling on teenage and youthful unemployed in this period of economic recession, and one of the concerns about our report that I have is its absence of consideration of the impact of a rigid and inflexible minimum wage—Federal minimum wage—on youthful unemployment. Since a minimum wage is so much a part of the union commitment, do you think any flexibility in the minimum wage laws would enhance the possibility of increased teenage and youth employment? Is this something that ought to be looked at?

MR. STRUGS. You say flexibility, are you thinking about a lower minimum wage for teenagers than the prescribed minimum wage?

COMMISSIONER SALTZMAN. In some undertakings, perhaps, where certain kinds of jobs are eliminated because of the minimum wage and technology.

MR. STRUGS. I think I am inclined to draw my answer from what has just taken place in a recently concluded negotiation with Ford where we resisted the attempts of the company to start a new employee at a given rate lower than they had previously proposed. I think our answer would be no.

COMMISSIONER SALTZMAN. I am speaking specifically to youthful, teenage employment.

MR. STRUGS. I understand that.

COMMISSIONER SALTZMAN. You would not view a new job classification with favor?

VICE CHAIRMAN HORN. Fourteen to 19 years of age, let's say, is what you're talking about?

COMMISSIONER SALTZMAN. Yes. As a possibility to alleviate the enormous burden of teenage unemployment and the concommitant problems that it's raising in so many other areas.

MR. STRUGS. I am not aware of anything that we may have done in this area, but, again, as I said to the other Commissioner, I would be willing to charge this question, along with the other, to the research department to see if we have anything.

But off the top of my head, I think I would be inclined to say no.

CHAIRMAN FLEMMING. I was very much interested in the latter part of your testimony where you are setting forth a concept which you describe, I think, at the end, as benefit versus competitive seniority. Now, I didn't quite get the feel of how that would work. Would you mind just kind of discussing that with us informally?

MR. STRUGS. I believe this was in the remedy where we had found adversity in layoff situations. What we propose here is a concept that we proposed in a case down in Ohio, the *Meadows* case, which, by footnote, the Court in *Franks* said that, even though *Meadows* was not before them, they recognized it for its position set forth in our amicus.

We say that where there has been hiring discrimination, a worker should be entitled both to his job and back pay from the employer and any retroactive *benefit seniority*, benefit for vacations, pensions, those kinds of economic benefits that accrue to a worker individually, but not competitive seniority to be used in a layoff for bumping older employees.

CHAIRMAN FLEMMING. So that, in effect—let me say first of all, I think this is a very constructive and interesting concept, one that I certainly would like to learn more about.

But you finally come out at the point where, when it comes to a layoff, you do feel as a union that you should hold to the seniority concept, last hired, first fired concept? As a union, you don't see any way around that? In other words, I gather you provided us with this editorial from the *Detroit Free Press*—I have just scanned it, but I have looked at the closing paragraph which says that minority groups will have to earn their seniority and play by the same rules, even though they only lately were allowed onto the field. It's an inherently unsatisfactory solution, one that only time itself will repair, but in time—they go on—it may be repaired. As a union, do you really come out with that particular point?

MR. STRUGS. We do, because while the evidence is not hard and cold, the point, we think—we think a trend has shown that minorities and women have begun to, shall we say, climb the seniority tree and enjoy the fruits thereof. That's why we put the emphasis and the stress on more opportunities for employment.

CHAIRMAN FLEMMING. Well, your industry went through a period—

MR. STRUGS. Indeed, we did.

CHAIRMAN FLEMMING. —where a good many people were laid off. Have you made studies which indicate what the impact of those layoffs was, either company by company or the industry as a whole, as far as women and minorities are concerned?

MR. STRUGS. We asked that, and because of—let's see—we tried to get that information out of interest to compare the recession of '74–75 to the recession period of 1958, and the research department let us know that sufficient data simply was not there. At best, it would be pure speculation to try to compare the '58 recession and the '74–75 recession as to what the impact may have been. We do know and

regretfully admit there was a serious, adverse impact on minorities and women. The extent, we cannot say.

CHAIRMAN FLEMMING. Could I return to a comment I made when you joined us? As I have read in the newspapers about the negotiations that have been going on during the past few weeks, I have gathered that one of the major issues has been the issue really of sharing the work. I don't know whether that's an accurate way of putting it or not. But I am wondering if you would react to that, and if you feel that kind of agreement that you are trying to get would lessen the impact of depressions in the industry on minorities and on women?

MR. STRUGS. Shortly after we began negotiations with Ford Motor Company, I had the privilege to sit in on one of the big table meetings, at which three proposals were put forth by our union, with the prime objective of lessening the impact of these layoffs on minorities and women.

First, we wanted to get an extension of what we referred to as our "time-for-time" provision, which says essentially that if a worker having short seniority, for example, 2 years at the time of layoff, remains on layoff beyond 2 years, then that seniority is lost.

During that 2-year period of time, if the person had earned SUB credits—and one must have a year's seniority to earn them—the person would have drawn SUB benefits. Pensions and other fringes that related to seniority would have continued, too, for that 2-year period.

The proposal would have preserved seniority and those related benefits beyond 2 years because, certainly, if you cut off seniority you cut off benefits. The proposal was for a uniform period of "time-for-time," 3 to 5 years, for example, regardless of how little seniority one may have had.

I tried to find out what happened on that proposal. Many times I am like the public, I have to read the papers to know what we got at the table. But the information I received is that it was lost.

Another proposal was inverse seniority arrangement—I spoke of that in the paper—whereby older, higher seniority workers may opt to take a layoff, thus allowing minority and women workers to continue working. That is to become an option for negotiation at the local levels; in other words, a given local union may elect to negotiate that as an option.

CHAIRMAN FLEMMING. Kind of got your foot in the door.

MR. STRUGS. That one was not entirely lost. Concomitant with inverse seniority, of course, as we all know, is the question of changes that may be required in a given State's unemployment compensation law. They will have to work that one out.

The other item proposed was that of reduced work time. Here again, the thought being that a certain number of days off for the senior workers would not only provide initial job opportunities but would allow junior workers to continue working, thereby gaining additional seniority with which to survive future layoffs.

It is my understanding that we did get 13 days over the period of a 3-year contract. President Woodcock himself, and I must join him, has not, as yet, come up with a figure on the number of jobs this would create. I recall having read that on a yearly basis, 12 days in the Ford organization would generate something like 8,500 jobs. If that same kind of program was spread throughout the automotive industry, the article stated, possibly it would generate something like 35,000 jobs. But we cannot say.

CHAIRMAN FLEMMING. I appreciate your providing us with that summary. And we deeply appreciate your coming here and presenting the views that you have to us and responding to our questions. It's very helpful to us, as we consider what kind of findings and recommendations we are going to make on what's obviously a very tough issue.

Thank you very much.

MR. STRUGS. You are indeed welcome. I will follow up on those two points.

CHAIRMAN FLEMMING. Did somebody else have a question?

COMMISSIONER FREEMAN. I want to know if we could get a copy of your paper?

CHAIRMAN FLEMMING. If you could send a number of copies, or more than one.

MR. STRUGS. I will do that within the next few days.

CHAIRMAN FLEMMING. I think it would be appropriate at this point to take about a 7- or 8-minute recess.

CHAIRMAN FLEMMING. May I ask the hearing to come to order, please. We are now going to hear from those who have agreed to serve on a specialists panel. I am not quite sure how many are here. I am starting a little ahead of time. They thought we were going to start at 3:45.

Mr. James Farmer of the Coalition of American Public Employees; Isabel Sawhill, the Urban Institute; Howard Glickstein of Howard University School of Law, formerly Staff Director of this Commission; Barbara Bergmann, Economics Department, University of Maryland. I would like to ask as many of the members of the panel as are here if they will join us here at the table to the left. Howard, are you the only one of the panel to arrive so far?

VICE CHAIRMAN HORN. I've never known Howard to be at a loss for words.

CHAIRMAN FLEMMING. If you don't mind, we would like to get underway and we are looking forward to hearing your views of the draft document you have had an opportunity of reviewing. You can appreciate that we are not only interested in your reaction to the document, but if you want to identify other issues that you feel are relevant and that we should be looking at, we would appreciate your doing so.

STATEMENT OF HOWARD GLICKSTEIN, HOWARD UNIVERSITY SCHOOL OF LAW

MR. GLICKSTEIN. Thank you, Mr. Chairman and members of the Commission.

I have some random comments on the Commission report. In the last few years, it's been very frustrating for me to read Commission reports after they were all printed and I couldn't do anything in terms of making a contribution to them. But I am glad there's an opportunity today to say something before it's printed.

First, I have some words of caution about some of the legal analyses of the report. The tendency of the report to rely on the *Griggs* case and the tendency of the report to place a great deal of faith in what courts will do if there is some sort of a disproportionate impact I think probably places too much faith in what our present Supreme Court is likely to do.

The report discusses the case of *Washington v. Davis*, which was decided by the Supreme Court at the end of its last term. That case does not involve Title VII. It was a 14th amendment case. The Court seemed to abandon some previous decisions in which it had placed a great deal of emphasis on the effect of the allegedly discriminatory conduct, and in *Washington v. Davis* the Court over and over said that what is important is a discriminatory purpose, discriminatory intent, and that the effect of the conduct alone isn't enough. I think, although the Court did make clear they weren't talking about Title VII, I think that is a sign from the Court that no longer will just the discriminatory impact of some conduct receive so much weight from the Court.

Similarly, some other decisions of the Court last term that are somewhat disturbing are: The voting case where the Court made clear it was opposed to proportionality. That was a voting case where the ability of blacks to elect representatives in proportion to their numbers in the population was at issue—the *Beer* case—I forget the other party of the case, but it involved the apportionment of the New Orleans City Council. And even in the Pasadena school case, the Court again showed that it wasn't particularly sympathetic toward any sort of balance formula. So where the report does place a lot of emphasis on the *Griggs* case and on the *Griggs* test of looking for a disproportionate impact, I think that decision has been somewhat weakened by *Washington v. Davis*.

Now, of course, the cases can all be distinguished. The *Griggs* case was an ideal case to take to the Supreme Court. What was involved was patently absurd intelligence tests given to people seeking jobs sweeping floors. In *Washington v.Davis*, on the other hand, there the tests were given to people seeking promotions and seeking to be hired in police departments, and, of course, there the facts weren't as sympathetic. So I think that's one caution I have.

A second caution I have is that I think the Court made clear in *Franks v. Bowman* that its concern was particularly with identifiable

individuals that had been discriminated against. A couple of times—I think on page 33 of your report—there's a quote from *Bowman* where the Supreme Court made clear that what it is talking about there is identifiable individuals that were discriminated against, and they are prepared to provide a remedy for some identifiable individuals. But when you move from identifiable individuals and say that the last 50 employees that were hired under an affirmative action plan, even though they individually hadn't been discriminated against, merit some sort of special treatment in a layoff situation, I think there the Court might have a little more difficulty than it would with identifiable individuals. Most of the cases so far where the courts have provided some sort of remedy both in the case of direct discrimination and in the case of so-called "reverse discrimination," there have been identifiable individuals who have claimed discrimination.

Now I think the report suggests that one possible way of conducting a layoff is to have a list of black males, a list of black females, and a list of white males, and then the persons would be laid off in proportion to their proportion in the general work force or the population. To the extent that an individual would not be treated on the basis of that person being an identifiable victim of discrimination, I think the Court will have much more difficulty with that sort of a case than where there are identifiable victims of discrimination.

There is some suggestion, in fact, in the opinion that where there are identifiable victims—I am referring to footnote 38 where the Court talks about the recommendation that the United Automobile Workers—footnote 38 in the *Bowman* case—the court talks about the recommendation that the UAW had made in the *Bowman* case where the United Auto Workers suggested that if you are going to provide some special benefit to the victims of discrimination and that is going to affect some identifiable white males, it's only fair that the employer bear that burden because, after all, the employer did discriminate. And the United Auto Workers suggested that, in a layoff situation, if you decide to use some sort of proportional layoff and, as a result, some white males get laid off who would not have been laid off under the other method, then the white males should somehow be compensated for it by the employers.

There is another thought I have had in the last year or so in viewing some of the reverse discrimination controversy. I think it's very appropriate to argue, and I think it can be argued, that every white male bears some responsibility for discrimination in this country. And every white male should bear the burden of alleviating that discrimination. And I think that it would not shock—doesn't shock my conscience to find that in a layoff situation you might have some senior white males being laid off in preference to more recently hired blacks or women.

Now, I think that while, as a general theory of justice, that probably is sound theory, I think in application it's a little more difficult. I think there are a lot of general theories of justice that in generality seem

great, but we don't always apply them. I suppose an eye for an eye and a tooth for a tooth is a very good principle of justice, but that's very rarely rigorously applied. Similarly, I think when you call upon specific, identifiable individuals to bear the burden of society in general's discriminatory conduct, you run into much more opposition and much more difficulties, even though what you are doing is ethically correct and probably just.

So I think we should perhaps think more in terms of some sort of program, some sort of Federal program, that will somehow compensate the individuals who are going to be displaced as a result of some affirmative effort. For example, some years ago there was a great concern with automating the procedures on the New York waterfront, and there was enormous hostility by the unions to any sort of automation because that was going to result in many job losses. But finally, when some program which was heavily subsidized by the Government was developed which provided compensation for those people affected by the automation, that program was carried forward.

Similarly, I think we have some program on the books at the present time that compensates businesses that suffer as a result of Government trade policies, where, as a result of some trade policy that favors products from foreign countries, some businesses suffer, that we have a program to compensate businessmen.

So what I am suggesting is that maybe there should be some sort of Federal program that is directly intended to deal with dislocations that occur as a result of implementing affirmative action programs, whether they are hiring programs or layoff programs.

Which gets me to another point. I think there was a good deal of discussion in the Commission's report directed at the courts and what the courts should do. And while I think it's very valuable for the Commission to engage in legal analysis, I think perhaps the Commission's greatest contribution can be in the area of factfinding directed to the legislature. In addition to that being the area in which the Commission has been historically successful, I also think that the time when the Supreme Court could be viewed as the dispenser of great theories of justice, of taking of pioneering positions on issues, is perhaps past. We are not going to see, for some years, any *Baker v. Carr*, *Reynolds v. Simms*, or some of those other great decisions coming from the present Supreme Court.

On the other hand, the United States Congress is perhaps more liberal today than it's been in many years, and there have been a number of recent events where the Congress has stepped in to undo retrogressive decisions of the Supreme Court. A year ago, the Supreme Court decided that in the absence of a statute, plaintiffs' attorneys cannot get attorneys' fees in public interest cases. The Congress remedied that in legislation a few weeks ago.

We are likely to find the United States Congress more sympathetic to progressive programs than the courts, and I think chapter 4 of the

report, which I found most stimulating, is one that I would urge that somehow be expanded, that perhaps the Commission hold hearings and collect a great deal of specific information on how some of these work sharing programs have worked and what are the reactions of management workers. You might even have some testimony on some of the human effects of layoffs. I think it's in that area, in factfinding and developing the record, where the Commission could be most effective.

In 1957 when Congress was considering the Civil Rights Act of 1957, everybody knew what the 15th amendment said. Everybody knew what the prohibition against discrimination in voting was. And yet, that statute had a great deal of difficulty in getting through. On the other hand, a few years later, in 1960 when additional civil rights legislation was before Congress and the Commission had been in business for 3 years, and the Commission had done some factfinding, and the Commission had sought to demonstrate that there were really voting problems in this country, I think that factfinding made a great contribution to Congress's deliberation in 1960. And it wasn't the Commission's theory of what the 15th amendment said that was so important. It was the Commission's facts that had been found.

So I would urge that some of the few new factual information that the Commission has come up with in this report, that some of the analyses and discussion in chapter 4 or part 4—I haven't really seen them in many places before, nor have I seen it well publicized, and I think that's very, very useful to get out to the general public that there is such a thing as work sharing and that it's done in places, and it's done apparently quite extensively in Europe.

Well, I think I have exhausted my comments but I would like to refer to another episode in the Commission's history before I conclude, and I would like to say this in Mr. Farmer's presence.

In 1968, the Civil Rights Commission held a hearing in Montgomery, Alabama. As a result of that, they made a movie called *Cycle to Nowhere*. That movie took about a year to edit and complete, and we were going to release it in, I think, late 1969, when Mr. Farmer was Assistant Secretary of HEW. And we asked him to introduce the movie and be present when it was shown.

It was shown in some departmental auditorium. And I heard through the grapevine, days before that showing, that it was unlikely that Mr. Farmer would be there because a great deal of pressure was being placed upon him not to be there, not to introduce the movie, and that we should think of somebody else to introduce it because it was very likely that he would not appear. And when I arrived at the departmental auditorium, of course, Mr. Farmer was there, and I thanked him for being there, and he just smiled and said a lot of people didn't want him to be there, but he was there and he introduced that movie. And I think that's an interesting footnote in the Commission's history, and I am particularly honored to be seated near Mr. Farmer today.

CHAIRMAN FLEMMING. I appreciate it very, very much. I appreciate your comments.

After we listen to the other members of the panel, we will be engaged in a dialogue on some of these issues.

I am very happy to recognize at this time, Barbara Bergmann from the economics department of the University of Maryland. We are delighted to have you with us.

STATEMENT OF BARBARA BERGMANN, UNIVERSITY OF MARYLAND ECONOMICS DEPARTMENT

MS. BERGMANN. Thank you. I am delighted to be here.

I would like to make a few remarks which give you the perspective in which I see this whole issue. For me, the most important civil rights issue now before us—in fact I would say our most important national issue—is getting rid of occupational segregation. That is—not to put too fine a point on it—the reduction of the monopoly which white males have of certain kinds of jobs. The most obvious ones are administrative jobs, crafts jobs, in some places police jobs, and so on.

I believe that if we achieve this goal, we will also importantly reduce many of our urban problems. We will reduce crime, and we will reduce some of our housing problems. So I believe that getting rid of occupational segregation, and ending the denial to blacks and women of entry into certain kinds of jobs, should be and deserves to be number one on our national agenda.

Now we know, thanks to the reports of the Civil Rights Commission, and thanks to the reports of the General Accounting Office, and thanks to what we read in the papers, that the present state of enforcement of the laws we now have is very poor, that the agencies which are supposed to be doing this seem not to know how to do it, seem to be wasting their resources, and seem to be, in general, ineffective and perhaps counterproductive. Unfortunately, even the Congressional Black Caucus seems to have dropped this issue of fair employment practices off their agenda. So I would say that there is very little steam behind the whole issue of fair employment practices.

Now, as a result of this nonfeasance of the agencies which are supposed to be enforcing these rules, there are thousands of establishments all across the country which are in gross violation. We don't need, in most of these cases, to worry about fine points. They are in gross violation. The restaurant that I eat at has never had a black waitress in the 11 years I have been there. Never had a waiter, either, for that matter. And, of course, this example is legion. We are still going through the same old thing. So that practices which are clearly discriminatory under the law are not being corrected.

Now, when we come to this issue of seniority layoff, I would say that it's, of course, regrettable that in the current recession women and blacks have disproportionately been displaced from the few decent

jobs they have got. That is unfortunate. But I would say that this is less important than fair hiring and promotions. And I rather hate to see attention devoted to this less important area when the area right in the bull's eye is being neglected—and shamefully neglected.

There are also aspects of some of the suggestions for breaking down the unfortunate race and sex effects of seniority which could be pernicious. Suppose, for example, we go to this issue of constructive seniority. Under constructive seniority, when a person comes in, if it's a woman or a black, we assign them a higher seniority than they would otherwise get. Although this would have obvious benefits, it would also have obvious defects. One of them is the following.

Anybody who has watched the process of integration knows that the most vital time is after the new person is on the job. They have to be taken in hand by the existing employees, who have to contribute to their indoctrination, their training, letting them know where the bathroom is, the things they better not do—they better not fall into that particular machine—and also making them feel like human beings, instead of alienated strangers. And all of these things are extremely important if occupational integration by race and sex is to be a success in the establishment.

Constructive seniority interferes with that. It makes the new person into a torpedo aimed at the jobs of the older employees, and, therefore, makes these older employees less likely to be friendly to the newcomer and makes it less likely that this integration will succeed.

So if you are going to modify the seniority system, it might be better to get rid of it entirely. Because if you keep it, and you make this kind of change, you may be worse off for the reasons I have stated, even assuming that the courts let you do it.

Now, in deciding whether one wants to get rid of it, I would say that seniority systems have some virtues. They make some people's lives more sure and less stressful. They also reduce the discretion of the foreman, and so make the workplace discipline less arbitrary. So I am somewhat negative, therefore, about minor tinkerings with seniority and about doing away with it entirely.

I would say that part of the report which I find most interesting and most suggestive is the material on work sharing. The suggestions on allowing people in short-work weeks to collect some unemployment insurance may not be feasible because they will tend to retard people's leaving declining industries. That is, if you have coal miners who can work 3 days a week and get unemployment insurance for 2 days a week, that would be a permanent situation and they would tend not to drift away. So it might be that if you did institute such a system, it might be in operation only when the unemployment rate was higher than a certain level.

I think you might have other problems of tinkering. You might have to change the tax exemption features. The proposal as it stands would probably drain the funds rather faster than the present method. You

would also have to worry about eligibility. Thus, more research on feasibility and finance and ways and means of operating would need to be done. An argument in favor of combining short-work weeks and unemployment insurance is, of course, that it would share both the drops in income and the leisure among workers more fairly. I understand that some people call this spreading the poverty. But is it better that 100 people get an 8 percent cut, or that 8 percent of the people get completely cut? And I think the question answers itself.

CHAIRMAN FLEMMING. Thank you very, very much.

We appreciated the footnote to history that Howard Glickstein just provided us in connection with his relationship with Mr. Farmer when he was serving as Assistant Secretary of HEW. I was delighted to listen to it, but I wasn't at all surprised at the outcome. I wasn't being held in suspense, in other words, as to whether or not Mr. Farmer was going to show up. I was confident that that would be the case.

And we are certainly very happy to have you here with us today.

STATEMENT OF JAMES FARMER, COALITION OF AMERICAN PUBLIC EMPLOYEES

MR. FARMER. Thank you.

CHAIRMAN FLEMMING. We appreciate your willingness to get acquainted with the draft of the report and share some of your insights and views.

MR. FARMER. Thank you, Dr. Flemming.

I must confess that I was a little apprehensive about the story, because I didn't recall the incident. And I was in suspense as to what the conclusion was going to be. I was keeping my fingers crossed. I'm glad it turned out happily.

I thought that in the few minutes at my disposal, I would try to do a couple of things. One, give a little theoretical background of what seems to me to be the basic controversy underlying the controversy over strict seniority layoffs and the whole question of seniority versus affirmative action.

There seems to me to be a conflict between what the report refers to as faceless neutrality and affirmative action, or color blindness and affirmative action. And I see a good deal of ambivalence around the country on that issue by many persons who are in favor of affirmative action, even numerical goals and timetables—some, indeed, who are in a position of trying to enforce affirmative action. In EEO, they have a controversy internally between affirmative action, which is a kind of color consciousness and sex consciousness, and the old color blindness and sex blindness or faceless neutrality of the past.

So I thought I would very briefly try to sketch some of the background of it. When the civil rights movement first began talking about doing something to close the income gap and to find better jobs for those who had been excluded from certain kinds of jobs, we were

then stressing color blindness. What we said to employers was, "Be facelessly neutral and don't see the color of the applicant for a job. And similarly, don't see the color of an applicant for a layoff. Just hire the best qualified person who happens to apply, regardless of color."

Well, the fact of the matter is, the Nation isn't yet colorblind, so this did not work. We would go back to the employer 2 years later and say, "Now how many Puerto Ricans or blacks do you employ?"

His answer would be, "How in the world should I know? I am colorblind."

And a visual check would show that he had none. And he then said, "So what? Can you prove that I discriminated against anybody, that I was not facelessly neutral? Can you prove that I hired a person who was less qualified than one whom I did not hire, and the hiring was done solely on the basis of color?"

If you could not prove that, then you had no argument. Indeed, the early equal opportunity laws, so-called "fair employment practices laws," were written according to that colorblind philosophy. They made it illegal to advertise or to seek or to hire a person with race or color as a criteria.

If I may share with you one somewhat humorous incident that we had years ago in a civil rights movement—one organization I was associated with. We were complaining about discriminatory employment in a chain of hamburger joints in one of the boroughs of New York. I forget the name of it.

At any rate, the only blacks and Puerto Ricans employed there were janitors. So we used the usual tactics of that period of the early 1960s. We sat in and marched and picketed, and so forth, and finally sat down to negotiate. Management agreed to sit down and negotiate. And across the table, management said to me, "Mr. Farmer, you are absolutely correct, we have discriminated in the past, and we do discriminate. You are absolutely accurate that the only Puerto Ricans and blacks in our employ are janitors, and we agree that that is wrong. And we feel very bad about it, and we would like to do something about it. However, we will say, in addition, that we anticipate that we will need about 50 sales personnel within the next 3 or 4 months." That was their euphemism they used for counter persons. And they said, "We would like to hire blacks and Puerto Ricans for those jobs. However, we can't do it."

"Well, why not?" I asked, briskly.

"It happens that we get our employees through the State employment service, and if we go and say, 'Send us 50 blacks and Puerto Ricans for these jobs,' we will be charged immediately with violating the State fair employment practices law,"—which was facelessly neutral, colorblind. "So," he said,"we can't do it." He smiled rather triumphantly, I thought.

I asked for a recess and called an old buddy of mine who worked for the State employment service, and said, "Jack, you realize that the

law is archaic." He said, "Of course, it's one of those colorblind laws that a lot of people like you fought so hard to get a few years ago."

I explained our problem and asked for his advice. What he said was, "Talk to the manager, go back into session and ask the manager to call me—don't write, just call—and explain his needs to me on the phone, and I will call our office on 125th street in Harlem and tell them to send 50 applicants, regardless of race, color, creed, or national origin."

This was a recognition, of course, that there was a limitation in the color blindness idea, the faceless neutrality, and something needed to be done.

Well, the civil rights activists, the Urban League, and the organization that I was then associated with, too, sought a change in that. I recall that on one occasion when we spoke with Vice President Johnson, when he was head of the President's Commission on Equal Employment Opportunity, we suggested some horrible term such as "compensatory preferential hiring" as a public policy. I cannot imagine a worse term from a public relations standpoint.

Well, Johnson, in rather characteristic fashion, said, "Don't call it that, that's terrible. Call it 'affirmative action.' We will be affirmative. We will be positive."

Then he told the story of President Kennedy stepping off the plane in Washington and observing the National Guard, which was all white, and he called an officer over and he said, "I see there are no Negroes in the honor guard" that was, of course, the word that was used to describe blacks at the time.

The officer said, "Well, that's correct, Mr. President. You see, none have applied."

The President said, "Well, go out and find some." Which was not color blindness. It was not faceless neutrality. It was an expression of the new concept, which was, I would say, "color consciousness" to eliminate color discrimination.

That became the public policy of the Government. And obviously, the tension between those two ideas is still going on.

Now it seems clear to me that we need to revise, if not abandon, the seniority system. I would prefer to revise it or to work out some kind of formula which would include seniority. As an old trade unionist, I believe in a principle of seniority, but recognize its limitations.

Now, in the Federal Government, in many of the personnel practices, seniority is not the deciding factor. I discovered that at HEW. When there were promotions, we didn't hire the person who had been eligible the longest period of time. There was a "merit" system which was used. So that was another factor that came in, the competence or merit of the individual.

Seniority is one other acceptable factor, but the third factor which is often neglected, and I would argue that it's equally important as the

other two, is the past and present discrimination against a group of people—the injury, "the not being made whole," as the Court refers to it. And I think some such formula, including at least those three factors, those three elements, needs to be worked out.

Now I, of course, am in favor of work sharing and the various alternatives which have been presented in this report. I recall one recent incident of a kind of work sharing or job sharing in New York City when the hospital workers were out on strike and they were striking to prevent layoffs of their colleagues. Well, they won, in the sense that the other hospital workers were not laid off, as the city had planned to do, but those workers whose jobs were secure, were not in jeopardy, had to give up some money. I forget now whether it was a raise which they were about to get, or whether it was a cost-of-living increase. But they willingly gave that up so that the others would not lose their jobs. Well, in a sense, this was a sharing of the burden of the cost of labor. And I think that that needs to be stressed.

I have talked already too long and I want to close it quickly, but I would like to read the quotation in the report from the Supreme Court decision. I think it's most apropos:

> Denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectation of other arguably innocent employees would, if applied generally, frustrate the central make-whole objective of Title VII. If relief under Title VII can be denied merely because the majority group of employees who have not suffered discrimination will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.

It seems to me that this is a most vital point which speaks to the question of reverse seniority. In the few years that I have been involved in social action, taking my lumps, winning a few and losing a few, I am hard pressed to find any issue of social change—basic, important social change—which has been achieved without there being some suffering, without somebody suffering.

As a humanist, I wish that that were not the case, but I think that it is, and I think with a deeply rooted evil such as discrimination, which has been so historical within our Nation, it is now quite impossible for us to correct the effects of it without all of us sharing the damage that has been done and sharing the disadvantage. We share the work. We must share the unemployment. We must share the limited money that is available for the cost of labor. We must share, in a word, the future of the Nation.

CHAIRMAN FLEMMING. Thank you very much, Mr. Farmer.

Now, Isabel Sawhill from the Urban Institute.

STATEMENT OF ISABEL SAWHILL, THE URBAN INSTITUTE

Ms. SAWHILL. I have some brief written remarks. Let me begin by saying that the staff which prepared the report we are considering deserves the highest praise. It is a well-researched and well-documented report whose basic conclusions seem to be both important and sound.

I would like to devote my remarks to underscoring and elaborating on several points touched upon in the report. The first point that I want to emphasize is that we need not accept the high rates of unemployment and the kind of depressed economy which has been our lot in recent years. To think otherwise is to subscribe to a kind of Marxist-inspired pessimism about the ability of a democratic, free enterprise system to manage the economy wisely through monetary and fiscal policy.

Macroeconomic policies can and should be our first line of defense against unemployment. They have been used timidly in recent years because of the fears of inflation. To an economist, it's not at all clear that the costs of moderate inflation are as great as the costs of unemployment. The major effect of inflation is to redistribute income. Unemployment not only has a redistributional effect, but also reduces the size of the economic pie, since the goods and services which might have been produced by unemployed workers are forever lost to the system.

Why then are our macroeconomic policies focused so heavily on inflation at the expense of employment? I think that one obvious reason is because inflation is more visible and appears to impact nearly everyone, while unemployment strikes only the unfortunate few who happen to lose their jobs.

It occurs to me, in this connection, that the kind of work sharing alternatives advocated in the Commission's report might lead to a more balanced assessment on the public's part of the relative costs of inflation and unemployment because more people's employment status would be directly affected. The costs of unemployment would be spread more evenly across the body politic, instead of being localized in one part of that body.

My remarks thus far should not be interpreted to mean that the full responsibility for achieving full employment can be left to macroeconomic policies alone. They will need to be supplemented by more selected set of wage, price, and employment policies, and need to be targeted at groups with above-average unemployment rates. If such selected policies can be designed and implemented, we will be able to navigate more successfully between inflation and unemployment. At the same time, I want to stress again that policies aimed at spreading the available work around should take second place to policies aimed at increasing the number of available jobs.

In the first chapter of the Commission's report, a good deal of attention is focused on the so-called "discouraged worker." We must bear

in mind that the ranks of discouraged workers will grow if new jobs are not created.

Full employment is not just a matter of providing jobs for existing members of the labor force. It is also a matter of absorbing new entrants and reentrants, most of whom are women or young people just out of school. Moreover, a close link exists between the level of overall employment in the economy and the success of even the best enforced affirmative action programs. If the number of jobs in an industry is not growing, there can be no new hiring and thus no new breakthroughs for women and minorities.

Work sharing will help to protect the position of those who have already gained a toehold in industry. It will do nothing for those who have not.

It's true that some gains may be achieved through addition or through the growth and decline of individual industries within the aggregate, but progress would undoubtedly be slow.

To summarize this first part of my testimony, then, I am simply making a plea that we not forget the importance of providing enough jobs to accommodate all of those able and willing to work. The same point is made somewhat more briefly on page 66 of the report.

The second major point I wish to make—and here again, I think I am only echoing what has been convincingly argued in the report—is the following. If unemployment is a necessary evil, then sharing the cost of such unemployment through reduced hours, staggered layoffs, and the like, seems eminently fair. Undoubtedly, some will argue that employment and layoff decisions should be based on consideration of costs and productivity, not equity or equal rights. But since seniority begins by departing from these principles, I believe that the work sharing alternatives discussed in the report are clearly preferable. They not only seem fairer from an equal opportunity perspective, but offer a number of other possible advantages as well.

Employers, for one, may find that work sharing enhances hourly productivity and, unless offset by higher costs for mandated fringe benefits, this would reduce unit labor costs. If lower labor costs are then passed on to the consumer in the form of lower prices, this could even help to restrain inflation, although I would not want to make too much of that point.

Employees, for their part, may find that shorter hours, even at less pay, dovetail well with their own preferences for leisure over income, or with competing demands on their time, such as child-care responsibilities or continuing education. The recent UAW settlement with the Ford Motor Company points out the growing demand for a shorter work week.

In all these cases, the price that workers pay, of course, is a loss of income that otherwise might have been earned, but they do not lose their jobs in the process. And this is an important point, because there is growing evidence—some cited on page 13 of the report and referred

to again in its concluding paragraph—that it is one's employment status rather than one's income which is most highly correlated with such things as a positive outlook on life, social integration, good health, and family stability.

Thank you.

CHAIRMAN FLEMMING. Thank you very much.

Bayard Rustin of the A. Philip Randolph Institute planned to be with us but could not come, but he has asked an associate, Mr. Norman Hill, to represent him. We are very happy to have you with us here.

STATEMENT OF NORMAN HILL, A. PHILIP RANDOLPH INSTITUTE

MR. HILL. Thank you.

I would like to read a statement that has been published on behalf of the A. Philip Randolph Institute by Bayard Rustin and myself, entitled, "Seniority and Racial Progress."

Job seniority is under fire as never before. As economic decline and stagnation threaten to wipe out the gains made by blacks, other minorities, and women, criticism of the seniority system has increased. This should come as no surprise, for hard times have always generated intense racial and ethnic competition for jobs.

With the official rate of black unemployment hovering at 14 percent throughout 1975, it is only natural that blacks should anxiously seek solutions to the devastating effect that unemployment is having on their communities and lives. Those who propose that seniority rights should be abrogated by court decision, legislative action, or public pressure honestly believe that this would benefit the black unemployed and underemployed. They argue that it is the seniority system itself which is the cause of the excessively high unemployment among blacks. They imply that if the seniority system were abolished then many economic problems of black Americans would be overcome.

We disagree profoundly with this view. It is based on a lack of understanding of the nature, purpose, and history of the seniority system. It lacks an analysis of the conditions which are actually responsible for the economic oppression of black Americans. And because it also ignores the political consequences of attacking seniority, it does not present a realistic or effective strategy to reverse the deteriorating economic conditions of black Americans.

The attacks on seniority are nurtured in the soil of despair and frustration over the dismal economic outlook for blacks if excessive unemployment continues until 1980 or beyond. But like all ideas born of frustration, the attack on seniority rights essentially provides expression for anger without altering the underlying conditions that produce it. Indeed, it may well be that a strategy of attacking seniority will prolong the economic devastation of black Americans.

If some blacks feel that seniority is against their interest, it is in part because the principle of seniority seems to resemble the slogan that

summarized the employment discrimination which so long brutalized blacks—last hired, first fired. Under this principle of systematic discrimination, employers hired blacks only when there were no available whites and fired blacks at the first available opportunity.

The principle of seniority is often summarized by the same slogan—last hired, first fired. The similarity of the slogans obscures the fundamental differences in the way in which the two principles operate.

Employment discrimination meant that blacks were hired and fired on the basis of their color. Seniority is exactly the opposite. Seniority is a necessary right that protects workers from the whims and prejudices of employers. Not the least of its protections is its preventing employers from arbitrarily forcing the brunt of layoffs on blacks, according to the old last hired, first fired racial principle.

Seniority is an equitable principle; it treats workers on a fair and rational basis not related to race, religion, creed, or sex. But it is more than this. It is a just and humanitarian principle accepted overwhelmingly by the American people. Next to the union card itself, seniority is the most important possession of American workers, as it protects them from the arbitrary and capricious decisions of employers.

Seniority does not simply govern who is to be laid off first. It is also the criteria by which is decided who should work the graveyard shift; who will have the first opportunity for transfers, upgrading, and promotion; who will get the first choice of vacation time. The courts have termed seniority a vested right. That is, they have said that seniority is earned by the worker's service for a company.

While some critics acknowledge the importance and value of seniority, they conclude that seniority must be abridged during the emergency of the recession. While we sympathize with their sentiments that something must be done to ease the plight of black workers who have been laid off, we do not believe that the answer to black unemployment is to abolish or weaken seniority. If seniority were to vanish tonight, there would not be more jobs tomorrow. Even if seniority were to disappear and blacks were to be given preference in rehiring, no new jobs for blacks would be created by throwing whites out of their jobs. If black unemployment were as "low" as white unemployment, 8 percent or more throughout 1975, there would still remain immense problems of unemployment, underemployment, and poverty for blacks.

Seniority is being blamed for social conditions, particularly discrimination in hiring, which it did not create and which its abolition will not solve. The critics of seniority are correct in concluding that unemployment in general and the disproportionate unemployment among blacks are the result of society's failure. They are correct in judging that it is society's responsibility to remedy this failure. But doing away with seniority would not end unemployment. It would not

make society as a whole correct its shortcomings. Instead, it would place the burden almost entirely on workers whose economic condition is not much better than those who would be given their jobs.

The attack on seniority is particularly tragic for it pits blacks against one of our oldest and staunchest allies, the labor movement. The tragedy is compounded because the critics of seniority have attacked labor on erroneous and unfair grounds. Labor is blamed for not adopting a fallacious and ineffective solution to unemployment. Attention and energies are devoted to a confrontation with the labor movement instead of joining with the labor movement to fight for jobs.

The labor movement, like every other American institution, is not without a record of racial discrimination. Nonetheless, it is today the most integrated segment of American society. The labor movement not only provided the crucial political muscle that was necessary to enact the civil rights legislation of the sixties, it was far out in front of other institutions in its willingness to set its house in order. In 1963, for example, George Meany was successful in getting Congress to add a title to the civil rights bill banning discrimination on account of race, sex, religion, and national origin by employers, employment agencies, and unions.

The myth of union racism, nonetheless, remains very powerful. Unions, to be sure, play a role in the problem of job discrimination in the United States, but we should see that role in perspective. The overwhelming majority of hiring done in this country is done by employers. Of the charges of job discrimination by the Equal Employment Opportunity Commission, 85 percent are brought against employers and the other 15 percent is divided between employment agencies and trade unions. Despite this, the lion's share of public attention to the problem is focused on discrimination by unions. If we are serious about combating the problem of black unemployment, we will keep this in perspective and remember that the union movement has fought harder, longer, and more effectively than any other institution to improve job opportunities for minority workers.

The unions are a concrete target, an identifiable enemy, while the economy is a complex and amorphous system. It is much easier to attack the labor movement by proposing the abolition of seniority than to come up with a program that will achieve full employment. But simplistic answers will not make any real contribution to ending black unemployment and underemployment. The critics of seniority make unsound proposals because they do not fully understand the changes in seniority that have been made in the struggle against discrimination. There is a big difference between, on the one hand, plantwide seniority and phantom or fictional seniority, on the other.

There is no doubt that there has been employment discrimination. It is reasonable to conclude that in some instances the seniority system might perpetuate those injustices. For the black or other minority worker who was discriminatorily denied employment or promotion, the

just solution is that he or she be given the opportunity to advance to his or her rightful place by granting the seniority that would have accumulated but for the past discrimination. In the past, and to a lesser extent today, employers have often segregated blacks in menial tasks and dead-end jobs. Seniority systems based upon length of service in a specific job or department, without the privilege to advance with full seniority, would obviously perpetuate the effects of past discrimination.

The courts have recognized the injustice of this procedure and have correctly determined that a seniority system based on job or departmental service is not a bona fide seniority system, within the meaning of Title VII of the Civil Rights Act of 1964, if it has a harmful effect on women or minorities. They have insisted when this occurs that departmental or job seniority be replaced by plantwide seniority. Thus, a black in one department, on the basis of his seniority in the plant, will have priority in filling a position in another department where there will be greater opportunities for advancement, without loss of seniority and sometimes with full-rate retention.

Retaining pay rates is, unfortunately, not automatic; it has to be negotiated at the bargaining table, and not every bargaining unit has succeeded in gaining it.

Fictional or phantom seniority is an entirely different matter. The proposal here is that blacks as a class should receive preferential or fictional seniority. Thus, some prominent black leaders have actually called for whites with 20 years or more seniority to lose their jobs to young blacks who would not have even been old enough to have held the job when the whites were initially hired. It would be foolhardy to expect whites to sit back and accept arrangements of this sort as fair and equitable. Indeed, we anticipate that the reaction would be quite different. As fiercely as whites have rejected busing and housing integration, they will even more determinedly defend their jobs. Losing one's job because of the breaking of seniority rights is more than an inconvenience, it is being deprived of one's livelihood.

Lest there be confusion about what we are saying, we want to emphasize that the reaction of white workers to the loss of seniority would not be racial. What whites would object to is not a black getting ajob, but losing their own. Of course, their frustrations at what they would see as a monumental injustice would be expressed in racial terms.

But whites with seniority would react just as violently if those taking their jobs were some other ethnic group, or if the beneficiaries were younger whites. The white worker who vigorously protects his job is not necessarily antiblack. He might well vote for candidates who would put America back to work and probably would support spending tax dollars to train the poor and unemployed. But it doesn't make any sense to him to be asked to sacrifice his job while the Rockefellers and the giant corporations go untouched.

The argument over seniority only appears to divide workers along racial lines. The real division is between those who have more and those who have less seniority. In fact, it is conceivable that situations will arise where blacks are asked to give up the protection of accumulated seniority in order to protect some other group.

There is a relatively simple way for blacks to understand why whites oppose breaking seniority rights. Ask black men with 4 years' seniority if they will give up their jobs for women with 2 years' seniority, for black women with 2 years' seniority. We have frequently asked such questions and have, thus far, found no one who accepts such a principle. Whites oppose giving up their jobs to ensure a certain percentage of black workers for precisely the same reasons that black men resist giving up their jobs to ensure a certain percentage of women workers.

There is a world of difference between proposals to wreck or tamper with seniority rights and reforms of the seniority system to make it more fully reflect the principles of equity. The AFL–CIO civil rights department and international unions have made major efforts to speed the transition from departmental to plantwide seniority.

Some unions have adopted work sharing and similar proposals. When done voluntarily to maximize the economic condition of the whole work force, such steps do not divide workers. Some unions have been able to negotiate collective bargaining agreements providing incentives for senior employees to opt for early retirement, thereby giving work opportunities to junior employees. Other unions have provided for the sharing of reduced work by all employees during a temporary emergency period.

As important as these measures are, it would be a major mistake to mount a public pressure campaign to force more unions to adopt work sharing. A campaign for work sharing would only divert energies from the more crucial struggle for full employment. And even if work sharing were more widely adopted, it would mean a reduction in the total economic benefits available to the working force as a whole.

As the primary motivation for the attacks on seniority is a response to high unemployment, the argument against seniority must ultimately be accepted or rejected on economic grounds. Restriction or abolition of seniority is only one of a number of gimmicks that have been put forward to deal with the crisis of unemployment. Like proposals for shortened work weeks, reduction of benefits, or across-the-board pay cuts, attacking seniority would be little more than an equitable sharing of poverty.

The acceptance of antiseniority formulas means a lessening of the commitment to full employment. When blacks employ antiseniority rhetoric, they are accepting the proposition that it is inevitable that economic stagnation and high unemployment continue for years to come. Though seemingly radical, the antiseniority mood means a lowering of our sights and aspirations. It pushes to the forefront the economic goals of equal unemployment for blacks and whites, while

deemphasizing or ignoring the urgent need for more jobs for blacks and whites alike.

Paradoxically, by one measure the ratio of black to white unemployment, the economic condition of blacks has actually improved during the recession. In March of 1974, there were two blacks unemployed for every white unemployed. But in March of 1975, there were only 1.8 blacks unemployed for every white unemployed. Similarly, during the year from March 1974 to March 1975, white unemployment increased by 56 percent and black unemployment by only 44 percent. Of course, the reason for these surprising statistics was that black unemployment was already at recession levels in March of 1974.

But these statistics do illustrate two facts of crucial importance to the debate over seniority. First, it is not blacks alone who have suffered from the recession; unemployment has also had a devastating effect on white workers. Second, the causes of black unemployment are infinitely more deeply rooted than a seniority system which lays off junior workers first.

To the extent that blacks suffer disproportionate unemployment during recessions, it is not primarily the result of present discrimination but the consequence of past discrimination, poor education, lack of job training and skills, and inadequate job opportunities. The only periods in which blacks have been able to make economic advances are during periods of economic growth and near-full employment. Black economist Andrew Brimmer warns that:

> If...the higher national [unemployment] rates were to prevail, at the end of this decade, the effects on blacks would be particularly adverse. Under those circumstances, blacks would have little chance to resume the progress [checked by two recessions] toward closing the economic gaps they suffer vis-a-vis whites.

The political implications which Brimmer drew from this dismal outlook is that when the black community recognizes the consequences of this unpromising outlook, it will mobilize its political power, which is considerable and growing, to lift the economy above the subpar performance it might otherwise produce in the years ahead.

Whatever else it might do, attacking seniority is not a program to lift the economy above its subpar performance. But it will divert energies from the need to achieve a real economic transformation. For even if the more optimistic predictions of the Ford administration come true, blacks will still be stuck in the recession. If the national unemployment rate were to decrease to 5 percent in 1980, black unemployment would be about 9.1 percent. This high rate of unemployment and the entry of over 1.5 million blacks into the labor force would mean that black unemployment would decrease only from 1.4 million in 1975 to 1.1 million. This would be no improvement over 1974 when black unemployment was about 1 million.

The only solution to black unemployment is full employment. Instead of engaging in debate among ourselves and disputes with the labor movement over the seniority system, we should join in fighting for a national commitment to reduce unemployment to 3 percent or less.

Some of the attacks on seniority are based on the mistaken notion that if whites suffered the same degree of unemployment as blacks the Nation would not tolerate high unemployment. There is a grain of truth in this. But that does not mean that a strategy of increasing white unemployment to the levels of black unemployment will lead to a political movement to decrease unemployment. Far from it. The result would be instead to inflame already volatile racial tensions.

Others suggest that seniority should be temporarily modified to preserve black jobs until there is a national commitment to full employment. The moderation of this proposal has much to commend it, but its political and therefore economic consequences would have equally disastrous results. It, too, would pit black worker against white worker to the detriment of both.

The cardinal rule of political life for black Americans is that we do not, by ourselves, have the political or economic strength to accomplish any of the things we so desperately need. We have never gotten anything by simply being right. Instead, we have required allies to get what is right.

Thus, the second rule is that we must define our agenda so as to win the support of groups with similar goals. We will not be able to solve the problem of black unemployment if we present it as a black issue. The only way to solve the problem is to define our goal as full employment for all.

The advocates of seniority busting have forgotten these rules. By excluding white workers from being part of the problem, and by asking white workers to pay the cost of the solution, they divide workers along racial lines. By making the issue jobs for blacks, they force white workers to see the dangers to their jobs as the demands of black workers and not an economy that doesn't produce enough jobs for everyone. The antiseniority efforts drive a wedge between black workers and white workers. Moreover, the seniority issue presents the opportunity for the worst sort of racial demagogues to further separate whites and blacks.

Virtually every black leader is committed to full employment, but what is lacking is a political strategy to achieve full employment. In all too many cases, the conception is entirely negative—that is, the idea is how to prevent high black unemployment, not how to achieve full employment. Thus, proposals like tampering with seniority are put forward which, in a misguided effort to halt the economic deterioration of black Americans, actually make it more difficult to achieve full employment by frustrating the building of the coalition which is required to obtain full employment.

The only possible solution for black unemployment is full employment. We should not waste our energies and resources fighting a hopeless and counterproductive battle to abolish or weaken seniority rights. But by joining with the labor movement and others, there is an excellent chance that a national commitment to full employment can be won. That is the task that is before us.

CHAIRMAN FLEMMING. Thank you very much.

Commissioner Freeman, any questions or comments?

COMMISSIONER FREEMAN. Mr. Farmer, I want to thank you again for introducing that movie. When you were back in the years when we were involved in the struggle for employment, we heard some statements that were made where many people would say, "Where do we begin?" And you and I and other persons have said many times, "You begin where you're at."

Now as in the case with the restaurant that was referred to, where the lady stated she had been eating for 11 years and there had been in the last 11 years no black person employed, if the lady had complained to the restaurant in the beginning and the practice had been changed then, by now the blacks would at least have had 10 years of employment.

What I would like to know—with respect to this, each of you might comment—is the extent to which we can deal with the elimination of racial discrimination as a matter of Government policy by Executive order; that is not reflected in the report which we have before us. Are there any areas that in the "last hired, first fired report need to be stressed that our Commission has not stressed?

MR. FARMER. Is the question directed to me or to all the members of the panel?

COMMISSIONER FREEMAN. All the members of the panel.

MR. FARMER. Does anyone else care to tackle it first?

MR. GLICKSTEIN. I had one thought when I read the report. There is some discussion of what the EEOC can do and what the OFCC can do. I suppose it would help for the EEOC to issue the guidelines you recommended. I did express doubt as to whether the guidelines would pass judicial muster.

For the OFCC to issue the guidelines, it's hard for me to conceptualize. Generally, a Government contractor, or as a result of getting the contract, is not going to have a layoff problem. So when you negotiate a contract, you wouldn't ask the contractor to come up with some sort of provision for laying off, because they are not going to lay anybody off if they have gotten the contract.

I guess there could be some situations. When you perhaps give a university a Government contract, it might provide for that.

COMMISSIONER FREEMAN. Under the existing Executive order, in which the Government contracts are permitted, do you see areas in which the President could issue a new Executive order which would deal with the question of work sharing? You see, nobody is required

to enter into a Government contract. The carrot approach would be built into the Executive order; and the Federal agency, before the contract would be let, would then present those provisions which would have to be enforced by OFCC.

MR. GLICKSTEIN. My point would be that usually a Government contractor would not be in a position of ever having to face the layoff question, because, as a result of having the Government contract, he presumably would have full employment.

MR. FARMER. Of course, the contract could be cut back.

MR. GLICKSTEIN. The other thing I would quickly mention, I think it might be worthwhile for the EEOC, in working out settlements with companies, to include some sort of a layoff agreement.

In the *Jersey Central Power Company* case, which was cited in the report, the EEOC did make an effort to get Jersey Central to agree that the employees hired as a result of an affirmative action plan would get some special dispensation if there were layoffs, and Jersey Central refused to do that, and that might have made a difference in the case if Jersey Central had done it.

So maybe EEOC should be more aggressive in that regard in the future and work out—if they work out an agreement with a company, to insist that it include some sort of provision for layoff.

MR. FARMER. It should be entirely feasible for the Government, through an Executive order of the President, or through EEOC, to require, or at the very least to suggest, that those companies holding Government contracts, or any other company for that matter, if that can be done legally, to consider alternatives to layoffs when there has to be some reduction in the cost of production, to consider alternatives and alternatives might be suggested.

You have suggested some of them in your report, quite a few of them. And I think it might also be feasible to suggest that when the alternatives to layoffs have been considered and none are found feasible in their specific situation, that then they consider some form of work sharing so as to equalize the suffering and not put the heaviest burden upon those who have been discriminated against in the past—women, minorities, and the young. I would certainly feel strongly that that ought to be done.

MS. BERGMANN. Well, as I have said, I share very strongly with Mr. Hill and Mr. Glickstein the fear that this issue will prove diversionary and will prove to be divisive. Now, he mentioned divisive in the sense of the fight for full employment. I am concerned with that, but I am also concerned with the problem of enforcing fair hiring.

Now, as President Ford keeps trying to remind us, more people are at work now than ever before. There have been a lot of hires—new hires, not just rehires. There have been a lot of new hires, and no one is tending that store. No one is seeing to it that those new hires are on a nondiscriminatory basis. There are plenty of new white faces in that restaurant that I eat in. There are plenty of new white male

professors getting tenure at my university, and very few new black and women faces. Nobody is paying the slightest attention to that.

We have an enforcement problem here. We have, first of all, a problem of getting people who will do the job in enforcement, and we also have a problem in the mode of enforcement. I don't think we know how to enforce these laws, even assuming that we have a good will to want to do it. Part of our problem is that there is not a firm in the country that is in compliance with these laws. And I think the mode of operation which EEOC has adopted is not adequate.

And we need more thought on how to do this. So that I would put the seniority as of only medium priority, rather than high in priority, and I think the fact that remedies for it will alienate powerful supporters of fair hiring and full employment has got to be recognized.

MR. HILL. I just wanted to add a comment.

I think, insofar as the EEOC staff playing a role in trying to achieve this, maybe they ought to be aware of a movement in the labor unions to rewriting of contracts so there is permanent recall right. And maybe this is one of the things mentioned—I don't know if it's in the report—but it seems to me that that would go a long way toward easing some of the problems and some of the feelings involved.

MS. BERGMANN. As a matter of fact, you know, you could argue that the more turnover we have, the more chance we have for homogenizing the work force, for getting more people who have been denied into the better jobs. The more layoffs and rehires—but not of the same people—we have, the more chance we have of applying fair hiring and getting results. But I'm a little leery of that sort of shift, frankly.

CHAIRMAN FLEMMING. Thank you very much.

Mr. Horn?

VICE CHAIRMAN HORN. I would like to wait until after my colleagues finish, Mr. Chairman. I have a substantial number of questions.

CHAIRMAN FLEMMING. All right. Mr. Saltzman?

COMMISSIONER SALTZMAN. I'm not sure I'm getting the message here. I would like to ask a question, because heretofore the panelists throughout the day—you yourselves—have indicated they were very much in favor of our publishing this draft as soon as possible. And now from Mr. Hill and Mr. Glickstein, I'm not sure that I'm getting that same message. Rather, I believe they seem to be saying that this report may have a very negative impact. Is that what you are trying to tell us, or what you have told us?

MS. BERGMANN. Yes.

MR. GLICKSTEIN. No, I don't agree.

I think this problem exists on a variety of levels. If you are talking about constructive seniority for an identifiable black male or woman who has been discriminated against, I say certainly that is an area where some remedy is called for immediately. If you are talking about the sort of problem that existed in the *Watkins* case, where the young men who were given some sort of constructive seniority weren't even

old enough to be employed at the time the company discriminated, that is a more difficult problem.

I don't think you have to deal with every single problem at once. I think there are many, many cases. The situation is almost analogous to the old distinction between *de facto* and *de jure* discrimination. You can concede that if the situation is *de facto*, you probably can't do anything about it. But as we found in the school area, if you dug deep enough, there was almost no situation that was *de facto*.

I think, similarly here, you can concede, if the employer is totally innocent, none of the blacks or women in the work force had in any way been victims of discrimination, then maybe there isn't anything you can do. But on the other hand, if you can show that some people have been victims, then a remedy should be provided.

In addition to that, I think this report is useful to release just to identify what the problems are, highlight the problems, suggest some solutions, get some discussion going about this. To the extent the labor unions are very concerned about some of the types of remedies suggested as being divisive, we need more discussion and suggestions and programs to deal with that.

MR. FARMER. I think the report ought to be issued, and as soon as possible.

I sympathize with, and to some extent share, the concern of the labor movement for what they see as an attack upon seniority, and I certainly agree with Norm Hill that full employment is the ultimate answer, when it does come about.

But I am concerned with the steps that we take in the interim. What do we do until we get full employment? We have got to have some remedies in the meantime, and I think the remedies that are suggested here might be helpful.

I would not personally want to place too much weight to the argument that others might object—some of the white workers. It is an argument, of course. It is a valid, legitimate argument. I wish there was no such objection. But if a public policy is determined by the Federal Government, merely urging more unions to adopt such work sharing programs, and others as have been pointed out in your report, I do not see that that would add to the divisiveness. We have public policies, and our country is a multiple culture country in which there are all kinds of different agendas and different emphases, and one of the functions of public policy is to encourage a certain point of view without increasing the divisiveness. I think that that can very well be done in this case.

COMMISSIONER RUIZ. Yes, I appreciate those words just made, as an old civil rights man. This hearing has given me the opportunity to call attention to an historical footnote. Commissioner Freeman touched upon this in referring to a comment made by Mr. Farmer. I first heard of Mr. Farmer when Vice President Johnson first came to the California west coast. The Vice President at that time mentioned Mr. Farmer.

MR. FARMER. Was it good or bad?

COMMISSIONER RUIZ. It was within the conference—our conference in California. I did not have the pleasure of knowing you.

As Mexican Americans, we were concerned also with problems of faceless neutrality.

This is the first personal contact that I have had with Mr. Farmer over the years, and he has reinforced my original concept made by the Vice President as a knowledgeable and articulate spokesman.

In California we were also concerned with that problem of faceless neutrality. We called then Vice President Johnson's attention to the lack of Mexican Americans in meaningful jobs in New Mexico, where in this area about 40 or 45 percent of the segment of the population were Mexican Americans. The problem was that there were no statistics to prove that Mexican Americans were identifiable, a parallel situation, and it was exciting to me to hear of the development of the concept of color consciousness to eliminate color discrimination in order to better identify victims. And I think it continues to be of highest priority.

Now, I listened to all of the members in our panels this morning, and it was unanimous to the effect that this particular work should be brought out as quickly as possible, because it identifies problems. And as an oldtimer, unless you start identifying problems, you don't even get people to thinking about them. And I am happy to know that the majority, at least, of this panel is in consensus with what the other persons have brought to our attention.

I personally appreciate it, and I have learned a lot here today. Thank you.

MS. BERGMANN. Can I make a remark about these problems?

When you have cancer and you go to the cancer specialist, you won't waste your time talking about your toenail. And I think that's the problem. The EEOC is understaffed; they have got that mountain of complaints on which they are not making very much progress, while we sit and argue about this—and you may not have gotten much argument on this from the people you invited, but there's plenty of argument out there, believe me.

COMMISSIONER RUIZ. I am aware of that. EEOC has now been giving a lot of "right to sue" letters to a lot of people, and even identifying lawyers to go to, and there is a bill in process right now in the Congress for even paying those lawers; it's already passed the Senate.

MS. BERGMANN. Okay. I think, though, the problem is, if you go to the EEOC and look at what cases they are working on, you don't see much about obvious, glaring cases of discrimination. You see stuff about an employer who has a Seventh Day Adventist employee and says, "You can't leave on Friday afternoon." Is that discrimination?

That's what they are spending their time on. That's what the lawyers are doing. There's been a lot of piddling around with defining discrimination, defining the borderline of discrimination—Is that particular practice discrimination? Is this practice discrimination?—and very

little coming down hard on what every man, woman, and child knows is discrimination.

There have been cases which have been in the courts for years after they have been won, and when you go back to the EEOC lawyer, "By the way, did they correct that practice?" she or he will answer, "I don't know."

COMMISSIONER RUIZ. I am very happy to hear your impatience because we are in the same boat.

CHAIRMAN FLEMMING. Most of the witnesses who have appeared before us—in fact, I think all of them today—have emphasized the importance of our nation really moving in a significant way toward the goal and objective of full employment. The members of this panel have also done this. And I think our report reflects our own—the draft of the report—reflects our own convictions along this line, but maybe we should underline it a little bit more emphatically.

MS. SAWHILL. Can I interject a slight note? My feeling was you ought to have that right at the beginning. Where it is now in the report, it only comes up at the very end.

CHAIRMAN FLEMMING. All right.

The second thing that a number of witnesses have underlined during the course of the day is the fact that they think our report should reaffirm what we have put out a good many times relative to affirmative action, and reaffirm the convictions that we have expressed relative to the failure of the departments connected with the Federal Government to enforce in a vigorous way affirmative action concepts and programs. Personally, I agree with that. I think that is lacking in the report. Because when we get into the employment area, I think we should always reinforce our commitments and our convictions along that particular line. But also, as suggested by at least one earlier witness, that the constitutional principles or rights that are at stake in connection with affirmative action in the employment area are also at stake when it comes to layoffs and when it comes to recall, and that we should give careful consideration to seeing to what extent they link up the layoffs and the recalls with these same basic principles.

Now, let me say that earlier in the day representatives of State and city commissions on human rights were very critical of the fact that the EEOC had not given them any guidelines, and they feel that the EEOC has got an obligation to provide them—not them alone—employers and employees—with guidelines. Part of our proposed report deals with that.

As I listen to Mr. Glickstein, I gather you do object—I mean, you take issue—with some of the things that we have included in there as recommendations to EEOC. I assume, however, that you don't take issue with the fact that EEOC really should step in here with guidelines, hopefully guidelines that will rest on a good, solid foundation. But I have the feeling there is a vacuum here at the present time and that the Government is not providing leadership on a very critical

issue, and I am just wondering if I interpreted your point of view there correctly.

MR. GLICKSTEIN. Well, I think there should be guidelines, and I think probably the guidelines that were suggested in this report are probably about as good as any that could be thought of. However, I did express concern that the Supreme Court might have difficulty sustaining those guidelines.

CHAIRMAN FLEMMING. Now, you raise in your presentation—you put a good deal of emphasis on the court decisions dealing with the individual situations. We had our attention called earlier this afternoon to a fifth circuit decision coming out of Mobile, Alabama. It concerned employment of minorities in a particular plant. If it's equal to a representation of minorities in the general population in that area, then you can't challenge successfully an employment practice that in effect denies equal employment opportunity to an individual or that discriminates against an individual.

This was a test, an employment test, and the court said, having been established that this particular company's minority employment was equal to the representation of minorities in the general population of that area, you can't challenge the test on the ground that the test discriminates against the individual black citizen. Now, that's a little—is that or isn't that in conflict with what you were emphasizing?

I'm just fascinated with your emphasis, in light of the discussion we had had. To me, that seems to be a rather dangerous trend, I mean, because it takes it out of the realm of dealing with what has happened to the individual. Has the individual been discriminated against or not?

MR. GLICKSTEIN. Well, in the *Griggs* case, the factor that the Supreme Court paid so much attention to was that the test had to have a disproportionate impact and that in the fifth circuit case, apparently, there was no disproportion.

CHAIRMAN FLEMMING. Yes, there was.

VICE CHAIRMAN HORN. The applicant pool was four times more blacks than is in the population.

MR. GLICKSTEIN. Well, I think the test—if the test itself had a disproportionate impact but the work population of the company reflected the community, I think it could still be challenged. I think the courts have been split on that.

The courts have said—there are other decisions that go the other way, that say if the test has a disproportionate impact under Title VII—in *Washington v. Davis*, where you were not dealing with Title VII but the 14th amendment, there the population of the Washington, D.C., police department was more or less—depending on what statistics you use—more or less reflected the population of the area. However, the test that was given, the hiring test, did have a disproportionate effect, and the court there, as you know, rejected the disproportionate impact test. Unless you could show the test had a discriminatory purpose, the fact that it had a disproportionate impact wasn't enough.

CHAIRMAN FLEMMING. Well, just one other thought I would like to throw out. We did receive testimony from the Congressional Budget Office this morning in which they indicated that their projections over the period of the next few years in terms of unemployment rates were not too encouraging, in that they used an order of magnitude of five to seven—maybe four to six—something of that kind. But anyhow, they didn't project encouraging developments along that line.

Well, I am for putting emphasis on full employment. I am for putting vigorous emphasis on affirmative action and recruiting. And I still can't get out of my mind the people who are the victims, the minorities and women, of what is happening right now. And there clearly isn't any one answer, but it reminds me a little bit, you get into a discussion of desegregation of schools and people say, "The trouble is, you haven't desegregated the communities from a housing point of view."

Of course, my response is, "I'm all for it, but it isn't going to be of any help to today's children and young people. We have to deal with them in terms of the facts of life as they exist at the present time."

And I mean, I can't get out of my mind the members of minorities and women who felt that, at long last, we have got a breakthrough, and then suddenly, they see the rug pulled out from under them.

Now, I appreciate the emphasis of a number of you on the chapter on the work sharing, and I think you are right. I think that can be beefed up, maybe, made a little more practical and specific.

I also appreciate your comments on our maybe going a little too far in trying to speculate on what the courts may or may not do, to lay out the facts as they are and probably drop it at that particular point. I think that was the thrust of one of your comments.

MS. BERGMANN. I wanted to say that I don't think the work sharing should be submitted to a vote of the employees involved, because, generally speaking, this is an "I'm all right, Jack" society. That is, "I'm looking after number one."

And in most cases, the workers will vote against that. And therefore, I think that if one does make that recommendation, I think that you should not include, as was suggested you should, that this be put to a vote of the particular shop involved. I think it should be national policy.

Now, on this matter of the projection of the unemployment, let me say that, first of all, the economic projections—the art of economic projection is not very good. You don't need an economist to tell you that. Secondly, even if it were, these figures are not immutable. Human policies can improve them, and we know how to improve them. The thing which is keeping us from improving them is the fear of inflation, and I would suggest adding a sentence to the report saying that in the future, inflation must be fought in other ways than by deliberately created or tolerated unemployment. I think that's very important. Now, you may be reluctant to get into macroeconomic policy,

but I think it does have a very important civil rights component, as Mr. Hill said.

By the way, I want Mr. Farmer to know that I am not in the labor movement. Quite the opposite. I am a member of the Association of University Professors, which claims not to be a union.

VICE CHAIRMAN HORN. But it's increasingly—

MS. BERGMANN. I have some other minor corrections I would suggest, if you are going to put the report out over my dead body, so to speak. I would suggest the first chapter be either rewritten or junked, because it doesn't speak to the issue. It's rather muddy. I have some other suggestions for eliminating a certain amount of sexist language in the last chapter.

CHAIRMAN FLEMMING. We would appreciate very much having your suggestions along that line.

Steve?

VICE CHAIRMAN HORN. I would like to ask you, Professor Bergmann, you mentioned quite correctly that one of the problems in universities nowadays is that we are still hiring people and a lot of those people that get tenure seem to be white male professors, despite aggressive programs in some instances to attract female and minority persons.

We also face projections of declining enrollments. Many budgets—especially the one in your university and the one I'm at—relate the budget to student enrollment, and, therefore, it's possible within the next two decades there will be cutbacks affecting faculty.

Now, one of the decisions one has to make in a university is a little bit different than one might make in a plant or firm situation, since presumably merit is the essence of the original granting of tenure, and yet we have various labor organizations—and while AAUP is not a union, it has some increasing characteristics, as they have to fight with the AFT [American Federation of Teachers] and others for the faculty loyalties in that direction. And therefore, most boards of trustees, presidents and faculties and public generally and the legislatures will be faced in the next few years with the question of to what degree in a cutback situation—especially if you desire to preserve the gains made with women and minorities coming in at the assistant professor rank—should merit predominate in a layoff or cutback or reduction-in-force decision, as opposed to strictly seniority? And I would like to know what your values and opinions are on this issue.

MS. BERGMANN. Well, again, the gains have been very few. The data indicate that, I believe, the total percentage, for example, of tenure of women has actually gone down or has certainly not advanced. The number of assistant professors seems to have advanced very slightly.

Now, I think in the case of educational institutions, AAUP's answer would be that, so far, that tenure must be the dominating factor.

I would say, though, that there is a problem within universities of role models. That is, we want black students, we want women students

to see blacks and women in positions of authority, in positions of learning, and particularly in positions of authority in those disciplines where they are infrequent. So you might argue that you, just as in some firms there seems to be a provision for giving superseniority to union representatives and people of special skills, you might argue the same thing here.

But I think I would be untrue to my main line if I really took that point.

VICE CHAIRMAN HORN. In other words, you will not give on the seniority principle and say if you used merit as the criteria you might well preserve many women and minorities, because you might be relieving tenured faculty who perhaps have gone out to lunch in recent years, and they might be white males predominantly, and saving younger or newer faculty that reflects a broader cross section of the population?

MS. BERGMANN. While I think there are things to be said for both sides, I hate to be talking out of two sides of my mouth, frankly.

VICE CHAIRMAN HORN. That's why I thought I would give you an example that ought to come close to home.

MS. BERGMANN. Yes, you have, no question about it. But I think, by the way, that we will be getting a better age distribution in universities, and that will take care of itself.

But, as I say, I would like to see the emphasis on hiring. I was the equal employment opportunity officer in my department for about 3 or 4 years. There was not the slightest pressure on me to do anything.

VICE CHAIRMAN HORN. Well, I would agree with all the panel's views on the need for full employment, and while that's fine as a societal goal, reality is that some firms will have a reduction in employment, some universities and colleges and other institutions will have a reduction in employment, since society is unwilling to simply keep people at work when there is nothing to do.

MS. BERGMANN. That's right.

VICE CHAIRMAN HORN. I would like to ask Dr. Sawhill—you were the first of the panel to mention a third group that Commissioner Saltzman had given a little attention to earlier in the day, and that is the teenager. I wonder about the Urban Institute's policies or recommendations, if any, that would have to do with whether the minimum wage laws should be adjusted to provide or encourage employment for, say, the 14- to 19-year-olds in our society, and what might be the public policy implications of said changes, and what are the pluses and minuses?

MS. SAWHILL. The Urban Institute does not take a policy position on such questions. I haven't myself really looked into this question, and the people that work with me directly have not either, although there was a point in time at which we were going to not only look into the issue from a research standpoint, but also conduct some experiments out in the field, which had been mandated by legislation on a

pilot basis, to see what would happen if you had a lower minimum for teenagers. And I believe that mandated pilot program was later killed by union opposition.

So we don't know very much about that, although since you raise the question, I did read in the *Wall Street Journal* just yesterday that someone who is with the Federal Reserve Bank, I believe, in New York, has recently done a study which shows that if one had a lower minimum for teenagers, their unemployment rate would be something like 3 percentage points lower than it actually is.

VICE CHAIRMAN HORN. You mean the national unemployment rate for teenagers? Not the black or minority youth in center city, which ranges anywhere from 40 to 60 percent?

MS. SAWHILL. No, I believe it was the national overall unemployment rate for teenagers.

VICE CHAIRMAN HORN. Which is usually three times the general population unemployment rate.

MS. SAWHILL. However, I am obviously speaking from memory of a newspaper article and can't speak with great expertise about this.

But my opinion is that we do need to move in the direction of providing incentives for employers to give inexperienced workers more of an opportunity to come into the work force and get some training and some experience.

I attended some hearings that Shirley Chisholm held for the National Committee on Household Employment last year, and one of the things that really struck me was a young black woman who came to testify, who said that she went from place to place, looking for a job, and each employer told her, "We can't hire you because you don't have any experience."

And she said to Mrs. Chisholm, "But how can I ever get any experience in the first place if they keep telling me that I have to have it before I can be hired?"

So I think that's a very serious problem.

VICE CHAIRMAN HORN. You mentioned a pilot program that was killed by union opposition. Could you elaborate? I'm not familiar with that.

MS. SAWHILL. Well, I can't elaborate on it.

VICE CHAIRMAN HORN. Was this a Department of Labor-funded program?

MS. SAWHILL. Yes, it was a Department of Labor-funded project.

VICE CHAIRMAN HORN. And they tried to carry it out, but then it was killed due to political pressure of the labor unions on the Secretary of Labor? Is that what I am to infer?

MS. SAWHILL. I think that's what one infers. Again, I don't know the whole story on it.

VICE CHAIRMAN HORN. How recently was this?

CHAIRMAN FLEMMING. When did the law actually change?

MS. SAWHILL. This was about a year and a half ago, probably.

VICE CHAIRMAN HORN. I would like the Staff Director to look into it and give me a briefing on what that is all about. It's the first I have heard of it.

I have a series of questions for Mr. Hill. I remember when the Randolph Institute was begun, and Mr. Rustin went with it, so could you tell me a little bit about the range of research and what the purpose of the institute is?

MR. HILL. Basically, the institute was founded in 1964, essentially, to act as a bridge between the trade union movement and the civil rights movement and to carry out the basic ideas of A. Philip Randolph and Bayard Rustin—Randolph being very much in favor of trying to work out, in the course of mounting a constant campaign against discrimination, a working alliance between the trade union movement and minorities, especially blacks; and Bayard Rustin being especially concerned about the civil rights movement becoming a more political movement in terms of the nature of the economic and social problems now facing minorities.

Toward that end, the A. Philip Randolph Institute now has affiliates in about 180 cities in 35 States, made up primarily of black unionists working on voter registration and get-out-the-vote drives in communities.

VICE CHAIRMAN HORN. It's not a research organization, as such?

MR. HILL. Not primarily.

VICE CHAIRMAN HORN. Does the funding for the institute primarily come from the trade union movement?

MR. HILL. A good percentage of our funding comes from the trade union movement.

VICE CHAIRMAN HORN. We have had a discussion here all day long on work sharing, and there's been some concern expressed about it. One could argue that an early form of work sharing goes by another name, often used derogatorily, and I don't necessarily use it that way, but it's known as "featherbedding." The railroads were particularly noted for this, and where, instead of having a person drive a train 500 miles in a day, as a train is capable of being taken in an 8-hour period with the advances in technology, they have kept it at 100 miles in a day, and crews are shifted, and yet full pay is given to a crew. Does the institute—I notice your position on seniority—do you have a position on featherbedding?

MR. HILL. We haven't taken a specific position on that. In the days when Randolph was active as president of his union, they might have taken one.

MR. FARMER. There's one basic difference between featherbedding and work sharing; that is that featherbedding does not cut the work cost, it keeps it from being cut, while work sharing cuts it.

VICE CHAIRMAN HORN. Why does it cut it? It probably adds to it if you are going to take on 8 percent unemployment and we have the other 92 percent that are employed paying the bills.

MR. FARMER. Suppose, for example, the company wanted to cut, or had to cut, its work costs by 20 percent and planned to lay off 20 percent of the work force. One work sharing alternative would be to have all of the workers there work 4 days out of the week, or 80 percent of the time, and be paid for that. And thus the work costs would be cut.

VICE CHAIRMAN HORN. Okay. That's one option on work sharing. Another option is to have labor costs remain the same to the company, but employ more people, which means the individual workers will suffer a loss, but the corporation as a whole still has the same amount of labor costs and really hasn't had a reduction in expenditures for manpower.

MR. FARMER. That's one possibility.

VICE CHAIRMAN HORN. So there's a range of things that one can go through that affect corporate entities one time and others at other times, and a mixture in between.

MR. FARMER. When we refer to layoffs because of the high work costs and the company has to cut back, that's a different matter. There you are referring to the need for the company to reduce costs, rather than keep the costs the same and employ more people.

CHAIRMAN FLEMMING. Our report calls attention to the *Washington Star*, for example, which is another illustration.

VICE CHAIRMAN HORN. Mr. Hill, earlier today Mr. Mundel of the Congressional Budget Office gave the example of a tax cut of $1 billion resulting in 46,000 new jobs, 17 percent of them occupied by nonwhites and women; and $1 billion, Government-sponsored, federally-funded CETA [Comprehensive Employment Training Act] program which would result in 97,000 new jobs, 27 percent of them occupied by nonwhites. Later in the day, I asked him the relationship between those estimates in the long run, over 12 months, versus the short run. He admitted that his figure was for a 12 months, short-run impact, and that in the long run matters evened out.

Now, as we talk about—as each panel has, in this and other panels—a full-employment economy, I am curious if the A. Philip Randolph Institute has a position on which strategy seems to be the best in the long run to reach this full-employment economy and to provide more jobs for females and nonwhites? Is it strictly a Government fiscal strategy that spends $1 billion a year and has to spend that every year if you are going to employ 97,000 new jobs? Or is it a private sector strategy that has a tax cut, encourages the employment which is then not in the future dependent upon Federal fiscal outlay because it in turn stimulates the economy and people can buy more and so forth? Is there a position you have on this?

MR. HILL. I would say, by implication, since we have taken a position in favor of the Humphrey-Hawkins bill, it would be a mixture. Of course, Government support and Government funding, where necessary, as well as stimulation of the private economy.

VICE CHAIRMAN HORN. Which version of the Humphrey-Hawkins bill are you talking about? I must have heard of 30 in the last campaign months. Do you have a particular version you are wedded to?

MR. HILL. Not essentially, because it's now—

VICE CHAIRMAN HORN. Just the overall concept?

MR. HILL. The basic concept. It's now going through a variety of amendments and changes.

VICE CHAIRMAN HORN. I get hourly reports on it.

MS. BERGMANN. I think the basic concept is that inflation is not going to stand in the way of more jobs. The problem with the Humphrey-Hawkins bill is they don't have a mechanism to control inflation. I imagine they thought it had enough heavy freight. But let me say, by the way, that when you hand out public service jobs, that also stimulates the private economy.

VICE CHAIRMAN HORN. In the long run?

MS. SAWHILL. If you introduce a tax cut, part of the reduction in payment of taxes goes into savings, and therefore, not every dollar by which you reduce taxes, whether it be for businesses or individuals, goes into increased spending. But a dollar of Government spending is a dollar of Government spending, rather than less than a dollar.

VICE CHAIRMAN HORN. But you have a question on whether that's an inflationary effect and are you really saving anything if the cost of living is going up.

MS. SAWHILL. I'm talking about the stimulation which is injected into the economy.

VICE CHAIRMAN HORN. Does the Urban Institute have a study on what the alternative options might be and their impact on both the treasury and individuals generally? Because I would love to have one for the record if you have a paper on this.

MS. SAWHILL. Not on this particular subject, but all I am saying is that spending is more stimulative than tax cuts, dollar for dollar. It's also not true that you can have a one-time tax cut and then expect that to generate full employment without doing anything more. You have to maintain that tax cut from year to year until something new happens to necessitate a change in the course of macroeconomic policy.

I do think that your original question about CETA raises the questions of whether programs like CETA can't get at structural pockets of unemployment better than macroeconomic policy, and I think that they probably do, since those policies are aimed at the very groups whose unemployment rates are disproportionately high.

VICE CHAIRMAN HORN. That was, by the way, Mr. Mundel's differences in the statement of the problem. I merely asked if there was a difference in the long or short run. His answer was, in the long run it evens out.

Mr. Hill, one last question. In your testimony you said the A. Philip Randolph Institute favors a full-employment economy, and then you

used the figure a 3 percent unemployment as the criteria for a full-employment economy, I believe. Is that the position on the institute, that 3 percent would be the equivalency of a full-employment economy?

MR. HILL. I don't think we have a firm and fixed percentage position, but I was saying, at least in the context of certain other problems, that that would certainly be a major improvement, in terms of where we are, if that was adopted as a standard. We do take into consideration that, given the economy of the size in this country, that there will probably be a certain percentage inevitably—with seasonal changes in jobs, changes in the population—that will reflect that. Whether that is 2 or 3 percent can be debated.

VICE CHAIRMAN HORN. Obviously, my concern is this. Since I don't think anybody should be unemployed if they want a job, and when you settled for a 3 percent unemployment—which I realize is the easy talk economists make and public policymakers make—it probably means a 9 percent minority unemployment or 6 percent, if the trend of the last two decades means anything, when you compare national unemployment rates with the nonwhite unemployment rates. It's almost—since 1954—double or triple every year. I just don't see where that helps minority groups that much when one settles for a 3 percent rate.

MR. HILL. In that context, we are not talking about settling. We are referring to the fact that, insofar as job changes, seasonal changes, people going in and out of the labor force for reasons other than there not being jobs available—but we are not accepting 3 percent in terms of unemployment.

VICE CHAIRMAN HORN. Mr. Glickstein, as you know, I have a high respect for your legal ability and your analytical mind. However, you said a most interesting statement in the course of your testimony that I am just now trying to find. You said that every white male bears some burden for discrimination in this country. You noted later this was a theory of justice you were postulating. I would like to pursue that. Are you telling me that a white male living in the wilds of Montana, under your theory of justice, bears the burden for discrimination in this country?

I am curious what your historical precedents are and whether any other society has adopted this theory of justice? Law professors are used to hypothetical questions.

MR. GLICKSTEIN. I think that other societies have adopted that principle of justice. In Germany, the society took responsibility for what was done to the Jewish population in Germany in the 1930s, and they did adopt a massive compensation program which is still in effect. There was a book written a few years ago by a member of the Yale faculty, Boris Bitker, *The Case For Black Reparations*, and Professor Bitker relied rather heavily on the example of what Germany did.

I suppose another example in our own society, every American has taken some responsibility for what we have done to the American Indi-

ans and there are public policies that prefer and favor Indians. Title VII itself has provisions in it that prefer Indians.

VICE CHAIRMAN HORN. I would agree with you in a Government-adopted policy to compensate some group, in that we pay taxes and it's borne more by the individual who pays a higher progressive tax than one who doesn't.

Your mention of Germany intrigues me because the first thing, when you mentioned a group-guilt justice, that I thought of was Germany, and it wasn't Adenauer's compensation for what Germany had done. And I just wonder how a society is to pursue the group-guilt view as a way to rectify past discrimination.

COMMISSIONER RUIZ. I have noticed in international law, for example, under the German law, if you go by a lake and somebody is drowning, it's a duty on your part to go and try to save the man. It's just the opposite in the United States. If you see a man drowning, if you want to assist him and he drowns, he can sue you. We are beginning to adopt this good samaritan principle for the first time, but in Germany there is this affirmative duty as part of the general overall picture to do something.

VICE CHAIRMAN HORN. But the question is not on an affirmative duty. The question is, is there a theory of justice in any other society, such as you advocate, which would condemn a class based on the race and sex of that class? Because that's what your theory is.

The only one I can think of is Nazi Germany condemning Jews because of their religion and various and sundry other things.

MR. GLICKSTEIN. And then the German successor of Nazi Germany, Adenauer's Germany, and the present Germany, taking it as a responsibility to overcome the effects of that past discrimination, to compensate.

VICE CHAIRMAN HORN. But it's all of Germany that takes it as a responsibility, be they Germans or nationalized Americans living in Germany, males or females. It's not a class-section theory of justice.

MR. GLICKSTEIN. But the beneficiaries are a class.

VICE CHAIRMAN HORN. My quibble is your saying white males should bear the burden.

MR. GLICKSTEIN. I think in executing that policy, just as the Supreme Court in *Franks v. Bowman* expressed concern to remedy discrimination of identifiable victims of discrimination, I also think that, rather than placing the burden on identifiable people to remedy discrimination, the more desirable policy is for the Nation as a whole to somehow share that burden. And I do think you create some of the problems Dr. Bergmann and Norman Hill spoke about when there are identifiable white males, for example, that are laid off as a result of some affirmative policy.

I think in a way it's a kind of irony that the UAW spoke about in the brief in the *Franks v. Bowman* case. The employer is responsible for the discrimination. The employer is the one that had discriminated,

had a discriminatory policy, and yet some white males are paying for that discrimination rather than the employer. And I think we have to adopt policies where the Nation as a whole is going to bear the costs. We do that in a lot of areas. It would have been appropriate to require U.S. Steel to close down in Pittsburgh for the pollution they were involved in, but instead of doing that, and instead of economic consequences that would have flowed from that, they have agreed to spend a lot of money dealing with the problem over the years, and we are all going to pay for that.

VICE CHAIRMAN HORN. You and I aren't going to disagree on that. I questioned the UAW representative when he said, "Let us charge the employer." I said, "if the union committed discrimination," which they have, both UAW and the building trades, over the years—"would they not justifiably be charged?" He wasn't quite willing to go that far, but he did say whoever committed it should be charged.

That's all I have, Mr. Chairman.

COMMISSIONER SALTZMAN. As a brief footnote to the discussion, Mr. Glickstein mentioned the Biblical dictum of an eye for an eye. He indicated what he meant was a fair concept of justice in the Biblical tradition. But that verse implies a prohibition against cruel and unusual punishment. Is that what you had reference to?

MR. GLICKSTEIN. I was applying it more literally. I mean that is a dictum in the Bible, but we usually don't apply it. We don't exact an eye for an eye.

COMMISSIONER SALTZMAN. Well, it's a technical phrase in the Bible that is not to be taken literally, as the Bible later explains, and as rabbinical tradition explains. It's a prohibition against cruel and unusual punishment in our contemporary terms, but not a rule for punishment or retaliation. It prohibits cruel and unusual punishment.

CHAIRMAN FLEMMING. On that note, I think probably—we have gone 15 minutes beyond our adjournment time, and the Commission does have a meeting tonight—on that note I think we will end.

But before I do, may I express to the members of this panel our gratitude for the contribution that you have made to our thinking. We are grateful to you for coming.

[At 5:45 p.m. the hearing was adjourned.]

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