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Part II. Discussion Summary

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PART II. DISCUSSION SUMMARY

A. *Criticisms of Present Commission Practices*

Much of the Saturday morning discussion focused on the performance and policies of the New York State Commission for Human Rights. As one of the speakers noted, this was the penalty for being the oldest and the best. Much of the criticism appears in the papers presented by Messrs. Hill and Rabkin; Mr. Henry Spitz, General Counsel of the New York State Commission, devoted much of his talk to responding to these criticisms.

As appears from the papers printed herein, the state commissions were criticized for an alleged failure to articulate standards for the finding of probable cause or lack thereof, for the widespread use of conciliation, and for delay. Throughout these criticisms ran a feeling, often made explicit, that these commissions were excessively timid, unwilling to move aggressively, and too reluctant to move at all without very strong legal support. The participants seemed generally agreed that, as put by Mr. Madison S. Jones, Executive Director of the New York City Commission, these commissions must be aggressive. Mr. Jones added that such aggressiveness is necessary regardless of whether there seems to be strong legal support for the position to be taken.

Mr. Rabkin elaborated the criticisms in his paper by stressing that very often members of the minorities who are to be protected under antidiscrimination laws have a basic skepticism about whether authority and the state will, in fact, come to their aid. It is this skepticism toward which the commissions should now address themselves rather than to the predictions of dire results coming from employers, real estate operators, etc., whose rights to discriminate are being curtailed by such a law. He also suggested that the commissions lay bare their method of investigation to the complainant in order to overcome the complainant's basic skepticism. Overall, Mr. Rabkin felt that an FEP commission should consider itself a law enforcement and policing agency, rather than a judicial body whose primary job is to hold hearings and give impartial answers.

Mr. Spitz rejected many of these criticisms as baseless and uninformed. As to zeal and initiative, he pointed out that despite the legislature's failure to grant the New York State Commission power to initiate investigations, the Commission had initiated over 1000 such investigations. Marvin Karpatkin, Esq., representing the American Civil Liberties Union and a volunteer attorney for CORE expressed surprise at the figure, noting that there were many instances in his own experience where an industry-wide investigation utilizing creative techniques, such as the extensive compulsory questionnaires used by the Federal Trade Commission to ferret out illegal anti-trust practices in an entire industry, would have disclosed considerable evidence of discriminatory practices and patterns.

Mr. Spitz also noted Professor Jaffe's comment that courts have been unsuccessfully struggling with definitions of probable cause for over 500 years.

Mr. Rabkin retorted that he was only seeking some clarification of the standards by which the Commission decides to process some cases and not others.

Mr. Spitz added that once probable cause is found and no settlement is achieved, the Commission *must* notice the case for a public hearing. He personally deplored the absence of discretion in cases which perhaps should not have gone to Court. Mr. Rabkin stressed, however, that he was talking about discretion with respect to the finding of probable cause.

Complainants, moreover, continued Mr. Spitz, are always given a written explanation by the investigating commissioner for the findings on probable cause and these decisions can be appealed to both the Commission Chairman and the courts. Mr. Rabkin replied that he found these written explanations uninformative.

As for any alleged delay, Mr. Spitz stated that all cases noticed for public hearing are thoroughly prepared on the law and the facts, and he pointed to several recent setbacks suffered by other commissions and voluntary organizations where an adverse result had followed hasty preparation. He stated that the Commission has not lost a single litigated case in all of its nineteen years of existence. Mr. Rabkin replied that sloppiness was not a necessary incident to speed. Moreover, most respondents will not resist vigorously if the Commission moves quickly to enforce a complaint. He also observed that civil rights groups often looked to the speed with which the action was taken as an index of the agency's zeal.

In support of the need for speed, Mr. Karpatkin noted that complainants often were very discouraged by both the delay in action and the fact that while the complaint is being processed, the complainant is unable to learn anything about its progress. He described one case of a clear-cut housing violation, where delays which were not explained to the complainants—and were perhaps not explainable—resulted in direct action: sit-ins, arrests for trespassing, and heated Criminal Court proceedings, all of which could have been avoided had the Commission proceeded with dispatch; and if for any good reason the Commission could not have proceeded with dispatch, it should have found some way to communicate this to the community civil rights group, together with some reasonable assurance as to when an order would be issued.

Mr. Spitz denied these charges and said that the commissioners and staff are always available to advise complainants of the progress of their cases.

At the afternoon session, New York State Commissioner J. Edward Conway declared that some proceedings simply cannot be speeded up. Thus, in one case involving the Ironworkers Union, the matter was almost settled several times, but each time there was a change in union leadership and it was necessary to begin again. Finally, a public hearing was started.

Mr. Spitz concluded his response with some comments on conciliation standards. He noted that although there were no standards for conciliation agreements in the statute, the Commission tried to have respondents accept all

that they might have to accept after a full public hearing. In elaboration of this, Commissioner Conway stressed that conciliation did not mean bargaining. Thus, where investigation shows either probable cause of a violation or a clear violation the Commission informs the respondent of its terms, and as to these there is no bargaining. There could be some leeway with respect to what constitutes affirmative action to comply with the statute, depending on the situation.

B. *Possible Improvements*

Professors Jaffe and Girard, as did several others, discussed more effective use of agency resources, along the lines developed in their paper. They suggested that the present climate might permit much more spontaneous and vigorous action by the commissions and asked whether widespread employer and union resistance to equal employment opportunities still existed. Professor Girard raised the possibility that wilful union discrimination, particularly in the building trades, might not really affect very many jobs in the total picture and that wilful discrimination by employers had declined materially. Professor Jaffe and others noted that antidiscrimination proceedings were unlike proceedings against employers before the National Labor Relations Board where employers had a direct financial interest in fighting the agency's activities; thus, antidiscrimination proceedings might be easier to process quickly and successfully.

Much controversy erupted with respect to both questions. As to employer resistance, Mr. George Culberson thought there was very little overt employer discrimination on the part of top management; tradition is the real problem, for the employers are not eager to change traditional and efficient hiring procedures. On the other hand, lower echelon employees, often with a great deal of hiring power, might discriminate. Mr. Jones commented that because discriminatory attitudes on these lower levels are so widespread, the New York State Commission always tried to work first with top management. Mr. Rabkin, however, thought that the extent of discriminatory attitudes varied greatly from industry to industry. Thus, many top men in small firms might have the same prejudiced attitudes as the lower echelon personnel in the huge aircraft and space enterprises with whom Mr. Culberson dealt.

Professor George Brooks of Cornell argued that resistance to fair employment opportunities was still very strong in certain industries. For example, in the building trades, he emphasized that both employers and unions were adamant. He denied that this situation did not involve very many jobs, stressing that the number of jobs involved in construction and in apprenticeship programs was very significant. In the afternoon session, as well as in the Friday night session, conference participants working in and with the building trades noted that in the Buffalo area, unlike many others, construction work was relatively meager, and many construction workers, union and otherwise, were unemployed.

As to how best to use the commission's resources, Mr. Culberson noted that the filing of numerous complaints really impeded effective work, for each individual complaint took time away from other activities which could open up more jobs. Earlier, Mr. Milton Rosenberg, a representative from the New York State Commission, declared that the individual complaint system was indispensable but inadequate and stressed that the Commission was looking for and experimenting with other ways to use its resources. Commissioner Conway elaborated on this by declaring that complaints "unlocked the door to evidence of discrimination," but case-by-case adversary proceedings alone cannot make even a dent in the problem. The great value of the individual cases method is that it dramatizes the situation and shows that the statute has enforcement powers. Mr. Rabkin, however, denied that there was any real difference between an individual and a broad approach, for an individual case could unlock a whole industry.

A few specific improvements were also discussed. In response to a question, Professor Jaffe stated that if there were in fact no general and hard resistance, it would be dangerous to use punitive measures in the present climate of opinion where so many are concerned about the problem and there are many unused measures short of penal sanctions.

In this connection, it was brought out that few people thought it would be difficult to prove the existence of discrimination if it existed.

Finally Mr. Karpatkin stressed the importance of having an agency office in the heart of the ghetto neighborhood, since many Negroes and Puerto Ricans are afraid or otherwise reluctant to take the trip down to the City Hall area. Similarly, he pointed out the desirability of agencies having evening hours, so that the filing of a complaint would not necessitate losing a day's pay or a half-day's pay.