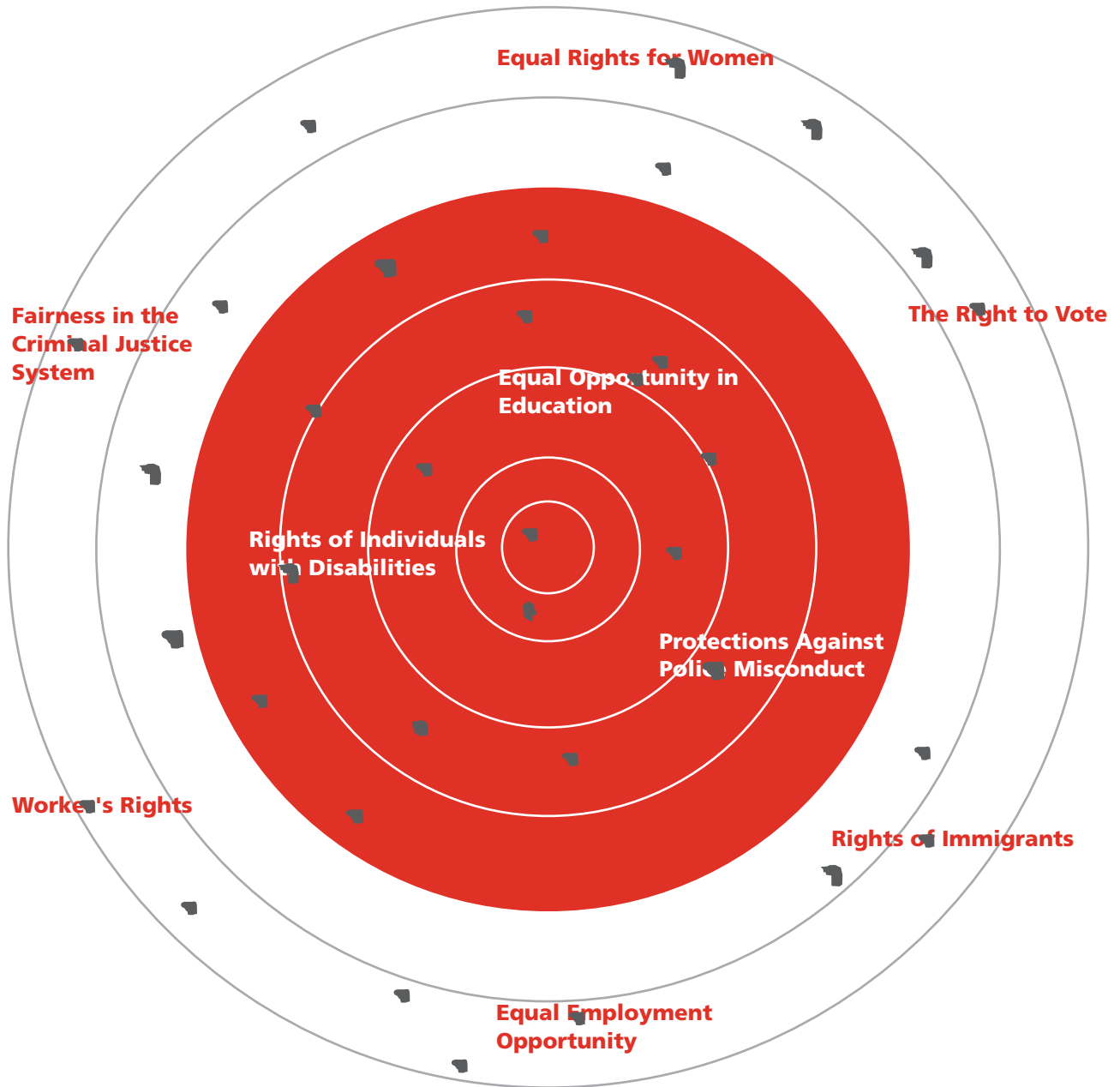


The Bush Administration Takes Aim: Civil Rights Under Attack



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The purpose behind release of this report is to highlight some of the ways in which the Bush administration is systematically impeding civil rights progress. While each of these actions by the administration may have received some attention by the media, the trend has not garnered sufficient public attention, both because national security dominates the headlines and because regulation, litigation, and funding often make only a faint impression on the public consciousness. We think it is imperative that attention be paid to these efforts which taken together represent a disturbing trend that must be addressed.

The author and publisher are solely responsible for the accuracy of statements and interpretations contained in this publication.

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Executive Summary

Civil rights remains the unfinished business of America. Yet progress in the nation's historic march toward equality has slowed over the first two years of the Bush administration. This report catalogues the ways in which the administration has reversed longstanding civil rights policies and has impeded civil rights progress.

Over the last fifty years, there has been a bipartisan national consensus on the need to remedy past and present discrimination through the establishment of strong federal protections. But today, the national bipartisan consensus in favor of a federal role in protecting fundamental civil rights is beginning to fray.

President Bush and many of his appointees and congressional allies are using the rhetoric of the so-called "states' rights" movement to undermine Congress' ability to promote progress on civil rights issues. These right-wing policies and constitutional theories undermine the foundation on which federal civil rights protections stand. If Congress lacks the authority to remedy discrimination, if states cannot be sued in federal court when they discriminate, and if federal agencies do not vigorously enforce the landmark laws of the 1960s, then civil rights protections lack the federal guarantee promised in the 14th and 15th Amendments.

The bipartisan civil rights consensus also has unraveled in Congress. There are a number of long-pending civil rights measures that represent a natural progression from the landmark laws of the 1960s: the Employment Non-Discrimination Act would extend workplace anti-bias protections to gays and lesbians; the End Racial Profiling Act would provide remedies for discriminatory policing; the Local Law Enforcement Enhancement Act would bolster federal authority to prosecute hate crimes. While no movement is afoot to repeal civil rights laws already on the books, President Bush and his congressional allies have refused to support these next-generation protections.

Meanwhile, the country finds itself in a war against global terrorism. The government's response to that assault itself challenges American values, including the value of equal rights.

The possibility of another terrorist attack and ongoing hostilities with Iraq have combined to shift the public's attention away from domestic matters, including civil rights enforcement. During this time, the Bush administration has made far-reaching but low-visibility civil rights policy decisions through regulation, litigation, and budgetary activity. In the aggregate, these policy decisions illustrate a pattern of hostility toward core civil rights values and signal a diminished commitment to the ideal of non-discrimination.

Chapter One of the Report details regulatory threats to civil rights. The current administration has been especially adept at quietly wielding its regulatory powers to achieve far-reaching policy objectives. In the area of civil rights, regulation has been used to undermine bedrock protections against discrimination. This chapter explores, for example:

- New regulations that weaken the civil rights of American workers;
- Threats to education equity for women and girls through new Title IX policies and other initiatives;
- The rejection of regulatory changes to address racial disparities in federal sentencing rules; and
- A number of anti-terrorism measures that adversely affect civil rights.

Chapter Two of the Report analyzes the Bush administration's reversal of civil rights policies through litigation. The Ashcroft Justice Department has abandoned long-held positions in key cases such as:

The University of Michigan affirmative action cases, in which the Bush administration filed *amicus* briefs in the Supreme Court that declare the university's policies unconstitutional;

- The New York City custodian case in which the Department of Justice — after over 10 years of support for the plaintiffs — unexpectedly abandoned the claims of the female and minority custodians and refused to defend the previously agreed to settlement against a challenge from White male custodians;
- The Pittsburgh Police consent decree, in which the Department of Justice abruptly joined with the defendants in asking the court to lift the consent decree, despite strong evidence of continuing problems.

Chapter Three of the Report describes how the current administration is undercutting the anti-discrimination agenda through its budgetary decisions. Key civil rights initiatives have been underfunded over the past year, and budgetary constraints are likely to worsen. While enforcement of existing civil rights laws is one important funding priority, more funding is also needed for social programs that advance the overarching civil rights goal of equal opportunity. Federal programs in the fields of education, housing, and health care are targeted at the low-income communities in which minorities disproportionately live. But the

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Bush tax cuts and multi-billion dollar increases for the Pentagon have squeezed resources for these domestic priorities.

The Report offers a series of recommendations to combat these trends:

1. The Bush administration should demonstrate renewed commitment to the fifty year-old bipartisan consensus on civil rights progress.
2. Congress should fulfill its constitutional role of overseeing the administration's civil rights activities and should consider how it can address regulatory actions inconsistent with the purpose of the 1960s' civil rights laws.
3. Congress should provide adequate funding for important civil rights programs;
4. Congress should consider seriously the need for new laws protecting gays and lesbians against employment discrimination, strengthening federal hate crime law, and ending the discredited practice of racial profiling;
5. The civil rights community must remain vigilant in monitoring the state of civil rights.

Individuals and organizations concerned about civil rights must be ever vigilant against backsliding in the nation's civil rights policies. This Report is the first step in a long-term effort to monitor regulations, litigation positions, and funding decisions that affect the state of civil rights in America. The Bush administration's decisions that make up its civil rights policy will remain below the radar screen unless advocates work to bring this pattern of hostility to civil rights progress to the attention of the public.

For defenders of civil rights, this is a perilous time. Leading advocates in the new states' rights movement now control or dominate all three branches of the federal government. They are prepared to move forward toward their extremist goals, even though those goals cannot be reconciled with the bipartisan civil rights consensus of the past fifty years.

I. Introduction

As Trent Lott recently demonstrated, civil rights remains the unfinished business of America. The nation's historic march toward equality is not completed.

Indeed, over the past two years, civil rights progress has faltered. With the American people understandably focused on the threat of terrorism, the Bush administration has quietly engineered a pattern of civil rights policy reversals through low-visibility regulations, litigation activity, and funding decisions. Meanwhile, the war on terrorism itself threatens the principle of equal protection.

It is unsurprising that civil rights remains a present day challenge, because government-sanctioned discrimination was pervasive in the United States until relatively recent times:

- Only 150 years ago, human beings from Africa were sold and possessed as chattel in half of the country;
- Only 100 years ago, Mexican Americans and Puerto Ricans were regarded as "conquered peoples" and were frequently denied property, voting, education, and employment rights;
- Only 90 years ago, women were denied the right to vote or own property in many regions of the country;
- Only 80 years ago, Native Americans whose ancestors had inhabited this land for 50,000 years were still denied citizenship in the United States;
- Only 70 years ago, job advertisements in Boston and other northeastern cities routinely declared: "No Irish Need Apply";
- Only 60 years ago, thousands of loyal Japanese-Americans were rounded up from their homes and businesses and held in relocation camps throughout World War II;
- Only 50 years ago, schools, restaurants, public bathrooms, and even drinking fountains were strictly segregated through much of the South;
- Only 15 years ago, it was legal in most states to fire an otherwise qualified employee solely because he became sick or disabled.

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Significant progress has been made to address these injustices. Following the Civil War, Congress passed and the states ratified amendments to the Constitution entitling all Americans equal protection of the laws and the privileges and immunities of citizenship. That promise went unfulfilled for many years, but in 1954, the Supreme Court renewed the promise by striking down school segregation laws in *Brown v. Board of Education*. In the 1960s, a series of landmark federal laws was enacted to make real the constitutional commitment of equal protection. The Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, the Education Amendments of 1972, the Americans with Disabilities Act of 1990, and other important federal laws outlaw discrimination and provide recourse when it occurs.

Despite these laws and despite all the progress that has been made, discrimination remains a stubborn feature of American life. Laws mandating school segregation are gone, but segregation persists in practice. No federal law prevents companies from refusing to hire an individual because of his or her sexual orientation. Unwarranted racial and ethnic disparities pervade the criminal justice system. Organized lynching is history, but the hate crimes committed against James Byrd and Matthew Shepard are current events.

And old attitudes die hard. Just recently, the former majority leader of the U.S. Senate declared on national television that if Strom Thurmond had been elected President in 1948, when he ran as the head of the pro-segregation Dixiecrat Party, the country "wouldn't have had all these problems over the years."

So while much has been accomplished to remove the stains of slavery and eradicate the legacy of Jim Crow laws and all the other laws and practices that relegated women and minorities to second-class citizenship, much remains to be done. This is not yet the nation that Dr. Martin Luther King dreamt of, a nation in which children are judged "not by the color of their skin but by the content of their character."

Civil rights progress in the last half century has been fueled by a bipartisan national consensus on the need to remedy past and present discrimination through the establishment of strong federal protections. To be sure, that bipartisan consensus was not as strong at the outset of the civil rights movement as it became later. In the early 1960s, Southern Democratic senators and some like-minded Republicans launched lengthy filibusters against civil rights bills. But bipartisan majorities eventually silenced those voices of resistance. Later, the Voting Rights Act Extension of 1982 and the Americans with Disabilities Act were enacted with overwhelming bipartisan support.

Opponents of the 1964 Civil Rights Act rallied under a banner of "states' rights." But the Republicans and Democrats who joined together to pass that law recognized that "states' rights" was a code phrase for racial segregation.

There is indeed a legitimate role for states as sovereign bodies and policy laboratories in our system of federalism, but when it comes to discrimination there is no room for experimentation. Residents of Mississippi or South Carolina are entitled to the same fundamental civil rights as residents of Maine or Wisconsin. The federal government - that is, Congress, the federal courts and, if necessary, federal marshals dispatched by the President of the United States - stands as the ultimate guarantor of federal constitutional and statutory rights.

Today, the national bipartisan consensus in favor of a federal role in protecting fundamental civil rights is beginning to fray. President Bush and many of his appointees and congressional allies subscribe to a radical view of the Constitution in which states' rights are paramount. They are deeply suspicious of federal activities beyond national defense; transparently, the administration's tax policies are designed to starve the federal government of resources to fund domestic programs. Meanwhile, the White House has sought to pack the federal appellate courts with right-wing ideologues. Many of these nominees have advocated previously far-fetched constitutional doctrines that would immunize states from federal lawsuits and invalidate assertions of congressional power to protect rights.

These right-wing policies and constitutional theories undermine the foundation on which federal civil rights protections stand. If Congress lacks the authority to remedy discrimination, if states cannot be sued in federal court when they discriminate, and if federal agencies do not vigorously enforce the landmark laws of the 1960s, then civil rights lack the federal guarantee promised in the 14th and 15th Amendments. Suddenly the right of an American to be free from public or private discrimination may vary as he or she travels across a state border.

The current advocates of states' rights, unlike their Jim Crow-era predecessors, do not deliberately utilize racial code words to mask racist intent. Nevertheless, their cramped conception of the federal government's role in our constitutional scheme is at odds with the civil rights movement of the past fifty years, a movement that conservative columnist Charles Krauthammer has rightly called "the most important political phenomenon of the past half-century of American history."¹

Our nation's bipartisan civil rights consensus faced a challenge early in the new administration when President Bush nominated defeated Missouri senator John Ashcroft to serve as his attorney general. Throughout his public career, Ashcroft had demonstrated extraordinary insensitivity towards civil rights. As Attorney General and governor of his state, he resisted court-ordered integration of the public schools. As a senator, he twisted facts and used veiled racial appeals to defeat federal judicial nominee Ronnie White, the first African-American to sit on the Missouri Supreme Court. Ashcroft was narrowly confirmed, but only after many Senators explained that his undistinguished record on civil rights made him ill-suited to head the agency with primary responsibility for civil rights policy and enforcement.

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President Bush's appointments to sub-Cabinet agencies responsible for civil rights enforcement consisted mostly of individuals who lacked experience enforcing civil rights laws, including his appointment of Ralph J. Boyd, Jr. to head the flagship Civil Rights Division at the Justice Department. Assistant Attorney General Boyd is responsible for numerous decisions reversing long-standing litigation positions taken by the Civil Rights Division that have resulted in the erosion of civil rights protections for women, minorities, individuals with disabilities, and many others. In addition, he has acted to remove career staff from positions of influence and replaced them either with right-wing political appointees or by less experienced career lawyers.²

The bipartisan civil rights consensus also has unraveled in Congress. There are a number of long-pending civil rights measures that represent a natural progression from the landmark laws of the 1960s: the Employment Non-Discrimination Act would extend workplace anti-bias protections to gays and lesbians; the End Racial Profiling Act would provide remedies for discriminatory policing; the Local Law Enforcement Enhancement Act would bolster federal authority to prosecute hate crimes. While no movement is afoot to repeal civil rights laws already on the books, President Bush and his congressional allies have refused to support these next-generation protections.

Meanwhile, the country finds itself in a war against global terrorism. It is ironic that the states' rights movement should achieve its ascendancy at a moment in history when overseas forces have targeted American values and interests. The terrorists who killed almost 3,000 Americans with hijacked planes on September 11 had no particular quarrel with the sovereign states of New York, Virginia, or Pennsylvania; they launched an assault on the United States of America. Yet the government's response to that assault itself challenges American values, including the value of equal rights.

Naturally, the public's perception of the Bush administration has been shaped by national security concerns. The possibility of another terrorist attack and imminent hostilities with Iraq has combined to shift the public's attention away from domestic matters, including civil rights enforcement. During this time, the Bush administration has undertaken a series of low-visibility actions through regulation, litigation, and budgetary policy that illustrate a pattern of hostility toward core civil rights values and signal a diminished commitment to the ideal of non-discrimination.

This report catalogues some of the ways in which the administration is systematically impeding civil rights progress. While each of these actions by the Bush administration may have received some attention by the media, the trend has not garnered sufficient public attention, both because national security dominates the headlines and because regulation, litigation, and funding often make only a faint impression on the public consciousness.

But attention must be paid: this nation was founded on the principle of equal rights. That promise was ignored for far too long, and we have come too far in the last half-century to tolerate backsliding toward policies that even Senator Lott now acknowledges were wicked and immoral. At a time when the United States is aggressively promoting the ideals of democracy and protection of civil and human rights throughout the world, it is imperative that we remain a shining example of a society that fully protects those rights.

For defenders of civil rights, this is a perilous time. Leading advocates in the new states' rights movement now control or dominate all three branches of the federal government. They are prepared to move forward toward their extremist goals, even though those goals cannot be reconciled with the bipartisan civil rights consensus of the past fifty years.

II. Undermining Civil Rights Through Regulation

The day-to-day work of government is carried out in the agencies of the executive branch. Long after a President has signed a law in the spotlight of the Oval Office or the bright sunshine of the Rose Garden, the success or failure of the law hinges on the little-noticed promulgation of regulations by the agency responsible for enforcement of the law.

Regulation is one of the least visible manifestations of government. While all proposed regulations must be published in the Federal Register, this dense publication is hardly recreational reading for most Americans. And while Cabinet secretaries may seek media attention for some regulatory actions, most are carried out with little fanfare and less press interest.

The current administration has been especially adept at quietly wielding its regulatory powers to achieve far-reaching policy objectives. In the area of civil rights, regulation has been used to undermine bedrock protections against discrimination.

Weakening the Civil Rights of American Workers

The Bush administration's uneasy relationship with labor unions is well known. Less widely publicized are the regulatory measures undertaken by this administration to impair the civil rights of American workers.

For example, after an extensive public process, including two rounds of public notice and comment on its proposals, the Clinton administration established an important set of protections for American workers known as the "Responsible Contractor" rules. The regulations implemented measures to help ensure that federal contracts are only awarded to companies that demonstrate compliance with civil rights laws and other legal requirements related to worker safety, the environment, and consumer protection.³ This common sense accountability measure strengthened the rights of American workers by creating a strong economic incentive for companies to respect civil rights and other basic workplace laws.

The rules vindicate an important principle — government contracts should only be awarded to responsible companies that respect their obligations under the law, not to corporations that violate their employees' civil rights or flout other important laws. The federal government should not use tax dollars to subsidize lawbreakers, but that is what was happening before these rules went into effect. The congressional General Accounting Office found hundreds of instances over a two-year period in which lucrative federal contracts were awarded to companies that had violated labor or workplace safety laws.⁴

Almost immediately after assuming office, President Bush began the process of dismantling these rules. First, his Civilian Agency Acquisition Council authorized agencies to issue a "deviation" from the new contractor responsibility rules. This low visibility maneuver created a gigantic loophole in the rules that the new President's appointees in several agencies quickly utilized. Then the President's Federal Acquisition Regulations (FAR) Council initiated the regulatory process to suspend and ultimately repeal these rules. Despite opposition from the Leadership Conference on Civil Rights and other groups concerned about worker protections, the rules were repealed on December 27, 2001.⁵

The timing of this regulatory activity is suspicious. By taking final action during the holiday season between Christmas and New Year's, the administration plainly sought to limit public scrutiny of this controversial move.

Additional evidence of the Bush administration's retreat on civil rights enforcement, particularly in the context of federal contracts, can be found in its work through the Office of Federal Contract Compliance Programs (OFCCP). OFCCP is a little-publicized agency within the Department of Labor that plays a critical, central role overseeing federal contractors and their compliance with important civil rights obligations. In particular, OFCCP enforces Executive Order 11246, which requires federal contractors to ensure nondiscrimination within their workforce and to take affirmative action to correct any workforce disparities. It is this unique enforcement responsibility, particularly its monitoring of affirmative action compliance, which has made OFCCP a frequent target of those seeking to shield contractors from vigorous civil rights enforcement.

Shortly after coming into office, the administration publicly and privately signaled a shift in its OFCCP enforcement efforts. The result has been a 25% drop in OFCCP resources for enforcement, redirecting monies instead for technical assistance to federal contractors. Equally troubling are the most recent OFCCP numbers for Fiscal Year 2002 that reflect a wholesale deterioration in almost every enforcement category: a sizable decline in the number of reviews conducted to ensure contractor compliance with their nondiscrimination and affirmative action obligations; a 25 percent to 50 percent drop in the percentage of compliance reviews where violations are found (39 percent in FY02 compared to 54 percent to 77 percent over the history of the program), a decline in the number of conciliation agreements, and a more than 20 percent reduction in the percentage of violations resolved with conciliation agreements (56 percent in FY02 compared to an average of 72 percent over the history of the program). These distressing numbers, combined with a small but persistent backlog of administrative complaints in the Office of the Solicitor, paint a bleak picture of the administration's overall commitment to ensuring that companies receiving millions of dollars in federal contracts comply with their civil rights obligations.

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In addition to stark drops in enforcement numbers, OFCCP also has taken steps to roll back important enforcement gains. One notable target has been the Equal Opportunity Survey (EO Survey) — a data collection instrument finalized in November 2000 that requires federal contractors to provide data on the demographic composition of their workforce, including data on compensation practices broken down by sex and race. The EO Survey was a groundbreaking achievement, intended to help OFCCP better target their reviews of federal contractors and identify potential violations. Of particular significance, it requires contractors for the first time to submit data about their pay practices on a regular basis. Such information is critical to uncovering illegal pay disparities and remedying wage discrimination.

The EO Survey was the product of more than twenty years of debate and consultation between OFCCP, contractors, and advocates, but it continues to face stiff opposition from federal contractors, many of whom undoubtedly seek to avoid such regular scrutiny. More troubling, however, has been the current OFCCP's failure to fully implement the EO Survey. Although the first surveys were sent to 50,000 contractors in early 2001, two years later OFCCP has yet to use that information target reviews of contractors. The agency then delayed for more than a year before sending out the second round of surveys in December 2002. Even then, the surveys were sent out to only 10,000 contractors rather than the 50,000 originally intended — an 80 percent reduction in the number of contractors asked to comply with the regulations. Although the administration has not moved to rescind the EO Survey, its quiet inaction has effectively achieved the same result - its failure to use the information collected in any meaningful way has reduced the promise of the EO Survey to little more than a shell of its original goal. Authorization for the EO Survey expires in March 2003 and the OFCCP has requested a limited, two-year extension authorizing 10,000 surveys per year.

In another early move to undercut the civil rights of American workers, the administration spearheaded repeal of the ergonomics rule promulgated by the Occupational Safety and Health Administration (OSHA) in November 2000. This vital regulation, preceded by years of deliberation and public comment, would have prevented hundreds of thousands of workplace injuries each year. The Bush administration's substitute plan, announced in April 2002, is nothing more than a collection of vague, voluntary measures providing no real protection for workers.

Ergonomics is a civil rights issue for several reasons. First, workers' rights are civil rights; the labor movement's historic struggle for fair treatment in the workplace is intertwined with the civil rights movement of the past half-century. More specifically, ergonomic injuries disproportionately affect women. Based on Bureau of Labor Statistics data, the AFL-CIO has found that women suffer 64 percent of repetitive motion injuries and 68 percent of the carpal tunnel syndrome injuries that result in lost worktime, despite the fact that women make up approximately 44 percent of the workforce.⁶

A number of the administration's anti-labor policies have had an especially devastating impact on minorities. For example, a federal judge recently struck down a practice by President Bush's Department of Labor that severely disadvantaged low-wage farm workers, the overwhelming majority of whom are of Mexican descent or belong to other minority groups.

Under the H-2A guest worker program, employers are permitted to hire temporary foreign workers based on the claim that there are an insufficient number of qualified U.S. farm workers. Employers participating in the program must offer wages that will not "adversely affect" the wages of U.S. farm workers. Near the beginning of each year, the Department of Labor is supposed to publish an "adverse effect wage rate" for each state, and H-2A employers may not pay their employees less than that hourly rate. But in each of the last two years, Labor Secretary Chao delayed publication of the wage rate, asserting the authority to withhold issuance until December 31 of the year. She apparently acted at the request of employers, who of course preferred to pay the lower wage rates from the previous year. As a result, tens of thousands of workers were underpaid.

The United Farmworkers of America and others sued the Labor Department. On September 10, 2002, Judge Gladys Kessler of the U.S. District Court for the District of Columbia ruled that the Department had violated its own regulations and the federal Administrative Procedure Act.⁷ As a result, some 48,000 workers around the country will be paid at the proper rates in 2003 and future years. Still, H-2A employers are demanding that Secretary Chao lower these wage rates, so continued vigilance is warranted.

Eliminating Non-Discrimination Obligations for Recipients of Federal Funds

In 1965, President Lyndon B. Johnson issued Executive Order ("EO") 11246, a cornerstone of civil rights law that prohibits discrimination on the basis of race, color, religion, sex, or national origin by recipients of federal funds. Additionally, EO 11246 contains important record keeping and affirmative action requirements to ensure that workplaces funded by federal tax dollars are free of discrimination.

The Community Development Block Grant ("CDBG") program was established by Congress in 1975 to promote healthy communities "by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." 42 U.S.C. § 5301(c). The Department of Housing and Urban Development awards grants to entities that improve community services and carry out a wide range of economic development activities. The President's 2004 budget allocates more than \$4.4 billion to the CDBG program.

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Since 1975, HUD regulations have mandated that CDBG “[g]rantees shall comply with EO 11246.” 24 C.F.R. § 570.607. However, under a new rule proposed by the Bush administration, recipients of CDBG funds would no longer be required to abide by federal non-discrimination requirements. This is a monumental change to HUD’s current regulations and contradicts a fundamental principle of civil rights policy — that federal funds should never be used to discriminate in any manner. Repeal of a regulation that ensures equal opportunity as a condition of \$4 billion in federal taxpayer money is an outright attack on civil rights laws.

Threats to Educational Equity for Women and Girls

Title IX of the Education Amendments of 1972 prohibits sex discrimination in education programs that receive federal financial assistance. The law covers approximately 16,000 local school districts, 3,200 colleges and universities, 5,000 for-profit schools, state education and vocational rehabilitation agencies, and numerous libraries and museums. Since its enactment, Title IX has immeasurably improved educational opportunities for women and girls, and lifted glass ceilings that kept women from reaching the highest ranks of academia.

The extent of blatant discrimination against female students prior to the enactment of this landmark law cannot be overstated. In many schools, girls were routinely required to take home economics and were excluded from classes that might lead to “non-traditional” career paths. Many colleges and universities — both public and private — either excluded female students altogether or enforced strict quotas for their admission. Athletic opportunities for girls and young women were scarce or non-existent.

Thankfully, the days of *de jure* discrimination in education are over. As then-Education Secretary Richard Riley said in marking the 25th anniversary of Title IX in 1997, “America is a more equal, more educated, and more prosperous nation because of the far-reaching effects of this legislation.”

But while there has been substantial progress in addressing sex discrimination in schools over the last 30 years, there is much to be done before true gender equity in education is achieved. For example, female students are still underrepresented in math, science, and high technology programs. There is still *de facto* segregation in many vocational education programs, with female students placed in “traditional” classes that lead to low wage jobs. Female students are still excluded from many opportunities to compete in athletics. There is still rampant sexual harassment in schools. And discrimination against pregnant and parenting young women, combined with wholly inadequate educational opportunities, exacerbates high dropout rates and fosters economic dependence.

Vigorous enforcement of Title IX is an essential element of the ongoing campaign for gender equity in education. And the roadmap for Title IX enforcement is found in the long-standing agency regulations and policies interpreting the requirements of the law. For 27 years, state education agencies and school districts have relied upon the specific guidance in the regulations to ensure compliance with civil rights requirements and to provide needed protections for female students and school employees.

So it was more than slightly unsettling when, on May 8, 2002, the Department of Education published a Notice of Intent to Regulate (NOIR) expressing the Secretary's intent to amend the Title IX regulations "to provide more flexibility for educators to establish single-sex classes and schools at the elementary and secondary levels."⁸ The NOIR set off alarm bells because of the troubled history of single-sex education and because it raised the specter of broader changes to these venerable regulations.

While Title IX generally prohibits single-sex education in vocational, professional, and graduate schools, the statute does not explicitly cover admissions policies in non-vocational elementary and secondary schools — at least those that were single-sex before Title IX was enacted. Congress was mindful of the record of single-sex education, a record permeated by harmful stereotypes that tended to limit opportunities for young women. So-called "parallel programs" for girls have often been distinctly unequal in scope and resources.

The Title IX regulations carry forward Congress' concerns about single-sex education. The regulations allow for the creation of single-sex classrooms in specific circumstances, such as physical education classes or activities involving contact sports, competitive athletics, human sexuality, and choirs. Single-sex classes and schools can also be created for compensatory purposes to allow girls and women to overcome barriers to equal education.

Where single-sex education is utilized, Title IX safeguards ensure that such programming serves, and does not undermine, equality of educational opportunity. The Title IX regulations provide ample flexibility for educators to establish single-sex programming at the elementary and secondary level, while simultaneously providing strong legal protections against programs that would reinforce stereotypes or subject students to discrimination in the educational opportunities they receive. The proposed regulatory action threatens those very safeguards.

Indeed, the Department of Education has received no mandate from Congress to amend Title IX regulations in the name of increased flexibility for single-sex education. The No Child Left Behind Act of 2001 (NCLBA) allows local education agencies to use innovative program funding "to provide same-gender schools and

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classrooms,” but only to the extent that they are “consistent with applicable law.”⁹ That bill did not call for opening the Title IX regulations. Rather, the NCLBA only required the Department of Education to issue guidelines on applicable law to schools seeking the new funding. The Office for Civil Rights at the Department of Education (OCR) fulfilled this requirement through guidance issued on May 8, 2002.

Only one month after publication of the May 2000 NOIR, Education Secretary Roderick Paige intensified concern among Title IX supporters by establishing a Commission on Opportunity in Athletics to recommend changes in the application of Title IX to school sports programs. The secretary’s appointments to this commission betray the administration’s agenda — ten of the fifteen members are from Division IA schools. These schools, which have large football and men’s basketball programs, have the greatest institutional interest in weakening the regulations to which they are subject.

Moreover, in coordinating the work of the commission, the Department of Education has exhibited hostility towards Title IX in various ways. According to the National Women’s Law Center, witnesses selected by the Department of Education testified two-to-one against current policies. Other expert testimony that was requested by commissioners was not provided. The recommendations advanced by the commission would seriously weaken Title IX protections and result in significant losses in participation opportunities and scholarships from those to which women and girls are entitled under current law.

Two commission members (Olympic champion Donna de Varona and Julie Foudy, captain of the U.S. National Women’s Soccer Team) dissented from the commission’s final report and issued a Minority Report that objects to certain recommendations and takes issue with the ambiguous wording of others.¹⁰ Secretary Paige refused to include the Minority Report in the record, and while he said he would move forward only with the so-called “unanimous” recommendations in the final report, he refused to consider specific objections of de Varona and Foudy to recommendations he termed unanimous.

Much has been accomplished in the classroom and on the playing field due to Title IX. Women have entered the medical and legal professions in record numbers and there has been a fourfold increase in women’s participation in intercollegiate athletics. In 1971, only 18 percent of American women had completed four or more years of college, compared to 26 percent of men. This gap has been closed — women now make up the majority of students in America’s colleges and universities and are the majority of recipients of master’s degrees (although women remain concentrated in fields such as teaching and nursing and comprise only a small percentage of professionals in the fields of engineering and physics). But discrimination persists and backsliding can occur. Now is not the time to reverse course.

Regulatory Reversal of Asylum Policy on Battered Women

The Justice Department recently proposed a regulation that would undermine the ability of women to receive protection under U.S. asylum laws. It is disturbing that the administration would seek to reverse current policy, which appropriately provides women who have fled violence with a safe haven once they have satisfied the rigorous requirements of asylum.

In *Matter of R-A-*, the Board of Immigration Appeals (BIA) ruled that Ms. Rodi Alvarado, a Guatemalan woman who had suffered ten years of horrific domestic violence and whose government would not protect her, could not seek refuge under U.S. asylum laws. Former Attorney General Janet Reno vacated the BIA's decision, and the INS shortly thereafter issued a proposed rule that clarified that domestic violence and other forms of gender-related persecution could in fact form the basis of an asylum claim.

But the Justice Department reportedly plans to issue a final rule that would reinstate the BIA's original denial of asylum to Ms. Alvarado. Such a rule would limit the ability of women and girls to seek protection from trafficking, sexual slavery, honor killings, domestic violence, and other gross human rights violations whenever such abuses have been perpetrated by non-state actors. In addition, such a rule would contravene established principles of international law including United Nations High Commissioner for Refugees (UNHCR) guidelines on gender persecution and would be out of step with the policies of countries such as the United Kingdom, Australia, and Canada, which recognize that government-tolerated violence based on gender can form the basis for asylum.

Rejection of Regulatory Changes to Address Racial Disparities in Federal Sentencing Rules

While progress has been made in recent decades to address racial disparities in employment, housing and other aspects of American life, racial inequality in the criminal justice system is growing, not receding. A primary cause and visible manifestation of that inequality is the well-known 100-to-1 ratio in federal law that dictates widely divergent sentences for crack cocaine and powder cocaine offenses. African-Americans feel the sting of this irrational policy since they are almost exclusively targeted for federal crack cocaine prosecutions.

There is bipartisan agreement in Congress on the need to confront this problem, and the independent U.S. Sentencing Commission has attempted to do so through regulation. But the Bush administration has actively thwarted any effort to redress this injustice. In other policy areas discussed in this report, the administration has used regulation to weaken civil rights protections. In this area, the administration has used its muscle in the regulatory process to block civil rights progress.

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Beginning in the mid-1980s, Congress enacted a series of laws designed to combat the sale and use of certain drugs. While the goal was laudable, the means often were not. A prominent feature of the so-called “war on drugs” has been mandatory minimum sentencing laws for drug offenses. These laws, enacted by Congress in a wave of racially tinged media hysteria, have led to profound injustices.

Mandatory sentencing laws deprive judges of their traditional discretion to tailor a sentence based on the culpability of the defendant and the seriousness of the crime. The sentences imposed under these laws are not truly mandatory because prosecutors (but not judges) may grant exceptions. Prosecutors can choose to charge particular defendants with offenses that do not carry mandatory penalties or they can agree to a plea agreement in which the charges carrying mandatory penalties will be dismissed. Also, under federal law, only the prosecutor may grant a departure from mandatory penalties by offering the subjective assertion that the defendant has provided “substantial assistance” to law enforcement.

When mandatory sentencing laws for drug crimes were enacted in the mid 1980s, race was a subtext of the congressional debate, especially in the uniquely harsh penalties assigned to crack cocaine. Federal law imposes a mandatory five-year federal prison sentence on anyone convicted of selling 500 grams or more of powder cocaine but the same mandatory five-year sentence applies to a defendant convicted of selling only five grams (the weight of a few sugar packets) of crack cocaine. A 10-year mandatory sentence is dictated for 5000 grams of powder but only 50 grams of crack. Meanwhile, federal law dictates a five-year minimum sentence for possession of crack cocaine, while the *maximum* sentence for possession of all other drugs is one year.

These rules are not only irrational on their face — they are also implemented in an outrageously discriminatory fashion, since over 90 percent of federal crack defendants are African-American. This facially neutral law in fact produces severe racial disparities in the criminal justice system as a whole.

Recent statistics compiled by the U.S. Sentencing Commission show that the problem relates not just to the unjustified differences between crack and powder cocaine penalties. Rather, minorities are now disproportionately subject to the harsh penalties for both types of cocaine. The issue is no longer just the “ratio” between crack and powder, although that remains a serious concern. The issue is that minorities are almost exclusively targeted for all federal cocaine arrests, and then find themselves in a mechanical sentencing system that results in unacceptably high minority incarceration rates.

In fiscal year 2000, Blacks and Hispanics made up 93.7 percent of those convicted for federal crack distribution offenses, while Whites made up only 5.6 percent. That

shocking figure has not changed much over the past decade. But the racial makeup of powder cocaine defendants has shifted in recent years. In 1992, Whites constituted almost one third (32 percent) of those convicted of federal powder cocaine distribution offenses, while Blacks made up 27 percent and Hispanics 39 percent. By 2000, the percentage of White powder cocaine defendants had dropped to 17.8 percent while the percentage of Black powder cocaine defendants had increased to 30.5 percent and the percentage of Hispanic powder cocaine defendants had increased to 50.8 percent. *In sum, minorities made up 81 percent of the federal powder cocaine defendants that year.*

Thus, the problem of racial disparity has worsened and become more deeply ingrained since the early 1990s. The unjustifiably harsh penalties for crack offenses still fall disproportionately — indeed almost exclusively — on Black defendants. But now, unlike ten years ago, the somewhat more moderate but still very harsh penalties for powder cocaine offenses fall disproportionately on minority defendants (both Black and Hispanic) as well. So the massive weight of federal enforcement against cocaine distribution falls almost exclusively on minorities: 93 percent of all crack defendants and 81 percent of all powder defendants.

Such an imbalanced focus on minorities is not justified by what is known about the racial make-up of cocaine users or cocaine sellers. In fact, even though Blacks and Hispanics are targeted at a higher rate for drug investigations, they have been found to commit drug offenses at a slightly lower rate proportionally to their percentage of the U.S. population. African-Americans represented approximately 12 percent of the U.S. population in 2000 and were 11 percent of all illicit drug users. While Hispanics constitute about 13 percent of the population, they were 10 percent of illicit drug users. In addition, for the past two decades, drug use among Black youths has been consistently lower per capita than among White youths.

Thus, the disturbing statistics regarding racial disparities in the “war on drugs” result from racially disparate enforcement strategies and charging decisions in cocaine cases. Minorities are disproportionately arrested for cocaine offenses, disproportionately charged in federal court, and then sentenced under especially harsh statutes and guidelines. These policies result in unhealthy rates of minority incarceration with untold adverse consequences for minority families and communities.

The U.S. Sentencing Commission is an independent bipartisan agency in the judicial branch of the federal government with responsibility for writing federal sentencing rules. In 1995, the commission recommended to Congress that the drug statutes and sentencing guidelines be altered to eliminate the differences between crack and cocaine sentencing thresholds.¹¹ Congress rejected that approach, but directed the commission to formulate a new recommendation between the discredited 100 to 1 ratio and the rejected 1 to 1 ratio.

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In early 2002, the commission again considered changes to the rules governing federal cocaine sentences. The commission heard testimony from noted scientists and criminologists and found no scientific evidence to justify treating crack as though it were 100 times more dangerous than powder cocaine. For example, at the commission's public hearing on February 25, 2002, Dr. Glenn Hanson, Director of the National Institute on Drug Abuse, was asked: "Is crack significantly more harmful to the individual in terms of its pharmacological effects than regular powder cocaine?" He answered: "I would say in general no; that they would be very similar."¹²

Nor is there anything special about the crack cocaine market to justify these differences. Rates of crack use, which have never exceeded rates of powder cocaine use, have remained stable for more than a decade. At the same time, the number of street level crack dealers charged in federal court has climbed from 48 percent to 66 percent of all crack defendants while the number of importers, leaders, and supervisors has fallen. According to U.S. Sentencing Commission statistics, the crack market is decidedly less violent than it was several years ago — well less than half of the crack cases involved a weapon and only 8 percent of the cases involved actual violence.

Whatever anecdotes and stereotypes caused Congress to treat crack cases so harshly in 1986 are no longer valid, if they ever were. Violent crack dealers should be punished for their violence; non-violent crack dealers should not be punished on the false assumption that all crack dealers are violent.

Congress itself, in rejecting the commission's 1995 proposal, directed the commission to "propose revision of the drug quantity ratio of crack cocaine to powder cocaine" (Pub. L. 104-38). And the record of the House and Senate Judiciary Committee hearings that year is replete with statements from Republicans, Democrats, and representatives of the Reno Justice Department condemning the 100 to 1 ratio and promising eventual change. Attorney General Reno and General Barry McCaffrey, then-Director of the Office of National Drug Control Policy, eventually proposed a 10 to 1 ratio. At that time no one defended the 100 to 1 ratio.

That has changed with the Bush/Ashcroft Justice Department. On March 19, 2002, Deputy Attorney General Larry Thompson testified before the commission, endorsed the 100 to 1 disparity in current law, and said any change in the ratio should be accomplished by raising powder cocaine penalties. Indeed, Deputy AG Thompson described the current penalty structure as "proper."

Notwithstanding this suggestion, increasing powder sentences would not be a constructive way to redress the 100 to 1 disparity. First, no one seriously believes that current powder cocaine sentences are insufficient to fulfill the purposes of

punishment. Deputy AG Thompson conceded to the commission that there is “no evidence that existing powder penalties are too low.” Second, lowering the powder threshold would subject more low-level powder defendants to harsh mandatory sentences; by definition, lowering the threshold affects low-level defendants. Third, raising powder sentences would have a disproportionate impact on Hispanics, who make up more than 50 percent of powder cocaine defendants. Now that more than 80 percent of those charged with powder cocaine offenses are minorities, it would only exacerbate the overall racial disparity if powder sentences were raised.

Deputy AG Thompson argued that lowering crack penalties would send the “wrong message.” But it is current law, based as it is on the scientifically indefensible and racially disparate 100 to 1 ratio, which sends the wrong message: that the criminal law is unfair. Changes to make these laws fair and rational would finally send the right message, not the wrong message.

The Bush administration’s position on this crucial issue contradicts the President’s earlier public statements. In January 2001, President Bush said: “I think a lot of people are coming to the realization that maybe long minimum sentences for the first-time users may not be the best way to occupy jail space and/or heal people from their disease. And I’m willing to look at that.” He then expressed support for “making sure the powder-cocaine and the crack-cocaine penalties are the same. I don’t believe we ought to be discriminatory.”¹³

The Bush administration’s rejection of regulatory changes in federal sentencing rules results in perpetuation of a sentencing structure that every objective observer believes is irrational, and that many minorities view as racist. Few policies have contributed more to minority cynicism about law enforcement. If anti-drug efforts are to have any credibility, especially in minority communities, these penalties must be significantly revised.

Expanding the Federal Death Penalty

The Bush administration has also been oblivious to civil rights concerns about capital punishment. The Leadership Conference on Civil Rights flatly opposes capital punishment, a view President Bush does not share. But one might hope that widespread outrage about flaws in the administration of capital punishment (as evidenced by more than 100 death row exonerations, many from the President’s home state of Texas), would lead his administration to exercise increased care in federal death penalty cases. Instead, the Bush/Ashcroft Justice Department has displayed unseemly enthusiasm for capital punishment.

Attorney General Ashcroft has ordered U.S. Attorneys to seek the death penalty in at least 19 cases where the U.S. Attorney in charge of the case recommended against it. That amounts to one in every three death penalty cases brought in

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federal court since he took office. By contrast, Attorney General Janet Reno overruled her prosecutors less than half as often in cases where the death penalty was not initially sought.¹⁴ Mr. Ashcroft has even ordered federal prosecutors in New York to seek the death penalty for a murder suspect who had agreed to testify against others tied to a deadly drug ring in exchange for a life sentence.¹⁵

Moreover, Attorney General Ashcroft has altered existing DOJ policies to make it easier for the Justice Department to override state prerogatives and invoke federal jurisdiction over capital cases. On June 7, 2001, the Department of Justice protocol governing invocation of the federal death penalty was revised. Previously, the absence of a death penalty statute in a given state did not by itself establish a sufficient federal interest for capital prosecution. That guiding principle was removed from the protocol, and the availability of “appropriate punishment upon conviction” in the state system has been added as a consideration.¹⁶

In other words, according to Mr. Ashcroft, the considered wisdom of the citizens of Michigan, Vermont, and the other 12 states that do not authorize capital punishment is not a reason to refrain from seeking the federal death penalty in those states; indeed, it is now a reason to seek death. This perspective is all the more bizarre coming from an administration purportedly committed to “states’ rights.”

This same disrespect for states’ rights was on public display in the aftermath of the Washington-area sniper attacks. Mr. Ashcroft presided over the ghoulish spectacle of neighboring prosecutors competing with each other for the right to bring capital charges against the sniper suspects, including 17-year-old John Lee Malvo. The attorney general awarded the “prize” to two Virginia counties that had each been the scene of one shooting. He explicitly declined to permit the case to go forward in Montgomery County, MD, where six citizens had been shot, because Maryland does not authorize imposition of the death penalty on juveniles and in general, carries out capital punishment with greater restraint than Virginia.

Mr. Ashcroft’s aggressive pursuit of capital punishment has been marred by the same racial disparities that have always characterized the death penalty. Since he became attorney general, the Justice Department has been three times more likely to seek death for Black defendants accused of killing Whites than for Blacks accused of killing non-Whites, according to the Federal Death Penalty Resource Counsel Project, a court-established monitoring effort.¹⁷

The influence of race as a factor in the imposition of capital punishment is well documented. First, the evidence reveals disparity in the application of the death penalty depending on the race of the victim. Individuals charged with killing White victims are significantly more likely to receive the death penalty than individuals charged with killing non-White victims. Of numerous studies of death penalty

outcomes reviewed by the congressional General Accounting Office (GAO), 82 percent found that imposition of the death penalty was more likely in the case of a White victim than in the case of a Black victim.¹⁸

The race of the defendant, when combined with the race of the victim, also yields significant disparities. In a case that reached the Supreme Court, the defendant demonstrated that Georgia prosecutors sought the death penalty in 70 percent of the cases involving Black defendants and White victims, while seeking the death penalty in only 19 percent of the cases involving White defendants and Black victims, and only 15 percent of the cases involving Black defendants and Black victims.¹⁹

Statistics on the imposition of the federal death penalty are similarly disturbing. In 1988, Congress enacted a law authorizing capital punishment for murders committed in the course of drug trafficking. From 1988 to 1994, Whites made up 75 percent of those convicted under that statute, but of those targeted for the death penalty under the law in the same period, Hispanics or Blacks were 89 percent (33 out of 37) and Whites were only 11 percent (four out of 37).²⁰ A study published by the Justice Department in September 2000 found that minorities were 80 percent of the 682 defendants who faced federal capital charges since 1995.²¹

The Bush administration's reversal of the presumption against use of the federal death penalty in non-death penalty states illustrates its freewheeling use of executive power to carry out its substantive goals. Meanwhile, Attorney General Ashcroft's application of the new protocol in individual cases illustrates another phenomenon: use of the government's broad litigation authority to undermine civil rights concerns. The chapter that follows demonstrates that the administration's litigators, like its regulators, have embarked on a systematic course to reverse the country's historic progress on civil rights.

Regulatory Activity in the War on Terrorism

A number of anti-terror tactics put in place by the Bush administration pose a direct threat to civil rights, including the widespread detention of non-citizens long after they had ceased to be terrorism suspects; dragnet questioning of immigrants without particularized suspicion; and priority deportations based on national origin. Even former FBI officials have questioned the effectiveness of a strategy so dependent on national origin profiling.²²

Among the panoply of anti-terror measures, there are several that were implemented without fanfare and have attracted little attention. More comprehensive critiques of the administration's tactics in the war on terror and their effect on civil

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liberties appear elsewhere.²³ But two aspects of the war on terror are themselves below the radar of public awareness and therefore merit inclusion here.

First, the administration has altered longstanding guidelines that constrained the FBI from conducting surveillance of religious and political organizations in the United States. The so-called "Levi guidelines," established by President Gerald Ford's Attorney General Edward H. Levi, were a response to public disclosure of outrageous domestic surveillance tactics being utilized by the FBI, under the code name Cointelpro, to disrupt peaceful domestic political movements. Martin Luther King, Jr. and other Black leaders, for example, were wiretapped, photographed, and generally hounded by J. Edgar Hoover's FBI as these leaders pursued their non-violent campaign for civil rights and human dignity.

Now, Attorney General Ashcroft is revising the Levi guidelines in a manner that leaves racial and religious minorities at risk of 1960s style harassment.²⁴ The civil rights movement itself was targeted by such tactics, and remains especially vulnerable to law enforcement abuses.

Second, the administration has used terrorism as a pretext to undermine the work of federal unions. For example, several months after the September 11 attacks, the White House issued an Executive Order stripping employees in four Department of Justice subdivisions of their right to union representation.²⁵ In a related vein, the administration pushed hard for language in the new Homeland Security legislation to establish a process by which the administration can bar airport screeners and many other federal workers from joining a union.²⁶ And early this year, the Director of the National Imagery and Mapping Agency invoked the September 11 attacks as he summarily terminated the collective bargaining rights of 1,322 workers at that agency. Federal employee union head Bobby Harnage decried the administration's attempt to "cloak this union busting with a respectable cover."²⁷

The horrific attacks on the World Trade Center and the Pentagon in September 2001 have challenged the nation in unprecedented ways. Americans are united in the goal of homeland security, yet generally recognize the need to protect public safety in a manner that respects the principles upon which our nation was founded. The United States should respond to the narrow-minded religious intolerance of its enemies with policies that are true to constitutional principles, including the principle of equal protection under law. Now, more than ever, the nation's laws must be enforced without resort to discrimination.

III. Undermining Civil Rights through Litigation

Over the past two years, the outlines of the Bush administration's civil rights litigation strategy have begun to emerge. In several important cases, the Civil Rights Division at the Ashcroft Justice Department, led by Assistant Attorney General Ralph J. Boyd, Jr., has shifted course from the position espoused by the Reno Justice Department, signaling several worrisome trends.

Impeding Equal Opportunity in Education: the University of Michigan Affirmative Action Cases

This year, the Supreme Court will decide consider two cases challenging the affirmative action policies at the University of Michigan — one involving the law school, the other involving the undergraduate program.²⁸ At issue is the university's consideration of race as one of many factors designed to ensure diversity in admissions.

University administrators value diversity because the different perspectives and experiences of a diverse student body enrich classroom discussions and campus life. Racial diversity in colleges and professional schools also advances the longstanding goal of equal economic opportunity. Unlike the discredited practice of considering race to exclude minorities, the consideration of race to encourage minority admissions serves legitimate government interests: it remedies historical discrimination, promotes educational values of diversity, and enhances civil rights. Affirmative action of this nature was upheld by a divided Supreme Court in the 1978 case of *Regents of the University of California v. Bakke*,²⁹ but has been under attack in recent years.

Recognizing the important societal goals served by diversity in higher education, the Clinton administration filed an *amicus curiae* brief in support of the University of Michigan in the district court, and had filed briefs in other courts in support of similar admissions policies. But the Bush administration has shifted course. On January 16, 2003, the administration filed *amicus* briefs in the Supreme Court, which declare the university's policies unconstitutional and say racial diversity may only be achieved through racially neutral means. The two highest-ranking African-Americans in the Administration - Secretary of State Colin Powell and National Security Advisor Condoleezza Rice - subsequently distanced themselves from the Bush administration brief.

Critics pointed out that President Bush's position is hypocritical – why is it permissible to use ostensibly racially neutral means to achieve the racially conscious goal of diversity?³⁰ Why are “percentage plans” an acceptable alternative when they rely on continued segregation of high schools? The President's condemnation of the system that *Bakke* endorsed, namely the benign consideration of race as one

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admission factor among many, calls into question his commitment to longstanding civil rights goals.

This shift reveals President Bush's contradictory views on the role of states in determining social policy. On the one hand, this administration champions "states' rights" and supports judicial nominees committed to limiting the ability of Congress to enact civil rights laws applicable to states. Yet administration officials assert federal authority when they want to stop states from enacting civil rights policies with which they disagree. Here, the state of Michigan has decided that the narrowly tailored use of race is necessary to achieve a diverse student body at state universities. The Bush administration disagrees with that policy and relies on federal supremacy to overturn it.

President Bush's willingness to reverse the federal government's position in this highly visible pending civil rights litigation has inflamed rather than soothed racial tensions.

Failing to Defend the Rights of Victims of Employment Discrimination: the New York City Custodian Case

In 1992, during the administration of President George H.W. Bush, the Justice Department began to investigate the dramatic under-representation of women and minorities among school custodians hired by the New York City Board of Education. By 1993, DOJ had filed suit, alleging in its pleadings that on a staff of 865 custodians, Whites made up 92 percent and males made up 98.5 percent, despite the availability of many qualified women and minorities. In essence, custodian jobs in New York were awarded within an "old boys" network that is plainly unacceptable under the Constitution and Title VII of the Civil Rights Act.

The suit was settled three years ago by means of a court-approved consent decree. But litigation over the consent decree continues, and the underlying problem has not been solved. Today, some 96 percent of the custodians are men, and very few of them are minorities.

Female and minority custodians received awards under the settlement with the support of the plaintiff Justice Department, but the seniority rights of those employees have been challenged by a group of White male custodians. Last April, the Civil Rights Division at DOJ abruptly abandoned the claims of the female and minority custodians and refused to defend the settlement against the challenge from White male custodians.

The American Civil Liberties Union has intervened in the case to assume defense of those claims, but DOJ's shift in position continues to reverberate. In a letter to the

court, lawyers for New York City — who had initially defended against the lawsuit — complained that the Justice Department had “abruptly refused to be bound by the settlement agreement that it proposed, signed, moved this court to approve and defended on appeal.”³¹

Undermining Equal Employment Opportunity for Women: the SEPTA Case

The Civil Rights Division at DOJ spent four years in litigation to overturn discriminatory hiring criteria used by the Southeastern Pennsylvania Transportation Authority (SEPTA). But in late 2001, on the very day an appellate brief in the case was due, the Department abruptly dropped the civil rights suit altogether.

The case focused on an aerobic capacity test that SEPTA administered to job applicants. SEPTA set the pass-rate for the test at a level that caused 93% of female applicants to fail. But the SEPTA standard was stricter than the standard used by the FBI, the Secret Service, and the New York City police and fire departments. Prior to the Bush administration’s reversal of position, the Justice Department had long contended that the SEPTA standard was unnecessarily strict and therefore impermissibly discriminated against women.

The litigation continues without federal involvement, but the female plaintiffs in the case are bitter about the Bush administration’s reversal. Terry Fromson, managing attorney of the Women’s Law Project, criticized, the Justice Department for “backing out on a commitment to defend equal rights for women in a highly visible case.” Another lawyer for the plaintiffs said: “This is politics. They are willing to turn their backs on women despite their pledge to enforce civil rights laws.”³²

Retreating on Racially Discriminatory Hiring Tests: the Buffalo Police Case

The Buffalo Police Department has a long history of employment discrimination. Blacks, Hispanics, and women were systematically excluded from becoming police officers by means of employment tests that bore little or no relation to law enforcement skills. In 1973, the city was sued under Title VII of the Civil Rights Act and found liable at trial. The Civil Rights Division played an important role in the case from its earliest days; a 1978 court order drafted by Justice Department has been the standard by which the city is judged in its efforts to achieve compliance with federal law.

In the intervening years, under court supervision, the city has made great strides in remedying past discrimination. But the job is not finished. Even today, the city has proposed employment tests of questionable validity that have an adverse effect on minority applicants. As recently as June 2001 — in the early months of the Bush

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administration — the Justice Department opposed such tests. But one year later the Department adopted a completely different position and insisted that the same career lawyer who had worked for years opposing the tests take the opposite position in court.

Paul C. Saunders, an attorney at the prestigious firm of Cravath, Swaine & Moore, which has long represented African-American police officers in the case, wrote a letter to the career government lawyer that aptly summarizes the Department's reversal:

To say that I was shocked and surprised by your new draft of the settlement agreement and proposed order would be an understatement of the first order. It represents such a dramatic departure from the Department of Justice's earlier positions that I can only conclude that it was imposed on you by the 'front office' [i.e., the political appointees] of the Civil Rights Division. Whether or not it was, however, the difference between the position now reflected in your proposal and the positions that the Department was taking less than a year ago is nothing short of breathtaking.³³

Interestingly, the current reversal echoes the government's earlier embarrassing turnaround in the case. During the Reagan administration, then-Civil Rights Division head William Bradford Reynolds sought to overturn the 1978 order that his Justice Department predecessors had drafted, arguing that such a "race-conscious" remedy order was illegal, even in the face of massive prior race discrimination. The Second Circuit affirmed the order and helped discredit Mr. Reynolds' extreme legal theories.³⁴

Undermining the Rights of Individuals with Disabilities

President Bush's father signed the Americans with Disabilities Act of 1990 (ADA) into law with great fanfare. The ADA offered the promise of equal, effective and meaningful opportunities for individuals with disabilities to participate in society. But the ADA is under attack in the courts. Employers have argued for narrow interpretations of key provisions in the ADA, interpretations that limit the number of Americans covered by the ADA and the scope of remedies available to them.

The Clinton administration frequently litigated in favor of a broad understanding of the ADA. Under Attorney General Reno, the Civil Rights Division vigorously enforced the Act, and the solicitor general filed briefs in support of litigants seeking protection. The current Bush administration has taken the opposite approach. In at least two ADA cases decided by the Supreme Court last term, Solicitor General Ted Olsen filed *amicus* briefs in favor of the employer, arguing for narrowing the scope of the ADA.³⁵

In an important Third Circuit case called *Frederick L. v. Department of Public Welfare*,³⁶ the Justice Department recently failed to file an *amicus* brief in support of the rights of individuals with disabilities. *Frederick L.* involves the implementation of *Olmstead v. L.C.*, a 1999 ADA case in which the Supreme Court held that individuals with disabilities must be moved from state institutions to community settings when clinically appropriate.³⁷ The central issue in *Frederick L.* is whether a state is excused from that responsibility if doing so would require the expenditure of additional funds, even if the state will later reap significant savings. The Clinton administration, which had filed a brief in *Olmstead* and advanced *Olmstead* claims in lower courts, surely would have recognized the national implications of *Frederick L.* and filed an *amicus* brief in support of the plaintiff. DOJ's absence from the case speaks volumes about the administration's lukewarm support for this very important civil rights statute.

Retreating from Enforcement of Civil Rights in Public Accommodations: the Adams Mark Case

Racial discrimination in providing hotel accommodations has been unlawful since the enactment of the Civil Rights Act of 1964 and the great majority of hotels have long since complied. However, allegations of serious problems with the treatment of African-Americans at the Adams Mark Hotel chain led the Clinton administration to investigate and ultimately enter into a consent decree with Adams Mark in March 2000 that required it, among other things, to implement non-discrimination policies and procedures in all of its hotels. While the decree was set to remain in effect for four years, less than two years after its adoption by the court, the Ashcroft Justice Department proposed ending the consent decree prematurely.

According to the original complaint, African-American guests attending an April 1999 Black College Reunion were systematically charged more than White guests for similar or inferior accommodations, offered restricted services, and singled out with a requirement to wear neon orange wristbands. Under a settlement with the Justice Department and the state of Florida, the company agreed to a series of reporting, training and advertising requirements that would remain in place until November 2004.

However, in February 2002, Assistant Attorney General Boyd told hotel officials that he might agree to modify the agreement to shorten the enforcement period. News accounts revealed that the company's president, a contributor to Attorney General Ashcroft's political campaigns, had requested such relief.³⁸ After a storm of protest, Mr. Boyd backed away from the possibility of ending the agreement prematurely.

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Restricting the Franchise: the Florida Voting Rights Case

Perhaps the most precious of the civil rights victories is the right to vote. The franchise is the fundamental engine of change in our democracy, and the primary means of ensuring the responsiveness of elected officials to public concerns. Yet one of the consequences of pervasive racial disparities in the criminal justice system³⁹ is the massive disenfranchisement of African-American men, especially in Southern states.

In 14 states, persons who have been convicted of a felony are prohibited from voting for life. Even individuals convicted of non-violent crimes who resume a law-abiding life remain permanently ostracized from civic life in this fashion. As a consequence of disenfranchisement laws, 1.4 million Black men — 13 percent of the entire adult Black male population — are denied the right to vote. In two states, Florida and Alabama, approximately 31 percent of all Black men are permanently disenfranchised.⁴⁰

The Brennan Center for Justice at New York University filed suit against Florida under Section 2 of the Voting Rights Act of 1965, which prohibits states from maintaining practices that deny or abridge the right to vote on account of race. The Florida law not only has the effect of denying thousands of African-Americans the franchise, there is also powerful evidence that it was originally enacted in 1868 with racial *animus*. One proponent of the law asserted that the disenfranchisement law would keep Florida from becoming “niggerized.”⁴¹

Fourteen former law enforcement and senior Department of Justice officials, including former Deputy Attorney General Eric Holder and former Solicitor General Seth Waxman, have filed an *amicus* brief in support of the plaintiffs in the case, *Johnson v. Bush*. But the current Justice Department has taken precisely the opposite position, filing an *amicus* brief in support of the offensive Florida law. Tellingly, Florida is represented by some of the same Washington lawyers who represented then-candidate George W. Bush in Florida following the 2000 election, an election in which felon disenfranchisement probably ensured Bush’s disputed margin of victory.

Rolling Back Protections Against Police Misconduct: the Pittsburgh Police Consent Decree

In 1994, Congress gave the Department of Justice important new authority to investigate troubled police departments and to remedy abuses that constitute a “pattern or practice” of police misconduct. One of the most successful invocations of that authority occurred in Pittsburgh, where in 1997, the Justice Department intervened

in a civil rights lawsuit against the local police department and played a key role in shaping systemic reforms.

But in September 2002, the Civil Rights Division joined forces with Pittsburgh officials and asked a federal judge to lift the consent decree, despite the fact that the court-appointed auditor's report had recently documented many remaining problems, including flaws in the systems used to investigate misconduct. Nonetheless, the court granted the Justice Department's motion in part, over the objection of the NAACP, the ACLU, and other groups that had initiated the lawsuit prior to the Justice Department's involvement.⁴²

Changes in position by federal government litigators should be relatively rare. While priorities may shift and strategies may be modified, the government's fundamental support for enforcement of the law, especially civil rights laws, should never be in doubt. Current occupants of the White House and the Justice Department should recognize the institutional interests that are served by continuity in litigation from one administration to the next.

John Dunne, a former New York State legislator who served as Assistant Attorney General for Civil Rights during the first Bush administration, has said that in his time at the Justice Department he never asked the solicitor general's office to cancel an appeal. Indeed, Dunne says that his views on the merits of litigation were based, in part, on the institutional views of career attorneys in his Division.⁴³

In contrast, the current Bush administration has shown itself to be too quick to alter the government's litigation posture in important cases. This is one more arena in which the 50-year old bipartisan civil rights consensus is being tested as never before.

IV. Undermining Civil Rights through Funding Decisions

A third arena in which the current administration is undercutting the anti-discrimination agenda is the federal budget. Key civil rights initiatives and enforcement efforts have been underfunded over the past year, and budgetary constraints are likely to worsen.

Funding is an especially important indicator of an administration's commitment to civil rights. While there are major civil rights proposals still awaiting congressional action, including the Employment Non-Discrimination Act, the End Racial Profiling Act, and the Local Law Enforcement Enhancement Act, many federal civil rights protections have been on the books for decades. The question is whether they will be enforced.

Enforcement actions by federal agencies are not the only way to vindicate civil rights. Historically, agency enforcement has been only a corollary to private lawsuits. But private civil rights litigation has become more difficult in recent years due to recent Supreme Court decisions such as *Alexander v. Sandoval*⁴⁴, which undermined the right of private plaintiffs to bring actions under Title VI's disparate impact regulations, and *Buckhannon Board & Care Home, Inc. v. West Virginia*⁴⁵, which has harmed the ability of plaintiffs' lawyers to recover attorneys' fees.

Most ominously, the Rehnquist Court has handed down several decisions in recent years shielding states from private lawsuits under a strained reading of the 11th Amendment to the U.S. Constitution. In *Kimel v. Florida Board of Regents*⁴⁶ and *University of Alabama v. Garrett*,⁴⁷ the Court held that the Constitution immunizes states from private lawsuits seeking damages under, respectively, the Age Discrimination in Employment Act and the Americans with Disabilities Act. Unlike *Sandoval* and *Buckhannon*, which involve statutory interpretation and may someday be overturned by Congress, *Kimel* and *Garrett* are constitutional decisions that cannot directly be addressed by amending the underlying statutes. There may be other means available to Congress to bolster enforcement of these laws, but for now, federal agency enforcement is the only clear-cut legal avenue for victims of state-sponsored discrimination.

The Bush administration is therefore undermining civil rights laws from two directions. The President's judicial nominees include conservative law professors and lawyers who share a "states' rights" perspective on constitutional law and are likely to continue the legal trends that limit the rights of private plaintiffs to sue states for violations of federal civil rights statutes. At the same time, the President's budget fails to provide increased resources for federal civil rights agencies to ensure compliance with anti-discrimination mandates. The combined effect of these policies is diminishing civil rights enforcement.

Enforcement of existing civil rights laws is one important funding priority, but more funding is also needed for social programs that advance the overarching civil rights goal of equal opportunity. Federal programs in the fields of education, housing, and health care are targeted at the low-income communities in which minorities disproportionately live. But the Bush tax cuts and multi-billion dollar increases for the Pentagon have squeezed resources for these domestic priorities. Civil rights are illusory in a society without quality public education, decent housing, and affordable health care for all citizens.

In his first two years in office, President Bush has pushed through Congress tax cuts and other economic policies that deplete resources available to domestic discretionary programs, including civil rights enforcement. Among the civil rights programs that have received inadequate funding are programs to remedy the so-called "digital divide," the well-documented gap between communities with access to computers and high-technology training, and communities without those advantages.

There is a danger that Americans in rural areas and inner cities will be left behind in the New Economy unless special efforts are made to ensure access to new technologies across income brackets and in all geographic regions. To respond to this "digital divide," Congress authorized and began funding a series of targeted programs to enhance skills development, teacher training, and other mechanisms to address inequality between the technological haves and have-nots.

The Bush administration has resisted the concept of a digital divide and has actively — but so far unsuccessfully — sought to eliminate programs to remedy it. The Clinton Commerce Department had published a series of reports about the digital divide entitled *Falling Through the Net*. The Bush Commerce Department renamed the series *A Nation Online* and painted an overly rosy picture of access to technology. Consistent with this approach, the current administration has proposed to eliminate funding for a number of the remedial technology programs, including the Technology Opportunities Program and the Community Technology Centers initiative, both innovative, community-based partnerships. Congress has salvaged these programs up until now, but their prospects are uncertain.

A third crucial program, Preparing Tomorrow's Teachers to Use Technology (PT3), supports the development of tools and incentives to help educators adapt to technology-infused teaching. School districts are investing billions of dollars to equip schools with computers and modern communication networks, but only a third of all teachers feel prepared to use computers and the Internet in their teaching. The PT3 program was funded at \$125 million in the last year of the previous administration, but the current President has consistently sought to defund it.

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Finally, the President has tried to eliminate the Start Schools program, a \$27 million initiative promoting the development of telecommunications services and audiovisual equipment in under-funded schools. Senator Kennedy, author of the bill establishing the Start Schools program, has consistently fought for continued funding.

The campaign to bridge the digital divide enjoys bipartisan congressional support as well as strong support from the business community, which recognizes the long-term consequences of this disparity for the American workforce. The administration's unwillingness to accept this consensus parallels its skepticism of the more general bipartisan civil rights consensus.

VI. Recommendations

The pattern of civil rights policy reversals described in this report should serve as a wake-up call to defenders of civil rights in Congress and outside the government. So far, no one of these actions has aroused the widespread public indignation in the way that Senator Lott's comments did. But in the aggregate, these decisions have very serious consequences. The trend they represent is a clear roadmap of what to expect in the coming years.

Opponents of these measures and others that will follow must come together in principled opposition to civil rights backsliding. Opponents of the administration's civil rights policies have several important goals:

1. The Bush administration should demonstrate renewed commitment to the fifty year-old bipartisan consensus on civil rights progress.

After apologizing for his paean to Strom Thurmond's 1948 campaign, Senator Lott expressed his willingness to take concrete steps in the new Congress that would ameliorate concerns his remarks had generated. Senator Lott will no longer be able to carry out those steps as majority leader, but the need for a reconciliation process remains.

President Bush should pick up this mantle. The President should meet with a broad range of civil rights leaders and jointly formulate a civil rights agenda for the 108th Congress. He should reconsider regulatory activity that threatens civil rights progress, refrain from overturning settled government positions in civil rights cases, and request adequate funding of civil rights activities, including activities to address the digital divide and flaws in election administration.

2. Congress should fulfill its constitutional role of overseeing the administration's civil rights activities and should consider how it can address regulatory actions inconsistent with the purpose of the 1960s civil rights laws.

The administration has undermined enforcement of important civil rights laws without sufficient criticism from Congress. Last year both the Senate and House Judiciary Committees held oversight hearings with respect to the Civil Rights Division of the Justice Department, but were met with bland denials from Assistant Attorney General Boyd that policy changes were taking place.

Congress should play a more aggressive role in ensuring that the executive branch executes the laws as they are written, especially in the case of landmark laws like the Civil Rights Act of 1964. In 1991, Congress passed a new civil rights law for the

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sole purpose of overturning court decisions that had interpreted the civil rights laws too narrowly; consideration should be given to whether a similar approach is needed to overturn unfavorable court decisions and unfavorable regulatory choices.

3. Congress should provide adequate funding for important civil rights programs.

Congress also has responsibility to ensure that its civil rights laws are enforced by adequately funded agencies. While the administration proposes a budget to Congress, lawmakers retain ultimate responsibility for setting funding levels. In some cases, as with the digital divide programs, Congress has resisted cuts proposed by the executive branch. But in funding the civil rights enforcement units of each department, Congress has generally gone along with inflationary funding.

The promotion and protection of civil rights is a pressing domestic priority and should be funded accordingly.

4. Congress should consider seriously the need for new laws protecting gays and lesbians against employment discrimination, strengthening federal hate crime law, and ending the discredited practice of racial profiling.

While enforcement of existing civil rights laws is important, there are some minorities that lack statutory protection and other areas where protections need to be broadened and remedies expanded. The Employment Non-Discrimination Act, the End Racial Profiling Act, and the Local Law Enforcement Enhancement Act, each discussed earlier in this report, should be near the top for consideration in the 108th Congress.

5. The civil rights community must remain vigilant in monitoring the state of civil rights.

Citizens and groups concerned about civil rights must be ever vigilant against backsliding in the nation's civil rights policies. This report is the first step in a long-term effort to monitor regulations, litigation positions, and funding decisions that affect the state of civil rights in America. The Bush administration's decisions that make up civil rights policy will remain below the radar screen unless advocates bring this work to the attention of the public.

Conclusion

Senator Lott's now-infamous remarks at Strom Thurmond's birthday party engendered a national discussion about civil rights. On the one hand, Senator Lott's offensive comments were a potent reminder of America's ignominious racial history and the prejudice that lurks beneath the surface of American life. On the other hand, the swift condemnation that greeted his words is a tribute to the bipartisan American consensus in favor of civil rights progress.

President Bush was among Senator Lott's sharpest critics. The President spoke clearly: "Any suggestion that the segregated past was acceptable or positive is offensive and it is wrong...Recent comments by Sen. Lott do not reflect the spirit of our country."

The President is absolutely right that Senator Lott's remarks are not in the spirit of our country. But neither is the President's systematic reversal of civil rights in America.

Condemning Senator Lott was a necessary but insufficient step for the President to exorcise the ghost of Senator Thurmond's 1948 Dixiecrat campaign from his party and from his administration. The next step is to rededicate his presidency to the goal of advancing civil rights. The President should reexamine the decisions that his appointees have made in recent months that thwart enforcement of civil rights laws or that undercut their purpose. Senator Lott's comments are like a scab that has been opened — President Bush must do more than regret the wound — he must heal it.

In a nationally televised address on June 11, 1963, President John F. Kennedy explained to the American people why he had just deployed National Guard troops to escort African-American students onto the campus of the University of Alabama. He said, in part: "One hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons, are not fully free. They are not yet freed from the bonds of injustice. They are not yet freed from social and economic oppression. And this Nation, for all its hopes and all its boasts, will not be fully free until all its citizens are free."

Despite heroic progress over the four decades since President Kennedy spoke these words, it cannot yet be said that the nation is "fully free" of discrimination. This generation faces a civil rights challenge that is different, but in some ways more pernicious, than the civil rights challenge of President Kennedy's generation. President Bush must assume that challenge.

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Founded in 1969 as the education and research arm of the civil rights coalition, the Leadership Conference on Civil Rights Education Fund (LCCREF) promotes an understanding of the need for national policies that support civil rights and social and economic justice, and encourages an appreciation of the nation's diversity. LCCREF initiatives are grounded in the belief that an informed public is more likely to support effective federal civil rights and social justice policies. Through its online newsletter, "This Week in Civil Rights"; special reports and curricula; briefings; and tracking of legislation, court decisions and executive branch enforcement in "The Civil Rights Monitor", LCCREF accentuates the vital relationship between the movement's storied past and the critical civil rights issues of today.

Through its public education campaigns on contemporary civil rights issues, including education, voting rights and the federal judiciary; its community tensions prevention and response initiative, CommUNITY 2000; its youth-initiated hate violence education and awareness program, Partners Against Hate; its highly acclaimed fellowship program for college students poised to become the next generation of civil rights leaders, Civil Rights Summer; and its Information/Technology/Communications initiative, which is educating the public about the importance of federal leadership in bridging the digital divide in low income urban areas, rural communities, and Indian reservations, LCCREF has helped move the nation forward in its journey toward equal opportunity and justice for all.

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