THE RISE AND FALL OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS

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[T]he social engineers have lost their ideological monopoly of the Commission.

—1985 remark of Morris Abram, then Vice Chairman of the United States Commission on Civil Rights

A lawyer's either a social engineer, or he's a parasite on society.

—1935 remark of Charles Houston, the man described by Justice Thurgood Marshall as the "engineer" of *Brown v. Board of Education*¹

Introduction

"No" was the simple response of Mrs. Rosa Parks when, on December 1, 1955, a white man asked her to relinquish her seat in the front of the bus. Mrs. Parks' "no" sparked a major boycott of Montgomery, Alabama's segregated bus system and catapulted a young Montgomery minister named Martin Luther King, Jr. into the national spotlight.² Less than two years after Mrs. Parks said "no," President Eisenhower urged the creation of the United States Commission on Civil Rights, a bipartisan agency that would monitor the status of civil rights in the United States. Established in 1957, the Commission once played an important role in the struggle for civil rights; today, the Commission struggles simply to maintain its own credibility.

In 1957, Senator Strom Thurmond argued against the creation of a Civil Rights Commission and set a Senate endurance record by filibustering for slightly over twenty-four hours in

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¹ United States Commission on Civil Rights, Civil Rights Update 2 (Spring, 1986) (quoting Morris B. Abram). For Abram's theory of "social engineers" and affirmative action, see Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 Harv. L. Rev. 1312 (1986). In 1986, Abram resigned from the Commission and was replaced by Murray Friedman, who is currently the Vice Chairman of the Commission.


opposition to the legislation that created the Commission. The American Civil Liberties Union and the National Association for the Advancement of Colored People, on the other hand, strongly supported the creation of a federal agency to expose civil rights violations. Today, however, Senator Thurmond is praising the courage of the Commission’s current chairman, while the ACLU and the NAACP are among the Commission’s harshest critics. Times have changed, and so has the United States Commission on Civil Rights.

“No” is now the simple response of many traditional civil rights advocates to proposals to preserve the current Civil Rights Commission. Many charge that the Commission on Civil Rights is no longer an independent voice capable of critically assessing the status of civil rights in America. In light of the current controversy over the Commission, this Comment provides an historical sketch of the Commission, an analysis of the

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4 See infra text accompanying notes 31-32; 103 Cong. Rec. 16,263-75, 16,383-456 (1957); 13 Cong. Q. 563-64 (1957).


6 Trescott, Pendleton in the Hot Seat, Wash. Post, Apr. 21, 1986, at B1, col. 3 (“Strom Thurmond said to me, ‘You are one of the bravest men I know, and you do a hell of a good job.’”) (quoting Clarence M. Pendleton, Jr.).

7 See, e.g., American Civil Liberties Union, In Contempt of Congress and the Courts: The Reagan Civil Rights Record 20 (February 1984) (unpublished manuscript on file with the Harvard Civil Rights-Civil Liberties Law Review); Trescott, supra note 6, at B9, col. 1 (discussing NAACP’s opposition to the new Commission).

8 See, e.g., Don’t Decommission Civil Rights, N.Y. Times, Dec. 15, 1986, at A22, col. 2 (“Civil rights groups and their Congressional supporters charge that it has become a mouthpiece for the Reagan Administration’s limited view of civil rights.”); Face Facts About Civil Rights, N.Y. Times, Oct. 8, 1986, at A34, col. 2 (“Critics say the watchdog has become an Administration lapdog.”); Set Set-Asides Aside, New Republic, May 5, 1986, at 10 (“Hardly anybody seems to take the work of the U.S. Commission on Civil Rights seriously these days.”); Raspberry, Abolish the Civil Rights Commission, Wash. Post, Apr. 30, 1986, at A25, col. 5 (“the commission’s independence—its value as the White House conscience is gone.”).

In 1958, by contrast, Commission Chairman John A. Hannah noted:

I would like to emphasize that the Commission on Civil Rights is an independent agency of the Government, in no manner connected, even administratively, with the Department of Justice. . . . The emphasis of the commission and its staff is on objectivity, and, as the commission views it, objectivity presupposes getting all of the facts.

Commission's metamorphosis during the Reagan years, and a study of the nature of the Commission's independence.


A. The Commission's Forerunner: The President's Committee on Civil Rights

President Truman laid the foundation for the present Commission in 1946 when he established the President's Committee on Civil Rights. Truman authorized the fifteen-member Committee “to inquire into and to determine whether and in what respect current law-enforcement measures and the authority and means possessed by Federal, State, and local governments may be strengthened and improved to safeguard the civil rights of the people.” The President directed the Committee to “make recommendations with respect to the adoption or establishment, by legislation or otherwise, of more adequate and effective means and procedures for the protection of the civil rights of the people of the United States.” Although the Committee in its report acknowledged the “great progress” achieved in the field of civil rights since 1789, it chose to focus its attention almost exclusively on the failure of the nation to guarantee the basic civil rights of its citizens. The Committee decided to define its task broadly and undertook a comprehensive evaluation of civil rights in postwar America, believing “that the greatest hope for the future is the increasing awareness by more and more Americans of the gulf between our civil rights principles and our practices.”

The result of the Committee’s effort was a remarkable document focusing on the “civil rights frontier” and urging, among

10 Id. The Committee was headed by Charles Wilson, president of General Electric, and included a number of distinguished individuals. N.Y. Times, Oct. 30, 1947, at 1, col. 1. For a complete list of the Committee’s membership with biographical material, see Wash. Post, Oct. 30, 1947, at 9, col. 1.
11 Exec. Order No. 9808, 3 C.F.R. 590 (1943–1948) (1946). The sharp contrast between ideals and reality in the aftermath of World War II suggested the need for a national effort to protect basic civil liberties. Upon accepting the Committee's report, Truman stated: “I created this committee with a feeling of urgency. No sooner were we finished with the war when racial and religious intolerance began to appear and threaten the very things we had just fought for.” N.Y. Times, Oct. 30, 1947, at 14, col. 4.
12 President's Committee on Civil Rights, To Secure These Rights, ix (1947).
13 Id. at 17.
14 Id. at ix.
other things, "[t]he establishment of a permanent Commission on Civil Rights." The need for such a group, the Committee explained, was paramount:

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

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

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

A decade later, this statement would form the basis for legislation establishing the United States Commission on Civil Rights.

B. The Civil Rights Act of 1957 and the Early Years of the Commission

In 1957, President Eisenhower signed the first piece of civil rights legislation to be adopted in more than eighty years. The
Civil Rights Act of 1957\textsuperscript{19} was "designed to achieve a more effective enforcement of the rights already guaranteed by the Constitution and laws of the United States."\textsuperscript{20} While the 1957 Act addressed a number of civil rights concerns, it placed particular emphasis on protecting the right to vote in federal elections.\textsuperscript{21}

Part I of the 1957 Act created, within the executive branch of the federal government, a temporary, bipartisan "Commission on Civil Rights."\textsuperscript{22} The House Judiciary Committee referred to the Truman Committee's earlier proposal for a civil rights commission\textsuperscript{23} and endorsed the creation of a "factfinding and investigatory body [the Civil Rights Commission]" whose "primary purpose [would be] to collect and accumulate data so that a more intelligent study of the problem may be made."\textsuperscript{24} Eisenhower's Attorney General Herbert Brownell, one of the 1957 Act's chief architects, stated that "[i]nvestigation and hearings will bring into sharper focus the areas of responsibility of the Federal Government and of the States under our constitutional system. Through greater public understanding, therefore, the Commission may chart a course of progress to guide us in the years ahead."\textsuperscript{25} In his account of the Commission's early years, Foster Rhea Dulles identifies three goals of the early Commission: to gather facts which would lay the foundation for civil achievements since the war, and in the field of civil rights, the greatest since the Thirteenth Amendment." \textit{Id.} at 2. In fact, Acheson's statement is a bit hyperbolic. Though a breakthrough, the final version of the bill was the watered-down product of a series of legislative compromises. For a discussion of the particular legislative compromises built into the structure of the Commission on Civil Rights, see infra notes 224-32 and accompanying text.


\textsuperscript{21} Id.


\textsuperscript{24} Id. at 1973.

\textsuperscript{25} Id. at 1979. In his 1956 State of the Union Address, Eisenhower expressed concern over the denial of voting rights on the basis of race and "recommend[ed] that the substance of these charges be thoroughly examined by a Bipartisan Commission created by Congress." 1956 U.S. Code Cong. & Admin. News 4657, 4668.
rights legislation, to stimulate action by Congress and the Executive, and to serve as the conscience of the nation by exposing failures to secure and protect civil rights.26

In Part II of the five-part Act, Congress authorized the President to appoint an additional assistant United States attorney general to head a newly created "Civil Rights Division" of the Justice Department.27 The House report accompanying the passage of the 1957 Act noted that the major factor behind the decision to create the new Civil Rights Division was the extremely complex and delicate nature of civil rights issues.28 For the Eisenhower Administration, the Civil Rights Division and the Commission could provide a sort of one-two punch against voting discrimination. As historian Robert F. Burk has noted, "[w]ith the Civil Rights Commission . . . having provided legitimacy for legal actions by its public exposure of continuing racism, the newly created Civil Rights Division could move selectively to challenge obvious denials of the franchise."29 As a sentinel unconstrained by any prosecutorial responsibilities, the Commission could, through bold denunciations of systematic racism, provide an effective complement to the enforcement efforts of the Civil Rights Division.

Although the White House urged the creation of a Civil Rights Commission, congressional support was less forthcoming. White segregationists feared a commission empowered to expose racism, and many Southern congressmen railed against the creation of the Commission. Senator Herman Talmadge (D-Ga.), for example, declaimed:

Once the Commission begins its operations, the authority for star-chamber sessions, the authority for institution of arbitrary rules and procedures, and the unlimited power of smear and harassment, make the Commission a continuing threat to the welfare and security of every person in the nation as long as it exists.

26 See F. Dulles, supra note 5, at x.
29 R. Burk, The Eisenhower Administration and Black Civil Rights 228 (1985).
This is true because the Commission’s whole genesis is repugnant to basic constitutional principles.\(^{30}\)

Similarly, Senator Strom Thurmond (D-S.C.) stated that “I am opposed to the creation of a Commission on Civil Rights as proposed in part I of H.R. 6127. To begin with, there is absolutely no need or reason for the establishment of such a commission.”\(^{31}\) Like Talmadge, Thurmond feared the investigatory powers of the proposed Commission and protested:

> I do not believe the people of this country realize the virtually unlimited powers of inquiry which would be placed in the hands of this political Commission. While the Commission would have no powers to implement its desires, I do not believe the people want such a totalitarian type of persuasion imposed on them.\(^{32}\)

Many Southerners particularly objected to the grant of the subpoena power in the 1957 Act, which gave the Commission the power to issue “[s]ubpenas [sic] for the attendance and testimony of witnesses [at hearings held by the Commission] or the production of written or other matter.”\(^{33}\) Furthermore, upon application by the Attorney General, a federal district court judge could issue an order requiring compliance with the subpoena.\(^{34}\)

Soon after the passage of the 1957 Act, the fledgling Commission faced the formidable task of overcoming Southern resistance to its subpoena power. When the Commission was preparing for its first public hearing, held in Montgomery, Alabama in 1958, state officials directly flouted its subpoena power. To facilitate factfinding, the Commission issued subpoenas for the appearance of county registrars and for the production of

\(^{31}\) Id. at 13,733 (statement of Sen. Thurmond).
\(^{32}\) Id.
\(^{34}\) Pub. L. No. 85-315, § 105(g), 71 Stat. 634 (1957). Opponents objected to what they characterized as the quasi-judicial nature of the powers granted to the Commission. See, e.g., H.R. Rep. No. 291, supra note 20, at 1996–97. The House minority report asserted “this Commission is nothing more or less than a national grand jury, lacking only the power of indictment.” Id. at 1997. In addition, the House minority report expressed particular concern over the lack of procedural protections for those individuals called to testify before the Commission. Id. at 1997.
voting records.\textsuperscript{35} The registrars refused to provide their records, and their defiance was officially supported by state authorities in several counties.\textsuperscript{36}

The Alabama registrars’ open defiance of the Commission shocked the nation and prompted the \textit{New York Times} to comment: “In their resistance to the reasoned efforts of this ultramoderate Presidential commission to carry out its sworn duty the state and county officials are displaying an intolerable contempt for the law.”\textsuperscript{37} Despite the continued resistance by registrars and state officials, the Commission held the Alabama hearing and began to uncover serious voting rights violations.\textsuperscript{38} To enforce the Commission’s subpoena, Attorney General Browning filed a civil suit in federal district court. Federal District Court Judge Frank Johnson ultimately issued an order requiring state officials in three counties to make their voting records available to the Commission.\textsuperscript{39}

The Commission encountered another challenge to its subpoena power when, in response to a stream of affidavits alleging voting rights violations, it attempted to hold hearings in Louisiana.\textsuperscript{40} Again, state officials refused to cooperate, and the state attorney general sought a temporary restraining order to prevent the Commission from holding the hearing.\textsuperscript{41} Federal District Court Judge Benjamin Dawkins granted the restraining order just hours before the scheduled hearing.\textsuperscript{42} The resulting legal battle between the Commission and Louisiana eventually led to a significant Supreme Court decision, \textit{Hannah v. Larche},\textsuperscript{43} which upheld the constitutionality of the 1957 Act.

The constitutional challenge in \textit{Hannah} focused on the Commission’s procedures for conducting hearings.\textsuperscript{44} Specifi-

\textsuperscript{35} See F. Dulles, supra note 5, at 33.
\textsuperscript{36} Id. In Macon County, Alabama the refusal to comply with the subpoenas was in accordance with the stated policy of Alabama Attorney General John Patterson. Id. In two other counties, George Wallace, then a circuit judge, “officially impounded all registration records.” Id.
\textsuperscript{37} N.Y. Times, Dec. 10, 1958, at 38, col. 1.
\textsuperscript{38} See F. Dulles, supra note 5, at 33–38. The Commission published the results of the Alabama hearings in its 1959 report. Id.
\textsuperscript{39} Id. at 40.
\textsuperscript{40} Id. at 41; see also United States Commission on Civil Rights, 1959 Report 98.
\textsuperscript{41} See United States Commission on Civil Rights, 1959 Report, supra note 40, at 99–100.
\textsuperscript{42} See id. at 100.
cally, the Court in *Hannah* considered whether the Commission's hearing procedures violated the due process clause of the fifth amendment, since individuals called to testify before the Commission were not given the opportunity to cross-examine other witnesses.45

In his opinion for the Court, Chief Justice Warren undertook a detailed analysis of the Commission and its powers. After considering the procedures established by the 1957 Act, the Court stated:

> [F]rom this brief sketch of the statutory duties imposed upon the Commission, [it is clear that] its function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.46

This statement refuted the Southern officials' claim that the Commission was an adjudicatory body and provided strong support for the proposition that the Commission was merely an investigatory agency. The Court thus vacated the injunction barring the Commission from holding the Louisiana hearing.47

In addition to the dispute over the Commission's internal procedures, the appointment of Commission members was also a potentially explosive issue. Section 101 of the 1957 Act48 provided for a six-person bipartisan Commission whose members

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45 See 363 U.S. at 422.
46 Id. at 441.
47 Id. at 453. Justice Frankfurter directly addressed the constitutional issues in his concurring opinion and also found that the Commission's procedures, as authorized in the 1957 Act, did not violate the fifth amendment. Id. at 493 (Frankfurter, J., concurring). In a dissent joined by Justice Black, Justice Douglas stated that the Commission's procedures violated the due process rights of witnesses called before the Commission by exposing them to criminal liability without providing them the rights of confrontation or cross-examination. See id. at 508 (Douglas, J., dissenting).
would be "appointed by the President and confirmed by the Senate." \(^{49}\)  

Eisenhower began the search for the Commission's initial membership during a period of growing tension in the aftermath of *Brown v. Board of Education*. \(^{50}\) The confrontation at Little Rock, Arkansas between Governor Faubus and President Eisenhower over the desegregation of Central High School had occurred in September 1957. After Governor Faubus called out the National Guard to prevent the attendance of nine black children at all-white Central High, Eisenhower sent in federal troops to enforce the school desegregation program. \(^{51}\) Given this explosive context, Eisenhower sought commissioners "who might have an 'ameliorating effect' on the prejudices and passions aroused by the Little Rock crisis." \(^{52}\) 

In choosing the first Commission members, Eisenhower sought a diversity of geographic backgrounds and previous experience to fill the bipartisan Commission. The first six members of the Commission were all "persons of distinction in public service." \(^{53}\) Eisenhower chose John Hannah, president of Michigan State University, to serve as chairman. The other members were John Battle, a former Governor of Virginia, Father Theodore Hesburgh, president of Notre Dame, Robert Storey, dean of Southern Methodist University Law School, Ernest Wilkins, 

\(^{50}\) 347 U.S. 483 (1954).  
\(^{51}\) See F. Dulles, *supra* note 5, at 17. The events at Little Rock led the Supreme Court to issue one of its strongest statements in *Cooper v. Aaron*, 358 U.S. 1 (1958), which reaffirmed the importance of the rule of law in the enforcement of civil rights. The Court stated: "As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government." *Id.* at 4. In an opinion signed by all nine Justices, the Court held that "[t]he principles announced in [*Brown*] and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by [the Constitution]." *Id.* at 19–20. The Court asserted that "law and order are not here to be preserved by depriving the Negro children of their constitutional rights." *Id.* at 16. 

Attorney General Edwin Meese recently criticized *Cooper* in a speech illustrating his belief that the decisions of the Supreme Court do not "establish a 'supreme law of the land' that is binding on all persons and parts of government henceforth and forevermore." Moss, *The Policy and Rhetoric of Ed Meese*, 73 A.B.A. J. 64, 64 (1987) (quoting U.S. Attorney General Edwin Meese III). Likening *Cooper* to, of all cases, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), Meese added: "The logic of *Cooper v. Aaron* was, and is, at war with the basic principles of democratic government, and at war with the very meaning of the rule of law." Address by Attorney General Edwin Meese III, Tulane University (Oct. 21, 1986) (text of address on file with Harvard Civil Rights-Civil Liberties Law Review). 

\(^{52}\) F. Dulles, *supra* note 5, at 17–18.  
\(^{53}\) N.Y. Times, Jan. 5, 1958, at 8E, col. 3.
an Assistant Secretary of Labor, and Doyle Carleton, a one-time Governor of Florida. All three Southerners—Battle, Storey and Carleton—were Democrats; two of the Northerners—Hannah and Wilkins—were Republicans, and Hesburgh was an independent. Only one member of the all-male Commission, Wilkins, was black. He resigned for health reasons just eight months after his appointment and was replaced by George Johnson, a black Republican who had served as dean of Howard Law School from 1946 to 1958. The New York Times' characterization of the early Commission as “ultra-moderate” was correct; none of the commissioners had close ties to the civil rights movement, and one, John Battle, was even a well-known segregationist. Many observers were skeptical about the Commission's prospects as a watchdog for civil rights.

President Eisenhower appointed Gordon Tiffany, a Republican and former attorney general of New Hampshire, to the influential position of staff director. A full-time position, the staff director could exert considerable control over the Commission's activities. Senator Russell (D-Ga.) remarked in 1958 that the staff director’s views “will have more effect upon the work of the Commission and its final recommendations than any other individual, including the Chairman of the Commission.” During his confirmation hearings, Senators challenged Tiffany’s competence for the position of staff director on political and professional grounds. Despite these challenges, Tiffany was confirmed in June 1958.

Following the appointment of Tiffany as staff director, the Commission began to create State Advisory Committees (SACs) which would carry out much of the Commission’s work at the state and local level. The first advisory committees were or-

54 N.Y. Times, Jan. 4, 1958, at 1, col. 1. For a more detailed biographical account of these individuals see F. Dulles, supra note 5, at 19–22.  
55 See F. Dulles, supra note 5, at 21–22.  
56 Id. at 21.  
57 See, e.g., id. at 19 (“the Commission is not likely to break many lances crusading for civil rights”) (quoting editorial in the Nation).  
58 Id. at 24.  
59 Id.  
60 Id. at 23–24. Southern Democrats feared the appointment of a Republican from New Hampshire who might be an ardent foe of Southern segregation and accused Tiffany of being too radical and too inexperienced for the staff director position.  
61 Senate delays in confirming Tiffany and congressional stalling on funding the new agency yielded a sluggish start for the Commission, which lacked a staff director and an operating budget until June 1958. Id. at 25–26.  
ganized in the home states of the Commission members but the committees existed in virtually every state within a few months. In the next three decades, the State Advisory Committees would prove to be invaluable tools for examining civil rights violations at the state and local levels.

With regard to the protection of civil rights, the period from 1957 to 1961 was a time marked by growing tensions, rising hopes, and some notable legislative activity. In 1960, Congress passed a civil rights bill, sponsored by the Eisenhower Administration, which incorporated specific recommendations made by the Commission, including a federal voting referees plan. Title IV of the 1960 Act extended the power of the Commission by granting the members "the power and authority to administer oaths or take statements of witnesses under affirmation." Despite these and other modest gains in the 1960 Act, no significant

U.S.C. § 1975d(c) (Supp. 1985)) ("The Commission may constitute such advisory committees within States as it deems advisable, but the Commission shall constitute at least one advisory committee within each State composed of citizens of that State.").

During the Reagan administration, the Commission rechartered the State Advisory Committees (SACs) and selected new chairpersons to head them in 1985. Commission Chairman Clarence M. Pendleton, Jr. defended the replacements as necessary because the old SACs "had lost track of the changing nature of the [civil rights] movement," and should be "ideologically diverse." United States Commission on Civil Rights, Civil Rights Update, Oct./Nov./Dec. 1985, at 6. As a result of the reorganization of the SACs, the number of white chairpersons increased from 29 to 72 percent; black chairpersons dropped from 41 to 18 percent; and the percentage of male chairs increased from 61 to 92 percent. Id. Pendleton and acting Staff Director Max Green explained that they appointed the most qualified individuals, and that the selections were not made on the basis of race or sex. Id.

The SACs, under the aegis of the U.S. Commission on Civil Rights, should be distinguished from numerous state-created commissions and committees. With names such as "State Civil Rights Commission," "Council on Human Relations," "Commission on Human Rights," or "State Committee Against Discrimination," these bodies have been established by state statute and remain independent of the U.S. Commission and its SACs.

Fair Employment Practice Committees are also independent state agencies. Though state statutes vary, these bodies generally have been established to hear and investigate complaints of employment discrimination. In 1945, immediately after the federal Fair Employment Practice Committee, created by President Roosevelt's Executive Order 8802, was abolished because of southern opposition, New York established the first state Fair Employment Practice Committee. See K. Lloyd, Solving an American Dilemma: The Role of the FEPC Official 37–38 (1963).

See F. Dulles, supra note 5, at 29.


legislative advancements in the area of civil rights would occur until the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. 

C. The Kennedy Administration

Although President John F. Kennedy ran for office on a platform broadly endorsing civil rights enforcement, his support for new civil rights legislation during the first two years of his presidency was limited. During the last year of his Administration, however, Kennedy placed a renewed emphasis on civil rights.

With respect to the Commission, perhaps the most important steps Kennedy took in 1961 were his appointments of a new staff director and two new members to fill vacancies left by resignations. In March, 1961, Kennedy nominated as staff director Berl Bernhard, a young lawyer who had worked with the Commission since its inception. Kennedy also chose Erwin Griswold, dean of Harvard Law School, and Spottswood Robinson, dean of Howard Law School, to replace Commissioners Doyle Carleton and George Johnson, both of whom had just resigned for personal reasons. The Senate confirmed all three

69 See J. Harvey, Civil Rights During the Kennedy Administration 6-7 (1971) (discussing campaign endorsements of civil rights); D. Garrow, supra note 3, at 234 ("'Kennedy has often said to me'" [Dr. Martin Luther] King told Stanley [Levison], "'there is no point in introducing strong civil rights legislation because you can't get it through.'") (quoting Stanley Levison).
70 J. Harvey, supra note 69, at 71.
71 F. Dulles, supra note 5, at 101. The Commissioners unanimously supported this appointment. See id.
73 See F. Dulles, supra note 5, at 99-100. Kennedy's appointees were well-qualified for their positions on the Commission. Spottswood Robinson, for example, had argued before the Supreme Court on behalf of the black plaintiffs in one of the cases consolidated with Brown, 347 U.S. 483 (1954).
Dulles emphasized the significance of Kennedy's appointments, stating that they were

indicative both of the general trend of the civil rights movement and of the new Administration's apparently sympathetic attitude toward it. For while the new members maintained the bipartisan character of the Commission and at least in theory the traditional three-to-three division between North and South, they definitely changed its character. The Commission no longer had any political representatives; its composition was wholly academic and legalistic.
nominations in July. It was also during the Kennedy Administration that Clarence Clyde Ferguson, a leader in the field of international human rights, became general counsel to the Commission.

By 1962, the Commission had expanded the scope of its investigations beyond the original emphasis on voting, education and housing, although study of discrimination in these areas remained central to its work. As early as 1960, during hearings in Los Angeles and San Francisco, the Commission had sought "to emphasize the interrelationship among all aspects of discrimination and also to demonstrate that it was an acute problem not only in the South but throughout the country." The Los Angeles hearings had investigated discrimination against Mexican-Americans as well as blacks, and received testimony on education, housing and police misconduct. Furthermore, the Commission, "for the first time, took up the underlying economic issue of Negro unemployment." At the 1962 hearings in Memphis, moreover, the Commission investigated discrimination in public health facilities and discovered that many hospital facilities in Memphis were not admitting blacks.

In 1962, the Commission forcefully asserted its independence from the executive branch when, in the wake of events at the University of Mississippi, the Commission clashed with the White House. In a direct challenge to federal authority, Governor Ross Barnett of Mississippi attempted to block the admission of James Meredith, a black Air Force veteran, to the University of Mississippi. Governor Barnett's actions prompted Kennedy to call the Mississippi National Guard into federal service and also to send in federal troops. As the Justice Two university presidents, three law deans, and a political scientist made up the new membership.

F. Dulles, supra note 5, at 100.

74 See F. Dulles, supra note 5, at 103.
75 Id. at 154. Ferguson later held the positions of dean of Howard Law School and professor at Harvard Law School.
76 Id. at 119.
77 Id. at 120.
78 Id.
79 Id. at 164.
80 Id. at 164–65.
81 See N.Y. Times, Sept. 21, 1962, at 1, col. 5. The article commented that the confrontation "set the stage for one of the most critical conflicts between state and federal authority yet seen in the South." Id.
Department pursued contempt proceedings against Governor Barnett, the Commission sought to hold hearings in Mississippi. The Justice Department felt that the investigatory activities of the Commission would interfere with the Department’s enforcement efforts. Following increased violence against civil rights workers, including the bombing of the home of the Vice-Chairman of the Mississippi Advisory Committee, the Commission felt that some action was necessary. The Commission chose to produce an “Interim Report” on the conditions in Mississippi. The decision to release the report, which gave a “devastating picture” of the status of civil rights in Mississippi, led to a confrontation with President Kennedy, and the report was ultimately released over the President’s objections. In deciding not to attempt to suppress the report, Kennedy specifically deferred to the Commission’s independent status.

D. The Johnson Administration

During President Johnson’s years in office, Congress passed two of the most significant civil rights provisions of the twentieth century—the Civil Rights Act of 1964 and the Voting Rights Act of 1965. On November 27, 1963, just four days after Kennedy’s assassination, Johnson told Congress that no memorial “could more eloquently honor President Kennedy’s memory than the earliest possible passage of the civil rights bill for which he fought so long.” The Civil Rights Act of 1964, signed by Johnson on July 2, embodied the most important civil rights protections enacted since the Reconstruction Amendments.

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83 See F. Dulles, supra note 5, at 179–80.
84 Id. at 180–81.
85 Id. at 182. The report stated that “citizens of the United States have been shot, set upon by vicious dogs, beaten and otherwise terrorized because they sought to vote.” Id.
86 Id. at 182.
89 F. Dulles, supra note 5, at 214.
90 The core of the Act was the public accommodations provisions of Title II prohibiting discrimination on the basis of race in the “full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation.” Pub. L. No. 88-352, § 201, 78 Stat. 241 (1964). These provisions addressed the denial of service at lunch counters, theaters, hotels and other places that were open to the general public.
91 U.S. Const. amends. XIII, XIV, XV.
The 1964 Act also included several provisions specifically concerning the Civil Rights Commission. It established a number of new procedural requirements designed to strengthen protections for witnesses appearing at Commission hearings.\(^92\) In addition, it introduced a requirement that the Commission "serve as a national clearinghouse for information in respect to denial of equal protection of the laws because of race, color, religion or national origin."\(^93\) The 1964 Act also barred any investigation of the membership of fraternal organizations, college fraternities or sororities, private clubs or religious organizations.\(^94\) Finally, the 1964 Act extended the life of the Commission for another four years, requiring the submission of a final report before its expiration.\(^95\)

While Title I of the 1964 Act contained provisions designed to protect voting rights, it soon became clear that the provisions were inadequate to end the disenfranchisement of blacks. Following a hearing on voting rights in Mississippi in early 1965, the Commission issued a report detailing Mississippi's voting rights abuses.\(^96\) In light of such abuses, the Commission unanimously endorsed the voting rights bill then pending in Congress.\(^97\) On March 15, Johnson "called for the new voting legislation embodying the recommendations of the Civil Rights Commission."\(^98\)

The Voting Rights Act of 1965\(^99\) was even stronger than the original bill proposed by Johnson, in part because it incorporated the Commission's many recommendations regarding sanctions, pollwatchers and polltaxes.\(^100\) The strong correlation be-

\(^{94}\) Pub. L. No. 88-352, § 504(a), 78 Stat. 241 (1964) (codified as amended in 42 U.S.C. § 1975c(b)). This provision was enacted in response to complaints made about a questionnaire sent out by the Utah Advisory Committee. See F. Dulles, supra note 5, at 220–21.
\(^{95}\) Pub. L. No. 88-352, § 504(b), 78 Stat. 241 (1964); see supra note 22 (discussing periodic reauthorizations of Commission's existence).
\(^{96}\) F. Dulles, supra note 5, at 241. "The Mississippi hearing had wide coverage in the nation's newspapers; it generally evoked favorable editorial comment on its thoroughness and objectivity." Id.
\(^{97}\) See id. at 241–42.
\(^{98}\) Id. at 243.
\(^{100}\) See F. Dulles, supra note 5, at 244.
tween the Commission's recommendations and the final form of the Voting Rights Act of 1965 represents a high point in the Commission's influence on the legislative process. Moreover, in the area of voting rights, the Commission had become a particularly valuable information-gatherer. In *State of South Carolina v. Katzenbach*,\(^{101}\) for example, rejecting a major challenge to the constitutionality of the 1965 Voting Rights Act, the Supreme Court relied in part on data published by the Commission.\(^{102}\)

As the Commission broadened its scope, examining a wider range of issues, other agencies also began to address problems of discrimination. After 1965, many executive agencies, such as the Department of Health, Education and Welfare, the Department of Labor, and the Equal Employment Opportunity Commission, slowly began to displace or supplement some of the investigatory functions of the Commission.\(^{103}\)

The formation in the Johnson Administration of two independent commissions to report on the housing crisis somewhat diminished the Commission's institutional importance in the housing arena. The first—the Douglas Commission—was constituted in March of 1965, following the urban race riots of the 1960's.\(^{104}\) The second—the Kaiser Committee—met from June 1967 until December 1968.\(^{105}\) Both of these commissions pushed for important housing reforms—indeed, one of the major cases in the housing discrimination arena, *Javins v. First Nat'l Realty Corp.*,\(^{106}\) cited the work of both the Douglas and Kaiser commissions.\(^{107}\)

It would be a mistake, however, to conclude that the Commission made no effort to influence legal reforms in the area of housing during this period or that its efforts had no effect. The

\(^{101}\) 383 U.S. 307 (1966). Chief Justice Warren delivered the opinion of the Court and expressed hope that "millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live" through the free exercise of the right to vote under the fifteenth amendment, which was ratified almost a century before the passage of the 1965 Act. *Id.* at 337.

\(^{102}\) See, e.g., 383 U.S. at 309 n.5, 311 n.10, 323 n.33, 337 n.51.

\(^{103}\) Despite the expansive investigatory powers of the Commission, its impact on substantive areas of the law has been limited by the fact that the Commission must rely on other agencies for implementation of the Commission's recommendations and proposals.


\(^{105}\) *Id*., 69 Corn. L. Rev. 517, 585 (1984).


\(^{107}\) *Javins*, 498 F.2d at 1079; see also Rabin, supra note 104, at 595 (discussing *Javins*).
annual reports issued by the Commission included various recommendations on housing which were subsequently incorporated in either executive orders or in legislation.  

E. The Nixon Administration

Following the election of President Richard M. Nixon in 1968, the Commission continued its comprehensive evaluation of the major civil rights legislation passed during the Johnson Administration. In September 1970, the Commission published the first of a series of voluminous reports, *The Federal Civil Rights Enforcement Effort*. This report attempted to "evaluate for one moment in time the status of the entire Federal civil rights enforcement effort—to determine how effectively the Federal Government as a whole has geared itself to carrying out civil rights responsibilities pursuant to the various constitutional, congressional, and presidential mandates which govern their activities." The results of this impressive effort included numerous findings and recommendations addressing all aspects of federal civil rights enforcement.

After the publication of the 1970 study, the Commission issued several major follow-up reports. In its third follow-up report, released in 1973, the Commission emphasized the lack of progress made toward remedying the civil rights enforcement weaknesses which had been identified in 1970. This report noted:

Our basic conclusion is that the Federal effort is highly inadequate; that it has not improved as much as we

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108 For example, the Commission first recommended in its 1959 report that "the President issue an executive order on equal opportunity in housing," a recommendation which was finally carried out by Executive Order No. 11063, 3 C.F.R. 652 (1959–1963) (1962). Similarly, the Commission has pushed for a number of specific housing related reforms. The Commission's recommendations, ultimately carried out in the Sixties, are listed on a "scoresheet" delivered to the Subcommittee on Administrative Practice and Procedure of the Committee of the Judiciary of the United States Senate on June 23, 1971 by the Commission's Chairman Theodore Hesburgh. See *Implementation of Recommendations of Presidential and National Commissions: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 92nd Cong., 1st Sess. 263 (1971) [hereinafter *Implementation Hearings*].


110 *Id.* at ii.

would have expected since our last report in November 1971; and that strong leadership and direction are absolutely necessary to prevent a continuation of the ineffective enforcement program developed over the last nine years.\textsuperscript{112}

The fourth follow-up report, \textit{The Federal Civil Rights Enforcement Effort—1974}, was actually a series of seven reports that the Commission began issuing from 1974 to 1977. These reports focused on the efforts made by federal agencies to eliminate discriminatory practices within the industries under their regulatory control. The last report in this series considered the status of civil rights oversight and policy-making by the White House from 1972 to 1976.\textsuperscript{113} The report emphasized the lack of progress in the enforcement of civil rights and recommended that “the President assume responsibility for comprehensive oversight of Federal civil rights enforcement programs.”\textsuperscript{114}

Shortly after his reelection in 1972, Nixon took actions which seriously threatened the independence of the Commission. Nixon requested and obtained the resignation of Father Theodore Hesburgh who was then serving as chairman of the Commission.\textsuperscript{115} Apparently, Nixon sought the resignation because he disagreed with Hesburgh’s pro-busing stance.\textsuperscript{116} Despite the fact that Nixon requested letters of resignation from the other five Commission members, he sought to remove only Hesburgh.\textsuperscript{117}

\textsuperscript{112} Id. at 1-2.
\textsuperscript{113} See United States Commission on Civil Rights, The Federal Enforcement Effort—1974, Volume VII, To Preserve, Protect, and Defend the Constitution ii (1977). In the preface, the Commission noted:

As we have done with all previous Commission studies of the Federal enforcement effort, detailed questionnaires were sent to agencies, extensive interviewing of Washington-based civil rights officials took place, and a vast number of documents were reviewed, including laws, regulations, agency handbooks and guidelines, compliance review reports, and books authored by leading civil rights scholars.

\textit{Id.} at iv.
\textsuperscript{114} Id. at iii.
\textsuperscript{115} See \textit{N.Y.} Times, Nov. 18, 1972, at A1, col. 4. White House Press Secretary Ronald Ziegler “made it clear that members of President Nixon’s staff had actually sought, and received, the Hesburgh resignation . . . .” \textit{Id.}
\textsuperscript{116} Although the White House press secretary refused to give a reason for Nixon’s request of Hesburgh’s resignation, Hesburgh was “an outspoken opponent of President Nixon’s antibusing policy.” \textit{Id.}
\textsuperscript{117} See \textit{id.} at A17, col. 3.
This was not the first time a President had asked for resignations from Commission members: without controversy, President Kennedy in 1961 and President Johnson in 1963 had requested pro forma resignations from all Commission members.\footnote{See Hesburgh, \textit{Integer Vitae: Independence of the United States Commission on Civil Rights}, 46 Notre Dame L. Rev. 445, 454 (1974).} Johnson also made a similar request following his election victory in 1964.\footnote{See \textit{N.Y. Times}, Nov. 17, 1972, at A22, col. 4.} At that time, however, Erwin Griswold, a Commission member, said that compliance with Johnson’s request “would be an acknowledgement that we are not an independent agency, but are merely a part of the Presidential staff, holding office at the pleasure of the President.”\footnote{Id.} In any event, Johnson did not seek to remove any of the commissioners.\footnote{In fact, in January, 1964, President Johnson had expressed his hope that Chairman Hannah and the other commissioners would remain in office. \textit{See} F. Dulles, \textit{supra} note 5, at 215.}

Nixon’s successful attempt to remove Hesburgh, who had served on the Commission since its creation in 1957, set an unfortunate precedent for future administrations.

\textit{F. The Ford and the Carter Administrations}

During the 1970’s, the Commission continued to devote much of its effort toward such fundamental issues as school desegregation and to expand the scope of its inquiry beyond basic civil rights violations in voting, education and housing.

In 1968, the Commission had begun publishing, as part of its clearinghouse responsibilities, the \textit{Civil Rights Digest}. This quarterly journal, which the Commission published through 1978, offered a broad range of topics designed to stimulate interest in current civil rights issues. During the Ford Administration, the Commission published pieces in the \textit{Civil Rights Digest} addressing discrimination against a variety of racial and ethnic groups\footnote{See, \textit{e.g.}, United States Commission on Civil Rights, \textit{Civil Rights Digest}, Fall 1976, at 1 passim (articles focusing on discrimination against Asian-Americans).} and also articles considering the economic effects of discrimination.\footnote{See, \textit{e.g.}, Blumrosen & Blumrosen, \textit{Layoff or Work Sharing—The Civil Rights Act of 1964 in the Recession of 1975}, \textit{Civil Rights Digest}, Spring, 1975, at 35.}

After the publication in 1970 of its comprehensive report on the federal civil rights enforcement effort, the Commission
emphasized the importance of affirmative action programs which use quotas and timetables to redress the effects of previous discrimination. In its 1975 report, Twenty Years After Brown: Equality of Economic Opportunity, the Commission explicitly stated that the way to ensure that government contractors provide equal opportunity is to establish "goals and timetables . . . to measure progress in increasing minority employment." The report recommended that affirmative action be applied as a means of guaranteeing equal economic opportunity, stressing that "it is now time that specific operating goals, an implementation timetable, and monitoring procedures be established to insure [sic] the achievement of economic parity between all racial and ethnic groups and men and women."

As mandatory school desegregation reached Northern cities, the Commission again focused its attention on this complex problem. In particular, following outbreaks of violence in response to the court-ordered desegregation of the Boston public schools, the Massachusetts Advisory Committee requested that the Commission investigate desegregation in Boston. The Commission complied, and its investigation culminated in a week-long series of public hearings in the summer of 1975. The Commission's efforts in Boston demonstrated its commitment to resolving one of the most pressing issues of the 1970's.

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125 Id. at 81–82.
127 On June 21, 1974, Judge A. William Garrity entered an interlocutory order in Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass.), aff'd 509 F.2d 580 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975) imposing mandatory desegregation on some Boston public schools. See also United States Commission on Civil Rights, Desegregating the Boston Public Schools: A Crisis in Civic Responsibility, supra note 126, at ix. After conducting a preliminary study in 1974, the Commission "wrote to President Ford recommending substantially increased and well-coordinated Federal support and leadership." Id. The report later made several specific recommendations, further urging that the President "publicly support and affirm the Federal Government's commitment to eliminate unconstitutional school segregation." Id. at 213.
128 United States Commission on Civil Rights, Desegregating the Boston Public Schools: A Crisis in Civic Responsibility, supra note 126, at ix.
129 The events surrounding the mandatory desegregation of Boston public schools put to rest any misconceptions that the violent breaches of civil rights were somehow a uniquely Southern problem. Recognizing the seriousness of Northern opposition to busing, in a preliminary staff report dated November 27, 1974 the Commission considered the Boston school desegregation controversy "as critical to this time as the Little Rock conflict of the 1950's. Boston is indeed the Little Rock of the North." United States Commission on Civil Rights, Staff Research Report on the Crisis and Controversy Concerning Desegregation of Public Schools in Boston, Massachusetts 1 (1974) (on file with Harvard Civil Rights-Civil Liberties Law Review).
During the Ford Administration, the Commission, led by Chairman Arthur Flemming, also had a substantial impact in the area of age discrimination. In 1975, Flemming compared age discrimination to racism and sexism, thus spurring a flurry of congressional activity that culminated in the Age Discrimination Act (ADA) of 1975. The ADA authorized the Commission to undertake a study of age discrimination in federally funded programs. The study, released in January of 1978, consisted of an analysis of age discrimination in a variety of institutions, ranging from community health centers to universities. Defining age discrimination as "any act or failure to act, or any law or policy that adversely affects an individual on the basis of age," the study forcefully discounted a number of proffered justifications for age discrimination. Although some commentators criticized the report for its statistical methodology, Congress adopted the Commission's recommendations in the 1978 amendments to the ADA.

In 1977, the Commission issued a brief report on the overall status of civil rights in 1976. Although the Commission found "that continuing and significant progress was made in school desegregation," it also noted "serious violations by Federal agencies, including the Immigration and Naturalization Service and the Indian Health Service, of the civil rights of Hispanic Americans and Native Americans." Furthermore, the Com-
mission again emphasized the economic dimension of the struggle for equality:

[E]conomic conditions—high unemployment and inflation in such areas as the cost of health care, transportation, housing, and utilities—and the fiscal crisis in which many cities and States find themselves are directly relevant to our national commitment to equal opportunity. . . . A clear lesson of the Nation’s economic problems of the past few years is that policies designed to achieve full employment and economic stability are as essential in the area of civil rights as they are in improving the economic health and well-being of all Americans.139

As this statement suggests, the Commission in the 1970’s recognized that the effort to secure civil rights for all was deeply intertwined with economic justice.

During the Carter years, the Commission continued to address such issues as affirmative action, racial discrimination in higher education, housing discrimination, and equal rights for women. In 1977, the Commission again issued a formal statement endorsing affirmative action as a means of remedying past discrimination.140 The Commission stated that the “short history of affirmative action programs has shown such programs to be promising instruments in obtaining equality of opportunity.”141 After discussing the appropriateness of affirmative action in employment and higher education, the Commission concluded: “[W]e believe that affirmative action [programs] as applied in the variety of contexts examined in this statement, including those where numerically-based remedies have been employed,” meet the fundamental goals of addressing past discrimination while treating all citizens fairly.142

In 1981, in a report begun during the Carter Administration, the Commission boldly claimed that “[t]he Federal courts, Con-

141 Id. at 12.
gress, and the executive branch as well have ... repeatedly ordered and permitted numerically-based remedies that explicitly take race, sex, and national origin into account." Given significant public animosity toward the use of quotas in affirmative action programs, the Commission recognized the importance of unambiguously establishing their legality. The Commission invoked Supreme Court decisions such as Regents of the University of California v. Bakke, United Steelworkers of America v. Weber, and Fullilove v. Klutznick in support of its view that affirmative action quotas were legally permissible. The 1981 report caps an era in which the Commission sought to reshape rather than reflect public opinion, and employed the basic principle that equality of economic opportunity requires the consideration and correction of previous inequalities. The Commission believed that programs which made use of quotas, goals and timetables were an important part of the effort to redress previous inequalities.

In another important 1981 report, the Commission discussed the promotion of equal opportunities in public higher education through the use of Title VI of the 1964 Civil Rights Act, which prohibits the granting of federal funds to institutions which discriminate. The Department of Health, Education,

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144 Id. at 3-6.
145 438 U.S. 265 (1978) (plurality opinion suggesting that some affirmative action plans are permissible).
146 443 U.S. 193 (1979) (private employer and union can use quotas in job training programs).
147 448 U.S. 448 (1980) (federal agency may require states which receive grants from agency to set aside percentage of funding for minority-owned businesses).
148 The belief that there is a connection between previous discrimination and current opportunities was the basis for the Commission's endorsement of affirmative action quotas and timetables. As early as 1961, the Commission articulated this belief in its reports.

Beginning with the issuance of the 1961 report and continuing until the Commission's demise under President Reagan, the Commission recognized that guaranteeing equality of economic opportunity required that employers both refrain from practicing overt discrimination and seek to remedy the effects of previous discrimination. Merely abandoning overt discrimination, after practicing it for generations, was not considered sufficient to guarantee equal opportunity. See, e.g., Dismantling, supra note 143, at 5-6. This theory rested on the assumption that "despite civil rights laws and a noticeable improvement in public attitudes toward civil rights, continued inequalities compel the conclusion that our history of racism and sexism continues to affect the present." Id. at 4.
149 See After Brown, supra note 124, at 10-11.
and Welfare (HEW) was responsible for enforcement of this provision. Due to HEW’s limited success, dissatisfied private plaintiffs had filed suit in 1970 to force HEW to fulfill its Title VI responsibilities.151 This action ultimately led the federal district court for the District of Columbia, in Adams v. Califano,152 to find that HEW’s efforts to desegregate public higher education were inadequate; thus, the Court ordered HEW to develop specific desegregation criteria which would be sufficient to satisfy the requirements of Title VI.153 The Commission applauded the Adams decision as “a milestone in desegregation law” and praised “its mandate for a unitary system of higher education in which each institution in the system will provide equal educational opportunity and will be accessible to all students without regard to race.”154

During the late 1970’s, the Commission also focused its efforts on strengthening the Fair Housing Act of 1968155 and related legislation. On May 3, 1979, Chairman Arthur Flemming testified before the House Subcommittee on Civil and Constitutional Rights on potential amendments to the Fair Housing Act of 1968. In these hearings, Flemming urged the House to make three modifications to the 1968 Act. First, Flemming encouraged Congress to grant the Secretary of Housing and Urban Development greater enforcement powers.156 Second, he sought to broaden the coverage of Section 3613 of the Act in order to allow the Attorney General to litigate on behalf of individuals as well as groups.157 Third, Flemming argued for the elimination of a statutory exception shielding the actions of individual homeowners who rented no more than three units at a time.158

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153 See id. at 119-20.

154 Black/White Colleges, supra note 150, at 45. Furthermore, the Commission “emphasized the need for a strengthened commitment at the Federal level to monitor and enforce the implementation of the criteria if desegregation is to occur.” The Final Report, supra note 142, at 37.


157 Id. at 443.

158 Id. at 444.
Unfortunately, the 1979 Act amending the Fair Housing Act of 1968 did not incorporate any of Flemming’s recommendations.\textsuperscript{159} Given Congress’ failure to incorporate the Commission’s recommendations in the 1979 amendments, the Commission’s influence appears to have been limited. Yet, even in light of the Commission’s inability to sway Congress on this issue, it would be inappropriate to dismiss too readily the Commission’s influence in the area of housing. As Father Hesburgh testified before a congressional subcommittee in June of 1971, the Commission should not be judged exclusively on the basis of the percentage of its recommendations which are enacted into law:

\textit{The Commission is aware that many of its recommendations, when issued, are unlikely to be immediately adopted. In a wider sense, some of our recommendations have been politically unrealistic. . . . The Commission believes, however, that the time for each of our recommendations will come. A principal purpose of making what some believe are politically unrealistic recommendations is to bring these recommendations into the arena of public dialogue, with the conviction that this will hasten the time for adoption.}\textsuperscript{160}

During the Carter Administration, the Commission continued to stress its support for women’s rights and advocated the passage of the Equal Rights Amendment. Beginning with its full endorsement of the ERA in June 1973, the Commission had backed a constitutional guarantee which would end discrimination based upon sex by requiring equal protection under the law and mandating basic uniformity in federal and state statutes.\textsuperscript{161} In 1978, Commissioner Freeman and Chairman Flemming testified before the House Judiciary Committee, urging extension of the ratification period for the ERA.\textsuperscript{162} Moreover, the Commission was aware that many of its recommendations, when issued, are unlikely to be immediately adopted. In a wider sense, some of our recommendations have been politically unrealistic. . . . The Commission believes, however, that the time for each of our recommendations will come. A principal purpose of making what some believe are politically unrealistic recommendations is to bring these recommendations into the arena of public dialogue, with the conviction that this will hasten the time for adoption.

\textsuperscript{160} Implementation Hearings, supra note 108, at 263.
\textsuperscript{162} Id. (statements of Arthur S. Flemming, Chairman, United States Commission on Civil Rights, and Frankie M. Freeman, Commissioner, United States Commission on Civil Rights).
mission issued a report stating that "ratification of the Equal Rights Amendment continues to be essential to the attainment of equal rights for women and men under the law." Again in 1981, although recognizing that "the support for the principle of equality embodied in the Equal Rights Amendment [may be] stronger than support for the amendment itself, indicating that many persons have not accepted the fact that the ERA is the most effective way to secure equal rights for women," the Commission reaffirmed its support for the Equal Rights Amendment.

Although the early years of the Commission were not untainted by controversy and political infighting, the Commission quickly established itself as a credible and independent voice on civil rights. For the early Commission, the years culminating with the passage of the 1964 and 1965 Acts were an era of intense activity and exhaustive investigation into many areas of basic civil rights. The period following the passage of the Voting Rights Act of 1965 shows continued progress in this field; however, few pieces of legislation would have the dramatic impact of the 1964 and 1965 Acts. In a sense, the federal government had legislated remedies for the nation's obvious failures to protect basic civil rights; later activity in the field would focus on offenses less easily defined.

In the late 1960's and 1970's, the Commission exhibited a willingness to tackle more subtle forms of discrimination and was an outspoken critic of governmental, economic and social forces threatening civil rights. While aware of the great progress that had been made since the mid-1950's, the Commission did not hesitate to attack the status quo in order to expose pervasive racial injustice. And, while occasionally at odds with several presidential administrations, throughout the 1970's the Commission was able to maintain its credibility and its independence.

II. The Commission in the Reagan Era

A. "Commission-Packing"

The Commission's views on such issues as affirmative action, school desegregation and the ERA were hardly consistent

with the views of the newly-elected Reagan Administration, and it soon became apparent that the White House was seeking to transform the independent Commission. In September 1981, Reverend Edward Hill—a conservative Republican with ties to Jerry Falwell’s Moral Majority—announced that he had turned down the White House’s offer of the Commission chairmanship. A black fundamentalist preacher, Hill had anti-homosexual and anti-ERA views.\footnote{165 See Thompson, \textit{The Commission on Civil Rights}, in \textit{The Reagan Administration and Human Rights} 180, 187 (T. Yarbrough ed. 1985).}

In November, 1981, the White House announced that Clarence M. Pendleton, Jr. would replace Chairman Flemming, a Nixon appointee. A conservative black Republican, Pendleton was formerly head of the San Diego Urban League. The White House also declared that Mary Louise Smith, a former chairwoman of the Republican National Committee, would replace Commissioner Stephen Horn.\footnote{166 See id. at 187-88; see also Spence, \textit{The Civil Rights Commission Double Cross}, Focus, January, 1984, at 4, 4.}

In February 1982, the White House nominated Reverend B. Sam Hart, a black Philadelphia minister, to replace Commissioner Jill Ruckelshaus. Ruckelshaus was a Carter appointee and a moderate Republican who supported the ERA; her potential replacement, Hart, was a controversial figure who opposed the ERA, homosexuality and busing.\footnote{167 Thompson, \textit{supra} note 165, at 189; Spence, \textit{supra} note 166.}

Of homosexuals, for example, he stated: “They’re sorry, despicable, abominable—an abomination both to God and mankind.”\footnote{168 Reston, \textit{We Shall Undermine}, Rolling Stone, Mar. 13, 1986, at 44.}

In nominating Hart, Reagan made a serious political miscalculation by failing to consult the two Republican Senators from Hart’s home state—both of whom expressed concern about the nomination.\footnote{169 Both Senator John Heinz (R-Pa.) and Senator Arlen Specter (R-Pa.) were skeptical about Hart’s qualifications. Specter, long active in Philadelphia politics, said that he had never even heard of Hart before the nomination. Thompson, \textit{supra} note 165, at 190.}

Reagan, nonetheless, gave Hart his solid backing: “I am quite confident in his quality and ability for that job.”\footnote{170 \textit{Id.} (quoting Paul Weyrich of the Committee for the Survival of a Free Congress).}

The Moral Majority and other conservative groups also endorsed the nomination of Hart—one Hart supporter even accused Hart’s opponents of “McCarthy tactics.”\footnote{171 \textit{Id.} at 191.} Amid growing controversy
over his nomination, Hart finally asked the White House to withdraw his name from consideration.\textsuperscript{172}

After the Hart fiasco, the White House nominated three academics—Constantine Nicholas Dombalis, Guadalupe Quintanilla and Robert Destro—to replace three liberal commissioners—Mary Frances Berry, Blandina Cardenas Ramirez and Murray Saltzman.\textsuperscript{173} Although the Senate Judiciary Committee approved all three nominations, the full Senate failed to act upon them before the end of the 97th Congress; thus, Berry, Cardenas Ramirez and Saltzman retained their jobs.\textsuperscript{174} Later, in a second attempt to replace the three liberal Commissioners, Reagan renominated Destro along with two new nominations: Morris B. Abram, a New York lawyer, and John Bunzel of Stanford’s Hoover Institute.\textsuperscript{175} Although none of these individual nominees was patently unqualified for a position on the Commission,\textsuperscript{176} many civil rights groups feared that the wholesale replacements of Berry, Cardenas Ramirez and Saltzman would compromise the Commission’s independence.\textsuperscript{177}

The Administration’s effort to recast the Commission in its own image hinged not only on the replacement of Commission members but also on the replacement of Commission staff. Reagan nominated Linda Chavez, a former staff director of the American Federation of Teachers, as Commission staff director.\textsuperscript{178} A conservative Democrat who would later become a Re-

\begin{itemize}
  \item \textsuperscript{172} Id. at 191.
  \item \textsuperscript{173} See 18 Weekly Comp. Pres. Doc. 674, 674–75 (May 21, 1983) (White House announcement of President’s intention to nominate Destro, Dombalis and Quintanilla).
  \item \textsuperscript{174} Spence, supra note 166.
  \item \textsuperscript{175} Thompson, supra note 165, at 193; Spence, supra note 166.
  \item \textsuperscript{176} Abram, in particular, has an impressive resume. A past president of Brandeis University, he is a former chairman of the United Negro College Fund and a veteran of many civil rights struggles in his native Georgia. Yet, Abram parted ways with some of his former allies in the civil rights movement, and his stances on such topics as affirmative action are in harmony with the policies of the Reagan Administration.
  \item \textsuperscript{177} The ACLU, for instance, stated:
  \begin{quote}
  The ACLU has no position and will take no position on the individual qualifications of the nominees before the [Senate Judiciary] Committee. We do oppose the nominations however, because taken as a whole they represent an unprecedented attempt by the Reagan Administration to turn the Commission from an independent monitoring and evaluation agency into an instrument of Presidential policy.
  \end{quote}
  \item \textsuperscript{178} On August 16, 1983, the White House announced the recess appointment of Linda Chavez to the position of staff director of the Commission. 19 Weekly Comp. Pres. Doc. 1150 (Aug. 22, 1983).
\end{itemize}
publican candidate for the U.S. Senate, Ms. Chavez held views consistent with the President’s on such topics as quotas and busing.\(^{179}\)

In August 1983, the House of Representatives responded to Reagan’s “Commission-packing” plan by approving a bill that would have allowed the removal of Commissioners only for neglect of duty or malfeasance in office.\(^{180}\) The House bill also would have extended the life of the Commission five years beyond the scheduled September 30, 1983, when, in the absence of congressional reauthorization, the Commission was required to commence a sixty-day period to wind down its affairs before its final expiration date on November 30.\(^{181}\) But the House bill was never enacted, and as September 30 passed, a new legislative proposal to save the Commission began to take shape.\(^{182}\)

On October 25, however, Reagan jeopardized the hope for a compromise agreement to save the Commission by firing Commissioners Berry, Cardenas Ramirez, andSaltzman.\(^{183}\) On the following day, Berry and Cardenas Ramirez filed suit in federal court against Ronald Reagan.\(^{184}\) Berry and Cardenas Ramirez

\(^{179}\) For articles on Chavez’ subsequent White House appointment and senatorial campaign, see infra note 245.


\(^{181}\) Thompson, supra note 165, at 197; Spence, supra note 166, at 6; Civil Rights Commission Reconstituted, 39 Cong. Q. Almanac 292, 294 (1983).

\(^{182}\) Thompson, supra note 165, at 198; Spence, supra note 166, at 6.

\(^{183}\) Id. According to a White House statement, however, President Reagan fired the three liberal Commissioners to break a congressional deadlock over the Commission. White House Statement, Oct. 25, 1983, 19 Weekly Comp. Pres. Doc. 1489 (Oct. 31, 1983).

\(^{184}\) Berry v. Reagan, 32 Empl. Prac. Dec. (CCH) ¶ 33,898 (D.D.C. Nov. 14, 1983), vacated as moot upon expiration of commission’s statutory authorization, 732 F.2d 949 (D.C. Cir. 1983) (per curiam). On October 31, Judge Norma Holloway Johnson denied the motion of Berry and Cardenas Ramirez for a temporary restraining order to prevent the President from removing them from office. 32 Empl. Prac. Dec. at 31,304. (Murray Saltzman, the other Commissioner ousted by Reagan, was not a named plaintiff in the suit. Id. at 31,305.) Two weeks later, however, after a separate hearing for a preliminary injunction, Judge Johnson enjoined the President from removing Berry and Cardenas Ramirez from office. Id. at 31,304. The court noted:

Similarly, there is adequate evidence in the legislative record to support plaintiffs’ contention that Congress intended the duties of the Commission to be discharged free from any control or coercive influence by the President or the Congress. When performing its fact-finding, investigatory and monitoring functions, for example, the Commission is often required to criticize the policies of the Executive that are contrary to existing civil rights legislation.

Id. at 31,307. Moreover, the court noted: “It is likely that the Commission’s ability to fulfill its mandate is disrupted by plaintiffs’ removal, for the Commission is left without a quorum.” Id. at 31,308.

Despite the firings, a compromise agreement to save the Commission finally crystallized in mid-November, two weeks before the Commission was scheduled to shut down in the absence of congressional action. The compromise legislation called for an increase in the number of commissioners from six to eight, with four to be appointed by the President and four by Congress. According to civil rights groups who participated in the framing of the compromise, the proposed legislaton rested on an understanding that the President would reappoint Mary Louise Smith and Clarence Pendleton, and would appoint two new commissioners (probably Abram and Bunzel). The House Minority Leader, moreover, would recommend Jill Ruckleshaus for reappointment; and the other three congressional appointments were to be Berry, Cardenas Ramirez and a Republican with a strong civil rights record.\footnote{Thompson, \textit{supra} note 165, at 199; Spence, \textit{supra} note 166, at 6. In December, 1983, Senate Majority Leader Howard Baker recommended the appointment of Francis Guess, a black Republican who is currently Tennessee Commissioner of Labor and a member of Tennessee's Human Rights Commission. \textit{Civil Rights Commission Reconstituted}, supra note 181, at 295.} On November 30, the President signed into law \textit{“The United States Commission on Civil Rights Act of 1983.”}\footnote{Pub. L. No. 98-183, 97 Stat. 1301 (1983) (codified at 42 U.S.C. §§ 1975–1975f (Supp. 1985)); see Thompson, \textit{supra} note 165, at 199.}

To the dismay of civil rights groups who had participated in the negotiations for the new legislation, the President did not reappoint Smith. Instead, the President chose to appoint Esther Gonzalez-Arroyo Buckley, a high school teacher with no substantial civil rights experience. House Minority Leader Robert Michel, moreover, recommended the appointment of Robert Destro rather than Jill Ruckleshaus. Although civil rights leaders cried double-cross, the Reagan Administration’s attempt to pack the Commission was by then a \textit{fait accompli}.

\subsection*{B. The United States Commission on Civil Rights Act of 1983}

The United States Commission on Civil Rights Act of 1983 preserves much of the old statutory framework. For example,
the Commission's basic duties to monitor the status of civil rights in the United States are the same. In addition, the 1983 Act retains the prohibition against investigating "any membership practices or internal operations of any fraternal organization, any college or university fraternity or sorority, any private club or any religious organization." The 1983 Act, however, also added a prohibition against investigating matters relating to abortion.

The chief innovation of the 1983 Act is its method for appointing Commission members. The 1983 Act provides:

(A) four members of the Commission shall be appointed by the President;
(B) two members of the Commission shall be appointed by the President pro tempore of the Senate, upon the recommendations of the Majority Leader and the Minority Leader, and of the members appointed not more than one shall be appointed from the same political party; and
(C) two members of the Commission shall be appointed by the Speaker of the House of Representatives upon the recommendations of the Majority Leader and the Minority Leader, and of the members appointed not more than one shall be appointed from the same political party.

Thus, under the new system, the President and Congress share equally in the appointment of Commission members, and neither branch needs to approve the other's appointments.

When Reagan signed the 1983 bill, he noted that the Justice Department had expressed a concern about the constitutionality of the new appointment structure. Interestingly, sharing this concern was one of the co-sponsors of the 1983 Act, Senator Strom Thurmond, who had in 1957 completely opposed the creation of a civil rights commission. Though a proponent of

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189 Id. at § 1975c(b) (Supp. 1985).
190 Id. at § 1975c(e) (Supp. 1985). Robert Destro, one of the 1983 Reagan appointees, is a staunch foe of abortion, and his nomination may have prompted Congress to remove abortion from the Commission's jurisdiction.
191 Id. at § 1975(b)(1)(A)–(C) (Supp. 1985).
the 1983 legislation, Thurmond expressed reservations about the constitutionality of the Act: "It is not the compromise that I prefer, because I think under our tripartite system of government that Congress makes the law, the executive branch administers in [sic] the law, and the Supreme Court interprets the law." Thurmond's view is not completely untenable, for the constitutionality of the 1983 Act may be dubious in light of the strict formalism with which the Supreme Court has prohibited the "blending" of legislative and executive functions for violating the separation of powers doctrine.

Nonetheless, the Commission's appointment structure is probably constitutional. While Congress may not allow an agent subject to its removal power to exercise executive functions, nor appoint such an executive officer, Congress may allow the President to appoint officers to whom Congress may then delegate quasi-legislative or quasi-judicial functions. Of course, the President's removal power is limited when the officer does not perform "purely executive" functions and when Congress indicates its intent to keep the agency in which the officers work independent from the executive branch.

Thus, by enacting the bill that restructured the Commission, Congress has relinquished some of its investigatory powers to a body partially directed by executive appointees. The consti-

194 See Note, Incorporation of Independent Agencies into the Executive Branch, 94 Yale L.J. 1766, 1782 n.106 (1985) (shared appointment structure of the current Commission on Civil Rights "would seem impermissible" under the Supreme Court's formalistic approach).
196 See Bowsher, 106 S. Ct. at 3191.
197 See Buckley, 424 U.S. at 135-36.
199 See Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935) ("[I]t is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.").
tutionality of that delegation is sound even if the function of the Commission is quasi-legislative and not executive.\textsuperscript{200} There are limits to the extent to which Congress may delegate its functions, but numerous federal agencies that investigate violations of federal law currently operate with all of their officers appointed by the President.\textsuperscript{201}

Though probably constitutional, the new appointments structure is still defective. By giving the President and Congress\textit{carte blanche} authority to appoint—without the other's input—commissioners of their own choosing, the new appointments structure almost guarantees a polarized, internally-divided Commission.\textsuperscript{202}

\textbf{C. A Commission Chairman Under Fire}

The recent controversy surrounding the Commission has largely focused on the rhetoric of the Reagan-appointed Chairman of the Commission, Clarence M. Pendleton, Jr.\textsuperscript{203} Pendleton has called comparable worth (the theory of equal pay for jobs of comparable worth) "probably the looniest idea since Looney

\textsuperscript{200} See Berry, 32 Empl. Prac. Dec. at 31,305 (plaintiff Commissioner likely to prevail on merits of claim that President may not remove without cause, since Commission performs quasi-legislative and not executive functions).


\textsuperscript{202} Cf. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 645 (1984) ("it immediately became evident that the unchecked authority [of Congress and the President] to appoint conferred by the new scheme [the 1983 Act] offered far less opportunity for political struggle than had the prior arrangements.")

For instances of the internal dissension that has effectively paralyzed the Commission, see notes 211, 261–62, 267 and accompanying text.

Tunes came on the screen," and he has labeled affirmative action "a bankrupt public policy." He has denounced such black leaders as Jesse Jackson, Vernon Jordan and Benjamin Hooks. In an oft-cited speech, Pendleton stated: "I say to America's black leadership open the plantation gates and let us out! We refuse to be led into another political Jonestown as we were led during the presidential campaign. No more Kool-Aid, Jesse, Vernon and Ben! We want to be free."

Pendleton's rhetorical style and performance on the Commission have outraged both liberals and conservatives. Representative Parren J. Mitchell (D-Md.), for example, called Pendleton "a lackey for those who would crush black aspirations." In a recent speech at Harvard Law School, former Georgia state senator Julian Bond despaired that "we have come from Lincoln Perry [the actor who played Stepin Fetchit] to Clarence Pendleton." The chairman of the National Black Republican Council has said that Pendleton is "completely out of step with black America." J. Clay Smith, a Republican law professor at Howard University, has criticized Pendleton for "baiting black leaders."

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206 Id. Like the man who appointed him, Pendleton has a repertory of anecdotes, some of which are grounded in the de rigueur writings of prominent conservatives. For example, recounting an apparently fashionable but nonetheless erroneous statement by Charles Murray on the stigmatization of blacks who compete academically, Pendleton has repeatedly echoed the canard that "the current term at Harvard for blacks who study is 'incog-negro.'" See, e.g., Address by Clarence M. Pendleton at the National Press Club 16 (Mar. 5, 1985) (transcript on file with Harvard Civil Rights-Civil Liberties Law Review). But see Letter from Camille Holmes, Executive Board Member, Harvard/Radcliffe Black Students Association, to Mechele Dickerson (n.d.) (rejecting Murray's assertion) (letter on file with Harvard Civil Rights-Civil Liberties Law Review). References to the glories of entrepreneurship and the free market also pepper Pendleton's speeches. When he was head of the San Diego Urban League, for example, he remarked that "the best way to help poor folks is not to be one." Goldberg, supra note 203, at 17.
208 Address by Julian Bond at Harvard Law School (Feb. 12, 1987).
209 Pear, Rights Unit Chief Urging Parties to Scrap Caucuses for Minorities, supra note 203, at A21, col. 1 (quoting Fred Brown).
210 Trescott, supra note 6, at B9, col. 1.
servative Democrat, and Commissioner Francis Guess, a Republican, have also criticized Pendleton’s rhetorical style.\textsuperscript{211}

In large part, Pendleton has come under fire as a direct result of his frequently careless and eminently quotable remarks. Nonetheless, his position as a prominent black in a white-dominated government has generated some outright racist attacks on his character. Upon his nomination, for example, the San Diego branch of the Ku Klux Klan lambasted Reagan’s appointment of a black man from San Diego to a high governmental position.\textsuperscript{212} In Pendleton’s eyes, however, the Klan is not the only prominent group of racists who have criticized him. Calling proponents of affirmative action “the new racists,” Pendleton noted: “Finding that their [sic] intellectual underpinnings are challenged the new racist has taken to name calling and petulance instead of welcoming debate.”\textsuperscript{213}

Pendleton, moreover, sees the recent cut in the Commission’s budget as a personal affront with “racial overtones.”\textsuperscript{214}

\textsuperscript{211} See Reston, \textit{supra} note 168, at 42 (discussing friction between Clarence Pendleton and Francis Guess). During a hearing on minority set-aside contracts, Pendleton and Guess engaged in this bit of verbal jousting:

\textbf{COMMISSIONER GUESS.} Mr. Chairman, . . . I’d also like to take this opportunity for the record to invite you to move back into the black community as I have done.

\textbf{CHAIRMAN PENDLETON.} Mr. Guess, I make my own decisions about where it is that I want to live and what I want to do like everybody else does.

\textbf{Selected Affirmative Action Topics,} \textit{supra} note 207, at 174.

Former Commissioner Bunzel has been a particularly vocal critic of Pendleton. In an open letter urging Pendleton to resign from the Commission, Bunzel referred to a controversy over Pendleton’s financial dealings as a “cloud that continues to hang over you.” Cohn, \textit{Civil Rights: A Chairman Under Fire}, Newsweek, Apr. 21, 1986, at 29 (quoting Bunzel). Shortly before Bunzel’s letter urging Pendleton to resign, a 1986 article in \textit{The New Republic} had recounted several irregularities in Pendleton’s financial dealings. Goldberg, \textit{supra} note 203, at 17 \textit{passim}. The most stinging accusation was the charge that Pendleton, a well-known foe of minority set-asides, had been the phony front man for two white businessmen who were seeking minority set-aside contracts. \textit{Id.} at 19. In a letter beginning with the Reagan catch-phrase, “There you go again,” Pendleton angrily responded that the article was a string of lies and deceptions. Letter to Editors from Clarence M. Pendleton, Jr., New Republic, May 5, 1986, at 6.

\textsuperscript{212} Cummings, \textit{supra} note 203, at A21, col. 2. (“Clarence Pendleton of San Diego has proven that if you’re black and Oreo’d enough, keep your nose in the trap and say ‘Yassir’ to the right people, you too may go right to Washington and sit on a commission or two.”) (quoting San Diego branch of Ku Klux Klan).

\textsuperscript{213} Address, \textit{supra} note 206, at 17.

\textsuperscript{214} Telephone interview with Clarence M. Pendleton, Jr., Chairman of the United States Commission on Civil Rights (Feb. 11, 1987) For an account of the slashing of the Commission’s budget for Fiscal Year 1987, see \textit{infra} notes 247–253 and accompanying text.
Although the budget cut is unlikely to have been racially-motivated, it may well reflect congressional dissatisfaction with Pendleton’s personal performance. In fact, Pendleton has been a lightning rod, personally weathering congressional and media assaults upon the Commission. Yet, by focusing on the personality of Pendleton, the recent debate has underemphasized the institutional deficiencies and ideological shifts that have also damaged the Commission’s independence.

III. The Institutional Role of the “Independent” U.S. Commission on Civil Rights

Several forces—the Commission’s legislative design, presidential and congressional interference in the Commission’s operation, recent internal restructurings, ideological shifts, and perceptions of a decline in the quality of the Commission’s scholarly output—have jeopardized the independence and vitality of the U. S. Commission on Civil Rights.

A. Independence: A Matter of Institutional Design

President Truman’s Committee on Civil Rights was the original inspiration for a Civil Rights Commission. Yet the Committee never explained why an “independent” Commission was needed. Furthermore, the original statutory framework of the Commission did not explicitly create two of the major characteristics of an independent federal agency: a “for cause only” restriction on the President’s power to remove sitting members of the Commission; and staggered, fixed terms for the individual commissioners. Because Congress slated the Commission to

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215 But cf. Williams, Rights Panel, Expecting Big Cut, Is Gearing Down, N.Y. Times, Sept. 26, 1986, at A17, col. 3 (“We are not pointing fingers at anybody,’ Mr. Lautenberg [the sponsor of the Senate proposal to reduce the Commission’s funding] said. “The Civil Rights Commission has gone from being a watchdog to a lapdog. My legislation is aimed at making it a watchdog again.’

216 See supra notes 9–17 and accompanying text.

expire not later than two years and sixty days after its creation,\textsuperscript{218} the issues of commissioner removal and the length of commissioners' terms seemed rather insignificant in 1957. Indeed, as originally constituted in 1957, the Commission seemed more of an executive branch advisory body than an independent agency.

"Independent" governmental bodies at the federal level most commonly exist as economic or social regulatory agencies, and some of the oldest have been in existence for nearly a century.\textsuperscript{219} Such agencies are not completely independent, but rely extensively upon all three branches of the government for their existence and operation. In some sense, however, an agency's "trifurcated dependency" yields an effective form of independence from any single branch of the federal government, since the agency is held partially accountable to all three branches.\textsuperscript{220}

An important measure of the strength of an agency's independence is its leadership structure. Most "independent" federal regulatory agencies are considered independent because their leadership is bipartisan, and because the process for replacing their leaders is structured to keep partisan policymaking from dominating the agencies' work.\textsuperscript{221} Thus, the most common model of an independent agency is one in which agency heads: (1) are appointed by the President with the advice and consent of the Senate; (2) serve long, staggered terms which usually exceed the length of a presidential term; and (3) cannot be removed without cause. Under such a system, no one President may appoint more than half of the commissioners. These checks discourage the imposition of a political policy agenda upon the agency and encourage consistency in analysis and action.

In his pioneering work on the "life cycle" of independent regulatory agencies, Marver Bernstein suggests that the independence of these agencies grows out of a need to balance competing political and public interests, and the desire to appease special interest groups.\textsuperscript{222} However, independence may

\begin{footnotesize}
\begin{enumerate}
\item For example, the Interstate Commerce Commission (ICC) was established in 1887. See Act of Feb. 4, 1887, ch. 104, § 11 (24 Stat.) (codified as amended in scattered sections of 49 U.S.C. (1982 and Supp. III 1985)).
\item See Williams, Cornerstones of American Administrative Law, 28 Admin. L. Rev. v-xii (1976).
\item See M. Bernstein, Regulating Business by Independent Commission (1955).
\end{enumerate}
\end{footnotesize}
also serve purposes more directly related to the agency's *raison d'être*. Whether the independence of the U.S. Commission on Civil Rights serves purposes other than political balancing becomes important when analyzing efforts to diminish that independence. 223

While the Commission's structure may reflect the goal of effectuating its congressional mandate, the legislative history of the Civil Rights Act of 1957 suggests that the "independence" of the Commission was more the result of political appeasement than deliberate legislative design. 224 Numerous competing interests—both in ideology and group representation—led to the unprecedented institutional structure of the Commission. The legislative history is fraught with concerns of federalism, 225 geographical underrepresentation, 226 McCarthyism 227 and racism. 228 Though such sentiments were expressed by members of both political parties and by members on both sides of the Mason-Dixon line, the primary confrontation over the Commission was between North and South. As Richard A. Wasserstrom wrote in 1968,

[T]he Commission's birth gives us [a reminder] of the fantastic power which Southern congressmen had gained and which they eagerly exercised in behalf of the interests they served and sought to protect. Moreover this power was fully matched by their vituperative rhetoric and warped convictions. . . .

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223 Comparisons between the Commission and independent regulatory bodies are, of course, not always apposite. As one former Commissioner claims, "[t]here is no agency in the federal establishment quite like the Commission."

224 Hesburgh notes that in the context of the available legislative history, "it can be fairly said that the principal reason for establishing a bipartisan investigative agency was to appease public pressure for a civil rights bill without inviting defeat of a stronger proposal."


226 Southern representatives of both major political parties also expressed concern over the fact that the House Subcommittee responsible for the legislation did not include a single Southerner. See 103 Cong. Rec. 13696 (1957).

227 Many Congressmen from both North and South suggested that the legislation would further Communist principles. See, e.g., id. at 13693.

228 Wasserstrom, supra note 5, at 173-74.
Such language and such fanatical opposition to any attempt to inform about—let alone change—the institutions of the South are nothing new. It is a painful reminder of the stake that most Southern Representatives and Senators had in the complete preservation of that system of racial discrimination and exploitation. Moreover, they accurately perceived that free and adequate information about its genuinely oppressive character would endanger the system. . . .

Legislative compromise ultimately yielded institutional characteristics that are less than suitable for a truly independent agency. While the legislative history sheds little light on how the debate actually affected the Commission’s structure, duties and powers, the available evidence suggests some plausible hypotheses. For example, the Commission’s limited subpoena power appears to be a compromise which responded to concerns of some legislators that persons of one state might be forced to appear in another, distant state. Similarly, the almost fanatical concern of Southern congressmen over potential “regional” biases was probably the impetus for granting the Commission the power to create state advisory committees. In conjunction with the limits on the Commission’s subpoena power, the creation of SACs seemed to foster a state-by-state approach to investigations, thereby increasing the opportunities for local input and control over the monitoring process. Compromise also relegated the Commission to a temporary status (the Truman Committee had suggested a permanent status). Over time,

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2. See Pub. L. No. 85-315, § 105(c), 71 Stat. 634 (1957); supra notes 30–33 and accompanying text.
3. In the House minority report which was filed with the original legislation, the authors claimed that:

Anyone who believes that this Commission will cease to exist in 2 years can rightfully be accused of believing in fairies. The 2-year limitation upon the duration of the Commission will mark its first milestone to perpetuity. There will be so many leftwing pressure groups howling for its permanency as now demand its creation. Considerations of political expediency which spawned it will not let it expire. Its hordes of employees and snoopers will perpetuate themselves on the public payroll.

1957 U.S. Code Cong. & Admin. News 1998. Though sarcastic, the sentiment proved prophetic; the Commission has undergone continual renewal ever since its creation 30 years ago. See supra note 22.
however, and most likely because of concern among civil rights activists that an unrealistically short lifespan for the Commission would hamper its efforts, Congress repeatedly extended the Commission's life.233

Obviously, long-term independence was not a primary consideration of the creators of the original Commission. Necessities of political appeasement and the belief that the Commission would be a temporary advisory body were sufficiently weighty to keep the issue of the Commission's independence from coming to the fore.

Supporters of the original Commission may have realized that the Commission's vitality hinged on its ability to act independently from the executive branch.234 Unfortunately, the absence in 1957 of explicit statutory provisions for staggered, fixed terms and "cause only" removal of commissioners left the Commission vulnerable to presidential administrations unwilling to respect its independence.

B. Independence: A Matter of Presidential and Congressional Deference

1. The President

The extent to which Presidents have attempted to influence the Commission is difficult to measure, but the most obvious and efficacious way for a President to influence the Commission is through the use or abuse of the appointment process. Under the Commission's original statutory framework, the President could appoint all six commissioners, no more than three of a single political party, with the advice and consent of the Senate.235 Perhaps as importantly, a President could appoint the staff director, after consultation with the Commission and with the advice and consent of the Senate.236

213 In 1958, Martin Luther King, Jr. and a number of other civil rights leaders met with the President and encouraged him to extend the life of the Commission for at least a full year beyond its 1959 expiration date. See A Statesman-Like Plan, Crisis, June-July, 1958, at 355 n.25.
214 See R. Burk, supra note 29, at 228-29.
236 Id. at § 105(a), 71 Stat. 634 (1957). Under the 1983 Act, however, the President appoints the staff director with the concurrence of a majority of the Commissioners, and need not obtain the advice and consent of the Senate. 42 U.S.C. § 1975d(a)(1) (Supp. 1985).
Presidents Kennedy, Johnson, Ford, and Carter all respected the underlying aim of the 1957 legislation—to create an investigative and critical body unhampered by a partisan political agenda—and tacitly accepted the custom of staggered, long-term appointments that arose during the Eisenhower years.\(^{237}\) Presidents Nixon and Reagan, however, made overt efforts to influence the ideological slant of the Commission by violating this traditional, deferential executive approach. Nixon fired Chairman Hesburgh for ideological reasons.\(^{238}\) And even more disturbing was President Reagan’s “Commission-packing.”\(^{239}\)

Executive branch influence over the Commission need not, however, take the form of overt political impositions such as appointments. It may also take the form of indirect, subtle communications between a President and commissioners of the same ideological bent. Former commissioners have denied that the White House has *directly* influenced their work on the Commission.\(^{240}\) Yet public statements by Clarence Pendleton and former Staff Director Linda Chavez soon led many observers to conclude that the Commission had become a mere mouthpiece for the Reagan Administration.\(^{241}\)

The President has substantial influence over the Commission because he appoints not only four commissioners but also the staff director, a powerful figure within the Commission. According to current practice, and the legal opinion of Commission Solicitor William H. Gillers, the staff director has the authority to appoint Commission personnel.\(^{242}\) Furthermore, the staff director has traditionally been accorded considerable deference in directing the Commission’s day-to-day operations, and often makes important decisions pertaining to its management.\(^{243}\) William Taylor, staff director during the Kennedy and

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\(^{237}\) See *supra* notes 48–57, 71–73 and accompanying text.

\(^{238}\) See *supra* notes 115–17 and accompanying text.

\(^{239}\) See *supra* notes 165–87 and accompanying text.

\(^{240}\) For example, one of President Reagan’s appointees, former Commission Vice Chairman Morris Abram, denies that the Reagan White House ever directly attempted to influence the commissioners’ decisions on “any subject,” believing that such an attempt would have been “deeply resented” by all of the commissioners. Telephone interview with Morris B. Abram, Nov. 10, 1986.


\(^{243}\) For example, Latham’s Fiscal Year 1987 reorganization proposal, based upon a
Johnson administrations, notes that as staff director he played "a considerable role" in shaping the policy agenda of the Commission during the 1960's.244 In practice, a staff director often functions as an additional commissioner.245 By handpicking the Commission's staff director, the President can have a dramatic impact on how the Commission is managed.

2. The Congress

Through formal budget processes and informal political means, Congress exercises at least some control over "independent agencies."246 Until the reconstitution of the Commission in 1983, however, which permitted Congress to appoint half of the commissioners, Congress' influence over the Commission had been far less significant than that of the President. From 1957 to 1983, Congress' periodic hearings on Commission appropriations and appointments were usually rather routine. Since 1983, however, Congress has taken a critical look at the Commission.

In the 1957 Senate debate on the Commission, Senator Strom Thurmond observed: "In the past, when creating an agency or commission, Congress has obtained control of its creation by the appropriation power. This is a wonderful check . . . against the abuse or misuse of Commission authority. Scrupulous care should be taken to preserve it."247 Thurmond's "wonderful check" lay more or less dormant until the summer of 1986.

On June 26, 1986, the House Appropriations Committee approved, as part of a general appropriations bill, a measure

projected appropriation of $6 million, was to go into effect "unless the Commission reject[ed] it by majority vote." See Memorandum from J. Al Latham to the Commissioners, at 1 (n.d.).

244 Telephone interview with William Taylor (February 17, 1987).
245 Staff Director Linda Chavez, more so than Chairman Pendleton, was the driving force behind the internal "Reaganization" of the Commission. For a sampling of articles on Ms. Chavez, see Pear, Rights Aide Asserts the Right to Speak Her Mind, N.Y. Times, June 12, 1984, at A24, col. 1 (discussing, among other things, Chavez' clashes with long-time Commission employees); Brownstein, Quotas Foe Chavez In a New Hot Seat As Reagan's Public Liaison Deputy, 17 Nat'l J. 860 (1985) (interview with Linda Chavez); Dowd, Razor-Edged Race for Maryland Seat, N.Y. Times, Oct. 21, 1986, at B8, col. 3 ("33 people who worked for Ms. Chavez when she directed the United States Civil Rights Commission urged her defeat [in senatorial campaign], asserting that she 'did her best to turn the commission into an anti-civil rights commission' and 'engorged the commission with temporary consultants and ideologically extreme political appointments.'").
246 1 K. Davis, Administrative Law Treatise, § 1.03 n.17, at 21 (1958).
sponsored by Representative Julian Dixon (D-Ca.) that preserved the Commission’s $11.8 million budget but limited the use of the funds to closing the Commission by December 31, 1986.248 Calling for the effective elimination of the Commission, Dixon’s measure reflected a widespread belief that the Commission was beyond repair. Three weeks later, the House approved the appropriations bill with Dixon’s proposal.

The Senate Appropriations Committee, on the other hand, incorporated in its version of the appropriations bill an amendment by Senator Frank Lautenberg (D-N.J.). The Lautenberg amendment proposed a Fiscal Year 1987 Commission budget of $6 million, with certain restrictions on the Commission’s internal operations.249 Motivated, no doubt, by the White House’s threat to veto any spending bill containing the House version of the Commission’s budget,250 the Budget Reconciliation Conference Committee produced an additional spending plan, ultimately passed by both Houses, that gave the Commission a $7.5 million budget for Fiscal 1987.251 The final spending plan placed limitations on the number of days per year that the chairman and commissioners, as part-time employees, can bill to the government, the number of political appointees on the Commission staff, and the amount of money that the Commission can spend on consultants, temporary employees and outside contracts.252 Moreover, the spending plan mandated that the Commission reserve $2 million of its Fiscal Year 1987 budget for its regional offices and $700,000 for its monitoring functions.253

In September 1986, anticipating a budget cut, the Commission reduced the number of its regional offices from ten to three. In addition, the Commission consolidated the Office of Federal Civil Rights Evaluation (OFCRE), an important monitoring unit within the Commission, with the Office of General Counsel (OGC). At the September 26 meeting to consider this proposed Commission reorganization, Commissioners Berry, Cardenas

248 No Funds for Civil Rights Commission, 44 Cong. Q. 1514, 1514 (1986).
253 Id.
Ramirez, and Guess unsuccessfully opposed the plan. Berry stated:

[If you're going to reorganize the Commission, there ought to be two priorities:

The first one ought to be to support the State Advisory Committees, and therefore maintain the regional office structure in some form in all of the ten regions, because that has been a major priority expressed by the Congress time and time again, whether in the budget process or whether in the authorization process, or oversight process. And that should be the first priority.

And the second priority ought to be the monitoring role of the Commission which we have had admonitions about over and over again from the Congress for our failure to be what they called a watchdog over the Federal agencies.

Both the reduction in the number of regional offices and the consolidation of the OFCRE into the OGC had been proposed by staff-director J. Al Latham, Jr.

On October 31, 1986, Staff Director Latham resigned, citing congressional attempts to "micro-manage" the Commission.

Bad policy or not, congressional "micro-management" was hardly sufficient to correct a three-year history of "macro-management." Nor was Congress successful in preventing a reduction in the number of regional offices, where many staff members from the pre-Reagan era still remained. The Com-

\[\text{[Note: Footnotes are not included in the plain text representation.]}\]
mission’s response to proposed and actual budget cuts has transformed a relatively decentralized organizational structure with many regional offices into a centralized agency lacking the ability to conduct any significant investigations at the state and local level. Congressional attempts to remedy the Commission’s defects through the use of the budget process have backfired. Today, only three regional offices exist to provide support services to fifty SACs.  

C. Independence: A Matter of Institutional Competence

1. The Quality of the Commission’s Scholarship

As a creation of the legislative and executive branches, the Commission is more likely to operate independently if those two branches perceive that the Commission is accomplishing its designated goals. The Commission’s goal of monitoring civil rights enforcement involves considerable communication—through official reports, studies, and public statements, or individual commissioner statements and speeches—with its creators. Congress and the White House have measured the Commission’s operation largely by the quality and methodology of its scholarship.

During the Reagan era, the Commission has been internally divided over important civil rights issues. For example, individual commissioners have clashed over the desirability of federal minority set-aside programs. The Commission produced a draft report that not only sharply criticized the programs but also recommended a one-year moratorium on their operation. Commissioners Cardenas Ramirez and Berry criticized the report, calling it...
an example of Commission work at its shoddiest, exhibiting a disdain for Commission procedure in its inception and an obtuseness about exploring the issues which extends to ignoring factual matter in the hearing transcript, and an overall product which concludes with the flimsiest findings and recommendations possible.262

Heavy criticisms of the Commission's scholarship also followed the release, in June 1985, of Comparable Worth: An Analysis and Recommendations.263 A year earlier, the Commission had held public consultations, inviting sixteen economists, attorneys, and political scientists—eight supporting the doctrine, and eight arguing against it—to comment on comparable worth issues.264 On the basis of their testimony and submitted documentation, the Commission made two recommendations. First, the Commission advised federal civil rights enforcement agencies to reject the notion of comparable worth, and to rely instead on the principle of equal pay for equal work.265 Second, Congress was urged not to adopt any legislation that would apply comparable worth doctrine to the setting of wages in either the federal government or the private sector.266 The Commission adopted the report and its recommendations by a vote of five to two, with one abstention. Commissioners Berry and Cardenas Ramirez were again in disagreement with the majority, and chastised the other commissioners for making findings and recom-

262 Statement of Blandina Cardenas Ramirez and Mary Frances Berry on Commission's Statement on Minority Set-Asides, April 11, 1986, at 5 [hereinafter cited as Dissenting Statement]. The Commission voted 5-3 to send the report back to the staff for further work. Commissioners Cardenas Ramirez, Berry and Guess wanted to reject the report altogether, noting that the Commission had never explicitly authorized it. See id. at 1; Pear, Rights Staff Told to Rework Minority Business Report, N.Y. Times, Apr. 12, 1986 at 9, col. 1.

President Reagan has, on occasion, supported the basic idea of minority business set-asides. On July 14, 1983, he signed Executive Order 12432, 44 Fed. Reg. 29657 (1983), which requires federal agencies to develop goals and methods of increasing minority business enterprise involvement in federal procurement through subcontracting. See id.


264 The proceedings of the consultations were eventually published, as were the studies and comments submitted by the participants. See generally United States Commission on Civil Rights, Comparable Worth: Issues for the 80's, Vols. 1 & 2 (1984).


266 Id.
mendations based upon insufficient information and limited expert testimony. In July of 1985, the General Accounting Office (GAO), at the request of Representative Mary Rose Oakar (D-Ohio), reviewed the Commission's comparable worth study. While indicating numerous weaknesses and apparent errors in the study, the review found fault at the outset with the Commission's definition of "comparable worth." In response to the GAO's review, the Commission's majority issued a point-by-point rebuttal that was subsequently criticized by Commissioners Berry and Cardenas Ramirez.

The review of the Commission's comparable worth study, however, was not to be the GAO's last word on the Commission. After the comparable worth review, a more general and com-

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269 The Commission's report states: "For the purpose of this report, comparable worth refers to the general formulation that employees in jobs held predominantly by females should be paid the same as jobs of comparable worth to the employer held predominantly by males." Comparable Worth: An Analysis and Recommendations, supra note 263, at 2. Commissioners Berry and Cardenas Ramirez pointed out that the Commission's definition excludes such important factors as seniority, merit, and labor market supply and demand. Berry and Cardenas Ramirez also noted that the commissioners who were proponents of the study used the absence of these same factors to denounce the notion of comparable worth. See Critique of Commission's Response, infra note 271, at 2.


prehensive “audit” of the Commission’s activities was initiated at the request of four U.S. Representatives whose committees or subcommittees often rely on the Commission’s work. The audit, released March 25, 1986 and covering the period from Fiscal Years 1983 through 1986, found missing and incomplete Commission records, improper hiring procedures for temporary employees and consultants, a disproportionately high number of political appointees, supervisory practices in violation of federal regulations, and $175,000 in unidentifiable costs.

Former Vice Chairman Abram believes that the “old Commission” (prior to its 1983 restructuring) was “not notable for its scholarship.” However, similar perceptions were not prominent in the public debate until President Reagan’s restructuring of the Commission. In addition to the comparable worth

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272 The request came from Reps. Don Edwards (D-Cal.), Subcomm. on Civil and Constitutional Rights; Augustus Hawkins (D-Cal.), Comm. on Education and Labor; Pat Schroeder (D-Colo.), Subcomm. on Civil Service; and Matthew Martinez (D-Cal.), Subcomm. on Employment Opportunities. United States Commission on Civil Rights, Civil Rights Update 1-2 (Spring, 1986).

273 Id. The Commission wanted to refute, point-by-point, the GAO findings, but Congress directed the GAO not to allow comment by the Commission before the report’s release. United States Commission on Civil Rights, News Release, “GAO Prevented From Issuing Fair Report of Commission,” Apr. 22, 1986, at 2 (on file with Harvard Civil Rights-Civil Liberties Law Review); see also United States Commission on Civil Rights, Civil Rights Update 1-3 (Spring, 1986).

In prepared testimony submitted to the House Subcommittee on Civil and Constitutional Rights on April 22, 1986, Staff Director J. Al Latham, Jr. did make a point-by-point rebuttal of each major charge in the GAO audit (only commissioners were allowed to appear in person to testify before the Subcommittee, and Chairman Pendleton criticized the Subcommittee for that restriction). United States Commission on Civil Rights, News Release, Apr. 22, 1986, supra at 1-2. Vice Chairman Abram, also testifying, suggested the motivation for the audit came from “the fact that the social engineers have lost their ideological monopoly of the Commission.” Id. at 2.

Chairman Pendleton successfully urged Congress to request a further audit of the Commission from 1978 to 1983 to cover the period before the reconstitution. Id. at 3. Sens. Strom Thurmond (R-S.C.), Chairman of the Judiciary Committee, and Orrin G. Hatch (R-Utah), Chairman of the Subcommittee on the Constitution, and Reps. F. James Sensenbrenner (R-Wis.), Michael DeWine (R-Ohio), and William E. Dannemeyer (R-Cal.) also urged an audit of the years before 1983. Id.

274 Telephone interview with Morris B. Abram, former Vice Chairman of the United States Commission on Civil Rights (Nov. 10, 1986).

275 See Pear, Advocates Fear for Autonomy of Civil Rights Panel, L.A. Daily J., Oct. 7, 1982, at 4, col. 3 (“Conservatives have criticized the commission’s support of numerical goals for hiring and the use of busing to desegregate public schools. But [the pre-Reagan Commission’s] reports have gained a certain amount of respect. They are not merely polemical documents. . . .”); but cf. Wash. Post, July 23, 1986 at A14, col. 1:

What used to be a place of some importance in the government has become the backdrop for a Punch-and-Judy show. . . . [Long before the arrival of the Reagan appointees, its] authority, along with the quality of its product, was in decline. . . . In the Reagan years, both before and after the administration took
set-asides studies, other works undertaken by the Commission have also come under fire for questionable scholarship. In general, however, the recent debate has perhaps overemphasized the methodologies of the Reagan Commission's studies and underemphasized their ideological underpinnings.

2. The Ideology of the Commission

Throughout the Reagan years, the Commission has adopted a general philosophy that reflects a conservative brand of economic thought, a narrow definition of civil rights, a particular vision of "color-blindness," and a constrained notion of its own role in shaping civil rights. The Commission's new ideology tends to legitimate—rather than criticize—a socio-economic status quo that frequently suffocates the aspirations of women and minorities.

In his famous dissent in *Lochner v. New York*, Justice Oliver Wendell Holmes, Jr. wrote that "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez-faire." In sharp contrast, the Commission has stated: "The commission . . . urges recognition of the principle that everyone is a beneficiary of a free market." At times, the Commission sounds more like an advocacy group for corporate America than a watchdog agency for civil rights. In its rather over, it has been mostly argumentative and shrill. Little useful work is any longer done by the commission.

276 For example, Gary Orfield, a political science professor at the University of Chicago and a former member of the Commission's own advisory group on a long-awaited school desegregation study, strongly criticized the methodology and data of the desegregation study. The Commission now contends that problems in the study's data-gathering have been remedied. See News Release, "Commission Votes to Move Forward With School Desegregation Study," Feb. 12, 1986 (on file with Harvard Civil Rights-Civil Liberties Law Review).


278 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

279 United States Commission on Civil Rights, *Civil Rights Update* 7 (Oct./Nov./Dec. 1985); see also Abram, *What Constitutes a Civil Right?*, N.Y. Times, June 10, 1984, § 6 (Magazine), at 52 ("We live in a constitutional democracy built not on the proposition that each has a fundamental entitlement to a particular piece of the economic pie, but rather on the concept that it is up to each individual to compete for economic goods. . . ").
equivocal statement on Grove City v. Bell, 280 a Supreme Court
decision that has severely hampered federal civil rights enforce-
ment efforts, the Commission stressed: "The preservation of an
independent, vigorous private sector is an important societal
goal." 281

"Many white Americans of good will," Dr. Martin Luther
King, Jr. said, "have never connected bigotry with economic
exploitation. They have deplored prejudice but tolerated or ig-
nored economic injustice. But the Negro knows that these two
evils have a malignant kinship." 282 In the late 1960's, Dr. King
called for both a hard look at the injustices of our market-based
economy and also a "radical redefinition of work." 283 In its
statement on comparable worth, however, the Commission es-
tensively adopted a laissez-faire attitude toward bias in the "free"
market. 284 For example, then-Vice Chairman Morris B. Abram
opined in his concurring statement to the comparable worth
report that wage-setting according to market rates can never be
an act of discrimination but "is merely the free and fair operation
of a market-based economic system." 285

The Commission's stance on comparable worth is mis-
guided. As Dr. Martin Luther King, Jr. realized, our economic
system is not immune from bias, and the Commission's laissez-
faire attitude toward a potentially-biased market could quite
easily translate into a laissez-faire attitude toward racism, sex-

280 465 U.S. 555, 573 (1984) (federal funding of only part of an educational institution
does not trigger institution-wide coverage for purposes of Title IX.).

281 United States Commission on Civil Rights, Commission Statement on Grove
City 8 (1985). In opposition to proposed legislation to overturn the Grove City decision,
the Commission's statement conjured up an Orwellian nightmare:

Therefore, those parts of a private entity not receiving federal aid should not
be federalized by broad coverage under these federal civil rights statutes.
America is not ready yet—and may it never be ready—for a society standard-
ized by the federal bureaucracy, turning out men and women fashioned by a
government-shaped cookie-cutter, encompassing more and more elements of
American Society so that virtually nothing is left untouched by the federal
bureaucracy.

Id. The Commission's statement on Grove City is a far cry from the Commission's
controversial 1963 "Interim Report," which urged the President to consider the cut-off
of all federal funding to the state of Mississippi because of Mississippi's persistent civil
rights violations. See F. Dulles, supra note 5, at 183.

282 The Words of Martin Luther King, Jr., Selected by Coretta Scott King 45 (1987).

283 D. Garrow, supra note 3, at 569 (quoting King).

284 See United States Commission on Civil Rights, Comparable Worth: An Analysis
and Recommendations, supra note 263.

285 Id. at 76 (concurring statement of Vice Chairman Morris B. Abram).
ism and religious prejudice. Unfortunately, the Commission appears more concerned with vindicating the laws of supply and demand than with critically assessing the laws of the land.\textsuperscript{286} Currently, the Commission is more likely to embrace the views of a conservative Nobel prize-winning economist than those of the progressive Nobel prize-winning activist Martin Luther King, Jr.

Since 1983, the Commission has often labored to remove issues of economic injustice from the realm of civil rights. Refusing, for example, to study the potentially discriminatory impact of student financial aid cutbacks upon colleges with significant numbers of minority students, the Commission reasoned that such a study would be beyond the scope of the Commission's duty to monitor civil rights.\textsuperscript{287} On the other hand, over the objections of liberal Commissioners Berry and Cardenas Ramirez, the Commission recently produced a report entitled \textit{The Economic Progress of Black Men in America}.\textsuperscript{288} Criticizing the report, Berry and Cardenas Ramirez stated: "We could not understand how it could be within the Commission's jurisdiction to study the economic progress of certain people in our society and not within it to study the economic effects of student aid changes and other policies on minorities."\textsuperscript{289} The report, however, quickly earned accolades from conservative sources like \textit{Fortune} magazine, which described it as "scholarly, measured in its judgments, utterly devoid of the agitprop impulses that used to result in ritualistic overstatements about the degree of discrimination in the U.S."\textsuperscript{290} Praising the new Commission, \textit{Fortune} added: "What else [besides federal civil rights legislation] might have reduced discrimination? One answer provided by the [Commission] study: 'market forces.' . . . You would

\textsuperscript{286} See Brown, Baumann & Melnick, \textit{ supra} note 267, at 142 ("Extolling the overriding authority of supply and demand is to ignore the possibility that that 'law' conflicts with Title VII, which like other regulatory legislation necessarily interferes with a laissez-faire economy.").

\textsuperscript{287} Pear, \textit{Rights Aide Asserts the Right to Speak Her Mind}, N.Y. Times, June 12, 1984, at A24, col. 3 ("Unless the commission wishes to establish that Federal student aid is a civil right guaranteed to members of minority groups, this project would appear clearly beyond our jurisdiction.") (quoting Staff Director Linda Chavez).

\textsuperscript{288} United States Commission on Civil Rights, \textit{The Economic Progress of Black Men in America} (1986).

\textsuperscript{289} Memorandum from Mary Frances Berry and Blandina Cardenas Ramirez to the Commissioners I (Sept. 8, 1986) (on file with Harvard Civil Rights-Civil Liberties Law Review).

absolutely, positively, never have got such an answer under the ancien régime."\(^{291}\)

Although the new Commission’s conservative brand of economic thought represents a significant departure from the views held by the Commission in the pre-Reagan era, the most disturbing aspect of the Commission’s new ideology is its insistence upon a version of “color-blindness” that would effectively destroy the sort of affirmative action programs endorsed by the old Commission.\(^{292}\) Staff Director J. Al Latham, for example, promised that the Commission’s revised report criticizing minority set-asides would embody “the basic principles” of “color-blind policies.”\(^{293}\) Yet, by wholeheartedly endorsing “color-blind policies,” the Commission seemingly ignores the fact that those who make, interpret and implement those policies are not “color-blind.” Moreover, the Commission’s ideology of “color-blindness” fails to account for the fact that our social institutions reflect hundreds of years of discrimination, and that the dominant, empowered majority has materially benefitted from discrimination against minorities.

It is worth contrasting former-Vice Chairman Morris Abram’s view that \emph{Brown v. Board of Education}\(^ {294}\) prefigured the current Commission’s stance on color-blindness with the contemporary view of an attorney who was a key participant in the \emph{Brown} litigation effort:

> Perhaps, one day America will be color-blind, but it takes an extraordinary ignorance of actual life in America today to believe that day has come. Such affirmative action programs and judicial remedies, it is argued, are inconsistent with the American “tradition” of color-blindness and individual merit. However, there has never been such a tradition for Black Americans. Moreover, there is another American “tradition”—one of slavery, segregation, bigotry and injustice.\(^ {295}\)

\(^{291}\) \emph{Id.}\ It is perhaps worth noting that under the Commission’s old regime, which rarely offered grand paens to “market-forces,” the Commission received few, if any, endorsements from magazines named \emph{Fortune}.  

\(^{292}\) \emph{See supra} notes 123–26, 140–49 and accompanying text.  


\(^{294}\) 347 U.S. 483 (1954).  

\(^{295}\) William T. Coleman, Jr., \emph{Equality—Not Yet}, N.Y. Times, July 13, 1981, at 15, col. 2, quoted in Keith, \emph{What Happens to a Dream Deferred: An Assessment of Civil}
But the American “tradition” of racism does not accord well with the Commission’s rather rosy view of race relations in America today.

The Reagan-era Commission has displayed an almost Panglossian optimism. In an article for The New York Times Magazine, then-Vice Chairman Abram wrote, “Atlanta has become a normalized, integrated society. It can happen elsewhere.”

Echoing Abram’s rather idealized notion of American society, current Commission Vice Chairman Murray Friedman asserted, in the wake of racially-motivated violence in Howard Beach, New York and Forsyth County, Georgia, that America is not a racist society. In fact, Friedman argues that the preoccupation of some with recent outbreaks of racially-motivated violence is “doing a disservice to those whose cause they seek to serve”, according to Friedman, a less-than-optimistic assessment of race relations in America convinces minority youths that “they do

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Rights Law Twenty Years After the 1963 March on Washington, 19 Harv. C.R.-C.L. L. Rev. 469, 483 (1984). Compare Abram, For Equity and Excellence, New Perspectives, Spring, 1985, at 15, 16 (“Instead, in Brown the NAACP argued, and the Supreme Court agreed, that the Constitution was color-blind and segregating by race was illegal.”) with Michelman, The Supreme Court, 1985 Term—Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4, 131 n.146 (1986) (“It is a matter worth pondering that Brown v. Board of Educ., a decision that has come to stand for the supremely universalistic principle of constitutional ‘colorblindness,’ is also a supreme example of deciding with an eye to context”) (citations omitted).

296 Abram, What Constitutes a Civil Right?, N.Y. Times, June 10, 1984, § 6 (Magazine), at 64. It is difficult to believe that Atlanta should be the paradigm for a “normalized, integrated society.” For a masterful account of how racism continues to shape Atlanta society, see J. Baldwin, The Evidence of Things Not Seen (1984).

297 Friedman, America is Not a Racist Society, Wall St. J., Feb. 20, 1987, at 20, col. 3.; cf. Voltaire, Candide 11 (trans. R. Adams 1966) (the fictional Dr. Pangloss shares his views on the tragic Lisbon earthquake: “all this is for the best, since if there is a volcano at Lisbon, it cannot be somewhere else, since it is unthinkable that things should not be where they are, since everything is well”). See also this March 1985 exchange between Commission Staff Director Linda Chavez and Nathan Glazer (who in the Fall of 1985 was the subject of a spotlight interview in the Commission publication New Perspectives):

DR. CHAVEZ. At the risk of simplifying things again, I’d like to ask Professor Glazer—not based on your feelings, but based on the work that you have done in affirmative action over a long and industrious career—do you believe that discrimination on the basis of race and gender today in employment is the exception or the rule?

DR. GLAZER. I believe it is the exception.


298 Friedman, supra note 297, at 20, col. 3.
not have a chance."299 Furthermore, Commission Chairman Clarence Pendleton has suggested that there will no longer be a need for a U.S. Commission on Civil Rights by 1989. In his words, "all the [civil rights] laws are on the books," and there is "nothing else to study."300

The views of these men reflect not only the Commission's ideological shift from an expansive definition of civil rights to a narrow one, but also a dramatic change in the Commission's understanding of its own role in the civil rights arena. Chiefly emphasizing the removal of a narrow class of overt forms of discrimination, the Commission under Pendleton's leadership has failed to fulfill its duty to propose methods to combat the entrenched racism that cannot be eliminated simply by enforcing existing legislation.301 The Commission's new posture, based upon an overly optimistic analysis of race relations in America, ignores the reality that racism continues to pervade our society. The new perspective of the Commission is a rosy gloss over the real race relations picture. Abandoning its dual function as a leader in the struggle to expose racism and a vigilant watchdog of federal civil rights enforcement, the Commission has donned a new role as the defender and preserver of the status quo. Insofar as "independence" requires the Commission to serve as the conscience of the nation and a monitor of the executive branch, the current Commission is anything but independent.

Conclusion

None of the hundreds of reports issued by the Commission has resonated quite like that single syllable uttered by Mrs. Rosa

299 Id.
300 Telephone interview with Clarence M. Pendleton, Jr., Chairman of the U.S. Commission on Civil Rights (Feb. 11, 1987).
301 The Commission, however, has even failed to monitor the Reagan Administration's enforcement of existing laws. See Leadership Conference on Civil Rights, supra note 241, at 12 ("Moreover, the Commission appears to have redefined one of its principal duties—monitoring the civil rights performance of federal agencies."). Rep. Patricia Schroeder (D-Colo.) noted on April 22, 1986 that since 1983 the Commission has not issued a single analysis of federal civil rights enforcement. Id.; cf. United States Commission on Civil Rights, Special Commission Meeting, supra note 254, at 73–74 ("I have been asking for some civil rights enforcement studies with respect to this administration for two years. And it may be coming, but the fact is we haven't done it and I think we should have.") (statement of Commissioner John Bunzel); cf. also Days, Turning Back the Clock: The Reagan Administration and Civil Rights, 19 Harv. C.R.-C.L. L. Rev. 309 (1984) (discussing the Reagan administration's failure to uphold existing civil rights laws). While the Civil Rights Commission nods, the Reagan Administration plods.
Parks on a crowded Montgomery bus. Yet, at least until the 1980’s, the Commission had been a credible and independent critic of injustice in our society.

Several factors—a precarious institutional design, presidential and congressional manipulation and a lack of credibility—have transformed a once independent agency into a weak and ineffectual one. But the damage need not be permanent. It is still possible to envision an “independent” Commission with the following characteristics: (1) Commission members appointed by the President with the advice and consent of the Senate; (2) staggered, fixed terms (six or more years in duration) for Commission members; (3) an explicit statutory limitation that would authorize removal of Commission members only for neglect or malfeasance in office; (4) a staff director appointed by the commissioners, rather than by the President; (5) a “permanent” status to signify our enduring commitment to civil rights; (6) broad authority to monitor all matters relating to civil rights and denials of equal protection, even in currently “forbidden” zones like men’s clubs and abortion clinics; (7) ten or more regional offices to offer assistance and support services to the State Advisory Committees; and (8) a statutory mandate to issue an annual “State of Civil Rights” report that includes critical evaluations of federal civil rights enforcement efforts.

The current Commission appears to be merely a public-relations firm for a presidential administration determined to roll back advances in civil rights. Indeed, since 1983, the Commission’s stance has reflected the position of the Reagan Administration on virtually every major civil rights issue, with the exception of minority set-asides. Unless and until the Commission regains its credibility as an effective watchdog agency, civil rights will remain in the back of the bus. By failing to tell the Reagan Administration “no,” the Commission has told civil rights opponents “yes.”

—Jocelyn C. Frye
Robert S. Gerber
Robert H. Pees
Arthur W. Richardson