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CHANGING THE JUSTICE DEPARTMENT'S POSITION IN PENDING LITIGATION*

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This article is reprinted from CITIZENS' COMMISSION ON CIVIL RIGHTS, ONE NATION, INDIVISIBLE: THE CIVIL RIGHTS CHALLENGE FOR THE 1990S 60-75, 523-24 (1989), *where it appeared as one of a number of working papers accompanying a report of the Citizens' Commission on Civil Rights. The Citizens' Commission is a bipartisan group of former officials who have served in the federal government in positions with responsibility for equal opportunity. It was established in 1982 to monitor the policies and practices of the federal government and to seek ways to accelerate progress in the area of civil rights. The 1989 report by the Commission and the accompanying working papers by various authors were prepared for the purpose,* inter alia, *of providing a resource for the President, Congress, policy planners, and civil rights advocates during the administration taking office in 1989. In the present article, prepared in 1988 before the presidential election and reprinted here with primarily technical revisions, Professor Selig explores the legal, institutional, and prudential constraints on changes of position in pending litigation by a new administration which may be more positively committed to civil rights enforcement than the Reagan administration.*

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I. INTRODUCTION

This essay offers some thoughts on the extent to which a new administration seeking to strengthen federal civil rights enforcement may be obliged to adhere to legal positions taken by the prior administration in pending cases.

I have previously written critically on the performance of the Reagan Justice Department in the area of civil rights enforcement, with particular focus on school desegregation, affirmative action in employment, and tax exemptions for racially discriminatory schools.[1] My critique engendered a reply from Assistant Attorney General William Bradford Reynolds,[2] and I have responded to his reply.[3] I have also previously reviewed the Justice Department's fair housing enforcement program, with particular emphasis on the Carter administration's efforts to combat racially exclusionary municipal land use practices.[4]

It has been my view that certain actions of the Justice Department's Civil Rights Division in the Reagan administration departed radically from a long-standing, bipartisan tradition of incrementally progressive civil rights enforcement. My criticisms have not focused on what I consider to be legitimate differences of opinion on substantive policy issues. Rather, I have criticized the Reagan Justice Department from an administration of justice perspective, concluding that it has in many instances acted in a manner inconsistent with neutral principles of responsible law enforcement.[5]

Each of the ten principles of responsible law enforcement that I have articulated[6] is potentially relevant to decisions by a new administration to change positions taken by the prior administration in pending litigation.[7] It seems reasonable to assume that the next administration, whether Republican or Democratic, may be more favorably disposed from a policy standpoint than the Reagan administration was to progressive civil rights enforcement. It is important to reflect, therefore, on the considerations that might constrain the next administration's desire to change the government's legal positions in pending liti-

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1. Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong,* 1985 U. ILL. L. REV. 785 (1986).

2. Reynolds, *The Reagan Administration and Civil Rights: Winning the War Against Discrimination,* 1986 U. ILL. L. REV. 1001 (1987).

3. Selig, *The Reagan Justice Department and Civil Rights: Professor Selig Responds to Assistant Attorney General Reynolds,* 1987 U. ILL. L. REV. 431 (1988).

4. Selig, *The Justice Department and Racially Exclusionary Municipal Practices: Creative Ventures in Fair Housing Act Enforcement,* 17 U.C. DAVIS L. REV. 445 (1984).

5. Selig, *supra* note 1; Selig, *supra* note 3.

6. *See* Selig, *supra* note 1, at 790-95 ("respect for the law," "regard for the facts," "institutional continuity," "historical continuity," "appropriate priorities," "positive public image," "separation from politics," "utilization of institutional strengths," "self-restraint," and "promotion of peace"). The cited exposition of these principles is reprinted *infra* as an appendix to this essay.

7. They are also relevant to changes of legal position in new cases, but this essay focuses on the question of changes of position in pending litigation, the more specialized problem which the Citizens' Commission on Civil Rights asked me to address.

gation. In fairness, we who have criticized the Reagan administration for its departures from principles of responsible law enforcement must be prepared to apply those principles to a new administration whose substantive policies may be more to our liking. The question that then arises is whether the application of those law enforcement principles may produce different results when what we view as a more progressive administration is rectifying what we consider the misguided course of the prior administration, as compared to when what some of us viewed as a radical administration was reversing what we considered the proper course of previous administrations — or whether the application of those principles must produce the same results in both circumstances if they are to retain their neutrality and their vitality.

Before exploring the intricacies of this question, some preliminary points should be noted. First, although I have vigorously criticized the Reagan administration for its frequent disregard of law enforcement principles and for some of its changes of position in pending litigation,[8] I have never suggested that the principles I have articulated provide a mechanical formula for deciding what to do every time the question of a change of position is considered. Nevertheless, I do maintain that those principles should be applied fairly and dispassionately by each administration and by those advising or evaluating each administration, regardless of the policy or political preferences of the administration, its advisors, or its critics. Second, while similar situations should be resolved similarly, it is not inconsistent with neutral principles to treat differently situations that truly are distinguishable. Finally, it is important to remember that the institutional and prudential constraints I have discussed are not the only limitations on changes of position: there are legal constraints as well. It seems appropriate to begin by considering those legal constraints before discussing institutional and prudential limitations.

II. LEGAL CONSTRAINTS

Consider a school desegregation case which has been fully tried with respect to liability and remedy, and in which the district court has refused the government's request that it order mandatory pupil reassignments to desegregate grades 1-2 at schools found to be unlawfully segregated. Suppose that in the Reagan administration the government declined, for inappropriate reasons, to appeal the district court's refusal to desegregate those grade levels.[9] Would a new administration be free to ask the court, in which the case is still pending and a regulatory injunction outstanding, to reconsider its previous decision to exclude the lower grade levels, and then appeal an unfavorable ruling? Alter-

8. *See, e.g.,* Selig, *supra* note 1, at 795-817 (discussing school desegregation); *id.* at 817-21 (discussing tax exemptions for racially discriminatory private schools).

9. *See, e.g., id.* at 799, 800, 805 (discussing Kansas City, Kansas, school desegregation case) (grades 1-2); *id.* at 816 (discussing Beaumont, Texas, school desegregation case) (grades 1-3).

natively, would the government be free to bring a new lawsuit seeking to remedy the continued segregation at those grade levels?

At the very least, it would seem that the government would face a heavy burden to overcome the argument that issue preclusion in the first scenario or claim preclusion in the second forecloses it from attempting to pursue further desegregation at those grade levels at this late date, given its previous decision to abandon the issue. The government might attempt to argue that the continued segregation at those schools is an unlawful, unconstitutional condition which a court must be free — indeed, must be required — to remedy by whatever means is necessary notwithstanding ordinary principles of collateral estoppel or res judicata. However, when the trial court has explicitly found that the law does *not* require a more extensive remedy at those grade levels; when there has been no higher court decision changing the applicable legal standards in the period since the court's previous decision;[10] when the court's explanation for its decision included supporting factual findings and consideration of factors relevant to the exercise of equitable remedial discretion; and when the government did not appeal the court's judgment within the time provided for an appeal, it would be extremely difficult if not impossible to escape the conclusion that the government is precluded from further pursuit of the issue, even if the court's unappealed decision was both legally and factually incorrect and the previous administration's decision not to appeal indefensible.

Consider another example: an employment discrimination case settled by consent decree in the Reagan administration. The decree provides various forms of relief, including a general injunction, prohibition of unvalidated testing procedures, back pay and other specific relief for identified victims of discrimination, affirmative action in the form of intensified minority recruitment efforts, but no relief in the form of quotas or goals and timetables. The government settled without quota relief because of the Reagan administration's antipathy to such relief as a matter of policy and its mistaken belief that such relief is both unlawful under Title VII of the 1964 Civil Rights Act[11] and unconstitutional.[12] The administration's position on quota relief was wrong under the law as it existed when the consent decree was entered, and it

10. This differentiates the hypothetical from the many cases in which "post-*Green*" or "post-*Swann*" motions requesting further desegregation were filed routinely in the wake of the Supreme Court's decisions changing or clarifying the applicable legal standards in Green v. County School Board, 391 U.S. 430 (1968) ("freedom-of-choice" desegregation plan constitutionally insufficient) and Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) (desegregation orders requiring mandatory student reassignments and busing to achieve specified racial attendance ratios are within remedial power of federal court).

11. 42 U.S.C. §§ 2000e to 2000e-17 (1982) (prohibiting discrimination in employment) (originally enacted as Title VII of Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-16, 78 Stat. 253-66), *as amended by* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 2-11, 13-14, 86 Stat. 103.

12. *See* Selig, *supra* note 1, at 821-29 (discussing the law and Reagan administration actions regarding quota remedies); Selig, *supra* note 3, at 440-42 (same).

remains wrong in the wake of recent Supreme Court decisions.[13] Assuming that the court has continuing jurisdiction under the consent decree, which is still in effect, would a new administration be free to ask the court to modify the decree to include quota remedies?

In this case again it would seem that the government would face a virtually insurmountable obstacle. The case is, if anything, less appealing than the school desegregation example in two respects: the government consented to the limited relief provided as part of a compromise settlement, which may place it in a less favorable position from the standpoint of equity than if it had ill-advisedly failed to appeal an adverse litigated determination; and the consent decree simply provides less stringent and less effective relief than a quota decree would provide, thereby perhaps lengthening the time within which a workforce free of the effects of prior discrimination may be achieved, but in no way perpetuating continuing unlawful practices. There has been neither a change in the law nor a change in factual conditions that would require or justify modifying the consent decree and thereby releasing the government from the bargain it struck.[14] If the government is unable to identify any "change in law or facts [which] has made inequitable what was once equitable,"[15] it seems likely to be met with the following response: "[The government] chose to renounce what [it] might otherwise have claimed, and the decree of a court confirmed the renunciation and placed it beyond recall."[16] Unless the consent decree expressly adopted a long-term numerical goal and a time frame within which to achieve it, so that the government could argue that experience under the decree had demonstrated that the relief would be ineffective to achieve the goal within the anticipated time period, the court would likely consider itself legally precluded from modifying the decree if the defendant does not consent. Even if the court does not consider itself without discretion in the matter, its decision against the government could certainly not be reversed as an abuse of discretion.

Thus a new administration that believes in affirmative action and quota relief as a matter of policy might find itself forced to confine its efforts to obtain such relief to new cases and pending cases in which litigated or consent decrees have not yet been entered, even if it does not consider itself so constrained in any event by prudential considerations.[17]

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13. *See* Selig, *Affirmative Action in Employment: The Legacy of a Supreme Court Majority*, 63 IND. L.J. 301 (1988) (analyzing and evaluating Supreme Court cases); Selig, *Affirmative Action in Employment After* Croson *and* Martin: *The Legacy Remains Intact*, 63 TEMP. L. REV. 1 (1990) (same); Selig, *supra* note 1, at 821-29 (discussing the law and Reagan administration actions regarding quota remedies); Selig, *supra* note 3, at 440-42 (same).

14. *Compare* System Fed'n No. 91, Ry. Employees' Dep't v. Wright, 364 U.S. 642, 651-53 (1961) (change in law requires change in decree) *with* United States v. Swift & Co., 286 U.S. 106, 114-17, 119-20 (1932) (change in conditions insufficient to justify change in decree).

15. *System Fed'n*, 364 U.S. at 652.

16. *Swift*, 286 U.S. at 119.

17. *Cf.* Selig, *supra* note 1, at 825-29 (criticizing Reagan administration efforts to reopen and modify existing decrees).

No doubt other realistic examples can be hypothesized in which there are formidable and in some cases insurmountable legal limitations on the government's ability to change its position in pending litigation. Would a court allow the government to change its position in a housing discrimination case at the post-trial briefing stage so that a new administration could argue that the defendant's practices were unlawful under a theory of unjustified discriminatory effect, when the government's pre-trial brief, the pre-trial order, and the trial — all completed in the Reagan administration — had committed the government to the position that only practices motivated by a discriminatory purpose are unlawful, and the defendant had prepared for trial and tried the case on that basis?[18] In another case, at what point would the untimeliness of a new administration's motion for leave to amend its complaint to allege additional legal violations which the prior administration had declined to pursue strain the limits of even the liberal standard provided by Rule 15(a) of the Federal Rules of Civil Procedure,[19] or at least render immune from reversal a decision by the trial court denying leave to amend?[20] On the difficult school desegregation questions of declarations of unitariness, releases from court supervision, and approvals of revised student assignment plans that increase racial separation,[21] to what extent would a new administration be legally bound by ill-advised decisions on such matters reached under incorrect legal standards or perhaps even for improper political reasons in the prior administration, and incorporated into litigated determinations or consent decrees containing apparently binding recitals of factual findings? This last hypothetical is potentially significant in its implications, depending on what the Reagan administration does along these lines in its waning days in office.

The point of all this is that the government's ability to change its position in pending litigation is in many cases subject to legal constraints wholly apart from the institutional and prudential constraints to which this discussion will shortly turn. Of course, doctrines of procedural fairness, of finality and estoppel, and of equitable remedial discretion are not applied mechanically; rather, decisions are guided by general principles that are applied on a case-by-case basis, with room for some flexibility of judgment. There are even situations in which the government may properly be treated differently from other litigants insofar as some doctrines are concerned.[22] But there are legal limits

18. *See id.* at 831 (discussing Reagan administration position in housing discrimination cases); Selig, *supra* note 4, at 474 n.128, 482 n.171, 486 nn.193-94 (same).

19. FED. R. CIV. P. 15(a) (amendment of pleadings).

20. *Cf.* Selig, *supra* note 1, at 803, 813 (raising new allegations at too late a stage unfair to defendants).

21. *Compare* Landsberg, *The Desegregated School System and the Retrogression Plan,* 48 LA. L. REV. 789 (1988) (discussion of the issues by a former Justice Department official and long-time proponent of desegregation) *with* Beard, *The Role of Res Judicata in Recognizing Unitary Status and Terminating Desegregation Litigation: A Response to the Structural Injunction,* 49 LA. L. REV. 1239 (1989) (discussion of the issues by a current Justice Department official who opposes Landsberg's analysis).

22. For example, partly because of the necessity of preserving the government's ability to change its policy and its legal position on an issue under a new administra-

on a new administration's ability to escape the impact of decisions taken and positions advocated during a prior administration, no matter how erroneous or even abhorrent those actions may have been.

III. INSTITUTIONAL AND PRUDENTIAL CONSTRAINTS

Consider now another hypothetical case in which the Reagan administration did not pursue desegregation of grades 1-2 in unlawfully segregated schools; or pursued desegregation only by voluntary means, eschewing any resort to mandatory student reassignments and busing even though some such measures were necessary to achieve the full desegregation that the law requires; or pursued desegregation only at some unlawfully segregated schools and not at others.[23] Assume that the Reagan administration's positions on these issues were inconsistent with the governing law concerning remedy and liability as declared by the Supreme Court.[24] Suppose further that, unlike in the cases discussed in the previous section, the pertinent portion of the litigation — the remedy phase or the liability phase — was not completed before the new administration entered office, so that the government is not legally precluded from changing its position on the matters in question. Should the government, in light of the pertinent institutional and prudential constraints, change its position or forbear from doing so?

In my view, the proper approach to this kind of question entails, if anything, more flexibility than the approach to questions concerning legal constraints such as those discussed above. It implicates difficult value judgments and calls for a balancing of various institutional and prudential considerations on a case-by-case basis. Nevertheless, I believe that the same principles of responsible law enforcement against which I have elsewhere measured the Reagan Justice Department's civil rights record are equally pertinent in the present context. The foregoing hypothetical may be analyzed as follows in terms of those ten principles (my previous exposition of which[25] is reprinted as an appendix to this essay).

The first and most important principle of responsible law enforcement is respect for the law.[26] Since the hypothetical under consideration assumes that the prior administration's position was inconsistent with the controlling case law, this principle points strongly in favor of changing the government's position.

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tion, nonmutual collateral estoppel is not available against the government. United States v. Stauffer Chemical Co., 464 U.S. 165, 173 (1984) (defensive estoppel) (dictum); United States v. Mendoza, 464 U.S. 154, 159-63 (1984) (offensive estoppel).

23. *See* Selig, *supra* note 1, at 795-817 (discussing Reagan administration actions regarding school desegregation, including actions in Kansas City, Kansas, and Beaumont, Texas, cases).

24. *See, e.g.,* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (liability) (articulating presumptions regarding impact and intent); Davis v. Board of School Comm'rs, 402 U.S. 33 (1971) (remedy) (mandating consideration of busing); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (remedy) (approving busing).

25. Selig, *supra* note 1, at 790-95 (reprinted *infra* as an appendix).

26. *See* Selig, *supra* note 1, at 790-91 (respect for the law).

Occasions on which one can rightly say that the Justice Department's position has been inconsistent with the governing law as declared by the Supreme Court should be rare indeed. Unfortunately, such occasions were not so rare in the Reagan administration, particularly in the school desegregation area, where the Department refused to apply a number of Supreme Court decisions with which it disagreed.[27] For this reason, there may be a number of cases facing the next administration in which proper respect for the law requires a change in the government's position. In other cases, however, it may not be so clear that the prior administration was ignoring clearly defined legal mandates.

The present hypothetical also may be one in which the prior administration's position raises questions concerning a fair and proper regard for the relevant facts and circumstances.[28] The prior administration may have concluded that grades 1-2 could not be desegregated without endangering the health or safety of the students involved; that mandatory desegregation measures either were infeasible or were unnecessary because voluntary measures would achieve the necessary results; or that application of the controlling evidentiary presumptions[29] would lead to the conclusion that certain schools were not unlawfully segregated.

The prior administration's conclusions on these factual (or mixed legal and factual) questions may have been plainly erroneous, influenced by its distaste for the applicable legal standards and its policy against mandatory desegregation. On the other hand, its conclusions in any particular case may have been correct. The duty of the new administration would be to evaluate these conclusions fairly and dispassionately and to reach its own objective conclusions. If it sincerely believes that the prior administration's conclusions were clearly incorrect, then a change of position would be indicated. If it agrees with the prior factual conclusions, and if the prior position did not misapply the law, then no change would be indicated. In cases where the facts may be evaluated fairly in more than one way, appropriate humility and self-restraint[30] should also enter into the equation. In some cases self-restraint might lead the new administration to leave well enough alone if the question is close even though it might have decided the question differently as an original matter. It may be that, in a particular case, neither a more aggressive nor a less aggressive approach would be inconsistent with principles of responsible law enforcement, and the final

27. Selig, *supra* note 1, at 807-11 (discussing Reagan administration's refusal to apply *Keyes,* 413 U.S. at 189 (articulating presumptions regarding impact and intent), *Davis,* 402 U.S. at 33 (mandating consideration of busing remedy), and *Swann,* 402 U.S. at 1 (approving busing remedy)). *See also* Selig, *supra* note 1, at 816 (discussing Reagan administration's refusal to apply settled law of Fifth Circuit in case in Fifth Circuit).

28. *See* Selig, *supra* note 1, at 791 (regard for the facts).

29. *See Keyes,* 413 U.S. at 201-03 (presumption regarding impact); *id.* at 208-09 (presumption regarding intent).

30. *See* Selig, *supra* note 1, at 794 (self-restraint).

decision would be a discretionary one that could go either way. Since certain factual issues may be more ambiguous than certain legal issues, such cases may well arise, and a new administration may be more reluctant to change the government's position in such cases.

Assuming that the prior administration's position was inconsistent with either the governing law or the relevant facts, would considerations of institutional continuity[31] and historical continuity[32] nevertheless counsel against changing the government's position? To the extent that the question involves the prior administration's refusal to apply the governing law, the answer would be negative. This would be a situation in which there really is a difference between the Reagan administration's refusal to fulfill its obligation to enforce the law and a new administration's willingness to fulfill that obligation. Although the new administration would be breaking continuity with the Reagan administration in this respect, it would also be restoring the institutional and historical continuity with previous administrations, both Republican and Democratic, that the Reagan administration had shattered. On this kind of issue — respect for the law as declared by the Supreme Court — it would be neither partisan nor nonneutral to conclude that considerations of institutional and historical continuity favor a change in the government's position, even though some expectations created by the prior administration may be disappointed and great care must be taken to ensure that the change is not perceived as political in nature. The situation here is to some degree analogous to a recent case in which the Supreme Court reversed itself on a commerce clause issue. The circumstances there were that the nine-year-old precedent which the Court overruled had itself represented a substantial break with institutional and historical continuity. The Court's recent reversal of position had the effect of restoring the continuity it had previously abandoned.[33]

To the extent that a possible reversal of position is based on a differing view of the facts of the case, considerations of institutional continuity in general and fairness to defendants in particular may weigh more heavily than if the reversal were based upon a return to the application of proper legal standards. When the prior administration's factual position was plainly erroneous or even motivated by improper considerations, the need to correct the government's position may be more important than the dangers of a break in continuity. When the question is closer, institutional continuity is an additional consideration that may point in the direction of forbearance even in the face of doubts as to the correctness of the prior administration's determination.

31. *See id.* at 791 (institutional continuity).

32. *See id.* at 792 (historical continuity).

33. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (application of Fair Labor Standards Act minimum wage and overtime requirements to state or local governments does not exceed congressional power under commerce clause, regardless of whether requirements are applied in areas of traditional governmental functions), *overruling* National League of Cities v. Usery, 426 U.S. 833 (1976) (application of same requirements to state or local governments in areas of traditional governmental functions exceeds congressional power under commerce clause).

The application of other law enforcement principles to the present hypothetical may be discussed more briefly. It would be consistent with appropriate priorities[34] to change the government's position to accord with the governing law as applied to the pertinent facts of the hypothetical case, since the case is still in litigation and it is important that it be resolved successfully by the complete desegregation that the law requires. It would also contribute to the Department's positive public image[35] to return to a posture of proper respect for the law and proper regard for the facts. Care must be taken, however, in applying the public image criterion in present circumstances, because it may conflict with another relevant criterion. The public image of the Reagan Justice Department has been so impaired by a combination of unique circumstances that it may be tempting to conclude that any change in a questionable position or any break with the past eight years is *ipso facto* desirable. The danger, however, is that changes of position may in fact be, or may come to be perceived by the public and the courts as if they were, reflexive, political, and unjustified by a careful and professional evaluation of the law and the facts. There would be no more wisdom in assuming that every position adopted by the Reagan Justice Department was incorrect than there was in what sometimes seemed like the Carter administration's assumption that every foreign policy position formulated by its predecessor was pernicious, or the Reagan administration's assumption that every Carter administration policy was inherently suspect. Reversals of position based on such unwarranted assumptions may be inconsistent with the separation from politics[36] that is an essential prerequisite of responsible law enforcement.

Proper utilization of institutional strengths[37] would include careful attention to the recommendations of experienced career attorneys on whether to change the government's position in any particular pending litigation. Such input would help place a check on any inclination of political appointees to change positions reflexively, for political purposes, or in unthinking response to interest group pressures. The importance of self-restraint[38] has already been mentioned in connection with revisiting close factual questions. In another context, where the question involves a voluntary desegregation plan offered or formulated by the prior administration, appropriate humility and self-restraint may in some cases indicate the desirability of trying such a plan as an initial step before resorting to more drastic alternatives even if there is a basis for doubting that the voluntary plan will be effective. Such judgments should be made on a case-by-case basis, and they also should include consideration of the costs in disruption of first implementing a voluntary plan which subsequently will have to be replaced by a mandatory one. This kind of case-specific judgment would normally be made

34. *See* Selig, *supra* note 1, at 792 (appropriate priorities).
35. *See id.* at 792-93 (positive public image).
36. *See id.* at 793 (separation from politics).
37. *See id.* at 793-94 (utilization of institutional strengths).
38. *See id.* at 794 (self-restraint).

in any event even if no question of a change in the government's position were involved. There may be cases in which the new administration would choose to proceed with a voluntary plan proposed by the prior administration even though that particular plan might not have been the new administration's preference as an original matter. Such an approach could include a mandatory back-up plan that is fully formulated and available for prompt implementation or, at a minimum, a reservation of the right to press for additional relief if the voluntary plan proves insufficiently effective. In making these kinds of choices, the goal of promotion of peace[39] as opposed to discord may point toward one decision in one case and toward a different decision in another.

The school desegregation hypothetical just reviewed at length may in many circumstances be an easy one to resolve in favor of changing the government's position. Another example that may be similarly easy to resolve is the employment discrimination case discussed in the previous section, with the modification that relief had not yet been formulated during the Reagan administration either through a consent decree or through contested litigation. The government's position in pre- and post-suit negotiations might have been that a proper decree could not include any relief in the form of quotas or goals and timetables, but no settlement had been concluded and the court had not entered a litigated decree.

In this situation it would seem that the government could appropriately abandon the Reagan administration's hard-line anti-affirmative action position, which was based both on an incorrect reading of the law that the courts have clearly rejected and on an extreme and ill-advised policy.[40] A position that is willing to seek quota relief in appropriate circumstances would be far more responsive to the law and to the facts of a particular case than the prior administration's blanket refusal to seek such relief under any circumstances. As in the school desegregation example, such a change in position would restore long-term institutional and historical continuity even though it would create a discontinuity with the uniquely discontinuous approach of the Reagan administration. There would be no unfairness to a defendant in withdrawing a settlement position which was available to it under the prior administration but of which it failed to take advantage. In appropriate cases no other principle would weigh against a change of position.

There may, however, be cases in which the government would encounter difficulties either because the Reagan administration's anti-affirmative action position had been communicated to the court in con-

39. *See id.* at 794-95 (promotion of peace).

40. *Compare* Reynolds, *supra* note 2, at 1014-21 (discussing the law and Reagan administration actions regarding quota remedies) *with* Selig, *supra* note 1, at 821-29 (same) *and* Selig, *supra* note 3, at 440-42 (same) *and* Selig, *Affirmative Action in Employment: The Legacy of a Supreme Court Majority,* 63 IND. L.J. 301 (1988) (analyzing and evaluating Supreme Court cases) *and* Selig, *Affirmative Action in Employment After* Croson *and* Martin: *The Legacy Remains Intact,* 63 TEMP. L. REV. 1 (1990) (same).

nection with settlement negotiations or, in the most problematic situation, because remedy hearings had already been held, briefs filed, and the case taken under submission during that administration. In the latter case the new administration would need to file a supplemental brief explicitly changing the government's position, seeking relief different from or in addition to that previously requested, and explaining to the court why it is doing so. Additional remedy hearings might become necessary, and the government would need to persuade the court of the correctness from a legal, equitable, and remedial standpoint of its new, more stringent position. In some cases, under some circumstances, with some judges, it might be very difficult for the government to meet such a burden of persuasion. If so, prudential or strategic considerations may counsel against a change in position or, at a minimum, affect the scope and degree of any change the government seeks to make in its relief request.

This last point may be of crucial importance in many cases in a variety of contexts. There may be no legal barrier to a particular change in position in pending litigation. There may be no institutional concern or other principle of responsible law enforcement that counsels against a change in position, or there may be concerns pointing in opposite directions but the balance may favor a change in position. Nevertheless, when the change is one that will have to be explained to a court and when the court will have to be persuaded or at least not offended, an additional and powerful prudential consideration comes into play as a check on overzealousness by a new administration. The more compelling the reasons that may be articulated for the government's change in position, the less likely the court will view the change as politically motivated. The less compelling the reasons that may be advanced, the more likely the government will suffer a loss of credibility with the court, not only with regard to the issue on which it has changed position, but possibly with regard to its entire case. Needless to say, a court is more likely to be persuaded, or at least less likely to be offended, by a change in position that restores an approach taken through several prior administrations but abruptly abandoned by the Reagan administration, than by a change that simply takes a more aggressive position on a previously untested issue of fact or law.

In many other situations the acceptability of a change in position may depend in substantial part on how advanced the litigation is at the time the change is made. Last-minute changes present problems of fairness and credibility more severe than changes made at an earlier stage. Similarly, the more clear the error of the prior administration's position, the stronger the argument for change; the more debatable the issue, the greater the likelihood that discretion may be the better part of valor, suggesting that the more aggressive approach be saved for a new case in which the extra burden of changing position is not involved. Of course, the danger that an adverse legal precedent may be set if the position is not changed in the pending litigation would also need to be taken into account.

Other circumstances may be hypothesized in which the government probably should not change its position even if it is legally free to do so, or in which the new position probably should be more moderate — less at odds with the former position — than it might be in a case where a different position had not been advocated previously. As already indicated, the government should be more reluctant to change positions on factual issues where reasonable people may differ, as compared to issues on which the prior administration was plainly wrong in its view of the facts or the law. Certainly, the government should not simply change its positions willy-nilly for political reasons.

There may be cases in which a new administration should restrain its desire to allege additional violations by a defendant or to expand upon the theories of liability it advocates, even if it is legally free to do so and could persuade a court to allow it to do so. Considerations of institutional continuity and fairness to the defendant, appropriate priorities, positive public image, and self-restraint all may suggest that the novel theory of liability be saved for a new case or cases, or that the additional arguable violation not be pursued in the case of this particular defendant. In other cases, of course, the balance of considerations may suggest the opposite conclusion. The same considerations may be applicable to some decisions whether to be more rather than less aggressive with regard to remedies sought in pending cases, assuming that there is room for discretionary choices between remedial strategies each of which would be sufficient to satisfy minimum legal requirements.

A new administration may inherit pending cases that it would not have brought in the first place but which it cannot simply drop without raising serious concerns about institutional continuity, the effect on the Department's public image, or reliance interests on the part of the victims of the allegedly unlawful practices. No doubt there were many Civil Rights Division cases that (like some antitrust cases) the Reagan administration would not have initiated and would have liked to have dropped, but instead continued out of concern for the furor that otherwise would have been created, and perhaps out of other concerns as well.[41] The next administration will probably find far fewer cases that the Reagan Justice Department brought and that it would not have brought, but it may find some, such as, for example, "reverse discrimination" cases,[42] low impact housing discrimination cases,[43] or housing cases challenging "integration maintenance" quotas.[44]

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41. *See, e.g.,* Selig, *supra* note 4, at 478-82, 484-88 (discussing cases challenging racially exclusionary municipal practices under Fair Housing Act).

42. *See, e.g., In re* Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492, 1501 (11th Cir. 1987) (United States estopped from collateral attack on consent decrees to which it is signatory), *aff'd on another issue sub nom.* Martin v. Wilks, 109 S. Ct. 2180 (1989).

43. *See, e.g.,* Selig, *supra* note 4, at 448-50, 450 n.18 (describing reorientation of Civil Rights Division fair housing litigation priorities in Carter administration).

44. *See id.* at 450 n.18 (integration maintenance cases low priority in Carter administration). Integration maintenance quotas apportion available housing units on a racial basis for the purpose of preserving a stable level of integration.

The Reagan administration filed and has so far prevailed in a suit challenging integration maintenance housing quotas implemented by a defendant (Starrett City Associates) whose practices the Carter Justice Department had decided it would neither challenge nor support,[45] and at this writing a petition for certiorari is pending in that case.[46] The integration maintenance issue is a difficult one that can be argued responsibly both ways, because it is not entirely clear which position better serves the goals of the Fair Housing Act[47] and the needs of the groups the legislation was designed specifically to protect. Indeed, in this kind of case there appears to be some tension between the broader goals of the Fair Housing Act and the immediate interests of some minority persons in access to housing on a nondiscriminatory basis. Moreover, in any particular case integration maintenance may be more or less appealing depending on the nature of the quota and the factual context in which it has been imposed.

The Second Circuit's opinion in the Starrett City case can be viewed as limited and fact-bound, and the new administration may agree with, or have no serious disagreement with, the court of appeals' decision. On the other hand, the new administration may agree with Judge Newman's eloquent dissent.[48] In the latter event, the government would nevertheless need to think long and hard before attempting to drop a suit in which a district court and a court of appeals have found the defendant to be in violation of the Fair Housing Act. It would be extremely difficult to justify taking such an action even if it were legally possible to do so, and even if private plaintiffs or intervenors were disabled by the settlement of a prior class action from vitiating the effect of a dismissal of the government's suit.[49]

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45. The author participated in the Carter administration's decision.

46. *See* United States v. Starrett City Assocs., 840 F.2d 1096 (2d Cir.) (regardless of integration maintenance motivation, rigid 22% black and 8% hispanic quotas of indefinite duration restricting minority access to scarce and desirable rental accommodations violated Fair Housing Act), *cert. denied,* 109 S. Ct. 376 (1988), *aff'g* 660 F. Supp. 668 (E.D.N.Y. 1987). This essay was written in August, 1988. The Supreme Court denied certiorari in the Starrett City case on November 7, 1988. *Starrett City,* 109 S. Ct. at 376.

47. 42 U.S.C. §§ 3601-3619 (1982) (Title VIII of Civil Rights Act of 1968) (prohibiting discrimination in residential housing).

48. *Starrett City,* 840 F.2d at 1103 (Newman, J., dissenting) (Fair Housing Act not intended to prohibit race-conscious rental policy that promotes integration, but in any event Starrett City should have had opportunity to prove quotas were necessary to prevent integrated housing complex from becoming segregated).

49. *See id.,* 840 F.2d at 1105 (Newman, J., dissenting) (noting settlement of private class action challenging Starrett City's integration maintenance quotas). *But cf. id.* (Justice Department suit filed one month after private class action settlement to force Starrett City to abandon policies that have enabled it to maintain racial integration raises substantial question as to government's commitment to integrated housing). *See generally* Bob Jones University v. United States, 461 U.S. 574, 585 n.9, 599 n.24 (1983) (Supreme Court appointed private attorney as amicus curiae to defend denial of tax exemptions to racially discriminatory private schools after government changed its position and asserted Internal Revenue Service lacked statutory authority to deny such exemptions); Selig, *supra* note 1, at 817-21 (criticizing Reagan administration's change of position in *Bob Jones*).

Putting to one side the question of attempting to drop the government's suit, and continuing to assume hypothetically that the new administration is unhappy with the Second Circuit's decision, the response to the petition for certiorari will be filed by the Reagan administration, and the new administration may choose to take no further action unless certiorari is granted. In that event, still assuming hypothetically that it disagrees with the prior administration's position and the Second Circuit's decision, the new administration may choose to adopt a position that occupies a middle ground on the legal issue and perhaps even supports the result in this particular case, rather than to effect a complete reversal of the government's position in the litigation. In deciding how to proceed, the new administration should not limit its review to the abstract legal issue or even to the application of its view of the law to the facts of this particular case, but should carefully consider all relevant principles of responsible law enforcement, including those addressed to institutional and historical continuity, humility and self-restraint, and maintaining a positive law enforcement image.[50]

One final series of hypothetical situations should be mentioned. These relate to questions of declarations of unitariness,[51] releases from court supervision, and approvals of "retrogressive" student assignment plans,[52] in situations where the status of the legal proceeding is such at the time of the new administration's accession to office that the government is not necessarily legally bound by the position taken by the prior administration. As previously noted, the questions raised can be difficult both factually and legally, and the applicable legal standards have not yet been definitively established.[53]

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50. *See* Selig, *supra* note 1, at 817-21, 832-33 (criticizing Reagan administration's changes of position in Supreme Court in *Bob Jones* (IRS did not exceed its authority in denying tax exemptions to racially discriminatory private schools), Plyler v. Doe, 457 U.S. 202 (1982) (Texas' denial of free public education to children of undocumented aliens unconstitutional), and Washington v. Seattle School District No. 1, 458 U.S. 457 (1982) (Washington's anti-busing initiative unconstitutional)).

Former Attorney General Griffin B. Bell has related the following anecdote from his service in the Carter administration:

> [Bell:] [T]he staff people got the President to sign an option paper on a question involving a case pending in the Supreme Court. I was directed to change the position of the government from a position that the former Administration had taken. I went to see the President and explained to him that you do not change a position in court absent a change in the law or the facts, that there had been no change in the law or facts; therefore, I could not change the position of the government. He said, "I do not understand all that, but if you say that is what it is, it is fine with me; just forget about the option paper I sent over there."

D. MEADOR, THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE 87 (1980) (transcript of conference at University of Virginia, Jan. 4-5, 1980).

51. *See* Landsberg, *supra* note 21, at 812-13 (discussing denotations and connotations of "unitariness").

52. A retrogressive student assignment plan is one that increases the level of racial separation from the reduced level achieved under a desegregation plan. *See* Landsberg, *supra* note 21, at 801 ("a plan of student assignment which, while arguably not adopted with discriminatory intent, significantly increases the number of minority students attending one-race schools").

53. *Compare* Landsberg, *supra* note 21 (discussing the issues) *with* Beard, *supra* note 21 (same).

Various issues may arise in various procedural contexts. A motion for a declaration of unitariness, release from court supervision, or approval of a retrogression plan may be pending but not yet acted upon, the Reagan administration may have taken a formal position on the motion, and the new administration may need to decide whether to withdraw the government's previous response to the school board's motion or to withdraw the government's motion. Alternatively, motions may not yet have been filed, but the Reagan administration may have notified the school board formally of the government's proposed position; or the school board may have taken actions based on informal communications regarding the government's position, and may or may not have submitted proposed revisions in the student assignment plan to the court for approval. In some cases a revised student assignment plan or release from court supervision may be expected to result in no or a relatively insignificant increase in racial separation; in other cases, substantial retrogression may be anticipated.

Each situation may be different, and many may present very real tensions between a proper application of the law to the facts and, on the other hand, the expectations of school boards and patrons based in part on assumed institutional continuity. In addition, legitimate expectations of school boards and others for continuity with the Reagan administration's position may conflict with equally legitimate expectations of minority patrons for a review of the applicable law and facts from a standpoint more sympathetic to their rights and interests and more consistent with the Department's approach to such matters under other administrations. In weighing the pertinent law enforcement considerations, it would be relevant to ask whether the legal and factual questions are close and difficult as opposed to clear and obvious; whether the issues are worth reopening as a matter of appropriate priorities and from the standpoint of promotion of peace rather than discord; what the impact of reopening the issues might be on the Department's public image and on the perception and the reality that it is operating on a nonpolitical basis; and what the likelihood is that the court could be persuaded to adopt the new administration's changed position on the matters in question. One can imagine cases in which it would be fairly clear that the proper course is to leave well enough alone, and others in which it would be fairly clear that the prior administration's action was indefensible, will have significant impact, and should be set right if at all possible. Other cases falling between the two extremes may call for decisions of substantial difficulty.

IV. CONCLUSION

In any given case it may or may not be objectionable for a new administration to change the prior administration's position in pending litigation. The totality of the circumstances must be considered in evaluating each instance of such conduct. In addition, while each change of position must be analyzed on its own merits, it is also relevant to consider the overall pattern of a new administration's actions in this

regard, because the pattern as a whole as well as each individual action has an impact on the Justice Department's overall posture as a responsible law enforcement agency.

The same standards used in analyzing the Reagan Justice Department's record should be applied in evaluating other administrations. Standards are available to guide the Department's conduct, but a mechanical formula for decisionmaking is not and cannot be available. In the final analysis, what is required is the exercise of good, sound, responsible judgment on a case-by-case basis. In the civil rights area as in other spheres of Justice Department responsibility, the first priority of the new administration should be to insure that men and women of integrity, intellect, experience, judgment, and fidelity to the rule of law are in a position to make the necessary decisions, and to instruct them to act on a nonpolitical basis, without ideological blinders of the left or right, without fear or favor, and pursuant to principles of responsible law enforcement. If this priority is fulfilled, then the new administration will have taken the essential first step toward the goal that the decisions made, including those on which reasonable people may differ, will enhance rather than undermine public confidence in the administration of justice.[54]

54. The post of Assistant Attorney General for Civil Rights was vacant for more than a year after the Bush administration took office. President Bush's nomination of William Lucas, whose selection to be nominated was announced by Attorney General Thornburgh on February 24, 1989, was rejected by the Senate Judiciary Committee on August 1, 1989. Wash. Post, Feb. 25, 1989, at A3, col. 4; *id.*, Aug. 2, 1989, at A1, col. 1. John R. Dunne, nominated on January 25, 1990 and confirmed on March 9, 1990, entered on duty on April 2, 1990. Telephone interview with Mr. Dunne's office (Apr. 13, 1990). During the lengthy interim period, Deputy Assistant Attorney General James P. Turner, a career Civil Rights Division attorney, served as Acting Assistant Attorney General.

Appendix

The following excerpt is reprinted from Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong,* 1985 U. ILL. L. REV. 785, 790-95 (1986), by permission of the author and the Board of Trustees of the University of Illinois.

III. PRINCIPLES

The radicalism of the Reagan approach is reflected in the degree to which the Civil Rights Division in this administration has departed from ten important principles of responsible law enforcement. Whatever view one takes on substantive policy issues, the validity of these principles should not be controversial from an administration of justice standpoint. Although these ten principles are not an exhaustive catalogue, they define the most significant shortcomings of the Reagan record.

A. Respect for the Law

The foremost duty of the Department of Justice is to enforce the law as declared by Congress and the courts. The Department does play a significant role in the development of legal precedent, and it can and should pursue its vision of proper legal policies and standards. Its discretion in this regard, however, is circumscribed by binding legislative and judicial determinations. Any administration properly may attempt to persuade Congress or the courts to change the law to bring it more in line with that administration's policy preferences. The Department of Justice, however, is not free to decline to enforce existing law merely because of disagreement with it. Fundamental precepts of separation of powers and executive branch duty preclude any claim of discretion to ignore the law. When the Department is responsible for enforcing statutory rights, it should give a fair reading and reasonable deference to congressional intent. When the Supreme Court has ruled on the meaning and impact of statutory or constitutional provisions which the Department must enforce, the Department should give full scope and effect to the Court's decisions. The Department also should support the actions of the lower

courts when these courts effectuate pertinent statutes or Supreme Court decisions, whether or not those laws or decisions are popular with any particular political constituency.

B. Regard for the Facts

The Department should apply the law in any given case with a fair and proper regard for the relevant facts and circumstances. The Department's law enforcement role does not grant it the license for biased factual analysis and argument enjoyed by private litigants. Decisions regarding the existence, nature, and scope of prosecutable violations, and the necessity or appropriateness of particular remedies, should derive from an objective view of the facts of the case. Although the Department may choose among reasonable conflicting factual interpretations and can and should use its best judgment in evaluating and presenting the facts to the courts in a persuasive fashion, a high standard of fairness and objectivity should govern the Department's discretion in this regard. Of course, no litigant should distort the facts or attempt to mislead the courts or opposing parties, but these strictures apply with special force to the legal representatives of the United States. If the Department ignores the facts to achieve particular results for ideological or other reasons, then it fails in its obligation to give proper weight to the rights and interests of all citizens affected by its actions.

C. Institutional Continuity

Within the bounds of proper respect for the law and regard for the facts, different administrations generally are free to pursue different legal interpretations and programmatic strategies. However, such freedom should be restrained to some degree by the demands of institutional continuity and consistency. These demands are especially strong in the context of ongoing litigation. A decision to apply standards in the prosecution of new cases which differ from those applied by a previous administration is quite distinct from a decision to apply different standards in pending litigation so as to alter the basic thrust of the Department's prior positions. Shifts of position in pending litigation undermine the public's and the courts' perception of the Department as a law enforcement agency; the result is damage to the Department's prestige and effectiveness. Changes of position also may be unfair both to defendants and to victims who look to the Department for redress of legal violations. Whether the need for continuity precludes a particular position in a particular case is a matter of judgment. But the Department must make responsible judgments on shifts in position; otherwise its cases and the people affected by them become mere political footballs, or objects of experimentation and manipulation rather than of legitimate law enforcement.

D. Historical Continuity

Although historical continuity may be more intangible than institutional continuity, the concept is nevertheless of substantial importance. The Department should not make discretionary law enforcement choices in an historical vacuum. When considering departures from the policies or legal interpretations of prior administrations, the Department should know when it is too late to make certain changes responsibly, absent legislative or constitutional revision. Some legal interpretations and law enforcement policies are so settled as to give rise to significant reliance interests on the part of citizens, the Congress, and the courts. These reliance interests may be so substantial that attempts to disturb them would be irresponsible, even if a strong argument exists that the earlier decisions were mistaken. Considerations of historical continuity also should affect the Department's basic definition of its role in law enforcement. Historical continuity is especially relevant in the case of the Civil Rights Division, which, although it is not the property of the civil rights movement or any other constituency, has played a distinctive role in the nation's legal and social history. Those responsible for determining the Division's current posture and direction should not ignore its singular history.

E. Appropriate Priorities

Each administration must establish priorities for allocating limited law enforcement resources. Although incremental adjustments in priorities based on executive policy determinations are legitimate, decisionmakers should establish priorities within the parameters set by the Attorney General's statutory obligations. For example, the Antitrust Division may not appropriately close its eyes to illegal vertical price fixing simply because it believes that enforcement of the law in that area is either contrary to sound economic policy or of lower priority than other aspects of its responsibilities.[17] The same is true with regard to the panoply of civil rights laws that the Attorney General statutorily must enforce. Similarly, when determining the focus of its enforcement efforts, the Department cannot ignore legislative assumptions concerning those efforts reflected in the underlying statutory grants of enforcement authority.

F. Positive Public Image

The image the Department projects to the world at large can have a significant impact on its effectiveness as a law enforcement agency and

17. *But see* Wash. Post, Aug. 13, 1982, at A1, col. 1 ("[Ass't Att'y Gen. William F.] Baxter, chief of the Justice Department's Antitrust Division, said in an interview that he agrees . . . these pricing agreements are illegal and may result in higher costs to consumers. But since he has other reasons for believing that the laws against this form of price setting don't make good economic sense, Baxter said he will only enforce them in special cases.").

should be an important concern of the political appointees whose actions and pronouncements shape that image. The desired image should be a positive one, emphasizing commitment to aggressive and even-handed law enforcement. Such an image encourages citizen cooperation and a receptive forum in the courts, thereby generating information on prosecutable violations and enhancing the prospects for success in government litigation. A positive, aggressive image also fosters voluntary compliance by potential violators, a factor of considerable importance in view of the limited resources of the Department. Just as an image of positive commitment produces a valuable deterrent effect, an image of lack of commitment to the enforcement of certain laws invites violations of the law and noncompliance with outstanding court decrees, thus generating enforcement problems no administration should welcome. In the civil rights area, if the Department conveys an image of opposition to the law as declared by Congress and the courts, it lends an aura of legitimacy to negative racial attitudes and renders aid and comfort to the opponents of racial progress. Of course, the Department should not exalt image over substance, nor should it devote undue attention to the appearance as opposed to the reality of its activities. But image does have an impact on the Department's ability to accomplish its mission, and those whose duties include presenting the Department's policies to the public should take care to cultivate a positive image.

G. Separation from Politics

The Department should eschew politics in all its law enforcement activities. It represents all citizens of the United States and should be irreproachably nonpartisan in its relationships to all persons affected by its actions. Decisions on whether to initiate litigation, on what terms to settle cases, and on what positions to take in court should be made without regard to the political affiliation or the constituency status of those whom the decisions may benefit or burden. In performing its law enforcement function, the Department's duty does not include representing any administration's partisan political agenda. The Department's client is the law and the public interest. The views of judges, attorneys, and citizens with whom the Department deals span the political and ideological spectrum, and the Department should not curry favor with anyone, or disserve anyone's interests, because of such considerations. Although no administration has been entirely pure in this or any other respect, the importance of the point cannot be overemphasized. Every enforcement decision the Department makes should depend solely on the relevant law and facts, and not on extraneous political or ideological considerations.

H. Utilization of Institutional Strengths

The presidential appointees who populate the upper levels of the Department have at their disposal the advice and talents of the cadre of

career attorneys, including supervisors, who perform the day-to-day work. These attorneys can make available to a receptive Assistant Attorney General the strengths that their experience and institutional traditions provide.[18] The expertise of these attorneys is available to all administrations. Each transient administration has a reciprocal obligation to preserve and build on the inner strengths and external prestige accumulated by the Department over longer time periods. When the political leadership of the Department treats career attorneys and the traditions to which they are devoted with respect, it will enjoy benefits that cannot be derived from an occupation army mentality. Although career attorneys may disagree with certain policies of an administration, they can and will assist in implementing those policies that remain within the bounds of allowable discretion. The moderating influence of professional law enforcement officers is an essential ingredient to the success of any administration. To the extent that an administration regards career attorneys as the enemy, its stewardship of the Department will be compromised.

I. Self-Restraint

Humility and self-restraint play an important role in law enforcement. When confidence in one's policy preferences rises to the level of arrogance, as may occur when ideology is excessively prominent, the result may be a failure to appreciate many of the salutary principles outlined here. Regardless of an administration's preconceived views as to what the policy and content of the law should be, the political leadership is bound to go astray if it is unable seriously to consider that the contrary views of others, including the courts, might be correct. The political leadership of the Department should not reflexively assume that it possesses judgment superior to that of its predecessors in office, particularly when the independent federal judiciary has adopted those predecessors' views. Ideological arrogance also may create indifference to the inescapable factual or legal context of a particular case, and thereby lead to the pursuit of unsupportable positions that the courts will never adopt.

J. Promotion of Peace

In the area of civil rights, the Department of Justice should be a tiller of racial peace, not a sower of racial discord. This does not mean that it should fail to enforce the law because some persons may be upset by such activity, or that it should refrain from trying to persuade the courts to change the law simply because such efforts may be controversial. However, the Department's enforcement program should be designed to make an enduring contribution to racial harmony and pro-

18. For a discussion of the traditions of the Civil Rights Division, see *supra* text accompanying notes 3-16.

gress, not to align the government with one racial group as opposed to another or exploit the racial divisiveness that still exists in our society.

K. Other Principles

The foregoing discussion does not present an exclusive list of all principles of responsible law enforcement. Other desiderata would include, for example, talent, budget, quality work product, and efficient management. The above ten principles, however, serve as a partial blueprint for any effective law enforcement program. The remainder of this article discusses the extent to which the Reagan administration has followed a different blueprint in the civil rights area.