
CIVIL RIGHTS

FIXING THE CIVIL RIGHTS COMMISSION

By *Kenneth L. Marcus**

Several dozen advocacy organizations have recently promoted a high-profile proposal to “fix” the U.S. Commission on Civil Rights.¹ Their goal is to change the name of the commission to “The U.S. Commission on Civil and Human Rights” and to authorize the new commission to monitor U.S. compliance with international human rights treaties. At the same time, the current commissioners would be terminated, and the President would be authorized to appoint a new slate subject only to senate confirmation.² The primary advocate of this plan is none other than former commission chair Mary Frances Berry, who developed the concept in her 2009 book, *And Justice for All: The United States Commission on Civil Rights and the Continuing Struggle for Freedom in America*.³ Popular with Democratic congressional staff, the Berry plan has been actively promoted by a large coalition led by the American Civil Liberties Union, the Leadership Conference on Civil and Human Rights, the American Constitution Society, and a new group formed precisely to advance this proposal, the “Campaign for a New Domestic Human Rights Agenda.”⁴

History

Established by President Dwight David Eisenhower under the Civil Rights Act of 1957, the Commission is an independent, bi-partisan fact-finding agency.⁵ Charged with investigating a wide range of discriminatory conduct, but given no enforcement powers, the agency has long functioned as a research institution or think tank, issuing reports and railing from the bully pulpit.

During its first quarter century, the Commission probed racial and ethnic bigotry in the United States, laying the groundwork for landmark legislation such as the Civil Rights Act of 1964, the Fair Housing Act, and the Voting Rights Act. All along, powerful figures have tried to derail its investigations, which have often provoked strong outcry among those charged with bias. For example, John and Robert Kennedy connived to obstruct the commission from undertaking field hearings in Mississippi during the early 1960’s for fear that this would alienate or embarrass Southern Democrats in Congress. The Commission’s courageous work during this period earned it the title of “conscience of the nation on civil rights.”⁶

For much of its second quarter century, the Commission’s record was much spottier. During this period, marked by Commissioner Mary Frances Berry’s long tenure, the

Commission was known instead as a “Mickey Mouse agency” and as “Little Hanoi on the Potomac.” Berry gained notoriety for her support for Maoist educational and Soviet social policy,⁷ as well as her insistence that civil rights laws do not apply to white men.⁸ Late in Ms. Berry’s tenure, the General Accounting Office reported that the Commission was “an agency in disarray” lacking even “basic management controls.” Berry fought and lost a legal battle to prevent one of President George W. Bush’s appointees from being seated to the Commission.⁹ When her last term expired, Berry initially threatened to stay on longer, disputing the executive and judicial branches’ interpretation of the period of commissioner terms.¹⁰

In December 2004, conservatives were appointed to a majority of the Commission’s seats (including Dr. Berry’s former seat) as well as to the office of Staff Director.¹¹ In 2007, *The Wall Street Journal* lauded the agency, stating that it “deserves a medal for good governance” after achieving back-to-back clean financial audits. At the same time, the Commission refocused its agenda on a wide range of topics important to conservative civil rights advocates, such as “religious freedom, school choice, Title IX reform, voter fraud, the impact of economic regulation on minority employment, and the impact of illegal immigration on black employment.”¹² The Commission has also addressed, during this period, various other topics not generally associated with the conservative civil rights agenda, such as the misdiagnosis of racial minorities for special education,¹³ discrimination against Native Americans in border towns,¹⁴ and the effectiveness of historically black colleges and universities.¹⁵

More controversially, perhaps, the Commission also issued a series of important reports during this period which challenge an array of assumptions concerning the governmental application of racial preferences, e.g., that racial diversity produces demonstrable educational benefits;¹⁶ that preferences actually help black students;¹⁷ that the American Bar Association’s diversity standards comply with federal law;¹⁸ that the Akaka Bill on native Hawaiian sovereignty does not amount to racial balkanization;¹⁹ that the Justice Department increases re-segregation when it releases Southern school districts from desegregation orders;²⁰ that federal agencies comply with their constitutional obligation to seriously consider race-neutral alternatives before resorting to preferences in government contracts;²¹ and that the temporary provisions of the Voting Rights Act of 1965 are as necessary today as when they were first enacted.²² As two conservative Commissioners observed, the Commission’s new agenda asks this question of racially preferential governmental policies: “Should the principle of non-discrimination be temporarily sacrificed in the hope that such a sacrifice will, in the long run, help us become the society of equal opportunity that we all aspire to?” That is to say, the Commission has challenged the underpinnings of

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Even more questionable, however, is her proposed cure. If her goal is to expand the Commission's jurisdiction to include sexual orientation, this can be done through ordinary legislation, just as the Commission's jurisdiction was previously expanded to include disability issues.³⁸ It would be a rather minor change, since the Commission is already authorized to investigate discrimination on any basis, including sexual orientation, in "the administration of justice."³⁹ The Commission has traditionally interpreted this jurisdictional basis to support, for example, inquiry into whether equal protection is denied by state laws which limit marriage to opposite-sex couples. Since such matters are already within the Commission's jurisdiction, the inclusion of other issues of sexual orientation would be a relatively minor change, which would hardly justify the sort of transformation which is now proposed. At any rate, the question of gay rights is typically framed as a matter of antidiscrimination law, which is to say, an issue of "civil" and not just "human" rights. As a political matter, Berry's focus on gay issues may help her to build a constituency for legislative change; but as a legal matter, it seems irrelevant to her proposal to shift the Commission's focus to human rights.

C. *Would the Proposal Abdicate Civil Rights?*

Those who are committed to civil rights enforcement will object that the Berry proposal would dilute the effectiveness of the Commission's civil rights work by dividing its attention among competing priorities. "Given the continued contention and resurgence of conflicts over race and other domestic issues," Berry observes, "it might . . . be better to maintain the commission's focus on civil rights in this country."⁴⁰ Moreover, as Berry also recognizes, to change the Commission's mandate "might signal a belief that the work that needs doing is done or an abandonment of the idea of further progress because the job is too difficulty and the issues intractable."⁴¹ Nevertheless, Berry seems not to appreciate the force of her own arguments, concluding despite these ideas that "[t]he best approach would be a commission on civil and human rights."⁴²

D. *Does the Proposed Change Transform Human Rights?*

To the extent that the proposed change would dilute the Commission's civil rights capabilities, this cost must be balanced against the putative benefits in terms of human rights compliance. Here, though, the proposal's advocates have been somewhat vague. Presumably, the Commission's proposed new powers to monitor human rights compliance are intended to reduce the likelihood of civil liberties violations of the sort claimed during the last Administration. In fact, however, the human rights discourse of the left has increasingly drifted in other directions. This can be seen most saliently in Secretary of State Hillary Clinton's major address on "the Obama administration's human rights agenda for the 21st century."⁴³ The "human rights agenda for the 21st century," Clinton announced, will "see human rights in a broad context," insisting that "people must be . . . free from the oppression of want—want of food, want of health, want of education, and want of equality in law and in fact."⁴⁴

The first thing to be said about this agenda is that it is distinct from the question of human rights. Conflating human rights with social welfare policy was first devised, several decades

ago, by the Soviet foreign ministry, which distracted attention away from the Soviet Union's abysmal human rights record by drawing global focus to social welfare.⁴⁵ *The Washington Post* caught the irony, reminding Secretary Clinton that

[A]s U.S. diplomats used to tirelessly respond, rights of liberty—for free expression and religion, for example—are unique in that they are both natural and universal; they will exist so long as governments do not suppress them. Health care, shelter and education are desirable social services, but they depend on resources that governments may or may not possess. These are fundamentally different goods, and one cannot substitute for another.⁴⁶

Why would the Obama Administration want to reverse policy on this fundamental matter of principle? Opponents say that it is precisely for the same reason that motivated the Soviets, *i.e.*, in order to distract public attention from their abysmal record on human rights. It was not that long ago that Clinton was herself criticized by human rights activists for minimizing the importance of human rights discourse in the Administration's relationship with China.⁴⁷ Worse, President Obama's recent refusal to meet with the Dalai Lama at the White House—for fear that doing so would upset the Chinese, because it might remind the world of continuing human rights violations in Tibet—signals for many that the Administration is all too willing to sacrifice human rights objectives in the name of engagement.⁴⁸ The same observations have been made about Obama's policies on Iran and elsewhere.⁴⁹

Adding "human rights" to the Commission's agenda would have the benefit of creating the appearance that the Obama Administration cares about civil rights without actually requiring the president to make the difficult choices that he has not liked to make. By shifting the "human rights" discourse away from abuses by undemocratic countries, Obama is able to change the topic from a weakness to a strength. Most importantly, perhaps, it would enable the Obama Administration to turn the Civil Rights Commission into an advocate for economic redistribution. By negotiating multi-lateral treaties on such matters as education, health care, food, and general economic conditions—and then using the new Commission as a means to enforce U.S. compliance—Obama and his Democratic supporters could achieve a backdoor means of imposing redistributionist policies that might otherwise be anathema to the American people.

Conclusion

Given the intense criticism that the Civil Rights Commission has faced over the course of the last few decades, it is rather surprising that anyone would seek to expand its jurisdiction over other issues that they care about. Yet that is precisely what some advocates appear to be doing. This issue would look less partisan if the advocates for this bill would provide an effective date for their proposed legislation after the commencement of the next presidential term. That way, the substance of the proposal could be evaluated on its own terms and not as partisan politics.

Even on its own terms, however, the proposal is at best dubious. Those who believe that discrimination remains a persistent American problem, as these advocacy groups certainly

do, must explain how saddling this long under-budgeted agency with significant additional substantive responsibilities can have any effect other than to weaken its current capabilities. At a minimum, this significant cost must be balanced against whatever benefits the restructuring is thought to provide. Those benefits remain somewhat nebulous. Given Secretary Clinton's pronouncements on human rights policy, it appears that a new human rights commission would be less concerned with protecting actual human rights or civil liberties and more concerned with implementing redistributionist policies in the areas of education, health, jobs and the economy. This would not strengthen the Commission's traditional functions but would supplant them.

Endnotes

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