

THE REAUTHORIZATION OF THE U.S. COMMISSION ON CIVIL RIGHTS

HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE ONE HUNDRED FIRST CONGRESS FIRST SESSION

ON

PROPOSED LEGISLATION AUTHORIZING FUNDS
FOR THE U.S. COMMISSION ON CIVIL RIGHTS

JUNE 22, 1989

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U.S. COMMISSION ON CIVIL RIGHTS

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THE REAUTHORIZATION OF THE U.S. COMMISSION ON CIVIL RIGHTS

THURSDAY, JUNE 22, 1989

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:30 p.m., in room SD-526, Dirksen Senate Office Building, Hon. Paul Simon (chairman of the subcommittee) presiding.

Also present: Senator Specter.

OPENING STATEMENT OF HON. PAUL SIMON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator SIMON. The subcommittee will come to order. We are having a hearing on what we do in terms of the reauthorization of the Civil Rights Commission. The work of the Commission has always been important. It is, it seems to me, infinitely more important as a result of the recent Supreme Court decisions. We want to look at how we should proceed on this.

I might mention that one of those decisions is the *Richmond v. Croson* decision. I am introducing legislation today that, in effect, would reverse that particular decision. From my perspective, and I think the majority of the Members of Congress, *Richmond v. Croson* is an unfortunate decision.

But the immediate question we face is, what do we do on reauthorization of the Civil Rights Commission. We are pleased to have our witnesses today and we are just going to have a discussion here.

If they will all join us here. Mr. Robert Burgdorf, Ms. Linda Chavez, Mr. Louis Nunez, Dean Irwin Griswold, Dr. Stephen Horn, and Dr. Arthur Flemming, and then, I understand, Dr. Benjamin Hooks will be joining us shortly.

If all of you can take your places here. With the exception of Dr. Hooks, who has not actually been a member of the Commission, all the rest of you have been either advisors or members to the Commission and Dr. Flemming has been a chairman of the Commission.

Dr. Flemming, if I may, we will try to impose the 5-minute rule on everyone in terms of opening remarks and then we will have a more general discussion here. Dr. Flemming, let me call on you first.

STATEMENT OF DR. ARTHUR S. FLEMMING, FORMER CHAIRMAN,
U.S. COMMISSION ON CIVIL RIGHTS

Dr. FLEMMING. Mr. Chairman, thank you very much. I appreciate the opportunity of discussing the draft bill for a revitalized Civil Rights Commission.

In a recent report, entitled, "One Nation, Indivisible," the Citizens' Commission on Civil Rights on which I serve as chairman, said,

Unless the new Administration is willing to join the Congress in reconstituting the U.S. Commission on Civil Rights as an autonomous, bipartisan agency with members who are both independent and of unquestioned ability, Congress should refuse to reauthorize the agency.

Mr. Chairman, I believe that if the principal components of your draft bill were enacted into law, Congress would have laid the foundation for the achievement of the objectives set forth in our report.

In the Citizens' Commission report, we identified two types of actions that would need to be taken in order to achieve our recommended goal.

Mechanically, we said, such a transformation can occur by creating a new commission with the original system of Presidential appointments and Senate confirmation of commissioners, along with the provision allowing only for removal with cause. In practice, we said, however, it can only occur if the President is prepared to appoint distinguished citizens whose independence is unquestioned.

The draft bill would create a new commission. This is consistent with the Citizens' Commission recommendation. Personally, I believe that this clean break with the present is essential.

The draft bill identifies two options for the appointment of commissioners, namely, appointment of the entire membership by the President or appointment of three members by the President, two by the President pro tempore of the Senate, and two by the Speaker of the House.

I believe the goal of having the Commission composed of distinguished citizens whose independence is unquestioned, can be achieved under either option. I believe that it will be achieved under either option, however, only if those who believe that the existence of a bipartisan, independent Civil Rights Commission is a must in this day and age and are willing to assist the appointing authority or authorities in conducting a positive recruiting program that will make the dream a reality.

At this point, personally, in view of developments in both the executive and legislative branches, I favor the option that would divide the appointing authority between the President, President pro tempore of the Senate, and the Vice President.

I hope that the bill which is finally reported to the Senate will set the boundaries for the Commission's activities by clearly identifying the affirmative responsibilities that Congress expects the Commission to handle—responsibilities which will be responsive to today's vision for civil rights.

The Supreme Court decisions of the last few weeks underline the need for dealing with the Civil Rights Commission issue with a sense of urgency. Linda Greenhouse of the New York Times says

that the Court all but guaranteed that civil rights would leap to the forefront of domestic politics. That comment takes me back to 1956.

I was a member of President Eisenhower's Cabinet. We were considering which recommendations to make to the Congress in the light of the Supreme Court's decision in *Brown v. Board of Education*, a decision which caused civil rights, at that time, to leap to the forefront of domestic politics.

One recommendation was to create a bipartisan, independent Civil Rights Commission. President Eisenhower reacted very positively, stating that we needed such a body in order to get the facts on top of the table. It was included in the package and became a part of the Civil Rights Act of 1957.

Now, a backward movement by the Supreme Court, as compared with the forward movement of 1954, makes it all the more imperative for us to have a bipartisan, independent Civil Rights Commission that will get the facts on top of the table and on the basis of those facts, will provide us with a recommendation that can help turn the backward movement in the Supreme Court into a forward movement in Congress.

Mr. Chairman, we deeply appreciate the timely leadership on your part and hope that the Commission will act and act soon to give the Nation, once again, the services of a bipartisan, independent U.S. Commission on Civil Rights—not that the Commission will act, but the Congress will act and act soon to give the Nation once again the services of a bipartisan, independent U.S. Commission on Civil Rights.

[The prepared statement of Dr. Flemming follows:]

OUTLINE OF TESTIMONY

BY

ARTHUR S. FLEMING
CHAIRMAN, CITIZENS' COMMISSION ON CIVIL RIGHTS
FORMER CHAIRMAN, U. S. COMMISSION ON CIVIL RIGHTS

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY
U. S. SENATE

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June 22, 1989
562, Dirksen Senate Office Building

I. Introduction

- A. I appreciate the opportunity of discussing the discussion draft bill for a revitalized Civil Rights Commission.
- B. In a recent report entitled "One Nation, Indivisible" the Citizens' Commission on Civil Rights¹ on which I serve as Chairman said:
- "Unless the new Administration is willing to join the Congress in reconstituting the U. S. Commission on Civil Rights as an autonomous bi-partisan agency with members who are both independent and of unquestioned ability, Congress should refuse to reauthorize the agency."
- C. Mr. Chairman, I believe that if the principal components of your draft bill were enacted into law, Congress would have laid the foundation for the achievement of the objective set forth in our report.

II. Body

- A. In the Citizens' Commission report we identified two types of actions that would need to be taken in order to achieve our recommended goal.
1. "Mechanically," we said "such a transformation can occur by creating a new Commission with the original system of presidential appointments and Senate confirmation of Commissioners, along with a provision allowing only for removal with cause."
 2. "In practice," we said, "however, it can only occur if the President is prepared to appoint distinguished citizens whose independence is unquestioned."
- B. The draft bill would create a new Commission.
1. This is consistent with the Citizens' Commission recommendation.
 2. Personally I believe that this clean break with the present is essential.
- C. The draft bill identifies two options for the appointment of Commissioners, namely, appointment of the entire membership by the President or appointment of three members by the President, two members by the President pro tempore of the Senate, and two members by the Speaker of the House of Representatives.
1. I believe the goal of having the Commission composed of "distinguished citizens whose independence is unquestioned" can be achieved under either option.
 2. I believe that it will be achieved under either option, however, only if those who believe that the existence of a bi-partisan, independent civil rights commission is a "must" in this day and age are willing to assist the appointing authority or authorities in conducting a positive recruiting program that will make the dream a reality.
 3. At this point personally, in view of developments in both the executive and legislative branches, I favor the option that would divide the appointing authority between the President, the President pro tempore of the Senate and the Vice President.

¹ The members of the Citizens' Commission on Civil Rights are: Birch Bayh; William H. Brown, III; Arthur S. Flemming; Frankie Freeman; Erwin N. Griswold; Aileen Hernandez; Theodore M. Hesburgh; Ray Marshall; William M. Marutani; Eleanor Holmes Norton; Elliot L. Richardson; Manuel Ruiz; Murray Saltzman; William L. Taylor; Harold R. Tyler

- D. I hope that the bill which is finally reported to the Senate will set the boundaries for the Commission's activities by clearly identifying the affirmative responsibilities the Congress expects the Commission to do--responsibilities which will be responsive to today's vision for civil rights.
1. For example, the Citizens' Commission on Civil Rights in its report, "One Nation, Indivisible" urged that the Administration recommend and the Congress give "priority consideration" to legislation which gives more people access to the equal opportunities guaranteed by civil rights laws."
 2. A bi-partisan, independent U. S. Commission on Civil Rights could be of tremendous help to the executive and legislative branches in dealing with this fundamental issue just as the old U. S. Commission on Civil Rights was of tremendous help in dealing with the issue of voting rights.
 3. Language might be included in the bill which would make clear that the Commission should be concerned not only about rights of access but also about opportunities for access. ,

III. Conclusion

- A. The Supreme Court decisions of the last few weeks underline the need for dealing with the Civil Rights Commission issue with a sense of urgency.
1. Linda Greenhouse of The New York Times says that "the Court all but guaranteed that civil rights would leap to the forefront of domestic politics."
 2. That comment takes me back to 1956.
 - a. I was a member of President Eisenhower's Cabinet.
 - b. We were considering which recommendation to make to the Congress in the light of the Supreme Court's decision in Brown v. Board of Education--a decision which caused civil rights to leap to the forefront of domestic politics.
 - c. One recommendation was to create a bi-partisan, independent civil rights commission.
 - d. President Eisenhower reacted very positively stating that we needed such a body in order "to get the facts on top of the table."
 - e. It was included in the package and became a part of the Civil Rights Act of 1957.
 3. Now a backward movement by the Supreme Court--as compared with the forward movement of 1954--makes it all the more imperative for us to have a bi-partisan, independent civil rights commission that will get the facts on top of the table and on the basis of those facts, will provide us with the recommendations that can help turn the backward movement in the Supreme Court into a forward movement in Congress.
- B. Mr. Chairman, we deeply appreciate this timely leadership on your part and hope that the Commission will act and act soon to give the nation once again the services of a bi-partisan, independent U. S. Commission on Civil Rights.

Senator SIMON. I thank you, Dr. Flemming. I am pleased to see Dr. Benjamin Hooks has joined us here. I am going to take the rest of these witnesses first before I call on you, Dr. Hooks.

Dr. Stephen Horn, a former Commissioner and Vice Chairman of the Commission and former president of California State University at Long Beach. It is good to welcome you, Dr. Horn.

**STATEMENT OF DR. STEPHEN HORN, FORMER COMMISSIONER
AND VICE CHAIRMAN, U.S. COMMISSION ON CIVIL RIGHTS**

Dr. HORN. Thank you, Mr. Chairman. I commend you on the thoughtful and recent proposal you have submitted. I think the Commission should be reestablished. It needs new faces at both the commissioner and the staff levels. It needs to take a fresh look at the status of civil rights in our country.

One of the key roles of the Commission is to give very careful and reasoned consideration to how the Federal Government carries out the policies that are on the books put there by Congress or executive order or by judicial decision to prevent denial of equal protection of the laws and the right to vote to our fellow citizens.

The Commission cannot solve the civil rights problem. The Commission can goad those who have the authority and the resources to do their duty, carry out the Constitution, and help achieve some of the solutions that need to be achieved in civil rights. Many national administrations look on reports of the Commission at some time in their career as carping.

In my 13 years on the Commission as Vice Chairman, member, Acting Chairman, I found the reports constructive. I found that the members agreed, usually overwhelmingly, on what should be done regardless of party. Some were Independent; some were Democrats; some were Republicans.

In the 13 years I served, 1969-82, I cannot recall one decision that was made on a partisan basis. I feel very strongly that the President should nominate, the Senate should confirm these individuals.

If you go the route of President pro tempore and Speaker, I would recommend you increase the size of the Commission from seven to eight, permit the President to appoint four, the Speaker two, the President pro tempore two, and have the rule which is in the existing law that not more than half the Commission, at any point in time, can be of the same political party, whatever that particular party might be.

Over the years, many have been kind enough to say the Commission was the conscience of the Nation. I think that is true. I think the type of appointment, as Dr. Flemming has suggested, need to be people with a distinguished record in the field, not necessarily representatives of particular civil rights constituencies, but people that care about the solution to the civil rights problem.

I think service on the Commission is much more than simply holding a job. I would suggest, in terms of some of the other matters that you have in the bill and I have outlined a series which will be in the record and some of your staff has seen, that as you move from the appointment phase and look at who should appoint

the Chair, the Vice-Chair and the staff director, again I feel that basically, the President should make that appointment.

You have language suggesting a specific term. I do not really object to that of 3 years for those three officers, but I would suggest that it is somewhat demeaning if a Chair is doing his or her duty to have to go hat in hand and seek renewal as Chair from the White House.

Before and while I served, we had three Chairs designated by Presidents—John Hannah, Theodore Hesburgh, and Arthur Fleming. Both of them served at pleasure. All three of them served more than the 3-year appointment provided in the bill. I think it can work. They served under different administrations of different parties than those of which they were a member. I think what it needs is good faith on everybody's part.

I am confident that with the current administration, you would have the type of appointees that President Eisenhower had originally put on the Commission and other Presidents did also.

In terms of the duties of the Commission, I think it has got to be very clear that the Commissioners, in their corporate capacity, are the policy makers of the Commission. In the past, we have had too much diversion of energy and conflict between the Commission, as a collective body where each member's vote is the same as every other, even if one is Chair or Vice-Chair, chairmen and staff directors.

The staff director, even if nominated by the President, confirmed by the Senate, should report to the Commission, not run an independent fiefdom if something is to be accomplished and not just bureaucratic games. So, regardless of your system—and you have suggested perhaps the Commission could appoint and that is not an unreasonable view—but if we believe basically that executive officers—and these are executive officers—ought to be nominated by the President, I would suggest that whoever is President at a point in time when there is a vacancy should make that appointment.

I agree with you on the limitation on the President's right to remove. I do not think that should be a willy-nilly judgment. It should not simply be because a current administration disagrees with what the Commission is doing because that Commission should report to Congress—does report to Congress—as well as the President, as well as the court.

I enthusiastically support your authority to have the Commission file an amicus curiae brief. The Commission has long sought that authority when I was on it, and they have sufficient data and should have data to make that a meaningful brief over time. I think your idea of an annual report is also excellent. We have done that in parts of the 1970's and 1980's.

I would suggest though, if we are not just going to have rhetoric in those reports that you perhaps add language where you ask for the status on civil rights in the United States in the political and socioeconomic quality of minorities and women which states this, as much as feasible, the report should use, as a basis for comparison in measuring progress, the status of the white male in various categories.

We did that in what I think was one of the best reports that the Commission has turned out, using basic census data, so you have a

real standard by which one can say, yes, progress has been made for this particular protected group or not.

I am sure we are going to have a difference of opinion on this panel on advisory committees. Your bill says "shall," I would respectfully suggest we change that to "may," unless the Commission can be assured of another \$10 million to support advisory committees. Resources at the level that have been given the Commission are, very frankly, too short to have a 50-State, and even territory and DC—advisory committee apparatus. It might be useful in some States. I do not think it should be mandated in all States.

When I joined the Commission in 1969, we had the Littlejohn Commission report on who are the members of the advisory committees. Generally they found they were white male Democrats over 40. Well, I am not going to object to that, per se, given the chairman being a white male Democrat over 40. But we did think that it was in order to have people of different political views, different races, religions, gender, ages—senior citizens as well as younger people.

The Commission did a very good job in trying to assure that balance and I would suggest that if you go for the advisory committees, you ask that they be balanced as to political affiliation, representation in race, color, ethnicity, religion, sex, age, handicap, language, disability, and national origin.

I think also it has got to be clear, as I suggested earlier, that if the Commission is the policymaking body of the Commission—in other words, the seven Commissioners, then the Commissioners should be on a higher Federal executive salary scale than the staff director. I think it creates confusion in an administrative and management sense if they seem to be two, co-equal fiefdoms that occasionally, in the past, have not been talking to each other.

In terms of your language on the individual who is defamed, degraded, or incriminated, I commend you for that. I merely say that perhaps it should not only be in the appendix as you suggest, but the Commission should be urged, where appropriate, to put it in the text of their report.

Basically, those are the principal recommendations that I made, although there are a lot of smaller recommendations. I would be glad to respond to questions later in the session.

[The prepared statement of Dr. Horn follows:]

REMARKS OF
STEPHEN HORN
TRUSTEE PROFESSOR OF POLITICAL SCIENCE
CALIFORNIA STATE UNIVERSITY, LONG BEACH
ON THE
DISCUSSION DRAFT OF LEGISLATION
TO REESTABLISH THE UNITED STATES COMMISSION ON CIVIL RIGHTS
BEFORE THE
SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION
JUNE 22, 1989

Mr. Chairman:

I appreciate the opportunity to appear before you this afternoon in order to comment on your Discussion Draft to reestablish the United States Commission on Civil Rights.

The Commission should be reestablished. It needs new faces at the Commissioner and staff levels. It needs to take a fresh look at the status of civil rights in our nation.

You are to be commended for providing a solid and thoughtful proposal whose passage will, hopefully, restore the Commission to its original role. That role is to be a thorough and reasoned reviewer of the effectiveness of federal policies in implementing the Constitution of the United States and the laws, executive orders, and judicial decisions made in accord with that Constitution regarding the right to vote and to have that vote counted, and in eliminating discrimination or a denial of equal protection of the laws in specified areas.

From time to time since the establishment of the original Commission during the Eisenhower administration, some have looked to the Commission to serve as the conscience of the nation. Those who serve on the Commission must see their role as a solemn duty to assess the implementation of our laws and regulations. Service on the Commission must be more than simply a job. Those appointed to the Commission must be independent of political and constituency pressures.

There should be vigorous debate concerning reasonable solutions to the difficulties that still confront our nation in assuring the fulfillment of rights for all Americans regardless of their race, color, religion, sex, age, handicap, language, disability, or national origin. But once that debate is over, a majority of the Commission must determine a course of action. And a minority of the Commission, even if it is but a single Commissioner, must also have the right to dissent in writing and to make known the rationale for the approach and views which are strongly held.

4 In the thirteen years I served as a member of the Commission and the eleven I was Vice Chairman or Acting Chairman, I do not recall a decision that was made on partisan grounds. Some members were independents, some were Democrats, and some were Republicans. Commissioners agreed and disagreed with civility. Their focus was on the issues, not on each other's motives.

Although some in every national administration are likely to regard any report of the Commission as carping, I would like to think that the dozens of reports which we issued between 1969 and 1982 were constructive in nature and honest in supporting evidence. While each of us were part-time commissioners, we were working members who took our responsibilities seriously. We knew that neither we nor the government had all the answers as to how we might break the barriers which block millions of our fellow citizens from opportunity as a result of their socioeconomic class, race, ethnicity, and/or gender.

In reviewing your Discussion Draft, I approached the task on the assumption that the

Commissioners, not the Staff Director, must establish the basic policies of the Commission. Although also nominated by the President and confirmed by the Senate, the Staff Director should be the principal employee of the Commission and follow the guidance of the Commission in its corporate role. Similarly, the Chairman should be the principal voice of the Commission, but not a third center of power--or agency administration--separate from the majority of the Commission or its Staff Director.

As to specific comments on the Discussion Draft, they are as follows:

Section 3. MEMBERSHIP OF COMMISSION

(a) Appointment.

I favor presidential nomination of all seven commissioners with confirmation by the Senate.

If it is decided to split the source of appointment, so that the President appoints three and the President pro tempore and the Speaker each two, I would increase the size of the Commission from seven to eight members and have the President appoint four and the two Congressional leaders each appoint two. Using either the all-presidential or half-presidential method, I would require that not more than half of the appointments could come from the same political party.

(b) Terms of Office, Vacancies, and Dismissal.

If terms are to be set, a six year term with a renewal for a maximum of twelve years seems reasonable.

I do agree that the President's removal authority should be limited to neglect of duty or malfeasance in office.

(c) Chair, Vice Chair, and Staff Director.

As I have suggested earlier, I believe that, regardless of source of appointment, the Staff Director must be subordinate to a majority of the Commission. Unless those lines of

authority and responsibility are very clear, there will be an endless diversion of energy that ought better be applied to the major civil rights problems that still confront our nation.

I prefer having the President designate the Chair, Vice Chair, and Staff Director. I do not object to a fixed term of three years although for a poor choice that is too long a period and for a good choice it creates unnecessary anxiety if one has to curry favor with White House staff in order to be extended beyond three years. Between 1957 and 1982, the Commission had three Chairmen: John Hannah, Theodore Hesburgh, and Arthur Flemming. Each of them was an amazingly able public servant. Each served for more than three years. Personally, I would think it demeaning to require any of them to seek an extension of their term.

If the Staff Director reports to the Commission and is not to become an independent power base, then members of the Commission should be compensated at a higher level of the Federal Executive Salary Schedule than the Staff Director. Executive Level II is too high for the Staff Director. I would think that Executive Level IV would be more appropriate; at a maximum the Staff Director's salary level should not be higher than the schedule for the Commissioners, even though they are part-time.

Section 4. DUTIES OF THE COMMISSION.

To make explicit the supremacy of the members of the Commission in determining the policies of the Commission on Civil Rights, I would suggest the addition of language along this line:

"The policies of the Commission shall be made by a majority vote of the Commissioners acting in their corporate capacity as a Commission. The implementation of those policies shall be the responsibility of the Staff Director who shall report to the Commission once confirmed by the Senate."

Section 4 (b) (3) specifies the scope of the "national clearinghouse for information

concerning discrimination or denials of equal protection of the laws under the Constitution..." In line 5 on page 8, I would reinsert "but not limited to" before "the fields of voting, education, housing, employment, the use of public facilities, and transportation, or in the administration of justice;..." I do not believe we can anticipate all relevant areas of concern in the years ahead. That language was in the Civil Rights Act of 1957, as amended.

(d) Amicus Curiae Briefs.

I am delighted that you have provided for the Commission to "submit an amicus curiae brief to the Supreme Court of the United States on any matter within the jurisdiction of the Commission, if a majority of the members of the Commission approve the submission of such brief." The Commission has long sought such authority. By the very nature of its work, the Commission has brought together substantial data that ought to be useful to members of the Court in many of the civil rights matters which come before them.

(e) Reports.

I commend you on requiring an annual report from the Commission. Such a report would be timely in raising our nation's level of consciousness concerning civil rights. You have specified useful categories for the Commission to utilize in its report. I would make two suggestions in this regard. So that there might be a standard by which "progress"--or a lack thereof--might be judged and, over time, comparisons might be made, I would suggest that language be added to (e) (1) (A) "the existing status of civil rights in the United States" and (B) "the existing status of the political, social, and economic equality of minorities and women" as follows:

"as much as feasible, the report should use as a basis for comparison in measuring progress the status of the white male in various categories."

In (e) (1) (E), I would add to "any other information that the Chair determines appropriate," the following: "or a majority or individual member of the Commission." From

the beginning the Commission has recognized the right of each Commissioner to file additional views on any report. It is important that such a free flow of ideas be encouraged, not precluded.

In (e) (2) (A) where "the Commission is authorized to appraise the laws and policies of each State and the Federal government with respect to denials of the right to vote and the political participation of minority groups,..." I would add "but not limited to" after "including" and before "African Americans" in line 2 on page 10. Again, my reason is to be inclusive, not exclusive. Some of the groups legitimately recognized in 1989 would not have been recognized in 1957 when the Commission began.

I would continue the language that the Commission should study discrimination based on national origin. Such discrimination regrettably does still exist and should not be ignored.

Section 5. Powers and Duties of the Commission.

(b) Advisory Committees.

I would not mandate the Commission to establish an advisory committee in each State. Thus, I would change "shall" to "may" in line 14 on page 11.

When I joined the Commission in 1969, one of the first issues that confronted us was the composition of the various state advisory committees (SACs). A study showed that they were largely dominated by white male Democrats over 40 years of age. As Commissioners, we consciously set about to broaden the representation on these committees to include women as well as men of different political views, races, religion, and ages--senior citizens as well as young Americans--among other categories. If you decide to mandate state advisory committees, I would add the following language after "State" in line 16 on page 11:

The advisory committees shall be "balanced" as to political affiliation and have representation as to race, color, ethnicity, religion, sex age, handicap,

language, disability, and national origin."

Although some of the state advisory committees have done very good work in studying the civil rights situation in their jurisdiction, problems have arisen from time to time. The work of these committees is usually confused with the work of the Commission. The committees and their chairs hold press conferences. Occasionally an over-eager chair with political aspirations has used the state advisory committee as a forum for personal publicity.

However, those are minor concerns compared to more major ones. Basically, these committees use too high a proportion of very limited Commission resources compared to the work that is done. To be successful, these committees need the support of regional commission staff and such support obviously diverts staff from supporting more national programs.

When the Commission made a conscious decision to undertake a major national effort and to focus on public school desegregation in the mid-1970s and set about redirecting all Commission resources in order to do so, the screams from the states and the regional offices were loud and clear. A lot of pet projects had to be shunted aside in the process. The Commission did involve the state advisory committees and some good individual reports on school desegregation did result.

These state advisory committees do provide a political base for the Commission. Some see an advantage in that. Overall, these committees have been sacred cows. As with legislative bodies, the Commission has often found it difficult to make the tough choices and thus particular projects were authorized to pacify this or that particular group to show that the Commission "is doing something for them." The Commission must focus its efforts in a few limited areas if it is to make a difference.

To be effective, the Commission must seek to leverage the federal agencies which are funded to carry out various civil rights duties and responsibilities. The Commission

cannot "solve" all of the civil rights problems. But it can call to the attention of the responsible leaders in the legislative, executive, and judicial branches where the opportunities for change and action lie.

Section 6. COMMISSION HEARINGS.

(h) Censure and Exclusion.

Since the Chair and Vice Chair of the Commission are not always able to preside at a hearing held by the Commission as a whole or a subcommittee of the Commission, language should be added after "Vice Chair" on lines 5 and 6 of page 16 as follows:

"or the individual designated by the Chair to act as Chair at a hearing of the Commission."

(i) Defamation, Degradation, or Incrimination.--

(6) Verified Answer.

(D) Appendix to the Report.

Your concern for protecting an individual whom the Commission might tend "to defame, degrade or incriminate" is a very legitimate one. Thus, I was pleased to see that the answer provided the Commission by "each individual defamed, degraded, or incriminated in the report" would--in (D) --"be published as an appendix to such report." That is appropriate as a minimum. I would also suggest a revision of (D) as follows:

(D) Appendix to the Report. --Such answer shall at a minimum be published as an appendix to such report. The Commission may also decide to incorporate the answer in the relevant section(s) of its report." (Additions in italics)

This language would encourage the Commission to be fair and not to bury the answer of such an individual in an appendix attached to the report.

(l) Copy or Transcript.

If you decide to authorize State Advisory Committees and they continue to hold

hearings even though they do not have the subpoena power, I would add after "Commission" on line 24 of page 19 "or State Advisory Committee." That language would require that "an accurate transcript shall be made of the testimony of all witnesses at all hearings..." including those of the various State Advisory Committees.

I do not understand the reason for "(3) Exception.--" on line 5, page 30. Why should not a witness who testifies in executive session be able to secure a copy of the official transcript of that portion of the executive session which pertains to the questions he/she was asked and the answers that witness provided?

Senator SIMON. Thank you very, very much. Incidentally, we will enter your full statements in the record and before we report out a bill, we will go through each of these statements to follow, very specifically, the language. For example, I noticed that at the end of your statement, you have a question about a witness who testifies being able to get a secure copy of the transcript. I do not know just off hand why we have that particular provision in there, but we will check it out.

Dean Griswold, we are very happy to have you here. I would start listing your contributions to the Nation, but it would take the balance of our meeting here and I do not want to do that. So, we are just very, very pleased to have you here, Dean.

**STATEMENT OF ERWIN N. GRISWOLD, FORMER COMMISSIONER,
U.S. COMMISSION ON CIVIL RIGHTS**

Dean GRISWOLD. Thank you, Senator. I first want to respond by commending you for raising this question because I think it is high time that we take the step of restoring the Commission to the position of respect and usefulness which it long held on the American scene.

I speak as one who was a member of the Commission for more than 6 years, from July 1961, when I was appointed to the Commission as a Republican by President Kennedy. I served as a member until October 1967, when I was appointed Solicitor General by President Johnson, and I then resigned from the Commission only in order to avoid any possible conflict of interest in carrying out my duties in my new position.

I have watched the work of the Commission consistently since it was first established in 1957 in President Eisenhower's Administration. I am convinced that it made a very important contribution toward better understanding of problems of civil rights in this country, and in encouraging significant steps in eliminating problems of discrimination.

This was especially true of the field of race relations in the areas of voting, housing, employment, and education. I have seen the Commission flourish under great and constructive chairmen, such as John Hannah, Father Theodore Hesburgh, and Arthur Fleming, and a very considerable number of fine and able members.

I have also seen, with great regret, the decline in the influence and standing of the Commission over the past decade. The time has clearly come, in my opinion, when the Commission should be reestablished in status and given an opportunity to make important contributions toward further improvement in resolving some of our most difficult and intractable domestic problems.

The draft bill would bring about some important changes. I find myself in disagreement with each of the two previous witnesses on matters of detail, though in hearty agreement with them as to the general objective. I think, quite strongly, that the members of the Commission should be appointed by the President, with the advice and consent of the Senate.

The Commission has an important role to play, not only in our society, but in our legal system. Its members should be regarded as officers of the United States under section 2 of article II of the Con-

stitution, and should have the status and dignity of appointment by the President with Senate confirmation.

I will only add that I have had serious doubts about the constitutional validity of the present appointment system and one recommended by my greatly-esteemed friend, Dr. Flemming, of appointment in part by the President, part by the President pro tempore of the Senate, part by the Speaker of the House, that was established by the Civil Rights Act of 1983.

There is no provision in the Constitution for the appointment of officers of the United States by a legislative official and it is my fairly strong belief that that provision is simply unconstitutional as it now stands and as it is included as one of the alternatives in the draft bill.

Recent Presidents have been hostile to the Commission and this, in my judgment, has been very unfortunate. Restoring the appointment power to the President gives President Bush an opportunity to take an important step toward a kinder and gentler America, while confirmation by the Senate assures that such appointments will be carefully and thoughtfully made, bringing into the work the minds and energies of able Americans of stature who can propose constructive steps. For after all, the only thing that the Commission can do is to propose, while avoiding extremes of any sort.

I think that the draft bill takes a step forward in providing for fixed terms of appointment for members of the Commission. In the early 1960's, there was no provision for terms and it appeared that any appointment was, in effect, for the duration of the Commission and that it continued whenever the term of the Commission was extended.

The provision of terms of appointment with a limit of 12 years will provide for appropriate turnover in the Commission, while giving each member of the Commission suitable status and tenure.

The other powers granted to the Commission by the draft bill seem to be closely similar to those which were in effect in the prior active period of the Commission when they appeared to work very well.

Under such provisions, the Commission held hearings; it developed a large amount of factual information, leading to a better understanding of problems of discrimination in this country; and it made significant proposals, many of which were adopted by the Congress of the United States and approved by the President, the most important of which I venture to think was the Voting Rights Act of 1964. Other people participated, but the Commission played an important role.

We need a reestablished Commission with appropriate membership and powers and the proposed draft is clearly a useful basis for bringing that about. No doubt it can be perfected, but the general structure of the proposed draft seems to me to be commendable and I hope the subcommittee will recommend something along this line for consideration by the Committee on the Judiciary and by the Senate.

I have attached several detailed comments, only one of which I will refer to now, where this time, I disagree with Dr. Horn. There is a provision for the Commission to have power to file amicus curiae briefs in the Supreme Court. I seriously doubt the wisdom of

this provision, no doubt showing my prior experience as Solicitor General.

The Solicitor General is the officer of the United States who has the responsibility of representing any officer or agency of the United States before the Supreme Court. I do not think that it is wise for Congress to be making provisions which authorize some particular agency to bypass the Solicitor General. The agency can, of course, make a recommendation to the Solicitor General, but he is the one who should make the decision whether to file a brief or not.

Moreover, if the brief is filed under the signature of the Solicitor General, it will have much greater impact and effect with the Court than if it filed simply as one of the many agencies of the Government. Experience has shown that a proliferation of amicus briefs filed in the Supreme Court may be counter-productive.

There is one place on page 9 of the draft bill where it says that the annual report should include any other information that the Chair determines appropriate. I do not see why that determination should be made by the Chair. I think it should be made by the Commission—that is, a majority of the members.

With that, I will simply say again that any considerable step forward in this area, it seems to me, will be highly constructive. If we cannot make a significant step forward, then I think we should simply let the existing Commission expire. It would be unfortunate, but it would be better than continuing as we now are.

[The prepared statement of Mr. Griswold follows:]

STATEMENT OF ERWIN N. GRISWOLD
OF JONES, DAY, REAVIS & POGUE
WASHINGTON, D.C.
BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION
OF THE COMMITTEE ON THE JUDICIARY
OF THE UNITED STATES SENATE
on Thursday, June 22, 1989 at 2:00 p.m.

It is a privilege to speak before the Subcommittee on the draft bill designed to revitalize the United States Commission on Civil Rights. This draft bill seems to me to be an important step in the process of restoring the Commission to a position of respect and usefulness which it long held in the American scene.

I speak as one who was a member of the United States Commission on Civil Rights for more than six years, from July, 1961, when I was appointed to the Commission, as a Republican, by President Kennedy. I served as a member until October, 1967, when I was appointed Solicitor General by President Johnson. I resigned from the Commission at that time in order to avoid any possible conflict of interest in carrying out my duties in the new position.

From the time when the Commission was first established, in the 1950's, until the present, I have watched its work closely. I am convinced that it made a very important contribution towards a better understanding of problems of civil rights in this country, and in encouraging significant steps in alleviating problems of discrimination. This was

especially true in the field of race relations, including the areas of voting, housing, employment, and education. I have seen the Commission flourish under great and constructive chairmen, such as John Hannah, Father Theodore Hesburgh, and Arthur Flemming. I have also seen, with great regret, the decline in the influence and standing of the Commission over the past decade. The time has clearly come, in my opinion, when the Commission should be reestablished in status, and given an opportunity to make important contributions towards further improvement in resolving some of our most difficult and intractable domestic problems.

The draft bill, if perfected and enacted, would bring about a number of important changes. In the first place, it would provide for appointment of the members of the Commission by the President, with the advice and consent of the Senate. This is as it should be. The Commission has an important role to play, not only in our society, but in our legal system. Its members should be regarded as "Officers of the United States," under Section 2 of Article II of the Constitution, and should have the status and dignity of appointment by the President with Senate confirmation. (Parenthetically, I may say that I have had serious doubts about the constitutionality of the appointment system established by the United States Commission on Civil Rights Act of 1983, under which three members are appointed by the President, two members by the President Pro

Tempore of the Senate, and two members by the Speaker of the House of Representatives. There is no provision in the Constitution for the appointment of such officers by legislative officials.)

Recent Presidents have been hostile to the Commission, which, in my judgment, has been very unfortunate. Restoring the appointment power to the President gives President Bush an opportunity to take an important step towards a kinder and gentler America, while confirmation by the Senate assures that such appointments will be carefully and thoughtfully made, bringing into the work the minds and energies of able Americans of stature, who can propose constructive steps (for, after all, the Commission can only propose), while avoiding extremes of any sort.

In addition, I think that the draft bill takes a step forward in providing for fixed terms of appointment for members of the Commission. When I was a member of the Commission, in the early 1960's, there was no provision for terms, and it appeared that any appointment was, in effect, for the duration of the Commission, and that it continued whenever the term of the Commission was extended. The provision for terms of appointment, with a limit of twelve years, will provide for appropriate turnover in the Commission, while giving each member of the Commission suitable status and tenure.

The other powers granted to the Commission by the draft bill seem to be closely similar to those which were in effect in the prior active period of the Commission, when they appeared to work very well. Under such provisions, the Commission developed a large amount of facts leading to a better understanding of problems of discrimination in this country, and it made significant proposals, many of which were adopted by the Congress of the United States and approved by the President. We need a reestablished Commission with appropriate membership and powers, and the proposed draft is clearly a useful basis for bringing that about. No doubt it can be perfected, but the general structure of the proposed draft seems to me to be commendable, and I hope that the Subcommittee will recommend something along this line for consideration by the Committee on the Judiciary and by the Senate.

With the thought that it might be helpful, I add a few matters which might be considered in the process of developing perfecting amendments to the draft bill.

1. On page 9, at the top, there is a provision authorizing the Commission to file amicus curiae briefs in the Supreme Court. I doubt the wisdom of this provision.

In the first place, the Solicitor General is the officer of the United States who has the responsibility of representing

any officer or agency of the United States before the Supreme Court. I do not think that it is wise for Congress to be making provisions which authorizes some particular agency to bypass the Solicitor General. The Agency can, of course, make a recommendation to the Solicitor General, but he is the one who should make the decision. Experience has shown that a proliferation of amicus briefs filed in the Supreme Court may be counterproductive.

2. On page 9, line 20, it is provided that the Commission's annual report should include "any other information that the Chair determines appropriate." I can see no reason why this authority should be given to the Chair alone. It seems to me that the determination should be made by the Commission, and, accordingly, I would recommend that the word "Commission" be substituted for the word "Chair".

3. Page 10, lines 7 through 14. This provision with respect to "affirmative action" seems to me to be unfortunate in its present form. It now deals only with "adverse consequences of affirmative action programs." The field of "affirmative action" is very complicated, and there is much to be said on all sides. I think that it merits further consideration and study, and the development of more extensive factual knowledge as to how it actually works out in practice. I would recommend that something like the following be substituted for the present paragraph (B):

(B) Report -- The Commission is authorized to conduct studies and to make appraisals of affirmative action programs, public and private, and to make such recommendations with respect to them as it deems appropriate.

4. P. 23, line 20 -- a very small point: the word "appropriate" in this line should be "appropriated".

Senator SIMON. I thank you very, very much. You even found a typographical error in our draft as you went through. We thank you very, very much, Dean, and if I can just add, you would have no reason to remember this, but as a member of the House, I sat next to you while we heard the *Bakke* decision argued before the Supreme Court back some years ago.

Mr. Louis Nunez is a former staff director and we are very, very happy to have you here, Mr. Nunez.

**STATEMENT OF LOUIS NUNEZ, FORMER STAFF DIRECTOR, U.S.
COMMISSION ON CIVIL RIGHTS**

Mr. NUNEZ. Thank you, Senator. I'm pleased to be here. I'd like to point out that I was the deputy staff director, the acting staff director, and the staff director between the period of 1972-81. I had the honor and privilege of serving under Dr. Arthur Flemming and Father Ted Hesburgh, as Chairmen of the Commission and it was a very important part of my life to have served at the Commission in those days.

I commend you, Senator, for your efforts to revitalize the Commission on Civil Rights. It very badly needs this. It needs to be—it needs to establish its credibility and what is being presented here in this proposed bill is an effort to bring it back to where it was, as someone has referred, as the conscience of the Nation in civil rights.

I think the specific sections in the bill concerning the appointment of the Commissioners, their term of office, the way they are going to be nominated and appointed, is important because, as I recall during my tenure at the Commission, the idea that the Commissioners were nonpartisan, that they were removed from the political process was an understanding between the Executive and the Commission and the civil rights population.

Obviously, that was not the fact in that when we moved into—well, I remember when Father Hesburgh was removed and then when the Commissioners—several of them—were removed in 1981, there was no specific statutory language to protect the Commission's independence.

It was an understanding between the White House and the Commission that this would not happen. Obviously, that understanding was not mutual. I think this bill, by the provisions it lays out very specifically, guards the Commission's independence.

One area which I have some disagreement with in the proposal here is the idea that the Chairman—I do agree that the Chairman of the Commission should be appointed by the President. I feel that the stature of the Chair will be significantly enhanced by having the President appoint that person actually and, for that matter, the Vice-Chair.

Also, in my experience at the Commission, the Commission's work is very much involved with other executive departments of the Government and having the President appoint a Chair, to my mind, will facilitate that interworking, that cooperative relationship. I believe that the concept of having the President pro tempore of the Senate, the Speaker of the House select several of the

Commissioners is in keeping with the idea that perhaps the Commission is not merely an executive department.

It is a department or an agency that is—not divided so much, but is set up and organized between the Congress and the Executive, between the Congress and the President. I think previous legislation sort of laid the groundwork for this and I would endorse that.

In terms of the staff director, I was a staff director. I was appointed by the President. Thinking back on my experience there, I think it is better management to have the staff director selected by the Commission as a whole so that the staff director does not, in a sense, see himself in some respects separate and apart from his role in his relationship to the Commission as a whole.

I think the staff director should see himself as what the title connotes, a staff director to a body of Commissioners. So, I endorse that provision.

I do endorse the provision of *amicus curiae*. I believe this was an issue that we discussed for many years while I was on the Commission, and again, it goes to the idea that the Commission is a unique agency, that it is not simply an executive department of the Government, but that it is an agency that is responsive to the concerns of the Congress, is responsive to the concerns of the White House, to the Executive. So, in that sense, I support the added powers of having the Commission submit *amicus curiae* briefs directly to the Supreme Court.

I would disagree with my former colleague, Dr. Horn, in terms of the State advisory committees. We, during my tenure there, basically implemented the idea of 50 State advisory committees. I think they play a very useful role. It might cost some additional funding—not they might.

They will require some additional funding, but the idea of having 50 viable committees of dedicated citizens in all States of the Union reporting on civil rights issues in their respective jurisdictions, I think, is valuable to the Commission and to the Nation as a whole.

In terms of the salary scales of whether the levels should be between the staff director and the Commissioners, I do agree with Dr. Horn that the Commissioners should very clearly have a higher salary scale or salary level or grade level—executive grade level—than the staff director to clarify the relationships.

I again reiterate my opening comment. A lot of what went on in the Commission was an understanding between the Executive and the Commission. Time proved, and the reality proved, that that understanding did not exist amongst some of the incoming administrations. What this bill does is, it makes it crystal clear as to the independence of this Commission.

I see this bill not as an effort to make this a bipartisan Commission, but as an effort to make it a nonpartisan Commission, where people who are appointed as Commissioners are not merely Republicans, Democrats, Independents, but they are people of the highest standing in our society who are dedicated and interested in pursuing equal rights for all of our citizens. I think that is the essence of the changes proposed and in that, I heartily endorse what is being proposed.

Thank you.

[The prepared statement of Mr. Nunez follows.]

TESTIMONY
RE: U.S. COMMISSION ON CIVIL RIGHTS
AMENDMENTS ACT OF 1989 BEFORE SUB-COMMITTEE
ON THE CONSTITUTION
UNITED STATES SENATE COMMITTEE ON THE
JUDICIARY
JUNE 22, 1989

LOUIS NUNEZ
PRESIDENT

NATIONAL PUERTO RICAN
COALITION, INC.
1700 K. STREET, N.W.
WASHINGTON, D.C. 20006
(202) 223-3915

GOOD AFTERNOON, I AM PLEASED TO APPEAR TODAY IN SUPPORT OF THE PROPOSAL TO RE-ESTABLISH THE COMMISSION ON CIVIL RIGHTS AS PROVIDED BY UNITED STATES COMMISSION ON CIVIL RIGHTS AMENDMENTS ACTS OF 1989. I WOULD ALSO LIKE TO EXPRESS MY APPRECIATION TO SENATOR SIMON, CHAIRMAN OF THIS SUB-COMMITTEE, FOR HIS CONTINUING INTEREST, DEDICATION AND COMMITMENT TO CIVIL RIGHTS, AND TO THE RE-ESTABLISHMENT OF A STRENGTHENED CIVIL RIGHTS COMMISSION.

BETWEEN 1972 AND 1981, I SERVED AS THE DEPUTY STAFF DIRECTOR, ACTING STAFF DIRECTOR, AND STAFF DIRECTOR OF THE COMMISSION. DURING THIS PERIOD I SERVED UNDER FOUR PRESIDENTS AND TWO DISTINGUISHED CHAIRS OF THE COMMISSION, FATHER THEODORE HESSBURGH AND DR. ARTHUR FLEMMING. I RESIGNED IN JULY 1981 TO ACCEPT A POSITION AS PRESIDENT OF THE NATIONAL PUERTO RICAN COALITION, INC., AN ASSOCIATION OF 84 COMMUNITY ORGANIZATIONS WITH THE MISSION OF PROMOTING THE SOCIAL, ECONOMIC AND POLITICAL WELL-BEING OF AMERICAN CITIZENS OF PUERTO RICAN HERITAGE, BOTH IN THE CONTINENTAL UNITED STATES AND PUERTO RICO.

CRUCIAL TO THE FUTURE OF THE COMMISSION IS THE PRESSING NEED TO RE-ESTABLISH CREDIBILITY IN ITS FUNCTIONING. THE BILL BEFORE US DEALS DIRECTLY WITH THIS ISSUE. AS THE SECTIONS ON THE APPOINTMENT PROCESS FOR COMMISSIONERS CLEARLY POINT OUT, THE COMPOSITION OF THE COMMISSION, SHOULD NO LONGER BE VIEWED AS BI-PARTISAN, BUT MORE APPROPRIATELY AS NON-PARTISAN. HISTORICALLY, THE MOST EFFECTIVE COMMISSIONERS NEVER VIEWED THEMSELVES AS NEITHER DEMOCRATS, REPUBLICANS OR INDEPENDENTS, BUT AS CITIZENS

DEDICATED TO THE BETTERMENT OF OUR SOCIETY THROUGH THE STRENGTHENING OF CIVIL RIGHTS.

THE SECTIONS ON TERMS OF OFFICE, STAGGERED TERMS, AND THE FILLING OF VACANCIES AMONG THE COMMISSIONERS WILL GO A LONG WAY TOWARDS MAKING THE COMMISSION TRULY INDEPENDENT AND REMOVED FROM THE POLITICAL PROCESS RESULTING FROM CHANGES IN ADMINISTRATIONS.

OF PARTICULAR IMPORTANCE, IS THE SECTION ON DISMISSAL FROM OFFICE, NO COMMISSIONER CAN HENCEFORTH BE REMOVED EXCEPT "FOR NEGLECT OF DUTY, OR MALFEASANCE IN OFFICE." NO LONGER WILL A COMMISSIONER BE REQUESTED TO RESIGN IF HE/SHE IS MERELY IN DISAGREEMENT WITH THE POLICIES OF AN INCOMING ADMINISTRATION.

THE ONE SECTION I FIND MYSELF IN DISAGREEMENT WITH IS THE PROPOSAL TO HAVE THE CHAIR AND VICE-CHAIR SELECTED BY A MAJORITY OF THE MEMBERS OF THE COMMISSION. ALTHOUGH I SUPPORT THE CONCEPT OF REMOVING THE COMMISSION AS FAR AS PRACTICAL, FROM THE POLITICAL PROCESS, I DON'T BELIEVE IT IS NECESSARY TO REMOVE THE AUTHORITY OF THE PRESIDENT TO APPOINT A CHAIR AND VICE-CHAIR. THE REPUTATION OF THE COMMISSION HAS IN ITS MOST SUCCESSFUL PERIOD BEEN CLOSELY LINKED TO THE REPUTATION OF ITS CHAIR. GIVEN THE PROPOSED RESTRUCTURING, I WOULD THINK THAT HAVING THE PRESIDENT RETAIN THIS APPOINTING AUTHORITY WOULD SIGNIFICANTLY ENHANCE THE POSSIBILITY OF SELECTING AN OUTSTANDING INDIVIDUAL. ALSO, EXPERIENCE HAS SHOWN THAT FOR THE COMMISSION, TO EFFECTIVELY CARRY OUT ITS RESPONSIBILITIES, IT NEEDS THE FULL COOPERATION OF THE EXECUTIVE DEPARTMENTS. TO MY MIND, A CHAIR APPOINTED BY THE PRESIDENT COULD FACILITATE THIS PROCESS.

IN TERMS OF ADDITIONAL RESPONSIBILITIES, I SUPPORT THE RIGHT OF THE COMMISSION TO SUBMIT AMICUS CURIAE BRIEFS, AND TO SUBMIT REPORTS TO INCLUDE ASSESSING, "THE IMPACT OF FEDERAL FISCAL POLICIES, PROGRAMS AND ACTIVITIES ON MINORITIES AND WOMEN." THE COMMISSION, WHEN MOST EFFECTIVE, HAD THE UNIQUE CAPACITY OF BLENDING SOCIAL SCIENCE RESEARCH, LEGAL ANALYSIS, FIELD INVESTIGATIONS, AND PUBLIC HEARINGS TO DEVELOP ITS FINDINGS AND RECOMMENDATIONS. UNDERLYING THE COMMISSION'S WORK, HAS BEEN THE ASSUMPTION THAT A COMPREHENSIVE REVIEW OF THE FACTS AND THEIR EVALUATION, WOULD MOST APPROPRIATELY DETERMINE ITS FINDINGS AND RECOMMENDATIONS. THE SUPREME COURT HAS, FROM TIME TO TIME, CITED REPORTS OF THE COMMISSION IN DECIDING CASES. HAVING THE RIGHT TO SUBMIT AMICUS CURIAE BRIEFS, WILL IMMEASURABLY STRENGTHEN THE COMMISSION'S ABILITY TO DIRECTLY ADVISE THE COURT. ALSO, THE ISSUES SURROUNDING FEDERAL FISCAL POLICIES AND THE BUDGET, HAVE IN RECENT YEARS GAINED PARAMOUNT IMPORTANCE, AS PUBLIC POLICIES ARE FREQUENTLY INFLUENCED BY THE IMPACT OF THE BUDGET DEFICITS. FISCAL POLICIES, THUS BECOME A MAJOR CONSIDERATION IN FORMULATING AND MAKING RECOMMENDATIONS EVEN IN THE AREA OF CIVIL RIGHTS.

I STRONGLY SUPPORT THE AFFIRMATIVE COMMITMENT TO ADVISORY COMMITTEES, "THE COMMISSION SHALL ESTABLISH AN ADVISORY COMMITTEE IN EACH STATE THAT SHALL BE COMPOSED OF CITIZENS OF SUCH STATE." DURING MY TENURE AT THE COMMISSION, I FOUND THAT THE WORK OF THE COMMISSION WAS ENHANCED BY THE CONTRIBUTIONS OF MANY PUBLIC SPIRITED CITIZENS SERVING ON ADVISORY COMMITTEES FROM ALL 50 STATES. FREQUENTLY, THERE WERE ISSUES THAT WERE UNIQUE TO A

STATE OR REGION, OR WHICH NEEDED TO BE EXAMINED AT A STATE-LEVEL PRIOR TO DETERMINING WHETHER A NATIONAL STUDY WAS REQUIRED. THE STATE ADVISORY COMMITTEES WERE ABLE TO DO THIS MOST EFFECTIVELY, AND EQUALLY IMPORTANT, THE MEMBERS PROVIDED THE COMMISSION WITH A MUCH GREATER DIVERSITY OF VIEWS.

THIS BILL ENVISIONS THE EXPIRATION OF THE CURRENT COMMISSION, AND ITS RE-ESTABLISHMENT SEVERAL MONTHS LATER. SOME CRITICS CONTEND THAT PERHAPS THERE IS NO LONGER A NEED FOR A CIVIL RIGHTS COMMISSION. I STRONGLY DISAGREE. OUR SOCIETY, MULTI-RACIAL, MULTI-ETHNIC, MULTI-CULTURAL; MAY WELL BE UNIQUE IN THAT THE END GOAL IS TO CREATE A MORE INTEGRATED SOCIETY WITHOUT ELIMINATING DIFFERENCES. THE RESPONSIBILITY OF CONGRESS, THE EXECUTIVE, AND THE JUDICIARY, TO PROTECT THE RIGHTS OF ALL CITIZENS IS CLEAR. HOWEVER, THE CONSTANTLY SHIFTING DEMOGRAPHICS OF OUR SOCIETY; THE NEW IMMIGRATION, THE INTER-RELATIONSHIPS OF CIVIL RIGHTS ISSUES, AND THEIR IMPACT ON MINORITIES, WOMEN, THE HANDICAPPED, AND THE ISSUE OF AGE, CALLS FOR A COMMISSION WHICH CAN FULLY ADDRESS THESE COMPLEX ISSUES IN THE MOST PROFESSIONAL MANNER, AND MAKE RECOMMENDATIONS TO ALL SECTORS OF THE GOVERNMENT BASED ON COMPREHENSIVE STUDIES AND HEARINGS.

THE COMMISSION ON CIVIL RIGHTS ESSENTIALLY PROVIDES OUR SOCIETY WITH A CONTINUOUS OVERSIGHT OF THESE ISSUES. IT WILL CONTINUE TO HAVE THE UNIQUE RESPONSIBILITY TO PRESENT FINDINGS AND RECOMMENDATIONS WHICH WILL MOVE OUR GOVERNMENT AND SOCIETY FORWARD IN ATTAINING THE GOAL OF AN EQUITABLE SOCIETY BASED ON LAW FOR ALL ITS CITIZENS.

Senator SIMON. I thank you very much, Mr. Nunez. Let me note the presence of Senator Specter and that we are very pleased to have him here. He has shown a real interest in this area.

Senator Specter.

**OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S.
SENATOR FROM THE STATE OF PENNSYLVANIA**

Senator SPECTER. Well, thank you, Mr. Chairman.

I regret that I will not be able to spend long because there is a hearing before the Defense Appropriations Subcommittee with the Secretary of Defense testifying. I wanted to leave there and come here to express my keen interest in this subject, if that needs to be done.

My own sense is that the Civil Rights Commission is a very important entity and has been since President Eisenhower established it in 1957, I believe, and I have grave concern, candidly, about seeing the Commission expire because I am worried that it might not be reenacted. It is a much easier matter to extend the life of a commission or any entity in our Federal Government than it is to recreate it if it lapses.

I remember very well the trauma, I believe it was in 1983, when the last Commission expired and the issue was up whether there would be a new Commission. I introduced the legislation which called for a Commission to be appointed by the Congress because the executive branch did not want to have a Civil Rights Commission.

I recall very well the first appointments back in 1981 of three Commissioners who were all extraordinarily well qualified, but there was a critical issue as to whether there would be too much concentration of power in the hands of one appointing authority. We went back and forth on that for a long time and I am not unaware of the controversy surrounding the current Commission and the problems which it has.

But my own sense is, my own impression is that I do not have a closed mind on this. I respect what the Chairman is trying to do here and I have staff here and will study closely the comments which have been made. But I have grave concerns about seeing the Commission expire. There are many in the Congress who do not want a Civil Rights Commission. There are also many in the Congress who would like to eliminate most every branch or aspect of the Federal Government, perhaps save the Defense Department. Somebody might want to eliminate that as well, but it is very hard on the current climate to try to reduce the Government, to try to reduce expenditures to keep many instrumentalities in operation.

I am very much concerned about the continued existence of the Commission. I think overall, it has been a very dynamic force in the life of the country, sometimes more so than others, and right now, in a very problematic context. But I want you to know that I very much appreciate you being here and I repeat that I will study the record closely.

I know you are aware of what happens on Capitol Hill, that we are betwixt and between on these committee assignments at all

times, but I thank you for coming and will closely heed what you have testified to.

Thank you very much.

Senator SIMON. Thank you, Senator Specter.

We are pleased to have next another former staff director of the Commission, Ms. Linda Chavez. We are pleased to have you here.

STATEMENT OF LINDA CHAVEZ, FORMER STAFF DIRECTOR, U.S. COMMISSION ON CIVIL RIGHTS

Ms. CHAVEZ. Thank you very much, Senator Simon.

I feel very much as a minority of one as the only representative on this panel that served during the recent controversy surrounding the Civil Rights Commission and, as you might imagine, implicit in some of the statements that preceded mine is a strong degree of criticism of the Commission to work during my tenure and following that tenure.

It is very tempting to want to justify the work that was done. I will simply say that if one with a fair and open mind were to look at the studies that were produced, ranging in issues from comparable worth, to housing discrimination, to the status of economic progress of black men in the United States, to desegregation efforts in the United States, then I think that one would find that the Commission has indeed engaged in work of substance and of quality.

The comparable worth study that was done while I was there and was actually the only work that was actually published during my tenure was cited by then-Judge Anthony Kennedy of the Ninth Circuit in his decision on comparable worth. Of course, now Judge Kennedy sits in the Supreme Court.

I would also like to just briefly take issue with Dr. Griswold and his comments about the decline in influence of the Civil Rights Commission. You noted in your opening statement that the Supreme Court of the United States has recently issued a series of decisions in the civil rights area with which you do not agree.

I might just say that those decisions are decisions which I applaud and I think they reflect significantly the sentiment of members of the Civil Rights Commission who served there during my tenure. I also might add that I am pleased to note that the Congress is going to take up the issue of affirmative action and take up the issue of the best way to remedy discrimination.

I hope that in so doing that this issue will be put to the American public and that a free and open debate will occur on these issues, and that those who argue for preferential treatment to affirmative action programs for racial minorities and women will have the chance to see that issue debated and that Members of Congress will be forthcoming in their views on these issues and tell the American public what it is they really propose.

I would like, having taken issue with some of my fellow panelists, to now suggest that there are a number of issues that they have addressed with which I am in wholehearted agreement. First of all, Dean Griswold's suggestion that the Civil Rights Commission as an executive branch agency ought to have its members appoint-

ed by the President of the United States is one which I wholeheartedly endorse.

I think that there is a significant erosion of Presidential authority in establishing commissions which are really only quasi-executive. I think when the legislative branch makes those appointments, that it interferes with the President's constitutional right.

I would also like to echo Louis Nunez in his statements about the staff director. While it was a privilege and an honor for me to have been appointed by the President of the United States, as the chief executive officer of that agency, it made far more sense for what would be like a board of directors, ultimately the Commission, to have made that appointment and for the staff director to be beholden to the Commission rather than to the President.

Finally, I would like just to take a brief minute to discuss what I think is the more significant underlying issue and here, Senator Simon, I want to commend you for the concern that you demonstrated in the drafting of your legislation to try to constitute a commission whose interests will be the welfare of minorities and women in this country.

I applaud you for that concern and I do indeed believe that a national commission that addresses the problems of our inner cities and particularly, the problems of disadvantaged blacks, Hispanics, and women who are single heads of households is sorely needed at this time. There is no doubt in my mind that there are many persons in this society who are deprived of the ability to enjoy life, liberty and the pursuit of happiness by conditions that breed crime, dependency, and despair.

The out-of-wedlock birth rates and the rate of female heads of households among blacks and Puerto Ricans in this society virtually ensures that the next generation in these communities will remain poor and dependent. Violent crime and drug abuse take a far more devastating toll on the minority communities in this Nation than they do on middle class whites.

Many young black and Puerto Rican men have simply dropped out of the labor force, a fact which cannot be explained by high unemployment rates or a downturn in the economy. This pattern, by the way, is in stark contrast to that of other disadvantaged persons, including Mexican-Americans, who have a higher labor force participation rates than that of the total population.

I believe that these are desperately serious problems and that they deserve the attention of the President and of the Congress. But I do not believe that they will be addressed by searching for explanations in the enforcement of our civil rights laws, which is the concern of the U.S. Commission on Civil Rights.

Anyone who suggests that more punitive civil rights laws or tougher enforcement of those laws will begin to solve the problems of the growing underclass in this society is either a fool or a demagogue. That is not to say that we ought not to have enforcement of those civil rights laws and vigorous enforcement, nor is it to say that those laws ought not be rigorously adhered to. They should be. The responsibility for enforcement of those laws belongs with the executive branch and I believe that the responsibility to oversee the enforcement of those laws belongs with the legislative branch.

I do not believe that they can be carried out by a quasi-executive branch agency such as the U.S. Commission on Civil Rights. I urge you to consider abandoning the quest to reform the Civil Rights Commission. Take your views on racial quotas and preferential affirmative action to the American people by sponsoring legislation that explicitly advocates or prohibits these policies.

If you want better enforcement of civil rights laws, exercise your own oversight responsibility and hold the fire to the feet of any agency that you do not feel is doing its job. If you want to begin the long and difficult inquiry into the roots of the underclass in this society, begin the process with a clean slate—a new Commission that is not tethered by the constraints of looking only to racial discrimination as the probable explanation for the plight of many blacks and other minorities in this Nation.

Thank you.

[The prepared statement of Ms. Chavez follows:]

TESTIMONY
OF
LINDA CHAVEZ
CHAIRMAN EQUAL OPPORTUNITY FOUNDATION
FORMER STAFF DIRECTOR OF THE U.S. COMMISSION ON CIVIL RIGHTS
BEFORE
THE CONSTITUTION SUBCOMMITTEE
COMMITTEE ON THE JUDICIARY
U.S. SENATE
JUNE 22, 1989

MR. CHAIRMAN, I want to thank you for the opportunity to appear before you today to testify on the reauthorization of the United States Commission on Civil Rights. As you know, I was appointed by President Reagan to serve as the Staff Director of the Commission, a position which I held from August 1983 to April 1985.

I am not here today to debate the record of those years-- though of course I would be happy to answer any questions you might pose. But I will say that the views that I and some members of the Commission voiced on affirmative action, which were the cause of most of the controversy about the Commission during that period, have recently been vindicated by the Supreme Court of the United States. I know that we are not here to discuss the recent discrimination rulings handed down by the Court. And I understand from reading the Washington Post and other papers that civil rights groups intend to try to reverse their defeats in the Court through legislative action. I hope that such proposed legislation will allow a free and open debate on the issue of affirmative action. If preferences are to be given on the basis of race, gender and national origin in decisions that affect hiring, promotions, the awarding of government contracts and admission to higher education then that policy ought to be clearly stated and subject to the democratic process for adoption. What ought not to happen, however, is a repeat of the efforts of recent years to enact public policy on issue so vital to our concepts of equal protection of the laws

through a back door process of administrative subterfuge and legislative dissembling.

I raise this issue in the context of the reauthorization of the Civil Rights Commission because I fear a repeat of the experience of the last reauthorization. In 1983, the battle over preferential affirmative action was waged not as it should have been on the policy itself-- but on appointments to and the reauthorization of the Civil Rights Commission. Having been both a witness to and a participant in the wrangling that took place between the Executive and Legislative branches, I can assure you that no attempt to resolve debates on policy by tinkering with the composition of the U.S. Commission on Civil Rights will work. If anyone needs reminding of the law of unintended consequences, he need only refer back to the compromise reached on the last reauthorization. Those in the Leadership Conference on Civil Rights and some Democratic members of Congress believed that rewriting the authorizing legislation into its current form would ensure former Commissioners Mary Louise Smith and Jill Ruckelshaus-- both proponents of preferential affirmative action-- a place on the Commission and former Chairman Clarence Pendleton's replacement as chairman and my departure as staff director. Of course, nothing of the kind took place-- in fact, the best testimony to the failure of the reauthorization to achieve its purpose is evident by the current effort to rewrite the law.

It is clear from reading Sen. Simon's draft legislation that.

his concern is to constitute a commission whose interest will be the welfare of minorities and women in this country. I applaud Sen. Simon for that concern. Indeed, I believe a national commission that addresses the problems of our inner cities-- and particularly the problems of disadvantaged blacks, Hispanics and women who are single heads of households-- is sorely needed. There is no doubt in my mind that many persons in this society are deprived of the ability to enjoy life, liberty and the pursuit of happiness by conditions that breed crime, dependency and despair. The out of wedlock birthrate and the rate of female headed households among blacks and Puerto Ricans virtually ensures that the next generation in those communities will remain disproportionately poor and dependent. Violent crime and drug abuse take a far more devastating toll on minority communities in this nation than they do on middle class whites. Many young black and Puerto Rican men have simply dropped out of the labor force-- a fact which cannot be explained by high unemployment rates or a downturn in the economy. This pattern, by the way, is not true for other disadvantaged persons such as those of Mexican origin, who have a higher labor force participation rate than that of the total population.

These are serious problems and they deserve the attention of the Congress and of the President. But they will not be addressed by searching for explanations in the enforcement of our civil rights laws-- which is the concern of the U.S. Commission on Civil Rights. Anyone who suggests that more punitive civil

rights laws or tougher enforcement of those laws will begin to solve the problems of the growing underclass in this society is either a fool or a demagogue. That is not to say, however, that we ought not to have vigorous enforcement of our civil rights laws and that those laws ought not to be rigorously adhered to-- they should be. The responsibility for enforcement of those laws rests with the Executive branch. I believe that the responsibility to oversee the enforcement of those laws can more effectively be carried out by the Legislative branch than by a quasi-executive branch agency such as the U.S. Commission on Civil Rights envisioned in Sen. Simon's legislation.

I urge you to consider abandoning the quest to "reform" the Civil Rights Commission. Take your views on racial quotas and preferential affirmative action to the American people by sponsoring legislation that explicitly advocates or prohibits such programs. If you want better enforcement of civil rights laws, exercise your own oversight responsibility and hold to the fire the feet of agencies you don't feel are doing their job. If you want to begin the long and difficult inquiry into the roots of the underclass in this society, begin the process with a clean slate-- a new commission not tethered by the constraints of looking only to racial discrimination as the probable explanation for the plight of many blacks and other minorities in this nation.

Senator SIMON. Thank you. I think we can say we are not in full agreement, all of us here on this panel, and that is the way it ought to be.

Mr. Burgdorf, former attorney-advisor to the Commission. We are pleased to have you here.

STATEMENT OF ROBERT L. BURGDORF, JR., FORMER ATTORNEY-ADVISOR, U.S. COMMISSION ON CIVIL RIGHTS

Mr. BURGDORF. Mr. Chairman, I am very honored to be here. I am honored to be at this table in such august company. I am particularly honored to be testifying and to have been asked to testify at the Subcommittee on the Constitution as I have recently accepted a position to become a professor of law at the District of Columbia School of Law where I will be teaching constitutional law. So, it is doubly an honor to be here.

My particular field of expertise is that of disability rights and I was hired by the Commission at the time they decided to issue their first report on discrimination on the basis of handicap.

However, I have had a lot of interest in the Civil Rights Commission, both before and since my tenure there, and in 1972 I wrote a paper summarizing the first 15 years of the Civil Rights Commission, and I borrowed an analogy from Socrates, who once described himself as a gadfly, that he was a gadfly on the Roman senate, that he would focus their attention and be a pest to those things that they were not otherwise focusing on.

My analogy was that the Civil Rights Commission has functioned very much like a gadfly. It has buzzed around. It has flitted from problem to problem. It has aroused attention. It has focused people and where there has been an attempt to maintain the status quo where discrimination was occurring, the Commission has been a bothersome pest.

It has worked and it has played a major role and I quoted several different authorities, including former staff directors and news agencies. I talked about the Civil Rights Commission as one of the most remarkable agencies of the Federal Government and one of the most successful in achieving the mission that it started with.

If I were to do such a paper today, I would say the same things about the mission and the importance that I had to say then. I think other members of this panel are more able than I to speak about the need for a commission on civil rights. I wanted to add such two specific perspectives.

One of those is that I was present at the Civil Rights Commission during the changeover. I was there in the period that straddled the old Commission and the new Commission and a lot of my concern does not have as much to do with doctrine as it has to do with means and techniques.

I was very impressed when I first came to the Civil Rights Commission at how the level of scholarship was and what a premium was placed upon fairness and objectivity. I coauthored the Commission's report accommodating the spectrum of individual abilities and at times, it was a real pain to go through the demand for the other side's point of view, the demand for total documentation of

points, the verification by a team of attorneys of every statement that was made in the report.

It was a pain, but I think it helped to make the Commission's work become very objective and very bound in facts. My concern was that with the changeover in the Commission, there was much less of that. There was much less objectivity and scholarship. I felt that the emphasis became less on factfinding and more on proving a point, less on investigating and inquiring and more upon demonstrating preconceived assumptions, and less upon the search for truth and more on spreading doctrine.

I think the other thing I can add to the discussion is the perspective of the disability community. You, Senator Simon, were present this morning at a hearing on the Americans with Disabilities Act. People with disabilities are now asking Congress to give them rights in the civil rights arena that are parallel to those available to other minorities and to discrimination on the basis of sex.

There have been a series of four hearings in the Senate on discrimination on the basis of handicap and people with disabilities have come in with heart-wrenching stories of the day-to-day discrimination that they face, of being thrown out of movie theaters or being thrown out of restaurants, of a far-flung discrimination that reaches transportation and education in almost every facet of our society.

I do not want to begin to say that other types of discrimination have been addressed and there is no need to focus on them. Obviously, everyone on this panel knows better than that. But I do want to say there is a particular importance for a developing area such as that of disability rights, to have the expertise and the focus of such a thoughtful body as the Civil Rights Commission has traditionally been.

I agree with the structure that is proposed in your bill. I have some disagreements with other members of the panel, but I have also other areas of agreement. Specifically—and I sort of quake in my boots to do this—but I do disagree with Mr. Griswold on the point about the legality of the congressional appointments.

In my view—and I guess I echo the points of Louis Nunez—the Commission is not an executive agency. It is an independent, quasi-executive, quasi-legislative body who does not enforce laws. It simply finds facts and makes recommendations and that is important. But that does not constitute an executive agency and I think it is perfectly appropriate for there to be appointments of members to such a quasi-legislative body by the legislature itself.

Finally, I would just like to make one minor point. During one of the periods when the Commission was about to be closed down in 1983, there was a serious problem about what to do with some of the assets of the agency. Specifically, I am thinking about the civil rights library, which is not big, but is a very nice library that the Commission has compiled, and the warehouse of reports.

There are volumes and volumes of some of the traditional reports that the Commission has issued. In 1983, there was talk of burning or shredding those documents because there was no agency to become the recipient of them. So, I would urge that as you go forward with this legislation, that attention be paid to

making sure that such excellent documentation and such a real treasure to the Nation not be lost in the shuffle.

Finally, I urge the subcommittee to take action to reestablish the Commission on Civil Rights so that it can regain the glories of its past and avoid the pitfalls that have led to some of its recent and current troubles and so that it can once again serve as a strong catalyst for civil rights and equality in this country.

Thank you.

[The prepared statement of Mr. Burgdorf follows:]

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TESTIMONY PRESENTED
to the
SUBCOMMITTEE ON THE CONSTITUTION
of the
SENATE COMMITTEE ON THE JUDICIARY
regarding
THE FUTURE OF THE U.S. COMMISSION ON CIVIL RIGHTS

Witness:

ROBERT L. BURGENDORF JR.
Vice President for Project ACTION
National Easter Seal Society

Thursday, June 22, 1989

My name is Robert L. Burgdorf Jr. I am currently Vice President for Project ACTION of the National Easter Seal Society. I have recently accepted a position as Associate Professor of Law at the District of Columbia School of Law, where I will teach Constitutional Law, write a new edition of my law school casebook on the civil rights of persons with disabilities, and supervise a clinical program focusing on disability rights. Along with other representatives of the disability community, I worked with other civil rights groups to develop and support civil rights measures passed in the last Congress, most notably, the Civil Rights Restoration Act and the Fair Housing Amendments Act. I was the principal staff author for the National Council on Disability of the proposed Americans with Disabilities Act, introduced in both houses of Congress last year and reintroduced with some revisions and much bipartisan support in the 101st Congress.

From 1982 to 1985, I worked as an attorney-advisor in the Office of the General Counsel of the U.S. Commission on Civil Rights. In the Spring of 1982, the Commission had undertaken the development of its first official report on discrimination on the basis of handicap, and I was hired as a legal expert on the subject. I co-authored the Commission's report Accommodating the Spectrum of Individual Abilities (1983), which has proven to be an important benchmark in the development of disability rights analysis and has been well-received by the courts, commentators, and the disability rights movement.

I appreciate this opportunity to appear before the Subcommittee to present my perspectives on the Commission on Civil Rights.

Critical Role Played by the Commission

I have long been an interested observer of the role and activities of the U.S. Commission on Civil Rights. In 1972, as a law student, I wrote a paper analyzing the functions and efficacy of the Commission. Drawing upon the ancient analogy of Socrates who, once described himself as a gadfly prodding the conscience of the Roman Senate, I likened the Commission to a gadfly:

It flits around looking for problem spots, spotlights them causing irritation, and awakens the country from its lethargy. To those who would like to maintain the status quo it is a bothersome pest.

The paper examined the historical background of the Commission and described the limited but very significant role that had been assigned to the Commission:

The basic role of the Commission is that of fact-finder; it brings the attention of politicians and of the public to bear upon discrimination problems. The Commission has no power to solve problems on its own. It can only hope to goad Congress, the President, other agencies and the states into providing necessary remedies.

In the paper, I also outlined the broad methods (investigating, reporting, and presenting recommendations) by which the Commission fulfilled its role, and the more specific techniques (field investigations, witness interviews, subpoena power, public hearings, published hearing records, and detailed written reports

with findings and recommendations) used to achieve its objectives.

From my perspective of would-be legal scholarship as law student observer, I accorded the Commission my stamp of approval as having "done a good job," showing "surprising effectiveness," and making "some significant inroads into the evil of discrimination." I concurred with the characterization of the Commission in an ABC News Release as "one of the most remarkable agencies of the government," and its attribution of the Commission's success to the fact that "its investigations of violations of civil rights have been so thoroughly documented and dispassionately done and its findings so revealing."

To sum up the performance of the Commission consistent with my gadfly simile, I quoted the statement of former Commission Staff Director Berl Bernhard in 1963:

Though the Commission is a fact-finding agency alone and has no powers of enforcement, it will, I believe, be seen by history as a major and dynamic force for the realization of civil rights in America. It has done things that no group or other agency could do. It established national goals, conceived legislation, criticized inaction, uncovered and exposed denials of equality in many fields and places, prodded the Congress, nagged the Executive, and aided the courts. Above all, it has lacerated, sensitized, and perhaps even re-created the national conscience.

Were I to write a similar analytical paper today about the Commission on Civil Rights, I would not change the conclusions stated in the original paper regarding the importance of and potential role of the Commission, except to note the expansion of its jurisdiction to include important new areas of age and

handicap discrimination. In describing the effectiveness and success of the Commission in fulfilling its important missions, however, I would have to interject into the recitation of its tradition of civil rights accomplishments, a discrepant recounting of the blemished occurrences that marred the performance of the Commission at times during the latter years of the Reagan Administration.

Problem Times at the Commission

When I accepted a position with the Commission on Civil Rights in the Spring of 1982, I considered it an honor to be associated with such a worthwhile and revered institution. By the time I left the Commission in 1985, its performance and reputation, and my enthusiasm had diminished considerably. Among civil rights organizations, the general public, and many of its own staff members, the Commission suffered a substantial loss of credibility and esteem.

My tenure at the Commission straddled the two distinct phases of the "old" and the "new" Commissions. My firsthand experience of the transition that took place was of a drastic redirection and reduction of Commission activities and of a retreat from standards of thoroughness and thoughtfulness in research, investigation, and documentation.

When I first came to work in the Office of General Counsel, I was very impressed by the high standards of legal research and scholarship. "Legal sufficiency reviews" performed on proposed reports and other documents to be issued by the Commission were extremely thorough and required extensive verifications of referenced authorities. My work on Accommodating the Spectrum of Individual Abilities was subjected to extremely intense review, with an examination by other attorneys of original source materials for all legal, professional, or other authorities relied upon or referenced in the report. The process of staff review and Commission consideration of the proposed report resulted in the reworking of statements not deemed objective or evenhanded, and in the insertion of additional materials to incorporate "the other point of view" in order to maintain the Commission's tradition of comprehensiveness and fairness.

In the "redirected" Commission, however, I did not see the same commitment to objectivity and scholarship. The emphasis came to be less on fact-finding and more on proving a point; less upon investigating and inquiring and more upon demonstrating preconceived assumptions; and less upon the search for truth and more on spreading doctrines.

When I joined the staff of the Commission, morale was generally pretty high, as was the degree of work output. By the time that I left, morale was rock bottom and many of us had little, if any, work assigned to us. Most of the capable people began to leave the Commission staff to take jobs elsewhere. Few

of the excellent professionals whom it was my privilege to work with at the Commission are still working there. And, in my opinion, very little worthwhile work has been produced by the Commission in the last four or five years. The Commission appears to have lost its commitment both to its mission and to excellence.

A Reestablished, Revitalized Commission?

I very much favor the reestablishment of a Commission on Civil Rights along the lines of Senator Simon's discussion draft bill. I believe that problems of discrimination and denials of equal protection that prompted the original creation of the Commission on Civil Rights are still very much with us. Our Nation is still very far from having eliminated discrimination on the basis of sex, color, race, religion, or national origin; and it has only fairly recently begun to establish laws that prohibit discrimination on the basis of handicap or age.

I recently testified before the Subcommittee on the Handicapped of the Senate Committee on Labor and Human Resources in regard to the proposed Americans with Disabilities Act (S. 933). In my testimony, I described the extreme degree of social isolation of people with disabilities resulting from discrimination against them. Our Nation is only beginning to acknowledge the pervasiveness of such discrimination and of its costliness to our society in condemning many persons with

disabilities to lives of dependency, hopelessness, and poverty. As a person with a disability myself resulting from polio in infancy, and as a personal friend of many other individuals with disabilities, I know from experience that discrimination occurs every day. We are today only at the threshold of trying to fashion workable laws to proscribe such discrimination. A reconstituted, reinvigorated Commission on Civil Rights could play a major rôle in documenting and devising new remedies for this and other types of discrimination that persist in America.

I urge the Subcommittee to take action to reestablish the Commission on Civil Rights, so that it may regain the glories of its past and avoid the pitfalls that have precipitated its recent and current troubles, to once again serve as a strong catalyst for civil rights and equality in the United States.

Senator SIMON. Thank you. And finally, one of the real leaders in this country, the head of the NAACP, Dr. Benjamin Hooks. We are very pleased to have you with us, Dr. Hooks.

**STATEMENT OF DR. BENJAMIN L. HOOKS, EXECUTIVE DIRECTOR,
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE**

Dr. Hooks. Thank you, Mr. Chairman and members of the subcommittee and the panel.

I am Benjamin Hooks, executive director of the National Association for the Advancement of Colored People and I appreciate this opportunity to appear before this subcommittee, on behalf of our more than 2,300 branches and youth units in the 50 States of this Nation.

The NAACP was in the forefront of the legislative developments which led to the creation of the Civil Rights Commission in 1957. This was a major accomplishment, inasmuch as no civil rights legislation had been passed since reconstruction. The Commission has served a useful purpose, although I must admit, Mr. Chairman and members of the Commission, that it has a checkered history. In my written statement, I refer to the old Commission and the present Commission.

The old Commission functioned as an independent entity and made its decisions on factfinding, consultations, and datagathering. It was respected by the public, the courts and the Congress. However, the present Commission has failed, as far as we are concerned, to carry out its legal mandate, and during recent years, for all intents and purposes, no longer serves a useful purpose in relationship to its creation.

This behavior of the present Commission resulted in the NAACP in leading the call for the defunding of the Commission because we felt it was not performing its statutory mandate. We are not here to urge defunding of the Commission. We believe that the Congress has an opportunity in the reauthorization process to restructure the Commission, plug up the holes if there be any, which allow the present Commission to engage in independent frolic.

An independent, objective Commission is needed. Discrimination still exists and the recent U.S. Supreme Court decisions are making it much more difficult to level the remaining barriers of discrimination. The NAACP believes that the Commission must be restructured. The esteem with which the old Commission was held in has been dimmed by the blatant political actions of the present Commission.

Mr. Chairman, we appreciate the opportunity to have had the chance to look at your draft legislation and we feel, on the whole, it is a good bill. These are our suggestions.

First, we support the reauthorization of the Commission.

Second, we support a Commission structure which will have three Presidential appointees and four congressional appointees with vacancies being filled by the original appointing authorities. The NAACP supports the provision that limits removing members of the Commission to that of neglect of duty or malfeasance in office.

We strongly support the provision which calls for the selection of the Chair, Vice-Chair, and the staff director by a majority of the Commission members. This, we believe, will help ensure accountability. We support the 12-year term limitation. We do voice our concern over the provision which places the compensation rate of the staff director at a higher level than that of the Commissioners. We believe that this invites controversy and we strongly urge that this provision be redrafted to place the staff director's rate of compensation at a lower level than that of Commission members.

The NAACP supports the section of the bill which gives the Commission the power to submit amicus briefs to the Supreme Court and we call for State advisory committees and publication in the Federal Register. There is a great need for the Commission to appraise the laws and policies of the States and the Federal Government, with respect to denials and other barriers to the right of the franchise and we would hope that the reauthorized Commission would make this a top priority.

In conclusion, Mr. Chairman and members of the subcommittee, the NAACP urges the Congress to reauthorize the Civil Rights Commission as an independent entity, mandated to study and collect information, and appraise the policies and laws in the Federal Government, to investigate allegations of discrimination and to serve as a much-needed clearinghouse for information concerning denials of equal protection and of the laws and of discrimination.

We appreciate this opportunity to have had the chance to appear before you. I have my written statement and will welcome any questions—I do not know if we welcome them or not, but we will try to answer any questions.

[The prepared statement of Dr. Hooks follows:]



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TESTIMONY
of
BENJAMIN L. HOOKS
CEO/EXECUTIVE DIRECTOR
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY
U. S. SENATE
ON THE
REAUTHORIZATION OF THE U. S. COMMISSION ON CIVIL RIGHTS
THURSDAY, JUNE 22, 1989

50-562 Dirksen Bldg

Mr. Chairman, and members of the Subcommittee, I am Benjamin L. Hooks, Chief Executive Officer of the National Association for the Advancement of Colored People. The NAACP appreciates this opportunity to make a statement on behalf of its more than 2300 branches and youth units in the 50 states and the District of Columbia.

...in Pursuit of its Mandate

For more than two decades, the Civil Rights Commission performed its mandate under successive heads of state. It investigated, issued reports and made recommendations regarding housing, education, voting, employment and the administration of justice. It compiled an awesome collection of indisputable facts on the status of civil rights in the nation. It raised the consciousness of the Congress, the President and the entire nation about the plight of blacks, Hispanics, native Americans, women, the aged and the handicapped. Many of the Commission's recommendations became law which underscore the fact that the Commission was a vital tool in the process of expanding equality and justice for all.

While the Commission was always composed of people holding a variety of philosophical perspectives, it reached agreement on policy decisions because it engaged in fact-finding through balanced hearings, consultations and data-gathering by a non-political professional staff. It was as a direct result of fact-finding that the Commissioners, different in philosophy, were able, after study and deliberation, to reach agreement on civil rights issues.

Let me cite an example on a issue that has occupied us unduly during the past two weeks - affirmative action. It took the Civil Rights Commission more than two years of balanced hearings, consultations and data-gathering and study by a non-political professional staff to reach its 1981 affirmative action policy position. Yet, the present reconstituted Commission took less

than a two-hour meeting devoted to the subject to announce that it had changed its affirmative action policy. It should be noted that the Commission had no draft statement, no consultation, no public hearings, no fact-finding at all. All it had was a "philosophical bent" -- something the Commission was not mandated to focus on.

The present Commission has refused to engage in fact-finding; refused to observe the facts found by others or, what is even worse, it misrepresents them. A case in point: The Commission's statement on the Detroit police affirmative action case. The Supreme Court refused to hear the case. Yet the reconstituted Commission criticized the courts. The Appellate court found in the case that:

The record is replete with evidence to support the District Court's conclusion that the Board of Police Commissioners was correct in finding that the Detroit Police Department had employed a consistent overt policy of intentional discrimination against blacks in all phases of its operations...Most of this historical data stands undisputed...The evidence of discrimination... includes 1960 hearings of the U. S. Commission on Civil Rights, testimony by police officers, the 1968 report of the National Advisory Commission on Civil Disorders, the 1967 President's Crime Commission Report, and other official reports as well as expert testimony for both sides. Even after steps began to be taken to address discrimination against blacks who wanted to be officers or acquire promotions started after 1968, the District Court found these efforts were neither extensive or successful.

Another example of misrepresentation. The present Commission's claim that the "Commission's past policy has been to endorse mandatory busing to achieve desegregation" is misleading. The NAACP has never seen a Commission report that, on a blanket basis, said or implied that it endorsed mandatory busing. What the Civil Rights Commission has supported is the use of busing when ordered by a Court as a last resort to desegregate schools.

Now the new Commission may disagree with the Supreme Court, but it is at least important to know that they disagree because they are armed with the facts. The NAACP is of the opinion that without fact-finding, without careful review of the fact found by the past Commission, the present Commission remains only the mouthpiece of those bent on destroying, or at least eroding progress in civil rights.

Mr. Chairman, and members of the Commission I could recite countless examples of how this present Commission has failed to carry out its legal mandate if there was time. The Commission conduct was so irresponsible that over the past several years, the NAACP has led the call for the defunding of the Commission. It was and is the Association's position that if the Commission is not carrying out its statutory mandate that the taxpayers money should not be spent on its independent frolic.

The historical struggle of minorities led to the creation of the Civil Rights Commission and yet we have seen over the past eight (8) years, that same Commission attempt to narrow the definition of discrimination to include only "intentional" discrimination against individuals although it has been documented that many blacks are indeed not treated as individuals, but rather as members of a deprived collectivity, first, under slavery, then as poor sharecroppers, and now as a disproportionate part of the bottom of the working class.

The indisputable fact is that discrimination is still rampant, despite the many legal weapons available for use in combatting it and despite the significant progress that has been made in surpressing it since the passage of the Civil Rights Act of 1957. The long-standing violations of the constitutional rights of black citizens that inspired the passage of the Act and subsequent legislation and the yeoman-like work of the old Commission on Civil Rights made the Commission the official conscience of the nation,

speaking out on injustice wherever it exists. It has been a well-informed conscience, supplying statistics, examples and other data to support its positions--positions that in some cases have been adopted by the Congress the press and the courts.

The old Commission on Civil Rights had an effect on all civil rights legislation passed from 1960 to 1981. If anyone studies the debates on each piece of this legislation, he/she will see that the Commission's reports, testimony and recommendations are widely quoted to support positive positions supporting civil rights. The research performed by the Commission on the particular subject under consideration very often provided the convincing data needed to influence the course of legislation.

In some instances, it may be found that the information supplied by the Commission had been presented by other sources, but coming from an official source, it is granted a recognition of authenticity that is not given to other sources. To use an analogy--meat with a Department of Agriculture stamp of approval is accepted as meeting certain standards, although the stamp in no way changes the quality of the meat. Congress, the Courts and the public have accepted the findings of the old Commission as the findings of an official, disinterested government agency and have reacted to them accordingly.

Commission testimony/reports often made the difference...

Let me cite two examples where we feel the old Commission may well have provided the difference between passage or defeat of a specific piece of legislation before the Congress. Both examples deal with voting. The first was the changeover from court-appointed voting referees provided for in the Civil Rights Act of 1960 to Civil Service Commission-appointed voting examiners under the 1965 Voting Rights Act. The second instance was the

1975 extension of the protections of the 1965 Voting Rights Act to cover persons who are native Americans, Asian-Americans, Alaskan natives or of Spanish heritage. We could cite more, but we use these two examples because they relate to one of the most important of all civil rights--the right to vote.

Another important achievement of the old Commission was that of alerting the public to developments in the area of civil rights, both favorable and unfavorable. Its comprehensive reports on all aspects of American life were well-publicized, well-received and informative. We believe that its reports have helped to shape public opinion favorably to the exercise of civil rights and helped to dull many of the attacks on the assertion of those rights.

We stress particularly the positive approach the old Commission took. While it pointed out deficiencies in the administration and the enforcement of civil rights law, it also noted the gains made under them.

Mr. Chairman, and members of the subcommittee, my remarks thus far have dealt with what I term the "old" Civil Rights Commission--the pre-Reagan era Commission and the present Commission. The once independent, research-oriented, fact-finding agency, led by Commissioners with differing political philosophies, was destroyed by a vast majority of politically-partisan Commissioners whose first loyalty was to the President rather than to fact-finding and objective analysis of the fact.

Independence of the Commission

The Congress wisely made the U. S. Commission on Civil Rights an independent, bipartisan entity and, we believe, Mr. Chairman, and members of the Subcommittee, that that independence must be retained. Its studies and reports should, as it has in the past, force the government to be introspective and look within. The Commission must maintain its integrity regardless of the political winds of change.

Congress should reauthorize the Commission

Mr. Chairman, the NAACP has changed its position since it last appeared before this Subcommittee. We are not calling for defunding of the Commission. We are urging the Senate to critically look at what the old Commission accomplished, contrast that with the aberrant behavior of the current Commission and structure a new Commission that will be independent and perform the mandate of the Congress.

Structure of the Commission

The NAACP appreciates the opportunity to look at your draft legislation, Mr. Chairman. On the whole, it is a good bill. We do have several suggestions for change.

First, we support reauthorization of the Commission.

Second, we support a Commission structure which would have three (3) Presidential appointees and 4 Congressional appointees with vacancies being filled by the original appointing authorities.

The NAACP supports the provision that limits removal of members of the Commission to that of "neglect of duty or malfeasance in office."

We strongly support the provision which calls for the selection of the Chair, Vice Chair and the staff director by a majority of the Commission members. This, we believe, will help ensure accountability.

The NAACP supports the 12 year term limitation.

We do voice our concern over the provision which places the compensation rate of the staff director at a higher level than that of the Commissioners. We believe that this invites controversy and we strongly urge that this provision be redrafted to place the staff director's compensation rate at a lower level than that of Commission members.

The NAACP supports the sections of the bill which give the Commission the power to submit amicus curiae briefs to the Supreme Court; calls for

State Advisory Committee and publication in the Federal Register.

Appraisal of voting and political participation

There is a great need for the Commission to appraise the laws and policies of the States and the Federal government with respect to denials and other barriers to the right of the franchise and we would hope that the reauthorized Commission would make this a top priority.

Conclusion

In conclusion, Mr. Chairman, and members of the Subcommittee, the NAACP urges the Congress to reauthorize the Civil Rights Commission as an independent entity mandated to study and collect information and appraise the policies and laws of the Federal government, to investigate allegations of discrimination and to serve as much-needed national clearinghouse for information concerning denials of equal protection of the laws and discrimination.

We would hope that when the Chairman of the Commission speaks publicly that he/she is reflecting the views of the Commission and not his/her independent views and that the Commission will conduct itself in a seemly fashion so that it acquires the stature that will result in its proclamations being heeded.

We appreciate this opportunity to appear before you and will welcome any questions the Subcommittee may have.

Senator SIMON. Thank you very much, Dr. Hooks. Let me just add that a person who is no longer on my staff, who served with me for 8 or 9 years who is now practicing law, but who has been very helpful here, is Bud Blakey. He is out there in the audience and I appreciate his contribution to all of this.

Let me ask a very realistic, nuts and bolts question. Dr. Horn, you mentioned this in addition to Dr. Hooks. When you talk about having the Commissioners paid more than the staff director, my assumption has always been that the Commissioners are part-time people while the staff director is a full-time person.

Dr. Hooks. Senator, I was not referring to making more than the staff director, but the bill provides that the staff director be paid at the rate of executive level II and the Commissioners at the rate of executive level III. It is the rate of compensation, not the amount.

Senator SIMON. I see.

Dr. HORN. I agree with that and I agree with your limitation on the amount that the part-time members of the Commission can make. I think that precludes Chair, Vice-Chair, members from making it a full-time job. The strength of the Commission has been the part-time nature of the Commissioners, all of whom are full-time employed or retired, and are not dependent on that position and therefore, shade their views one way or another. I think that provision is a very good one on your part.

Senator SIMON. Dean Griswold, you and some of your colleagues disagree on this amicus question. Let me ask you a very practical question. You have observed the courts for many years. Is an amicus influential to a court or can it be?

Dean GRISWOLD. An amicus brief by the Solicitor General is frequently invited by the court and I think has a great tendency, if it is well-done and they usually are, to be very influential. But if we start a situation where the Securities and Exchange Commission and the Federal Trade Commission, and the Bureau of Indian Affairs, and the Civil Rights Commission—anyone can file briefs in the Supreme Court, they will be of very little weight.

I remember going to call on Justice Holmes a good many years ago and he picked up a pile of briefs on his desk and threw it in the wastebasket and he said, I do not read these briefs and I do not care who knows it either.

I think we might have a situation like that unless the Congress continues the policy which it has not followed now for 120 years of authorizing the Solicitor General to determine the representation of the officers and agencies of the United States before the Supreme Court of the United States.

Senator SIMON. What about a situation that, in fact, did develop where you have the Solicitor General speaking for the administration, but the majority of the people for whom the Civil Rights Commission was established, have precisely the opposite views?

It does seem to me that it is helpful for the Commission in that unusual circumstance—and we hope it remains unusual, maybe even unique—but in that kind of a circumstance, for the Commission to be able to file an independent amicus.

Dean GRISWOLD. If the Commission were to file one brief every 3 years, I think there is a lot to be said for it, but this is a blanket authority. The Commission could come in a half a dozen times a

year and that, I think, would be undesirable and a very bad precedent.

Senator SIMON. Mr. Nunez, you were wanting to add something there.

Mr. NUNEZ. Yes; well, I think this speaks to the central issue of whether the Commission is merely an executive department, or whether it is an agency rather, that reports to the Congress and to the President and I believe the latter. I would agree completely with Dean Griswold that if it was merely an executive department, it should follow the same pattern as any executive department.

But in terms of my view of the Commission and what is suggested here is that the Commission is a unique agency in this Federal Government, that it is responsible to the Congress and it is also responsible to the Executive. In that sense, I do think it should have that power to present *amicus curiae* briefs directly to the Supreme Court.

I think the Commission, in my period there, was cited several times—several of its reports through the years were cited by the Supreme Court. So, I think in terms of issues of great complexity, affirmative action for example, where this legislation calls specifically for the Commission to make reports, I think that by the very nature of the make-up of the Commission as is specified in this proposed legislation, I think the Supreme Court would be interested in the views of a nonpartisan Commission set up in this way, who had conducted comprehensive studies, had had public hearings, had done surveys, and so forth.

So, I think in that sense, as you see the Commission, then you will agree whether it should have *amicus curiae* powers.

Senator SIMON. We have a former judge among the panelists here. Judge Hooks, Dr. Hooks, any reflections on this?

Dr. Hooks. I remember when I was at the FCC more recently perhaps, I guess I felt somewhat like Justice Holmes. When I looked at that pile of papers, it was frightening and intimidating and overwhelming. Nevertheless, I think the Commission should have the right to file it because it may be that if it regains the good standing it once had, that it does have a certain type of appeal and might be the type of brief that the clerks at least would look at, if the Justices did not.

All of these papers, I know, can be overwhelming to a court, but I still think it is a power that the Commission ought to have and, of course, I do not think you can write into the legislation that they ought to use it sparingly, but I think that they ought to, in reviewing the legislative history that is discussed, it might be discussed in the legislative history so that it would not be filing willy-nilly, but that it would file in appropriate cases.

I remember in the *Runyon* case just recently before the Supreme Court, I believe, an extraordinarily large number of Senators and Congress people and other interested groups filed *amicus* briefs and I do not know if they had an effect on the Court, but even those who voted to rehear voted to uphold the original thing. I think it has some effectiveness and ought not to be—I think it ought to be granted.

Senator SIMON. Dr. Horn.

Dr. HORN. Mr. Chairman, from the beginning of the Commission in 1957, while it is an executive agency, it was made clear by Congress that it reports to the President and to Congress. Unlike other executive agencies, it has never had to clear its testimony with the Office of Management and Budget. It has not had to conform to those types of administration control rules and apply across-the-board to cabinet departments, and even regulatory aspects of the Government.

It has been said several times, the agency is unique. That is not just public relations puffery. What it is is a Presidential commission originally established for a few years, extended by Congress every few years, which can stay around to monitor its recommendations.

The only close analogy is the Hoover Commission, where the only way they monitored its recommendations was to set up a sort of private, followup group. All the other major Presidential commissions of history have met, studied a problem, issued a report, gone out of business, and most of their recommendations gather dust.

This Commission has been recognized by the Congress and President to have the staff needed, perhaps not as much as some would think, to go monitor what the executive branch has done, worked with congressional committees and subcommittees, as we have over the years with the Edwards Subcommittee in the House, in particular, to bring the evidence we have gathered together so that Congress can conduct its oversight function.

But we can stay at it with a certain amount of tenacity more than a congressional staff can because they are going to other issues under that particular staff's jurisdiction.

So, it is a very important role and there has sort of been a consensus that we do not operate like an executive agency, but we are of the executive branch and yet we report to both branches.

Dean GRISWOLD. I would agree entirely with Dr. Horn on that. It was, for 20 plus of its 30 year's existence, a very special agency being given a very broad amount of independence, expected to exercise that independence, and exercise it wisely, which I think for many years it did.

Nevertheless, I think that in constitutional terms, it is in the executive branch and that is why I think the members should be appointed by nomination by the President and confirmation by the Senate, one of the checks and balances provisions established by the Founders, which seems to me to be particularly relevant in this special agency.

Senator SIMON. Dr. Flemming, we have heard differing suggestions as to whether we should have State advisory committees. You did not refer to that in your statement, I do not believe. The U.S. Commission has been referred to as the conscience of the Nation.

Do the State advisory commissions serve a similar function? Are they worthwhile?

Dr. FLEMMING. I concur wholeheartedly in Louis Nunez's evaluation of the role of the State advisory committees. I also concur in the point that Dr. Horn has made, that one should recognize that if we are to get full benefit from the advisory committees, we must

make an investment in that particular part of the Commission's operation.

In other words, there must be staff support for these citizens who volunteer their services to serve on the State advisory committees. I think, in quite a number of instances, those committees have really moved out in front and been extremely helpful.

I also agree with Dr. Horn that if they are kept in the bill—and I certainly hope they will be—that language should be inserted which makes it very clear that the Congress expects those advisory committees to be representative of all segments of our population because when he and I were serving together on the Commission, we worked with Mr. Nunez and others in order to correct a situation that needed to be corrected, as far as that aspect of the matter is concerned.

But I think that they are unique. Not many agencies have 50 advisory committees. Most of us feel that we are relatively in a good position if we have one advisory committee, but if you have 50, why it does create some problems. But I think they are problems that are worthwhile creating.

Senator SIMON. We are pretty good at creating problems up here on the Hill.

Dr. FLEMMING. Well, that is all right. I would stay with it, but I would refine it and I hope that the Committee report would recognize the fact that you are continuing them, but you know that in order for them to function effectively, that this group of volunteers have got to have adequate staff support.

I am a great believer in the volunteer system in this country, but it works effectively only when we are able to give it good staff support. This is a good illustration of that.

Mr. Chairman, I would like also to comment on the discussion or the dialogue that has taken place on just how the Commission fits into our structure of government. I feel that Dr. Horn has described it very, very effectively and I would like to see that language captured as far as the bill is concerned.

We were able to maintain that status, but sometimes we were skating on pretty thin ice. I was admonished a couple of times by people over at OMB because I had not cleared some testimony with them before I came up and testified on behalf of the Commission, but I had no difficulty in dealing with that. But that was an understanding and it was an understanding that worked over a period of approximately a quarter of a century.

But I would like to see that kind of codified in the bill and I think if it were codified, it would be very helpful. I would also like to say this. If I were sitting on the Committee that you chair, that I would want to explore very, very carefully the constitutional issue that Dean Griswold has identified as far as appointment is concerned.

As you know, I have been involved in quite a number of discussions on the future of the Commission, some formal and some informal, and my overwhelming desire is to see this Commission reestablished as a strong, bipartisan, nonpartisan, independent Commission that will come to grips with these issues as the Commission did over a period of 25 years.

I recognize that because of the 1983 law, that the legislative branch has been brought into the appointing process, and I recognize that it may be difficult to change that. Now, that is no reason why it should not be changed if we are in a position where it is questionable from a constitutional point of view.

So, I think that ought to be explored. I can see some advantages from the standpoint—and that is why I reached the conclusion that I did—from the standpoint of achieving the overall objective that I have in mind of participation in the appointing process on the part of the President and the President pro tempore of the Senate and the Speaker of the House.

I would also like to say that, like Dr. Horn, I would like to even out the membership of the Commission. I have suggested, I think to one of the members of your staff, that it be six, not seven. Dr. Horn suggested eight, not seven. I guess probably—he and I have not talked about this—but we are probably thinking of it as a psychological factor.

We were accustomed to serving on the Commission in even numbers, with the provision that not more than three should be members of the same political party. We were accustomed to working with a Commission that developed a real, honest-to-goodness collegial feeling. As he said in his opening statement, we never split on party lines. In fact, after we spent sometimes days working with a proposed report, we did not split along any lines. We reached a consensus.

I can remember, as I am sure he can, the hours that we put into a monograph that we issued on affirmative action. We started out with quite a number of different points of view on that, but we stayed with it on the basis of the record that had been developed until we finally reached a consensus and I think that monograph has proved to be very helpful.

We had the same experience after we went up to Boston and had 5 days of hearing on school desegregation between phase I and phase II, so that we never had to worry about whether we were going to get a majority vote of four, say, if it were a Commission of three, to issue a report. We just did not split that way. That is why personally, I would feel a little more comfortable if it was either six or eight, one or the other.

Dr. HOOKS. Senator Simon, I had asked to be excused, if you do not mind.

Senator SIMON. I certainly do not. We are going to excuse everybody in just a few minutes. Let me just add, Dr. Hooks, before you leave. Your association has been well-represented down here by Althea Simmons, prodding us all regularly, and we appreciate her work for your organization and for all Americans.

Dr. HOOKS. Thank you, Senator.

Senator SIMON. Just two more quick questions.

Mr. Burgdorf, through the years, has the disability community been represented in appointments generally?

Mr. BURGDORF. To my knowledge, there has never been a person with a disability who has been a member on the Commission.

Senator SIMON. That was my recollection. I thank you very much.

And then, Ms. Chavez or anyone else here, I received a phone call this morning regarding an American in a situation outside the 50 States. Has the Commission considered the problems of Puerto Rican-Americans, American-Samoans, people in Guam, and so forth? Has that also been felt as a part of the Commission's responsibility? Ms. Chavez?

Ms. CHAVEZ. Well, certainly the issue of the rights of Puerto Rican-Americans has been addressed over a number of years and studies have been done that incorporated studies of Puerto Rican-Americans. I do not know about Guam.

Senator SIMON. But outside—you are talking about Puerto Rican-Americans in Puerto Rico? So that the Commission does not feel confined to the 50 States?

Ms. CHAVEZ. Not to my knowledge.

Senator SIMON. Mr. Nunez.

Mr. NUNEZ. When I was at the Commission, we did a survey of Puerto Rico and the statutes are somewhat ambiguous on whether Puerto Rico is covered in terms of States. We never came to a conclusion. It is a good point that we might want to be fairly specific in the proposed new legislation what occurs in jurisdictions that are not clearly States.

You can make the analogy with the District of Columbia, which is not a State and which is clearly covered. But Puerto Rico—we looked at it and as I recall, we never came to any conclusions as to whether it was covered.

For example, around the issue of whether a State advisory commission could be organized in Puerto Rico, we concluded that perhaps there no legal impediments, but the statutes were ambiguous enough to leave it alone for the moment.

I would perhaps recommend at this point that we say that the proposed bill say something to that effect, what is the jurisdiction of the Commission outside of the 50 States.

Senator SIMON. OK. Dr. Horn.

Dr. HORN. I would agree with that. I recall raising the question of the American military's conduct with various native populations in the Pacific Islands. I was suitably outraged at the time. We had an exchange of correspondence with the Pentagon on it, but we did not follow through, I regret to say, and go out there. I suspect we felt that one, it is the old story of major problems here driving out what are small problems for some, but big problems for the people affected.

I think it is also the problem of the fear of the Commission being accused of taking a junket to the South Seas. So, I would agree with Mr. Nunez. If the Congress wishes us to follow that trail of American activity in their treatment of some native peoples where we have left a lot to be desired in the last 40 years, that ought to be specifically noted in the legislation.

Senator SIMON. All right.

Let me just add my thanks to all of you. We will be keeping your comments in mind, as well as others—I have sent the draft of the legislation to a number of civil rights leaders around the country and we are going to be taking all of those into consideration as we introduce a bill shortly after we get back from the recess.

Dean Griswold, you get the final word here.

Dean GRISWOLD. May I add a footnote? There have been a number of references here to recent adverse decisions of the Supreme Court. I was long a law teacher and 6 years Solicitor General and I think it is important that those cases be read very carefully. I am not so sure that they are adverse and I am quite sure they are not all that adverse.

I think what they largely do is shift the burden of proof. It simply means that the people who are advocating civil rights will have to do a more thorough and careful job of digging out facts, presenting them to courts, and if they do, there is nothing in these decisions that say that those facts cannot be evaluated, relied on, and lead to favorable decisions.

Senator SIMON. We thank you. On that note, we shall adjourn our subcommittee hearing.

[Whereupon, at 3:30 p.m., the subcommittee was adjourned, subject to the call of the Chair.]

APPENDIX

231011.083

S.L.C.

DISCUSSION DRAFT

101ST CONGRESS
1ST SESSION

S. _____

IN THE SENATE OF THE UNITED STATES

Mr. SIMON introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To reestablish the United States Commission on Civil Rights,
and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assem-*
3 *bled,*

4 SECTION 1. SHORT TITLE.

5 "This Act may be cited as the "United States Com-
6 mission on Civil Rights Amendments Act of 1989".

1 SEC. 2. UNITED STATES COMMISSION ON CIVIL RIGHTS.

2 The United States Commission on Civil Rights Act of
3 1983 (42 U.S.C. 1975 et seq.) is amended to read as fol-
4 lows:

5 "SECTION 1. SHORT TITLE.

6 "This Act may be cited as the 'United States Com-
7 mission on Civil Rights Act of 1989'.

8 "SEC. 2. ESTABLISHMENT OF COMMISSION.

9 "There is established a United States Commission on
10 Civil Rights (hereinafter referred to in this Act as the
11 'Commission').

12 "SEC. 3. MEMBERSHIP OF COMMISSION.

13 "(a) APPOINTMENT.—

14 "(1) IN GENERAL.—The Commission shall con-
15 sist of seven members, of which—

16 "(A) three members shall be appointed by
17 the President;

18 "(B) two members shall be appointed by
19 the President pro tempore of the Senate; and

20 "(C) two members shall be appointed by
21 the Speaker of the House of Representatives.

22 "(a) APPOINTMENT.—

23 "(1) IN GENERAL.—*The Commission shall consist*
24 *of seven members to be appointed by the President,*
25 *with the advice and consent of the Senate.*

1 “(2) *LIMITATION.*—*Not more than three members*
2 *of the Commission may be from the same political*
3 *party.*

4 “(b) *TERMS OF OFFICE, VACANCIES, AND DISMISSAL.*—

5 “(1) *INITIAL TERM.*—*The terms of office for the*
6 *initial members of the Commission appointed under*
7 *subsection (a) shall be—*

8 “(A) *for the appointments made under*
9 *subsection (a)(1)(A)—*

10 “(i) *a period of 3 years for one such*
11 *member;*

12 “(ii) *a period of 2 years for one such*
13 *member; and*

14 “(iii) *a period of 1 year for one such*
15 *member;*

16 “(B) *for the appointments under subsection*
17 “(a)(1)(B)—

18 “(i) *a period of 3 years for one such*
19 *member; and*

20 “(ii) *a period of 6 years for one such*
21 *member; and*

22 “(C) *for the appointments under subsection*
23 “(a)(1)(C)—

24 “(i) *a period of 3 years for one such*
25 *member; and*

1 “(ii) a period of 6 years for one such
2 member.

3 “(2) SUBSEQUENT TERM.—The term of office for
4 members of the Commission who are appointed sub-
5 sequent to initial members appointed under para-
6 graph (1) shall be 6 years.

7 “(1) *IN GENERAL.*—*The terms of office for the*
8 *initial members of the Commission appointed under*
9 *subsection (a) shall be for a period of not less than*
10 *3 years and not to exceed 6 years, as determined by*
11 *the President. Each subsequent term shall be for a*
12 *period of 6 years.*

13 “(3) (2) DURATION OF TERM OF OFFICE.—An in-
14 dividual shall not serve for more than 12 years on
15 the Commission.

16 “(4) (3) VACANCIES.—

17 “(A) *IN GENERAL.*—A vacancy on the
18 Commission shall not affect the powers of such
19 Commission. A vacancy shall be filled in the
20 same manner as the original appointment was
21 made.

22 “(B) *TERM OF SUCCESSOR.*—An individual
23 who is appointed to fill a vacancy on the Com-
24 mission shall serve for the remainder of the

1 term for which the predecessor of such individ-
2 ual was appointed.

3 “(5) (4) DISMISSAL FROM OFFICE.—The Presi-
4 dent may remove a member of the Commission for
5 neglect of duty or malfeasance in office.

6 “(c) CHAIR, VICE CHAIR, AND STAFF DIRECTOR.—

7 “(1) SELECTION.—There shall be a Chair, Vice
8 Chair, and full-time Staff Director of the Commis-
9 sion, who shall be selected by a majority of the
10 members of the Commission.

11 “(2) TERM OF CHAIR.—The Chair of the Com-
12 mission shall serve for a term of not to exceed 3
13 years and may serve successive terms.

14 “(3) VICE CHAIR.—The Vice Chair shall act in
15 the place of the Chair in the absence of the Chair.

16 “(d) COMPENSATION.—

17 “(1) MEMBERS.—

18 “(A) IN GENERAL.—Each member of the
19 Commission who is not otherwise in the service
20 of the Federal government shall receive a sum
21 equivalent to the compensation paid at level III
22 of the Federal Executive Salary Schedule, pur-
23 suant to section 5314 of title 5, United States
24 Code, prorated on a daily basis for each day
25 spent in the work of the Commission.

1 “(B) TRAVEL EXPENSES AND PER DIEM.—
2 Each member of the Commission shall receive
3 reasonable allowances for necessary expenses of
4 travel, lodging, and subsistence incurred in at-
5 tending meetings and other activities of the
6 Commission in amounts that shall not exceed
7 the maximum fixed by subchapter 1 of chapter
8 57 of title 5, United States Code, for officers
9 and employees of the United States.

10 “(C) FEDERAL EMPLOYEE.—Each member
11 of the Commission who is otherwise in the
12 service of the Federal government shall serve
13 without compensation in addition to that re-
14 ceived for such other service, but while engaged
15 in the work of the Commission shall be paid ex-
16 penses as provided under subparagraph (B).

17 “(D) LIMITATION.—The total amount that
18 each member of the Commission may receive
19 under subparagraphs (A) through (C) in any one
20 calendar year shall not exceed one third of the
21 total compensation paid to the Staff Director in
22 any one calendar year under paragraph (2).

23 “(2) STAFF DIRECTOR.—The Staff Director of
24 the Commission shall receive a sum equivalent to
25 the compensation paid at level II of the Federal Ex-

1 executive Salary Schedule, pursuant to section 5313 of
2 title 5, United States Code.

3 "SEC. 4. DUTIES OF THE COMMISSION.

4 "(a) DEFINITION.—As used in this section, the term
5 'handicap' means a physical or mental impairment that
6 substantially limits one or more of the major life activities
7 of an individual.

8 "(b) IN GENERAL.—The Commission shall—

9 "(1) investigate allegations in writing, made
10 under oath or affirmation and setting forth facts on
11 which such allegation is based, that certain citizens
12 of the United States are being deprived of the right
13 to vote and have such vote counted by reason of
14 color, race, religion, sex, age, handicap, language,
15 disability, or national origin;

16 "(2) study and collect information, and appraise
17 the laws and policies of the Federal government,
18 concerning legal developments constituting discrimi-
19 nation, or a denial of equal protection of the laws
20 under the Constitution, because of race, color, reli-
21 gion, sex, age, handicap, language, disability, or na-
22 tional origin or in the administration of justice, edu-
23 cational opportunity, employment opportunity, and
24 equal housing opportunity;

1 “(3) serve as national clearinghouse for infor-
2 mation concerning discrimination or denials of equal
3 protection of the laws under the Constitution because
4 of race, color, religion, sex, age, handicap, language,
5 disability, or national origin, including the fields of
6 voting, education, housing, employment, the use of
7 public facilities, and transportation, or in the admin-
8 istration of justice; and

9 “(4) investigate allegations, made in writing
10 and under oath or affirmation, that citizens are un-
11 lawfully being accorded or denied the right to vote
12 and to have such vote properly counted in any elec-
13 tion of the Presidential electors, Members of the
14 Senate, or Members of the House of Representatives,
15 as a result of any patterns or practice of fraud or dis-
16 crimination in the conduct of such election.

17 “(c) LIMITATION.—Nothing in this or any other Act
18 shall be construed as authorizing the Commission, the ad-
19 visory committees of the Commission (as established
20 under section 5(b)(1)), or any individual under the supervi-
21 sion or control of the Commission to investigate any mem-
22 bership practice or internal operation of any fraternal orga-
23 nization, college or university fraternity or sorority, private
24 club, or any religious organization.

1 “(d) AMICUS CURIAE BRIEFS.—The Commission may
2 submit an amicus curiae brief to the Supreme Court of the
3 United States on any matter within the jurisdiction of the
4 Commission, if a majority of the members of the Commis-
5 sion approve the submission of such brief.

6 “(e) REPORTS.—

7 “(1) IN GENERAL.—The Commission shall
8 submit an annual report to the appropriate commit-
9 tees of Congress and to the President concerning—

10 “(A) the existing status of civil rights in
11 the United States;

12 “(B) the enforcement of civil rights laws
13 by Federal, State, and local governments;

14 “(C) the existing status of the political,
15 social, and economic equality of minorities and
16 women;

17 “(D) the impact of Federal fiscal policies,
18 programs, and activities on minorities and
19 women; and

20 “(E) any other information that the Chair
21 determines appropriate.

22 “(2) VOTING AND POLITICAL PARTICIPATION.—

23 “(A) APPRAISAL.—The Commission shall
24 appraise the laws and policies of each State and
25 the Federal government with respect to denials

1 of the right to vote and the political participa-
2 tion of minority groups, including African
3 Americans, Hispanic Americans, Asian Ameri-
4 cans, Native Americans, Americans from the
5 Pacific Islands, women, and disabled individ-
6 uals.

7 “(B) REPORT.—The Commission shall in-
8 clude the result of the appraisals conducted
9 under subparagraph (A) in the reports required
10 under paragraph (1), together with an analysis
11 of any adverse consequences of affirmative
12 action programs encouraged by the Federal gov-
13 ernment on the equal opportunity rights of such
14 citizens.

15 “(f) ABORTION.—Nothing in this or any other Act
16 shall be construed as authorizing the Commission, the ad-
17 visory committees of the Commission (as established
18 under section 5(b)(1)), or an individual under the supervi-
19 sion or control of the Commission to appraise, study, and
20 collect information concerning the laws and policies of the
21 Federal government, or any other governmental entity,
22 with respect to abortion.

23 “SEC. 5. POWERS AND DUTIES OF THE COMMISSION

24 “(a) EMPLOYEES.—

1 “(1) IN GENERAL.—The Commission may hire
2 employees and procure services as authorized by
3 section 3109 of title 5, United States Code. The rate
4 of compensation paid to such individuals by the
5 Commission may not exceed the daily equivalent
6 paid for positions at the maximum rate for an indi-
7 vidual who is at a position equivalent to GS-15 of
8 the General Schedule under section 5332 of title 5,
9 United States Code.

10 “(2) VOLUNTARY PERSONNEL.—The Commission
11 shall not accept or utilize services of voluntary or
12 uncompensated personnel.

13 “(b) ADVISORY COMMITTEES.—

14 “(1) IN GENERAL.—The Commission shall es-
15 tablish an advisory committee in each State that shall
16 be composed of citizens of such State.

17 “(2) INVESTIGATIVE AUTHORITY.—An advisory
18 committee established under paragraph (1) shall have
19 the same investigative authority as the Commission
20 has under section 6, except that such committee shall
21 not—

22 “(A) subpoena a witness or require such
23 witness to produce written or other material for
24 the Commission; and

1 “(B) conduct investigations beyond the
2 boundary of the State where such committee is
3 located.

4 “(c) CONSULTATION.—The Commission may consult
5 with governors, attorneys general, and other representa-
6 tives of State and local governments and private organiza-
7 tions, as the Commission considers appropriate.

8 “(d) EXEMPTION.—Members of the Commission, and
9 members of advisory committees established pursuant to
10 subsection (b), shall be exempt from sections 203, 205,
11 207, 208, and 209 of title 18 of the United States Code.

12 “(e) RULES AND REGULATIONS.—The Commission
13 shall have the power to make such rules and regulations as
14 are necessary to carry out this Act.

15 “(f) TRANSFER OF RECORDS.—The Commission shall
16 arrange for the transfer of all files, records, and balances of
17 appropriations of the Commission on Civil Rights as estab-
18 lished by the United States Commission on Civil Rights
19 Act of 1983 to the Commission established by this Act.

20 “(g) TRANSFER OF EMPLOYEES.—

21 “(1) TRANSFER TO ORIGINAL POSITION.—On the
22 application of an individual (other than the Staff Di-
23 rector of the Commission or a member of the Com-
24 mission) who was an employee of the Commission
25 on Civil Rights as established by United States Com-

1 mission on Civil Rights Act of 1983, who was em-
2 ployed by the Commission on Civil Rights on the
3 date of enactment of this Act, the Commission may
4 consider and appoint such individual to a position
5 with the equivalent duties, responsibilities, and rate
6 of pay as the position held by such individual on the
7 Commission on Civil Rights as established by the
8 United States Commission on Civil Rights Act of
9 1983.

10 “(2) RIGHTS AND BENEFITS.—Notwithstanding
11 any other provision of law, an employee transferred
12 to the Commission under this subsection shall retain
13 all rights and benefits that such employee was enti-
14 tled or eligible for immediately prior to such transfer
15 to the Commission.

16 “(h) PUBLICATION IN FEDERAL REGISTER.—

17 “(1) IN GENERAL.—The Commission shall pub-
18 lish in the Federal Register—

19 “(A) a description of central and field or-
20 ganizations of the Commission, including the
21 established places and methods that the public
22 may secure information or make requests;

23 “(B) statements of the general course and
24 method by which its functions are channeled
25 and determined; and

1 “(C) rules adopted as authorized by law.

2 “(2) NONPUBLICATION.—No individual may be
3 subject to rules, organizations, or procedures not
4 published as required under paragraph (1).

5 “SEC. 6. COMMISSION HEARINGS.

6 “(a) IN GENERAL.—The Commission or, on the au-
7 thorization of the Commission, a subcommittee of two or
8 more members of the Commission with representation
9 from both political parties, may hold such hearings and act
10 at such times and places as the Commission or such au-
11 thorized subcommittee consider necessary to carry out the
12 responsibilities of the Commission.

13 “(b) DECISION TO HOLD HEARING.—The decision to
14 hold a hearing by the Commission, or the appointment of a
15 subcommittee to hold hearings, shall be approved by a ma-
16 jority of the Commission, or by a majority of the members
17 of the Commission present at a meeting at which at least a
18 quorum of four members is present.

19 “(c) NOTIFICATION.—Not later than 30 days prior to
20 the commencement of any hearing, the Commission shall
21 publish in the Federal Register notice of the date on which
22 such hearing is to commence, the place at which such
23 hearing is to be held, and the subject of such hearing.

24 “(d) OPENING STATEMENT.—The Chair of the Com-
25 mission, or an individual designated by the Chair to act as

1 the Chair at a hearing of the Commission, shall announce
2 the subject of a hearing in the opening statement of such
3 hearing.

4 “(e) COPY OF RULES.—A copy of the rules of the
5 Commission shall be made available to any witness ap-
6 pearing before the Commission. A witness compelled by a
7 subpoena to appear before the Commission, or required to
8 produce written or other matter for the Commission, shall
9 be served with a copy of the rules of the Commission at
10 the time of service of such subpoena.

11 “(f) RIGHT OF COUNSEL.—

12 “(1) IN GENERAL.—An individual who is com-
13 pelled to appear before the Commission shall have
14 the right to be accompanied and advised by counsel.

15 “(2) RIGHT OF COUNSEL.—An attorney who rep-
16 represents an individual appearing before the Commis-
17 sion shall have the right to subject the client of such
18 attorney to reasonable examination, to make objec-
19 tions on the record, and to argue briefly concerning
20 the basis for such objections.

21 “(g) RIGHT TO A SPEEDY HEARING.—

22 “(1) IN GENERAL.—The Commission shall pro-
23 ceed with reasonable speed to conclude any hearing
24 that the Commission is conducting.

1 “(2) CONVENIENCE AND NECESSITY OF WIT-
2 NESSES.—The Commission shall act with due regard
3 for the convenience and necessity of witnesses to a
4 hearing.

5 “(h) CENSURE AND EXCLUSION.—The Chair or Vice
6 Chair of the Commission may punish breaches of order
7 and decorum by censure and exclusion from the hearings.

8 “(i) DEFAMATION, DEGRADATION, OR INCRIMINA-
9 TION.—

10 “(1) IN GENERAL.—If the Commission deter-
11 mines that evidence or testimony at a hearing may
12 tend to defame, degrade, or incriminate any individ-
13 ual, the Commission shall receive such evidence, tes-
14 timony, or summary of such evidence or testimony
15 in executive session.

16 “(2) OPPORTUNITY TO APPEAR.—The Commis-
17 sion shall allow an individual who is defamed, de-
18 graded, or incriminated by evidence or testimony re-
19 ferred to in paragraph (1) an opportunity to appear
20 and be heard in executive session, with a reasonable
21 number of additional witnesses requested by such in-
22 dividual, before deciding to use such evidence or tes-
23 timony.

24 “(3) PUBLIC SESSION.—If the Commission deter-
25 mines to release or use such evidence or testimony

1 referred to in paragraph (1) in a manner that publicly
2 reveals the identity of the individual who was de-
3 famed, degraded, or incriminated, such evidence or
4 testimony, prior to such public release or use, shall
5 be provided at a public session, and the Commission
6 shall afford such individual the opportunity to—

7 “(A) appear as a voluntary witness;

8 “(B) file a sworn statement on behalf of
9 such individual; and

10 “(C) submit brief and pertinent sworn
11 statements of other individuals.

12 “(4) ADDITIONAL WITNESSES.—The Commission
13 shall receive and dispose of requests from an indi-
14 vidual described in paragraph (3) to subpoena addi-
15 tional witnesses in accordance with paragraph (3)(C).

16 “(5) REPORT.—If a report of the Commission
17 tends to defame, degrade or incriminate any individ-
18 ual, such report shall be delivered to such individual
19 not later than 30 days prior to such report being
20 made public in order to allow such individual the
21 opportunity to make a timely answer to the report.

22 “(6) VERIFIED ANSWER.—

23 “(A) IN GENERAL.—Each individual de-
24 famed, degraded, or incriminated in the report
25 referred to in paragraph (5) may file a verified

1 answer to the report with the Commission not
2 later than 20 days after service of the report on
3 such individual.

4 “(B) EXTENSION.—On a showing of good
5 cause, the Commission may grant such individ-
6 ual an extension of time to file such answer.

7 “(C) SUBSTANCE OF ANSWER.—Such
8 answer shall plainly and concisely state the
9 facts and law constituting the reply or defense
10 of such individual to the charges or allegations
11 contained in a report referred to in paragraph
12 (5).

13 “(D) APPENDIX TO THE REPORT.—Such
14 answer shall be published as an appendix to
15 such report.

16 “(E) AMENDMENT OF THE ANSWER.—The
17 right to answer within the appropriate time limi-
18 tations, permitted under subparagraph (A), and
19 to have such answer annexed to such report,
20 shall be limited only by the power of the Com-
21 mission to amend such answer to exclude
22 matter that the Commission determines has been
23 inserted in such answer scandalously, prejudi-
24 cially, or unnecessarily.

25 “(j) RELEASE OF EVIDENCE OR TESTIMONY.—

1 “(1) IN GENERAL.—No evidence, testimony, or
2 summary of such evidence or testimony, taken in ex-
3 ecutive session may be released or used in public
4 sessions without the consent of the Commission.

5 “(2) PENALTY.—An individual, compensated by
6 the United States for services, who releases or uses
7 in public, without the consent of the Commission,
8 such evidence or testimony taken in executive ses-
9 sion shall be fined not more than \$1,000 or impris-
10 oned for not more than 1 year.

11 “(k) SWORN STATEMENTS.—

12 “(1) IN GENERAL.—In the discretion of the
13 Commission, witnesses in a hearing may submit
14 brief and pertinent sworn statements in writing for
15 inclusion in the record of such hearing.

16 “(2) RELEVANCE.—The Commission shall deter-
17 mine the relevance of the testimony and evidence
18 described in paragraph (1) at a hearing.

19 “(l) COPY OR TRANSCRIPT.—

20 “(1) IN GENERAL.—An accurate transcript shall
21 be made of the testimony of all witnesses at all hear-
22 ings, including both public or executive sessions, of
23 the Commission or of any subcommittee of the
24 Commission.

1 “(2) RIGHT TO TRANSCRIPT.—An individual who
2 submits data or evidence shall be entitled to inspect
3 or, on payment of lawfully prescribed costs, procure
4 a copy or transcript of such data or evidence.

5 “(3) EXCEPTION.—Paragraph (2) shall not apply
6 to a witness in a hearing held in executive session.
7 Such witness may, for good cause shown, be allowed
8 to inspect the official transcript of the testimony of
9 such witness.

10 “(4) OBTAINING COPIES OF TRANSCRIPT.—A
11 copy of the transcript for a public session of a hear-
12 ing may be obtained by a member of the general
13 public on the payment of the cost of such copy.

14 “(m) PAYMENT OF WITNESSES.—

15 “(1) IN GENERAL.—A witness attending any
16 hearing of the Commission shall be paid the same
17 fees and mileage costs as witnesses in the courts of
18 the United States.

19 “(2) MILEAGE PAYMENTS.—Mileage payments
20 shall be tendered to a witness under paragraph (1) on
21 service of a subpoena issued on behalf of the Com-
22 mission or any subcommittee of the Commission.

23 “(n) SUBPOENA.—

24 “(1) IN GENERAL.—A subpoena for the attend-
25 ance and testimony of a witness or the production of

1 written or other matter for the Commission may
2 be—

3 “(A) issued in accordance with subsection
4 (m) and paragraph (2) of this subsection, with
5 the signature of the Chair of the Commission or
6 of the appropriate subcommittee; and

7 “(B) served by any individual designated
8 by the Chair.

9 “(2) SUBPOENA AUTHORITY OUTSIDE OF JURISDIC-
10 TION.—

11 “(A) IN GENERAL.—The Commission may
12 not issue any subpoena for the attendance and
13 testimony of witnesses, or for the production of
14 written or other matter, that would require the
15 presence of the witness subpoenaed at a hearing
16 to be held outside of the State where such wit-
17 ness is found, resides, is domiciled, transacts
18 business, or has appointed an agent for receipt
19 of service of process.

20 “(B) EXCEPTION.—Subparagraph (A) shall
21 not apply if the attendance and testimony of a
22 witness or the production of written or other
23 matter is subpoenaed at a hearing that is held
24 within 50 miles of the place where such witness
25 is found, resides, is domiciled, transacts busi-

1 ness, or has appointed an agent for receipt of
2 service of process.

3 “(3) FAILURE TO OBEY SUBPOENA.—

4 “(A) IN GENERAL.—If an individual refuses
5 to obey a subpoena, a district court of the
6 United States, a United States court of any terri-
7 tory or possession, or the District Court of the
8 United States for the District of Columbia,
9 within the jurisdiction of the hearing for which
10 the Commission subpoenaed such individual or
11 that such individual is found, resides, is domi-
12 ciled, transacts business, or has appointed an
13 agent for receipt of service of process, shall, on
14 application by the Attorney General of the
15 United States, have jurisdiction to order such in-
16 dividual to appear before the Commission or a
17 subcommittee of the Commission in order to
18 produce pertinent, relevant, and nonprivileged
19 evidence as ordered by the Commission, or to
20 give testimony concerning the matter under in-
21 vestigation by the Commission.

22 “(B) CONTEMPT.—A failure to obey an
23 order of a court issued under subparagraph (A)
24 may be punished by such court as contempt.

1 “(4) REQUESTS TO SUBPOENA ADDITIONAL WIT-
2 NESSES.—The Chair of the Commission shall receive
3 and dispose of requests to subpoena additional wit-
4 nesses.

5 “(o) ADMINISTERING OATHS AND TAKING STATE-
6 MENTS.—Each member of the Commission shall have the
7 power and authority to administer oaths or take statements
8 of witnesses under affirmation during a hearing of the
9 Commission.

10 “(p) ADMINISTRATIVE PROCEDURE AND FREEDOM OF
11 INFORMATION.—Subchapter II of chapter 5 of title 5 of the
12 United States Code, relating to administrative procedure
13 and freedom of information, shall, to the extent not incon-
14 sistent with this section, apply to the Commission.

15 “SEC. 7. FEDERAL AGENCIES.

16 “Each Federal agency shall cooperate fully with the
17 Commission to enable the Commission to carry out effec-
18 tively the functions and duties of the Commission.

19 “SEC. 8. AUTHORIZATION OF APPROPRIATIONS.

20 “There are authorized to be appropriate each fiscal
21 year, such sums as may be necessary to carry out this
22 Act.”.

23 SEC. 3. EFFECTIVE DATE.

24 This Act and the amendment made by this Act shall
25 become effective on January 1, 1990.



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