



Office of the Assistant Attorney General

Washington, D.C. 20530

May 14, 1984

MEMORANDUM

TO: Robert A. McConnell
Assistant Attorney General
Office of Public Affairs

FROM: Wm. Bradford Reynolds *WBR*
Assistant Attorney General
Civil Rights Division

SUBJECT: H.R. 5490, "Civil Rights Act of 1984" --
Analysis of Bill

There are attached a number of suggestions for modifying H.R. 5490 in a manner that more fully conforms it to the stated objective of amending Title IX of the Education Amendments Act of 1972 so that it better reflects the institutionwide coverage purportedly contemplated by the sponsors of the bill. While I do not endorse many of these suggestions, they are all worthy of consideration.

Attachment

DRAFT.

Suggestion: Instead of deleting the "program or activity" language from title VI, title IX, section 504, and the Age Discrimination Act, amend these statutes by providing a definition of "program and activity" that is more expansive than the Supreme Court's Grove City legislation but more restrictive than the coverage of S.2568.

Proposal: Add the following definition to the four statutes:

The program or activity receiving Federal financial assistance shall include all practices and operations of the recipients of the assistance that are necessary to ensure the achievement of the objectives of the statutes authorizing the financial assistance, including both the operations directly receiving the assistance from the Federal agency or another recipient and any that are operated in conjunction therewith. Nothing in this section shall be construed to cover operations that are unrelated to the achievement of the objectives of the statutes authorizing the assistance. Operations of a recipient of Federal financial assistance shall be deemed unrelated to the objectives of the assistance if they would not affect the intended beneficiaries or participants in the operations directly receiving the assistance.

Comment: Incorporation of this definition of "program or activity" would reverse the Grove City decision to the extent that it considers operations of a recipient that can directly affect the intended beneficiaries of the Federal assistance to be outside the scope of the assisted program. As such, the definition would overrule those cases, like Grove City, that have narrowly defined the assisted program; e.g., Rice v. Harvard, 663 F.2d 336 (1st Cir. 1981), Hillsdale College v. HEW, 696 F.2d 418 (6th Cir. 1982), Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981), University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982), Ferris v. University of Texas, 558 F. Supp. 536 (E.D. Tex. 1983), and Stewart v. NYU, 430 F. Supp. 1305 (S.D. N.Y. 1976). At the same time, however, the program-specific nature of the civil rights statutes would be retained, and there would continue to be the possibility of program or activities of a recipient of Federal funds that would be outside of the scope of the statutes. These non-covered activities would be defined as those in which discrimination would not affect the intended

beneficiaries of the Federal assistance. As a result, cases using a broader definition of program or activity and thus arriving at a broader coverage would not be overruled, e.g., Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969), Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981), Bennett v. West Texas University, 698 F.2d 1215 (5th Cir. 1981), Simpson v. Reynolds Metals Corp., 629 F.2d 1226 (7th Cir. 1980), Jones v. MARTA, 681 F.2d 1376 (4th Cir. 1982), Flanagan v. Georgetown University, 417 F. Supp. 377 (D.D.C.Y. 1976), and In re Victoria Ind. Sch. Dist. (final dec. Sec'y of HEW, 1980). This definition of "program or activity" is explicitly based on the existing statutory language in titles VI and IX that requires that grant agencies effectuate those titles by issuing rules and regulations that "shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken," language that clearly reflects the nature of these civil rights provisions as conditions enacted pursuant to the spending power.

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Suggestion: Instead of deleting the "program or activity" language from title VI, title IX, section 504, and the Age Discrimination Act, add and define the term "educational institution," thus nullifying the "program or activity" holding of Grove City with respect to educational institutions without affecting civil rights enforcement in other areas.

Proposal:

(1) Insert the words, "or under any education program or activity conducted by an educational institution receiving Federal financial assistance," after the phrase, "Federal financial assistance," in 42 U.S.C. § 2000d (title VI), 20 U.S.C. § 1681(a) (title IX), 29 U.S.C. § 794 (section 504) and 42 U.S.C. § 6102 (ADA);

(2) add in each statute the definition of "educational institution," as it is presently defined in title IX, 20 U.S.C. § 1681(c): "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department;" and

(3) appropriately amend the fund termination provisions of each statute to provide for institution-wide termination in the case of educational institutions.

Comment: This proposal specifies that any assistance to an educational institution results in coverage of all of its education programs. This result could also be achieved by amending title IX to prohibit discrimination on the basis of race, color, national origin, age, or handicap.

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Suggestion: Limit the broad coverage of H.R. 5490 by amending it so that coverage is based on direct Federal assistance to an institution.

Proposal: In H.R. 5490, delete the phrase "which receives support from the extension of Federal financial assistance to any of its subunits" and replace it with "the operations and practices of a subunit of a larger entity if that subunit receives direct and material support from the extension of Federal financial assistance to another subunit of the same entity."

Comment: The expansiveness of coverage in H.R. 5490 derives in large part from the last phrase in the definition of "recipient" because that phrase includes as a recipient any entity that "receives support" from any one of its subunits. This proposed amendment would limit the definition in two ways: it would limit coverage under a "trickle up" theory to the larger entity only if that entity received "direct" and "material" support from the Federal grant; and it would only cover the "operations and practices" of the entity that received the support -- it would not cover the other activities of the subunit.

Because H.R. 5490 does not define Federal financial assistance, existing regulatory definitions and judicial interpretations of that term, including the Supreme Court's Grove City decision that BEOG's constitute Federal financial assistance, would remain in effect.

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Suggestion: Retain the existing "pinpoint" language of title VI, title IX, section 504, and the Age Discrimination Act.

Proposal: Delete from H.R. 5490 the changes to the third sentence of section 602, the third sentence of section 902, and the second and third sentences of section 305(b).

Comment: This proposal would retain the "program and activity" language for fund termination purposes even though these terms would be replaced by the "recipient" concept in the prohibition provisions of the civil rights statutes. Because the Supreme Court's interpretation of "program" would remain for fund termination under this approach, it would provide a more restrictive application of the fund termination power than H.R. 5490.

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Suggestion: Because H.R. 5490 will result in particularly broad coverage for State and local governments, the bill could be amended to narrow jurisdiction over State and local "recipients" by redefining "recipient" as the specific public agencies receiving the assistance rather than the entire State or local government.

Proposal: Insert the following definition in H.R. 5490, in lieu of its existing definition.

For the purposes of this title, the term "recipient" means

(A) any State or political instrumentality of a State or political subdivision thereof (including any subunit of any such State, subdivision or instrumentality) and any successor, assignee or transferee of any such State, subdivision, instrumentality or subunit to which Federal financial assistance is extended (directly or through another entity or a person), or

(B) any other public or private agency, institution, organization or other entity and any successor, assignee, or transferee of any such agency, institution, organization or entity to which Federal financial assistance is extended (directly or through another entity or person) or which receives support from the extension of Federal financial assistance to any of its subunits.

Comment: This definition creates two classes of recipients for the purposes of coverage. State and local governments or their subunits are recipients if they directly receive Federal financial assistance. Any other entity, public or private, is a recipient if it directly receives Federal financial assistance or if it receives support from Federal financial assistance that is extended directly to one of its subunits.

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Suggestion: One likely result of passage of H.R. 5490 will be overlapping agency jurisdiction. Statutory authority for coordinating implementation of enforcement of the civil rights statutes by Federal agencies will minimize inefficiency in the government's enforcement efforts and burdens on recipients of funds.

Proposal: H.R. 5490 could be amended to include the following language:

In order to reduce duplication in the civil rights enforcement programs of the Federal agencies that are empowered to provide Federal financial assistance and to reduce burdens on the recipients of Federal financial assistance, the Attorney General shall designate certain Federal agencies as the lead agencies responsible for all civil rights enforcement functions for certain classes of recipients and shall direct other Federal agencies to delegate their civil rights enforcement responsibilities to these lead agencies in cooperative agreements.

Comment: This proposal provides the Attorney General with the authority to establish certain Federal agencies as lead agencies. Such an approach would be a legislative analogue to Executive Order 12250.

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Suggestion: Expressly include in H.R. 5490 language on the denial of medical care to handicapped infants because this issue has been a major enforcement objective of the President.

Proposal: Section 504 would be amended to include the following language:

- (c) A recipient of Federal financial assistance for health care may not, on the basis of the present or anticipated physical or mental impairments of an infant, withhold medical or surgical treatment or nourishment from the infant, who, in spite of such impairments, will medically benefit from the treatment or nourishment.
 - (1) Futile treatment or treatment that will do no more than temporarily prolong the act of dying of a terminally ill infant is not considered treatment that will medically benefit the infant.
 - (2) Treatment that is considered medically contra-indicated by reasonable medical judgment is not considered treatment that will medically benefit the infant.
- (d) The Secretary of the Department of Health and Human Services and his or her designees shall be given access to the records of any recipient of Federal financial assistance for health care for the purpose of ascertaining the existence of any actions prohibited by this section.

Comment: This statutory language is adapted from HHS's recently issued regulation on Baby Doe issues. 49 Fed. Reg. 1622 (January 12, 1984) (to be codified at 45 CFR 84.55 and at Appendix C to Part 84). This proposal would eliminate the confusion created by the recent decision of the Second Circuit in U.S. v. University Hospital, 729 F.2d 144 (1984). This decision rejects the position that section 504 prohibits discrimination in medical services against handicapped infants on the basis of handicap.

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Suggestion: The "program or activity" holding of Grove City may be nullified with respect to educational institutions without affecting civil rights enforcement in other areas by amending title IX to include nondiscrimination on the basis of race, color, national origin, age, and handicap.

Proposal: Amend title IX:

(1) so that the introductory clauses of section 901(a) read:

(a) No person in the United States shall, on the basis of race, color, national origin, sex, or age, and no otherwise qualified handicapped individual in the United States, as defined in 29 U.S.C. 794, shall, solely by reason of his or her handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance or under any education program or activity conducted by an education institution receiving Federal financial assistance, except that: ...;

(2) by substituting the phrase, "the prohibition of sex discrimination," for the words, "this section," wherever they appear in section 901(a);

(3) by adding a section 901(d) that incorporates the exceptions and exemptions regarding age discrimination found in 42 U.S.C. 6103(b) and (c); and .

(4) by amending clause 1 of the third sentence of section 902 to read:

(1) by the termination of or refusal to grant or to continue assistance to any educational institution, or, in the case of any other recipient, education program or activity, as to which there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular educational institution or, in the case of any other recipient, education program or activity in which noncompliance has been found.

"Educational institution" is already defined in section 901(c) of title IX.

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Comment: This approach is adapted from the recent proposal by Representative Schneider to amend title IX to overturn the Grove City decision in the education arena. This proposal applies her concept to the areas of nondiscrimination covered by H.R. 5490.

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Suggestion: Clearly establish and define the personal immunity of officials implementing title VI, title IX, section 504, and ADA.

Proposal: Absolute immunity may be achieved by adding the following language to 42 U.S.C. § 2000d-1 (title VI and section 504); 20 U.S.C. § 1682 (title IX) and 42 U.S.C. § 6104 (ADA): "Nothing in this section shall be construed to impose personal liability on Federal officials."

Comment: Under the doctrine of qualified immunity established by the Supreme Court in Harlow & Butterfield v. Fitzgerald, 102 S. Ct. 2727 (1982) and applied to Federal civil rights officials in National Black Police Association v. Velde, 712 F.2d 569 (D.C. Cir. 1983), cert. denied, ___ U.S. ___ (1984), Federal officials are at personal risk for conduct that violates "clearly established statutory or constitutional rights of which a reasonable person would have known."

Although in Velde the D.C. Circuit held that title VI did not establish a clear duty to terminate funds upon a finding of discrimination, failure to act in other circumstances might still be held to lead to personal liability under title VI. The suggested language would preclude that possibility.

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Suggestion: To ensure that the ultimate beneficiary of Federal financial assistance would not be covered by the four civil rights statutes.

Proposal: Amend all four statutes:

The term "recipient" means:

(A) [A]ny State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits, but such term does not include any ultimate beneficiary of the Federal financial assistance.

Comments: The prevailing definition of the term "recipient" in existing regulations implementing the four statutes excludes the ultimate beneficiary of the Federal assistance. Consequently, individuals receiving Social Security or SSI benefits, Food Stamps, or Federal student aid, to name a few examples, are not considered "recipients" within the meaning of the civil rights statutes. Because the proposed bill deletes all references to program or activity, the critical distinction between operators of federally assisted programs,

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who have civil rights obligations, and ultimate beneficiaries of Federal financial assistance, who do not, may be lost. The bill's sponsors, however, have indicated that the bill should not be interpreted to include as "recipients" entities or individuals that have been regarded as ultimate beneficiaries under existing law.

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Suggestion: Limit the broad coverage of H.R. 5490 by narrowing the definition of "recipient" so that only those entities that receive Federal funds are included within the definition.

Proposal: Delete from the definition of "recipient" in H.R. 5490 the phrase "or which receives support from the extension of Federal financial assistance to any of its subunits."

Comment: The broad coverage of H.R. 5490 is, in part, due to the last phrase of the definition of recipient. Under this phrase, a large entity is viewed as a recipient if one of its subunits receives Federal funds and the large entity "receives support" from the grant of Federal funds to the subunit. If this phrase is deleted from the definition of "recipient," the "trickling up" of coverage from a subunit to its parent entity would not occur. As a result, coverage would be conferred under the four civil rights statutes, when an entity receives Federal funds directly or through a third party; once an entity received Federal funds, the whole entity and all of its component parts would be covered. Thus, under this proposal, coverage would depend on which entity received the Federal funds. If the college president received the funds, the entire college would be covered. If the physics department received the grant, the physics department would be covered but the remaining subunits of the college would not be covered unless they also received direct funding. Consequently, this approach would elevate the form of Federal granting to new significance. It would accomplish the aims of H.R. 5490's sponsors only to the extent that Federal grants are received by a university head. If, for example, BEOG's are received by the financial aid office, only the financial aid would be covered -- achieving the same result as the Supreme Court's decision in Grove City College. On the other hand, if a block grant was provided to the governor of a state, the entire activities of the state would be covered.

Historical Administration Position

- o Federal money to an institution brings civil rights coverage over assisted programs and activities.
- o Federal money to individuals does not bring coverage over institutions at which the individuals chose to use those funds, unless Congress expresses intent that payments to individuals be for the benefit of specific institutions for which the funds are earmarked.

Administration Position in Grove City Case

- o Pell Grant Program was expressly intended by Congress to be considered federal assistance to the institution attended by student grantees.
- o Language of Title IX limited civil rights coverage to the specific program or activity receiving the indirect federal assistance.-- in Grove City, the financial aid program of the school.

Administration Position on Introduction of Legislation to Overturn the Grove City Decision

Expressed in a statement at the press briefing on May 7: "The Administration is not opposed to Congress enacting legislation concerning the scope of Title IX to forbid discrimination by a recipient of federal money. We're now in the process of reviewing the proposed bill and will make specific comments on the legislation as Congress considers the bill."

Administration Position To Be Announced in Testimony May 22, 1984

The Administration will support a legislative change to Title IX which will have the effect of overturning the Grove City case. This will be evidenced by an announcement of Administration support of H.R. 5011/S. 2363. It is felt that these bills more fully meet the stated desires of most members to extend Title IX coverage to the entire educational institution. We will also express a willingness to expand coverage under Title IX by adding clauses dealing with age, race, and the handicapped. The Administration will express serious concerns about S. 2568/H.R. 5490, Kennedy/Packwood on the basis that its sweeping scope and resulting problems have not been adequately considered by Congress and they are not accurately reflected in the introductory statements of the bills' sponsors. The unintended ramifications are certain to create confusion in recipients of federal financial assistance, agencies and the courts.

Kennedy Bill

S. 2568

Scope

- o Goes beyond reversing Grove City.
- o Extends federal civil rights enforcement to virtually every organization - public and private - in America.
- o Would render a large and complex entity subject to all civil rights statutes as a result of the receipt of federal funds by its most insignificant component.
 - o o Currently, if a federal agency extends federal assistance, for example, to a state university system, the broadest conceivable claim would be that the entire university system is a covered "program" within the meaning of these statutes. Under the bill, it is not just the university that comes within the statutes. The bill could encompass all other state departments and agencies -- whether or not they are educational or perform an education service -- that can be shown to have eventually received some of the university funds (directly or indirectly) or to have received support from the existing funding arrangements.

Problems

- o Would allow any attorney to file a private suit against any "entity" that receives federal assistance to enforce civil rights laws (age, sex, race, handicapped).
 - o o Court cases which allow private attorneys to receive attorneys fees will encourage litigation.
- o Entity - defined as any organization - public & private and any sub unit or connected organization.
 - o o The bill clearly creates the possibility that states, cities, counties -- and even perhaps municipal corporations, state-owned utilities and water districts -- could be required to submit to the requirements of the four statutes as a result of federal aid to one program. There is no state in the country that does not receive some federal assistance to at least some of its activities, we believe the bill is capable of surpassing any precedent in imposing federally determined standards upon state and local governments.

= Title IX legislation

= what corrective lang is needed

(legis hist is not sufficient)

= wk out problem thru def. of "program" or "activity"

~~Ednc. signoff~~ =

Need to call Ted Bell =

hope that our allies in Europe might change their mind and cancel out their request. Well, the allies stood firm and I don't think the Alliance has ever been more solidly together than it is right now.

Q Mr. President, given the coolness of our relationship right now, do you think the Russians have a problem of saving face, perhaps, and returning to the negotiations? If so, would you be prepared to offer some gesture, to make some overture that would be that positive sign that they asked for in order to come to the table without a loss of face?

THE PRESIDENT: Well, Charlotte, I don't think it would be proper for us to do something, some concession that would make it look that we rewarded their intransigence and their walking out of the meetings. But we have pursued, and we took the lead in this -- negotiations on a number of other matters between our two countries that have nothing to do with strategic weapons, and we've been making some progress in a number of those negotiations. So I don't think things are as bad as they're being painted.

Let me switch around a little bit here. Bob?

Q Mr. President, the Civil Rights Act of 1984 is expected to go to House committees tomorrow. Because of the Supreme Court's decision in the Grove City College case, the bill restores all inclusive prohibitions against sex, race, handicap, or age discrimination at institutions with federally assisted programs. Do you support this measure?

THE PRESIDENT: There are some that are watching this legislation very closely. The court decision was based on the way Article IX was written by Congress and it was the way we interpreted it also. Now, if there is legislation to reverse the court decision with regard to Title IX -- I said Article -- Title IX that will prevent discrimination against women in educational institutions that are getting funds from the government, we support that.

There is legislation that has been proposed -- and I don't know just which they're going to take up tomorrow -- there is legislation which is so broad that actually it would open the door to federal intrusion in local and state governments and in any manner of ways beyond anything that has ever been intended by the Civil Rights Act. That kind of legislation we would oppose.

Yes.

Q Mr. President, you said earlier that if asked, the United States would assist Persian Gulf states in keeping the Straits of Hormuz open. Are there any circumstances where American interests could be so threatened that the United States would act unilaterally or without a request from those states?

MORE

THE PRESIDENT: Well, again, I can't foresee that. We probably would be, among all the importing of oil nations, we would be the least hurt by any shutdown. It is our allies -- it is Japan, it is our friends in Western Europe who would really be in trouble if there was any stop to the Middle East oil.

Actually, only 3 percent of our oil supply now -- thanks to decontrolling oil and increasing domestic production -- only 3 percent is involved in the Persian Gulf for us. And we have increased our stockpile of oil to four times what it was when we came here. So I can't see a kind of emergency that would do this.

But also remember, we are in consultation also with our allies with those nations that would be affected because we're not contemplating anything unilaterally here. This problem is one that affects all of us.

Q What would the United States do to help its allies in the event of an oil cutoff? Would we give them oil from the strategic reserve?

THE PRESIDENT: We have had people in consultations with our allies and they've been holding meetings on discussion contingencies of this kind. We would not hold back on immediately turning to our reserve, but I'm not prepared to say we've made any specific plans.

Gary?

MORE

WHITE HOUSE STAFFING MEMORANDUM

DATE: 5/16/84 ACTION/CONCURRENCE/COMMENT DUE BY: --

SUBJECT: REVISED MEMO RE TITLE IX CIVIL RIGHTS LEGISLATION

	ACTION FYI			ACTION FYI	
VICE PRESIDENT	<input type="checkbox"/>	<input type="checkbox"/>	McFARLANE	<input type="checkbox"/>	<input checked="" type="checkbox"/>
MEESE	<input type="checkbox"/>	<input type="checkbox"/>	McMANUS	<input type="checkbox"/>	<input checked="" type="checkbox"/>
BAKER	<input type="checkbox"/>	<input checked="" type="checkbox"/>	MURPHY	<input type="checkbox"/>	<input type="checkbox"/>
DEAVER	<input type="checkbox"/>	<input checked="" type="checkbox"/>	OGLESBY	<input type="checkbox"/>	<input checked="" type="checkbox"/>
STOCKMAN	<input type="checkbox"/>	<input type="checkbox"/>	ROGERS	<input type="checkbox"/>	<input type="checkbox"/>
DARMAN	<input type="checkbox"/>	<input checked="" type="checkbox"/>	SPEAKES	<input type="checkbox"/>	<input checked="" type="checkbox"/>
FELDSTEIN	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	SVAHN	<input type="checkbox"/>	<input checked="" type="checkbox"/>
FIELDING	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	VERSTANDIG	<input type="checkbox"/>	<input checked="" type="checkbox"/>
FULLER	<input type="checkbox"/>	<input checked="" type="checkbox"/>	WHITTLESEY	<input type="checkbox"/>	<input checked="" type="checkbox"/>
HERRINGTON	<input type="checkbox"/>	<input checked="" type="checkbox"/>	BARODDY	<input type="checkbox"/>	<input checked="" type="checkbox"/>
HICKEY	<input type="checkbox"/>	<input checked="" type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
JENKINS	<input type="checkbox"/>	<input checked="" type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>

REMARKS:

For your information, attached is a revised memo re Title IX Civil Rights Legislation which incorporates senior staff comments.

RESPONSE:

Richard G. Darman
Assistant to the President
Ext. 2702

THE WHITE HOUSE
WASHINGTON

May 15, 1984

MEMORANDUM FOR THE PRESIDENT

FROM: JOHN A. SVAHN *AS*
SUBJECT: Title IX Civil Rights Legislation

Following the Supreme Court decision in the Grove City case, much controversy has arisen surrounding Title IX. This controversy has resulted in a misinterpretation of the Administration's position vis-a-vis Title IX and has sparked opposition on Capitol Hill with women's groups and civil rights groups. Activity is underway on the Hill to reverse the Grove City decision and to expand civil rights coverage substantially. A policy decision is required for an Administration position on Title IX.

Historical Administration Position

- o Federal money to an institution brings civil rights coverage over assisted programs and activities.
- o Federal money to individuals does not bring coverage over institutions at which the individuals chose to use those funds, unless Congress expresses intent that payments to individuals be for the benefit of specific institutions for which the funds are earmarked.

Administration Position in Grove City Case

- o Pell Grant Program was expressly intended by Congress to be considered federal assistance to the institution attended by student grantees.
- o Language of Title IX limited civil rights coverage to the specific program or activity receiving the indirect federal assistance -- in Grove City, the financial aid program of the school.
- o The Supreme Court agreed with the Administration position, holding that Pell Grants paid to individual students constituted federal assistance to the college for which these grants were earmarked, and that Title IX coverage is program specific.

Following the Supreme Court's decision in Grove City, DOJ said the Administration's position on program specificity was based solely on their reading of the law as worded by Congress, not on a philosophical opposition to institutionalized civil rights coverage. The DOJ was quoted as saying that they had no objection to Congress expanding the law beyond the program specific approach. They further stated that the Administration's support or opposition would depend on how such legislation was drafted.

Current Administration Position

Expressed in a statement at the press briefing on May 7: "The Administration is not opposed to Congress enacting legislation concerning the scope of Title IX to forbid discrimination by a recipient of federal money. We're now in the process of reviewing the proposed bills and will make specific comments on the legislation as Congress considers the bills."

Current Status

There is strong feeling on Capitol Hill that the Grove City decision regarding Title IX should be reversed through legislation. There are two key approaches to doing this. There is confusion over the impact of each approach. The Administration should take steps to clarify each approach and explain the impact of each. At the same time it would be preferable for the Administration to adopt a policy position regarding Title IX legislation. The two approaches are outlined below.

a) Schneider/Packwood Bills -- H.R. 5011/S. 2363. This was the first major legislation introduced. It would simply overturn the Grove City decision by providing Title IX coverage over institutions as well as programs and activities.

- o 141 co-sponsors in the House, including Sensenbrenner of the House Judiciary Committee. 19 co-sponsors in Senate.
- o Key sponsors and civil rights leaders, while favoring this approach initially, are now pushing for a more expanded scope.

b) Kennedy/Packwood Bill and Simon Bills -- S. 2568/H.R. 5490 -- The Civil Rights Act of 1984. This bill radically expands all civil rights legislation. It is billed as an overturning of the Grove City decision, but its scope is much broader. These bills define a "recipient of federal financial assistance" to include:

- o any public or private agency institution, or entity, or
- o any sub-unit of an agency, plus any larger agency or institution which has a sub-unit recipient,

- o which receives federal financial assistance directly or through another entity or person.

Under this legislation, federal regulation regarding civil rights would be expanded to public and private activity. Theoretically all private activity could be regulated by the federal government under the language of this bill since "entity" includes almost anything and goes far beyond "institution" as is currently in Title IX. Since almost anything can be shown to benefit indirectly from federal assistance in the United States, the far-reaching impact of this legislation is substantial.

The bill has 61 co-sponsors in the Senate, including Senators Baker and Dole and is the favored vehicle of the civil rights lobby. It has 128 co-sponsors in the House. Many of the sponsors in both bodies are those who originally sponsored the Schneider/Packwood legislation. Because of its expansion to all civil rights activities, the bill has picked up numerous other interest groups in the civil rights area, including the handicapped.

Options

- 1) Oppose all legislation that would reverse Grove City decision.
 - Would be viewed as a retrenchment from our previously stated position taken by the Justice Department and by the White House. In all but the smallest of circles, it would be viewed as anti-civil rights and anti-women.
- 2) Support legislation to change the original Title IX language and reverse the Grove City decision without breaking new ground.
 - This option would be perceived as meeting the minimal commitments made by the Justice Department. Under this option, we would support institution-wide coverage rather than program specific coverage. This option would be supportive of the original Schneider/Packwood proposal. It would not expand coverage to all entities, nor would it expand coverage to institutions and entities benefiting indirectly from federal payments to individuals. While it appears that this was the original position of many members of Congress, Legislative Affairs indicates that support has shifted from this option to the Kennedy/Packwood bill.
- 3) Support legislation to change Title IX and reverse the Grove City decision and expand coverage to prohibit institution-wide discrimination based on sex, age, race and the handicapped.

This option builds on the original Schneider/Packwood legislation and expands coverage. It adds an age, race and handicapped clause to Title IX. The Justice Department feels that by adding in the other three categories that we would strengthen our position of opposition to the Kennedy/Packwood bill. It is believed that the expansion would gain more support from the reasonable interest groups involved.

Recommendation

The Department of Justice, OMB, OPD, OCA, Office of Legislative Affairs, the Counsel and the Counsellor to the President recommend Option 3. It is further recommended that Legislative Affairs be directed to discuss this option with the leadership and key sponsors before Presidential decision.

Approve _____

Disapprove _____

Other _____



Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Carl D. Perkins
Chairman
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This presents the views of the Department of Justice on S. 2568 and H.R. 5490, the proposed "Civil Rights Act of 1984." 1/ The bill would amend Title IX of the Education Amendments of 1972, 2/ Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 3/ the Age Discrimination Act of

1/ H.R. 5490 is in all respects identical to S. 2568. For the sake of convenience, we refer to them interchangeably as "S. 2568" or "the bill."

2/ No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance

20 U.S.C. § 1681.

3/ No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance

29 U.S.C. § 794.

Please note letter also sent to:

Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

1975 ("ADA"), 4/ and Title VI of the Civil Rights Act of 1964, 5/ all of which prohibit certain types of discrimination in federally assisted programs. This memorandum sets forth the background and what we perceive to be the possible effects of the amendments. We use Title VI, after which the other three statutes were patterned, 6/ to illustrate the proposed changes. We then discuss the constitutional issues raised by the bill. On the basis of this analysis, we conclude that the proposed amendments are not facially unconstitutional. Nevertheless, ambiguities in the language of the proposed amendments raise significant questions concerning their intended scope and application. Absent a clear statement in the language of the amendments or their legislative history, the courts will ultimately have to determine the proper extent and operation of the amendments. We have therefore examined the case law concerning the constitutional bases for such legislation -- the Spending Clause and Section 5 of the Fourteenth Amendment -- in order to evaluate how courts are likely to interpret the amendments and what limits, if any, the courts are likely to impose on them.

4/ [With certain exceptions] no person shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving federal financial assistance.

42 U.S.C. § 6102.

5/ Title VI prohibits discrimination on the basis of race, color, or national origin in federally assisted programs. 42 U.S.C. § 2000d (quoted at p. 4 infra.)

6/ See, e.g., Cannon v. University of Chicago, 441 U.S. 677, 694 (1979) (Title IX patterned after Title VI); NAACP v. Medical Center, Inc., 657 F.2d 1322, 1331 (3d Cir. 1981) (en banc) (§ 504 and ADA patterned after Title VI). The four statutes are listed here in the order that they appear in the bill. The Appendix to this report contains the full text of every provision that S. 2568 would amend, reflecting both existing and proposed language.

We have encountered considerable difficulty in interpreting a bill of such sweeping scope as S. 2568 without the benefit of full legislative history. Judging from discrepancies between the sponsors' explanations and the actual language of the bill, it is apparent that the consequences of this major legislation have not yet been fully considered by the Congress. The bill is amenable to interpretations that would reach far beyond the sponsors' declared purpose -- to overturn Grove City College v. Bell, 104 S. Ct. 1211 (1984). We conclude that, while we express no view as to the necessity or wisdom of such legislation, there are alternatives to S. 2568 and H.R. 5490 that would accomplish the objective of overturning Grove City without risking upheaval of the entire civil rights landscape which has developed through twenty years of administrative and judicial efforts.

Whatever the intent of Congress in this area, because of the importance and potential impact of this legislation, we strongly recommend that Congress develop fully the legislative history, including committee hearings and reports. Potentially affected state and local government representatives and private sector recipients of federal financial assistance might be an appropriate source from which to seek views as to how the legislation would actually affect such entities. A thorough legislative analysis of this proposal will aid in reducing ambiguities and misunderstanding of the legislation and perhaps minimize lengthy judicial challenges to it.

I

BACKGROUND

The four civil rights statutes which the bill proposes to amend share a common design, having two basic elements: substantive coverage and an enforcement provision. The former defines what conduct is prohibited, while the latter sets out procedures for sanctions in the event of noncompliance. In the existing statutes, all fashioned after Title VI, as well as in the proposed amendments, these two aspects of the statutory scheme are treated distinctly.

Section 601 of the Civil Rights Act of 1964, the substantive prohibition of Title VI, currently provides that:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d (emphasis added).

Section 602, the enforcement provision, currently provides that compliance may be effected by a termination of federal assistance under a program or activity, upon a finding of noncompliance,

but such termination . . . shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

42 U.S.C. § 2000d-1(1) (emphasis added). Alternatively, compliance may be effected "by any other means authorized by law." Id. § 2000d-1(2).

Although the fund-termination authority has rarely been invoked, ^{7/} disagreement arose as to whether the "program-specific" language of § 602 was intended also to limit the scope of the nondiscrimination mandate of § 601. Thus, some courts determined that § 601 was intended to prohibit all discrimination by recipients of federal aid. See, e.g.,

^{7/} More common have been cases brought under § 1983, which permits private suits for state deprivations of rights secured by the Constitution and laws of the United States. 42 U.S.C. § 1983. Because early Title VI cases were generally brought against state school districts, the substantive prohibitions of Title VI could be enforced by means of actions under § 1983. See, e.g., Singleton v. Jackson Municipal Separate School Dist., 355 F.2d 865 (5th Cir. 1966). Additionally, Title VI has been enforced through private causes of action. See p. 15, infra.

Flanagan v. President and Directors of Georgetown College, 417 F. Supp. 377 (D.D.C. 1976) (by accepting federal aid for building construction, school was required under Title VI to refrain from discriminating in all services and benefits provided to students). Others found that § 601 proscribed only discrimination in the particular program which received the federal aid. See, e.g., Stewart v. New York Univ., 430 F. Supp. 1305, 1314 (S.D.N.Y. 1976) (Title VI plaintiff must show "some material connection" between federal aid and alleged discrimination). Those who espoused the former view, extending private sanctions to all activities of a recipient, found support in the overall objective of the Civil Rights Act of 1964. See 110 Cong. Rec. 1521 (1964) (remarks of Rep. Celler) (to eradicate the "moral outrage of discrimination"). The latter, more restrictive, view found support both in the "pinpoint" approach of § 602 and in the narrower policy expressed by Senator Humphrey during the floor debates on the Civil Rights Act of 1964:

"Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."

110 Cong. Rec. 6543 (1964) (Sen. Humphrey, quoting from President Kennedy's message to Congress, June 19, 1963).

This dispute was recently resolved when the Supreme Court adopted the less expansive view in Grove City College v. Bell, 104 S. Ct. 1211, 1222 (1984). In that case, the Court held that a college that accepts students who receive federal financial aid is subject to Title IX only in the administration of its financial aid program. Under the Grove City interpretation of Title IX, which presumably will affect application of the other three similar statutes as well, 8/ an institution

8/ Although the precedential effect of Grove City on the other three statutes is not altogether clear, we would anticipate that courts would continue to interpret each of the four statutes by analogy to the others. For example, in concluding

[Footnote 8 continued on p. 6]

receiving federal aid in some of its departments would not be found to be in violation of the substantive prohibitions of the statute on the basis of discrimination in other programs. The Court rejected the argument that the entire recipient institution could be the "program or activity" and therefore be regulated in its entirety.

The sponsors of the bill purport to seek to overturn the Grove City decision and require the nondiscrimination mandate of § 601 and the similar provisions in the other three statutes to apply to all recipients of federal assistance. They assert their intention to "restore four major civil rights statutes . . . to the broad scope of coverage that was originally intended by Congress and that has marked their administration prior to [Grove City]." Cong. Rec. S4585 (Daily ed. Apr. 12, 1984) (joint explanation of Senators Kennedy and Packwood).

The bill proposes to effect this end by eliminating all references to "program or activity" which characterize the existing prohibitions and by replacing them with broad references to "recipients" of federal aid.

[Footnote 8 continued]

that a private cause of action is available under Title IX, the Supreme Court examined at great length the resolution of the same issue under Title VI, and found that evidence highly persuasive. Cannon v. University of Chicago, 441 U.S. 677, 694-709 (1979). See also NAACP v. Medical Center, Inc., 657 F.2d 1322, 1331 (3d Cir. 1981) (expressly adopting Title VI standard in case brought under § 504 and ADA). The introductory legislative history of the bill contains a statement suggesting that the bill's sponsors believe that the Department of Justice enforcement efforts will proceed on the assumption that the Grove City case is applicable to all four statutes. Cong. Rec. S4589 (Daily ed. Apr. 12, 1984) (statement of Sen. Packwood). We are unaware of any official source for this declaration.

II

EFFECT OF THE AMENDMENTS

A. Prohibited Conduct

The first change in the operation of § 601 is to broaden the class of entities to which the prohibition applies. In contrast to the current § 601, which has now clearly been interpreted to be program-specific, the amendment would delete the words "under any program or activity receiving" and simply substitute "by any recipient of" so that the amended statute would provide:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation, be denied benefits, or be subjected to discrimination by any recipient of Federal financial assistance.

Under the bill,

the term 'recipient' means--

(1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

(2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.

S. 2568, 98th Cong., 2d Sess. (1984) (emphasis added). ^{9/} In short, the prohibition on discrimination in a federally-aided program or activity would be changed to prohibit any discrimination in any activity by a recipient of federal funds for any of its activities.

One sponsor of S. 2568 explained the effect of the "recipient" definition as follows:

Consistent with past agency practice, when an entity receives federal aid for one of its parts or subdivisions, the entity -- and not the specific subunit of the entity -- is the recipient. Thus, in place of "program-specific" coverage as defined by the Supreme Court, the statutes will apply to all component parts of the recipient.

* * * * *

Example: A state prison receives federal funding to develop a better inmate classification system, and no other federal assistance. Its education activities and related benefits, such as classes and training programs, are covered by Title IX. The entire prison -- including its educational programs -- would be covered by Title VI, Section 504, and the ADA, because it is a recipient of federal funding and those statutes are not limited to education.

Cong. Rec. S4586 (Daily ed. Apr. 12, 1984) (statement of Sen. Kennedy).

^{9/} This language is similar to the existing definition of "recipient" under Title VI regulations: "any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program." 28 C.F.R. § 42.102(f) (1983).

By proscribing discrimination against any person by a recipient of federal aid, broadly defined, the bill would reverse the result of Grove City. The amended statute would prohibit discrimination in any endeavor sponsored by a grantee of federal aid, including those activities that receive no federal aid. The sponsors of S. 2568 claim that this result (the simple reversal of Grove City) is the primary purpose of the bill. See, e.g., Cong. Rec. S4589 (Daily ed. Apr. 12, 1984) (statement of Sen. Packwood); id. at S4592 (statement of Sen. Cranston); id. at E1661 (statement of Rep. AuCoin); id. at E1681 (statement of Rep. Johnson).

It seems clear, however, that the bill could potentially have a much broader impact. In the first place, while the bill has been characterized as restoring the original legislative intent behind this legislation, the Supreme Court found that Congress had intended program-specific application. Thus the bill, to the extent it does reverse Grove City, widens materially the application of these federal statutes. Second, the bill extends the nondiscrimination mandate (and consequent reporting requirements) beyond merely the other unfunded programs of the same federally assisted institution. The combined effect of the change from program specificity to a prohibition on the recipient and the new definition of "recipient," is to impose the obligation not to discriminate on related entities as well. In this regard, the bill would expand substantive coverage beyond that necessary to accomplish the mere reversal of Grove City in two ways: (1) by imposing the nondiscrimination requirements upon an entire state, even if only one program of one subunit receives federal funds, if the state is deemed to "receive support" from the funds; and (2) by imposing those requirements on every subunit of a state if the state, directly or through any of its subunits, receives any federal aid. 10/

10/ Additionally, the bill adopts a separate holding of Grove City, that there is no substantive difference under Title IX between direct institutional assistance and aid received by a school through its students. 104 S. Ct. at 1217, 1220. The sponsors of S. 2568 have lauded this result and have included language in the bill to embody it. Cong. Rec. S4592 (Daily ed. April 12, 1984) (statement of Sen. Cranston). The

[Footnote 10 continued on p. 10]

In other words, the bill's definition of "recipient" is so broad that it could be construed to render a large and complex entity subject to the statutes as a result of the

[Footnote 10 continued]

language chosen to effect this outcome, however ("directly or through another entity or a person"), suffers from the same ambiguity that afflicts the bill as a whole. It is going to be very difficult to determine, without detailed legislative history, when an entity, including a successor, assignee or transferee entity, receives aid "through another entity or a person." The sponsors appear to hold the view that this undefined standard would exclude from the definition of "recipient" "ultimate beneficiaries such as food stamp recipients or student[s] receiving Federal loans," id. at S4590 (statement of Sen. Dole); "the landlord whose tenant pays the rent with federal public assistance funds, the clothing store that is paid for a shirt with a Social Security check," id. at S4586 (statement of Sen. Kennedy); and other similarly situated "individuals and businesses which may ultimately receive federally provided dollars." Id. at S4595 (statement of Sen. Cranston). The term "ultimate beneficiary" in these examples is used inconsistently to mean either an individual receiving federal funds or a business or institution receiving them from the individual. This limitation, which suffers from latent ambiguities of its own, especially in the examples recited, appears to be derived from existing Title VI regulations, which expressly exclude any "ultimate beneficiary" under federal assistance programs. See n.9 supra. We are unaware, however, of any statutory language which would lead an agency or a court to exclude these or other classes of beneficiaries from the reach of the statute. Nor are we aware of any explanation for why the definition of "recipient" in the bill, which apparently is modeled on the regulatory definition of this term contained in 28 C.F.R. § 42.102(f) (1983), supra n.9, fails to adopt that regulation's express provision that "recipient" "does not include any ultimate beneficiary under any such program." Id. The omission of this language might well lead a court construing the bill's definition to conclude that Congress did intend to reach the "ultimate beneficiary," whatever that term means.

receipt of funds by its most insignificant component, depending upon how a court construed the term "receives support." The bill makes no attempt to define that term. The broadest construction would be that, by accepting federal aid to one state activity, the recipient state's treasury is facilitated in its ability to support other activities. The state would thus "receive support" from any amount of federal aid.

Although currently, if a federal agency extends federal assistance, for example, to a state university system, the broadest conceivable claim would be that the entire university system is a covered "program" within the meaning of these statutes, under the bill, it is not just the university that comes within the statutes. The bill could encompass all other state departments and agencies -- whether or not they are educational or perform an education service -- that can be shown to have eventually received some of the university funds (directly or indirectly) or to have received support from the existing funding arrangements.

The bill's sponsors have not specifically advocated this result, but they have emphasized repeatedly the "broad and comprehensive" coverage that the bill is intended to effect. On the basis of this legislative sentiment, a court might feel compelled to give the amended statute the broadest interpretation that is consistent with its plain language. The definition of "recipient" contains no words of limitation other than "receives support," an ambiguous safeguard at best. 11/

11/ It is possible that the term could be read more narrowly than we have described. A court could consider the ostensible purpose of the bill -- to reverse the Grove City decision, which involved a private institution -- and conclude that receipt of assistance should be attributed vicariously only within the confines of a discrete institution. A court could adopt this approach on the presumption that Congress would not create such significant changes in major civil rights legislation without, at the very least, clearly expressing its intention to do so. Arguing against such an approach, however, is the fact that Congress could have achieved the mere reversal of Grove City in much narrower terms. If Congress nevertheless passed the more expansive provisions contained in this bill, a court might reasonably conclude that it intended to reach a multitude of new classes of recipients.

By the same token, the bill characterizes a subunit as a "recipient" if its parent unit receives federal aid. Thus if a state were to receive any aid, directly or indirectly, apparently every political subdivision and each of its component parts -- that is to say, the entire structure of a state, including its county and municipal components and the tens of thousands of different units of local governments in this nation (see City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 407-08 (1978)) -- could be included in the coverage of the statute. This broad sweep of the statutory application represents a substantial departure from past practice, and seems to create uncertainty and potential liability far beyond what is needed to reverse Grove City.

To summarize, the bill clearly creates the possibility that states, cities, counties -- and even perhaps municipal corporations, state-owned utilities and water districts -- could be required to submit to the requirements of the four statutes as a result of federal aid to one program. As we are aware of no state in the country that does not receive some federal assistance to at least some of its activities, we believe the bill is capable of surpassing any precedent in imposing federally determined standards upon state and local governments.

Thus, far from "restoring" coverage under the four statutes to their original reach, as represented, the bill potentially does precisely what the framers of the initial legislation were careful to avoid: it "spread[s] the tentacles of the Federal Government to choke off all State activity." 110 Cong. Rec. 7059 (1964) (Sen. Pastore). Although there are many considerations that could restrain the courts from permitting the expansive application (see Part III, infra), the bill unnecessarily leaves to them the resolution of this vital issue.

B. Enforcement

1. Termination of funds

In addition to expanding the coverage of the non-discrimination provisions, the bill makes significant changes in the standards of enforcement of the Act. As amended by the bill, the statute would allow compliance to be effected, as before, by fund termination,

but such termination or refusal shall be limited in its effect to the particular assistance which supports such noncompliance so found, or . . . by any other means authorized by law.

S. 2568, § 5(b) (emphasis added).

Thus, the bill replaces the current language, limiting fund termination to "the particular program" in which noncompliance has been found, with new language limiting termination only to "the particular assistance which supports" noncompliance, ostensibly "retain[ing] the requirement that a nexus be established between the discrimination found and any federal funding" Cong. Rec. S4587 (Daily ed. Apr. 12, 1984) (joint explanation of Senators Kennedy and Packwood).

The sponsors have asserted that "[t]his bill does not change the enforcement structure and remedial tools available before Grove City raised questions about the statutes." Id. However, the ambiguous language of the amendments to the enforcement provision is subject to an interpretation that goes far beyond the enforcement scheme in place prior to Grove City. The new bill, by deleting the "particular program" language, could be construed to mean that "assistance which supports" discrimination encompasses all federal aid to an entity of which a subunit has violated the Act. That reading would deem any aid to the whole as "assisting" in the derelictions of the part, or conversely. Under this interpretation, discrimination by a single subunit or instrumentality of a state could result in termination of all federal aid to the state, including aid to its other subunits or instrumentalities not in violation. This broad potential for eliminating federal assistance programs would severely undermine the original intent of the program-specific limitation in Title VI, which "was not for the protection of the political entity whose funds might be cut off, but for the protection of the innocent beneficiaries of programs not tainted by discriminatory practices." Board of Public Instruction v. Finch, 414 F.2d 1068, 1075 (5th Cir. 1969) (emphasis by the court). Nor does this broad interpretation appear to be consistent with the overall context of the "assistance" phrase in the bill itself, the focus of which is on limiting, rather than expanding, the scope of funding termination as a sanction for noncompliance. Never-

theless, the bill does not specify in what respect a federal grant to one entity could be deemed to "assist" in discrimination committed by related entities and consequently implicate the vicarious termination requirement. 12/

On the one hand, the statements of the sponsors, 13/ indicating their intent to preserve the "pinpoint" approach of the enforcement scheme, would counsel against imparting the most expansive potential interpretation. On the other hand, these generalized statements might not persuade a court to limit the statutory language, because such a construction would tend to render the amendatory language nugatory. A court would be reluctant to construe a statutory amendment in a way that merely preserves the effect of the prior law. See Federal Ins. Co. v. Speight, 220 F. Supp. 90, 93 (E.D.S.C. 1963) ("The general rule is that a change in phraseology indicates persuasively, and raises a presumption, that a departure from the old law was intended").

The ambiguity of the bill on this critical question of the cutoff standard will present courts and administrative bodies with a difficult interpretative task, and will prevent

12/ The term "assistance which supports" could also be read to authorize a narrower scope for termination than Title VI currently allows. Theoretically, a single grant program could be divided up into unaffected portions and portions used in discriminatory activities; only the latter segments of the grant would be terminated, rather than the entire program. This reading, although consistent with the language of the bill, is unlikely to prevail because it is contrary to the avowed intentions of the bill's sponsors to impart a broader coverage to Title VI. See, e.g., Cong. Rec. S4585 (Daily ed. Apr. 12, 1984) (joint explanation of Senators Kennedy and Packwood).

13/ See, e.g., Cong. Rec. S2487 (Daily ed. Apr. 12, 1984) (joint explanation of Senators Kennedy and Packwood) ("The bill also retains the requirement that a nexus be established between the discrimination found and any federal funding that is to be terminated or suspended by the administrative agency enforcing the law."); id. at S4595 (statement of Sen. Cranston) (bill "remains faithful to the original purpose of 'pinpointing').

beneficiaries of federal assistance from knowing the limits of the obligations and potential liabilities they have undertaken by receiving federal financial assistance. If the sponsors intend merely to retain the present law on this point, there is simply no need to change the operative language and thereby create such interpretative problems. If they wish to change it, it is unclear what the new language will require. There are much simpler and clearer means to reverse the Grove City decision without creating such uncertainty in the operative provisions of civil rights statutes that have been the subject of twenty years of judicial interpretation.

2. Other Enforcement Options

In addition to providing for termination of funds, Title VI provides that compliance may be effected "by any other means authorized by law." 42 U.S.C. § 2000d-1(2). Two types of "other" enforcement actions have developed under Title VI. The Department of Justice may seek injunctive relief against the offending agency. See Cong. Rec. S4586 (Daily ed. Apr. 12, 1984) (joint explanation of Senators Kennedy and Packwood). In addition, an injured person may bring suit against a grantee under a private cause of action. See Regents of the Univ. of California v. Bakke, 438 U.S. 265, 419-21 (1978) (opinion of Stevens, J.) (Title VI); Lau v. Nichols, 414 U.S. 563 (1974) (Title VI); Cannon v. University of Chicago, 441 U.S. 677, 709 (1979) (Title IX). Strictly speaking, the applicability of these enforcement alternatives does not appear to be limited by the program-specific language in the existing provision relating to fund terminations. Recently, however, the Supreme Court held that, because the existing description of prohibited conduct itself imposes a "program-specific" limitation, enforcement under the "other means" clause is coextensive with the authority to terminate funds, and thus is limited under existing law to the "particular program" that has violated the statute. North Haven Board of Education v. Bell, 456 U.S. 512, 538 (1982) (Title IX).

The bill has an effect on these private enforcement alternatives as well as the fund-termination authority. Because it removes the "program-specific" limitation both in the nondiscrimination mandate of § 601 and in the granting agencies' authority to issue enforcement regulations, enforcement action taken "by any other means authorized by law"

would appear not to be limited to the particular program in which noncompliance was found. Thus, the Department of Justice could seek to enjoin the prohibited activity even though the granting agency might not have authority to terminate funds. The sponsors clearly intend to permit this discrepancy in the two modes of enforcement. See Cong. Rec. S4595 (Daily ed. Apr. 12, 1984) (statement of Sen. Cranston). Similarly, the private cause of action for individuals seeking injunctive relief would presumably remain as an available remedy against any entity encompassed by the nondiscrimination provision. See Cong. Rec. S4587 (Daily ed. Apr. 12, 1984) (joint explanation of Senators Kennedy and Packwood) (bill intended to preserve private rights of action).

III

ADMINISTRATIVE AND ENFORCEMENT PROBLEMS

Because of the broad coverage conferred by deleting the concept of program specificity and expansively defining "recipient," S. 2568 constitutes a qualitative reshaping and possible enlargement of federal civil rights jurisdiction. There are any number of examples that point up the bill's potentially expansive reach. The bill could be construed so that federal food stamp programs would subject participating supermarkets and local grocery stores to federal civil rights compliance reviews and complaint investigations. Pharmacies and drug stores that participate in medicare/medicaid programs could also be "recipients," as could the "transferee" of an individual's social security check who, upon acceptance of such payment, would have signed an open invitation to federal enforcers to enter and investigate. The sponsors do not appear to envision this result, see n.10, supra, but they have not tailored the language of the bill to protect against it.

State and local governments -- which under existing law are subject to coverage of the federal statutes only within their federally subsidized programs -- must, under the bill, defer to federal civil rights oversight of all their programs for their political subdivisions (funded and nonfunded) upon receipt by any one program of a federal dollar. For example, assume that a federal agency has proof that a city's police department discriminates on the basis of handicap in employment but receives no federal funds from the agency. However, the

fire department, also a subunit of the city government, receives substantial agency funds for its operations. Provided that the city or state received "support," that would be a sufficient basis for coverage under S. 2568. And, while defunding of the fire department might not be an available remedy in such circumstances, the federal agency could refer the matter to the Department of Justice for litigation in injunctive proceedings against the police department because the city is a recipient of federal funds (as a consequence of one of its subunits' receipt of federal funds from which it derives support) and thus is prohibited in all of its subdivisions from discriminating on the basis of handicap by section 504. This result is different from court decisions and agency practice before the Grove City College decision. These four civil rights statutes have never been construed to provide authority for the Federal Government to regulate behavior in a unit of state or local government that received no federal funds.

There are, as well, serious enforcement problems raised by S. 2568. Agency regulations and paperwork requirements imposed under the four existing civil rights statutes are currently onerous in many respects. The bill, which would give all funding agencies authority -- indeed, the statutory responsibility -- to regulate all of the programs, activities, and subunits, will remove existing boundaries of agency jurisdiction to conduct compliance reviews and complaint investigations. The result, particularly for universities and state and local governments that typically receive funding from many agencies, would likely be multiple compliance reviews and reporting requirements. Complainants could file with several agencies, resulting in duplication of effort and inefficiency in the operation of federal civil rights enforcement. Further, because agencies would be statutorily responsible for the activities of its federally funded and unfunded components, agency expertise in the operation of programs and activities that they do fund would no longer promote the avoidance of inappropriate requirements.

For example, assume that a county water district receives a grant from the Environmental Protection Agency (EPA) to study the county's sewer needs. S. 2568 would appear to provide that all of the county's operations are subject to all four civil rights statutes because the federal financial assistance gives "support" to the county. Further assume that EPA received a complaint alleging discrimination in

part of the county's operations that received no separate federal funds -- the county's road maintenance. Even though EPA has no knowledge or expertise in this area (it would fall within the province of the Department of Transportation), under the bill, EPA would presumably have the responsibility to deal with the allegation of discrimination. The federal government would lose a forceful tool -- the knowledge and expertise of those with specialized experience in the kind of discrimination involved.

There is no procedure contemplated by the bill for inter-agency referrals that might serve to alleviate the concern over inexpert or duplicative agency complaint investigations. Nor is it clear, even under some agency referral systems, how the fund termination provision would operate if the discriminatory activity existed in a nonfunded component, as investigated by a referral agency, and there developed a disagreement as to whether the federal funds "supported noncompliance." No attention appears to have been given to this set of complexities.

IV

CONSTITUTIONAL CONSIDERATIONS

In addition to the significant policy issues raised by the potentially expansive change in the law under S. 2568 as discussed above, the amendments may raise constitutional questions with respect to Congress' power to impose such requirements, and whether these requirements may be imposed on the states. Three possible sources of federal power are arguably available to support this legislation. First, the commerce power, U.S. Const. Art. I, § 8 cl. 3, could be relied upon for the imposition of nondiscrimination obligations on certain private entities. See Heart of Atlanta Motel v. United States, 379 U.S. 241, 261 (1964) (Title II of the Civil Rights Act of 1964, prohibiting discrimination in public accommodations, is valid exercise of commerce power).

Application of coercive responsibilities on the states through the commerce power, however, is limited by the effect of the Tenth Amendment. 14/ See National League of Cities v.

14/ "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X.

Usery, 426 U.S. 833, 852 (1976) (federal government may not regulate the states as states to impair their ability to structure integral operations in areas of traditional governmental functions). But see EEOC v. Wyoming, 103 S. Ct. 1054, 1064 (1983) (application of Age Discrimination in Employment Act to states under commerce power did not violate Tenth Amendment in context presented). If this legislation is to avoid the constraints of the Tenth Amendment, two alternative sources of federal power exist: the power to impose conditions on expenditures of funds pursuant to the Spending Clause 15/ and § 5 of the Fourteenth Amendment. 16/

When the source of legislative power is not articulated by Congress and could be either the Spending Clause or § 5, the Supreme Court generally looks to the type of obligations sought to be imposed by the legislation. If the claimed obligations involve affirmative financial outlays by the states, the Court will be less willing to infer that the power derives from § 5 and more likely to infer spending power authority, "since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." Pennhurst State School v. Halderman, 451 U.S. 1, 17 (1981) (Pennhurst I). 17/

15/ U.S. Const. Art. I, § 8, cl. 1.

16/ The Fourteenth Amendment provides, in part, that no state may "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Section 5 authorizes Congress "to enforce, by appropriate legislation," its provisions.

17/ This approach to determining the source of constitutional authority for federal legislation could create distinctions among the four civil rights statutes under consideration, depending on the claims raised in a particular case. The dispositive criterion would be whether the claimant sought merely to enforce prohibitory obligations or instead attempted to impose affirmative duties upon a recipient of federal aid. The extent to which the four statutes require affirmative steps has not been clearly resolved. See Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979) (college not required by § 504 to make affirmative efforts to overcome disabilities caused by handicaps). But see 45 C.F.R. § 84.44 (1983) (under § 504 recipient must provide necessary "auxiliary aids" to handicapped).

A. The Spending Clause

The Supreme Court has long recognized that Congress may fix the conditions upon which it disburses federal funds to the states. Pennhurst I, 451 U.S. at 17. There are, however, limits on the power to impose such conditions. Id. Although the Court has never defined those limits, its use of spending power analysis to construe statutes passed under authority of that power sheds some light on the general contours of this type of legislation.

In Pennhurst I, the Court considered a statutory question involving the Developmentally Disabled Assistance and Bill of Rights Act ("Disabled Assistance Act"), a voluntary program whereby the Federal Government provides assistance to states to aid them in treating the mentally retarded. The issue before the Court was whether the Disabled Assistance Act created any substantive rights on behalf of the mentally retarded to particular types of treatment and, if so, whether Congress, which had not articulated its source of authority, could impose these obligations on the states either under its spending power or under § 5 of the Fourteenth Amendment. The Court approached the question of power first, considering the scope of the spending power in order to determine what rights Congress had intended to create under the Act. The Court explained the principles of spending power analysis:

[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal money, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

451 U.S. at 17 (citations and footnote omitted).

The Court approached this question in Pennhurst I, not in the context of the limits on Congress's power under the Spending Clause, but rather by attempting to determine whether Congress had intended to impose certain affirmative financial obligations upon state participants in the program to realize social benefits that the Act sought to achieve. Ambiguous statutory language and legislative history in the Disabled Assistance Act persuaded the Court that Congress could not have intended to use its spending power in a way that would impose affirmative obligations on recipient states without clear notice. Id. at 27. ^{18/} Thus while Congress has broad power to place conditions upon funds expended under the Spending Clause, Pennhurst I stands for the proposition that legislation must clearly notify states accepting federal financial assistance that they are thereby incurring additional obligations. The Court declined to attribute to Congress an intent to impose significant financial obligations on the states without adequate notice. As in contract theory, the recipient must have the option to terminate or refuse a grant rather than assume the concomitant burdens. Guardians Ass'n v. Civil Service Comm'n of the City of New York, 103 S. Ct. 3221, 3229 (1983); Fullilove v. Klutznick, 448 U.S. 448, 474 (1980); Rosado v. Wyman, 397 U.S. 397, 420-21 (1970).

This construction of the spending power avoids the limitations of the Tenth Amendment, which apply with full force to Congress's power under the Commerce Clause. Because the State has a choice whether to accept a condition attached to federal funding, its sovereignty is not threatened as it is in certain mandatory applications of Congress's commerce power. This voluntary, knowing decision of a state to exchange burdens for benefits, at least in theory, preserves the autonomy of state governance and avoids the threat of federal coercion. See Steward Machine Co. v. Davis, 301 U.S. 548, 589 (1937) (rejecting Tenth Amendment challenge to federal social security tax law because state unable to claim duress);

^{18/} The Court reasoned further that since no provision in the Act authorized termination of funds for violation of the specific right claimed, affirmative accommodation of that right "can hardly be considered a 'condition' of the grant of federal funds." 141 U.S. at 23.

cf. National League of Cities v. Usery, 426 U.S., 833, 852 n.17 (1976) (expressing no view as to whether Tenth Amendment would pose an impediment to exercises of spending power); Coyle v. Oklahoma, 221 U.S. 559, 568 (1911) (under power to admit states to the union, Congress may impose terms and conditions but may not deprive a state of essential attributes).

An examination of S. 2568 in light of these principles discloses that the bill purports to set out the conditions under which a state will be deemed to have accepted the nondiscrimination obligations of the four civil rights statutes. If a state "receives support" from the federal money granted to it or to its subunit, then it must comply with the statutory mandates. (See pp. 6-8 supra.) Under a number of circumstances, it seems apparent that a state could not successfully claim that it was unaware of the intended effect of the bill, nor would a court have difficulty in such situations in determining that notice was adequate to ensure that the Spending Clause was properly invoked. Thus, for example, in a situation such as that involved in the Grove City case, an institution would be characterized as a "recipient" on account of aid to one of its departments, and could not successfully claim that it was unaware that the entire institution would be rendered subject to the Act through receipt of federal funding by a single department. This reading is consistent with both the language of the bill and the statements of its sponsors.

Different considerations might arise, however, if a state were charged with the responsibilities of the non-discrimination statutes as a result of federal aid to a discrete state component. Substantial uncertainty exists, for example, as to whether a federal research grant to a state university science facility would necessarily subject each and every other activity of the state or any of its subunits, no matter how remote in funding or activities, to statutory coverage. Assuming no other federal aid, the obligations and liabilities of the state's police department, legislature, or health clinics would depend on the extent to which the state could be said to "receive support" from the federal research grant. The bill does not provide a standard for determining this significant issue, nor does it clearly articulate the choices the state is making when it accepts the federal funds.

Clear notice to a state indicating the extent of the responsibilities it agrees to incur by accepting federal aid; therefore, might be absent in some circumstances, depending on the basis asserted for a claim that the state was covered by the statute. We believe that the bill is susceptible to certain applications that would not meet the notice standard articulated in Pennhurst I.

A challenge to the bill on this ground is unlikely to arise as a facial attack on the constitutionality of Congress's exercise of its spending power. Rather, it is more likely that a court would be asked to determine whether, under a specific set of facts, Congress had intended the ambiguous language to require that an entire state be covered by the statutes as a result of isolated federal assistance programs. As in Pennhurst I, the Court would tend to construe the statutes narrowly enough that they would not exceed the heretofore undefined limits of the spending power. See Lau v. Nichols, 414 U.S. 563, 569 (1974) ("whatever may be the limits" of the spending power, Title VI does not exceed them).

Only through a continuous process of judicial interpretation and reinterpretation could this legislation as presently drafted eventually develop meaningful contours of the type envisioned by the Court in Pennhurst I. Thus, while we do not believe that the ambiguity would necessarily require invalidation of any part of the amendments, we are concerned that considerable uncertainty would result with regard to the coverage of the four statutes affected by this bill. Although the statements of the sponsors of S. 2568 do not appear to recognize that the definition of "recipient" could extend statutory coverage far beyond the contours of a single institution and the Grove City facts, the language is broad enough to subject an entire state and all of its subunits to coverage if the state, or any of its subunits, receives any federal assistance. Evidently the sponsors either do not perceive or do not wish to emphasize the bill's amenability to this construction. Yet, the meaning of the "receives support" limitation -- if indeed it is a limitation -- is nowhere articulated. We believe that the amendments should be refined to achieve greater precision and to avoid unnecessary litigation and resultant confusion.

§ 2000d-6 [NEW]

For the purpose of this title, the term 'recipient' means--

(1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

(2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit, to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.

TITLE VI

CIVIL RIGHTS ACT OF 1964, § 601; 42 U.S.C. § 2000d

§ 2000d

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation [in], be denied [the] benefits [of], or be subjected to discrimination [under any program or activity receiving] by any recipient of Federal financial assistance.

§ 2000d-1

Each Federal department and agency which is empowered to extend Federal financial assistance to any [program or activity] recipient, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such [program or activity] recipient by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance [under such program or activity] to any recipient as to [whom] which there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to [whom] which such a finding has been made and, shall be limited in its effect to the particular [program, or part thereof, in which such noncompliance has been] assistance which supports such noncompliance so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action, terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

For purposes of this chapter--

* * * * *

(4) [NEW] the term 'recipient' means--

(A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.

(a) Methods of achieving compliance with regulations

The head of any Federal department or agency who prescribes regulations under section 6103 of this title may seek to achieve compliance with any such regulation--

- (1) by terminating, or refusing to grant or to continue, assistance [under the program or activity involved] to any recipient with respect to whom there has been an express finding on the record, after reasonable notice and opportunity for hearing, of a failure to comply with any such regulation; or
- (2) by any other means authorized by law.

(b) Limitations on termination

Any termination of, or refusal to grant or to continue, assistance under subsection (a)(1) of this section shall be limited to the particular political entity or other recipient with respect to which a finding has been made under subsection (a)(1) of this section. Any such termination or refusal shall be limited in its effect to [the particular program or activity, or part of such program or activity, with respect to which such funding has been made] assistance which supports the non-compliance so found. No such termination or refusal shall be based in whole or in part on any finding with respect to any [program or activity] noncompliance which [does] is not [receive Federal financial] supported by such assistance. Whenever the head of any Federal department or agency who prescribes regulations under section 6103 of this title withholds funds pursuant to subsection (a) of this section, he may, in accordance with regulations he shall prescribe, disburse the funds so withheld directly to any public or nonprofit private organization or agency, or State or political subdivision thereof, which demonstrates the ability to achieve the goals of the Federal statute authorizing the program or activity while complying with regulations issued under section 6103 of this title.

(e) Injunctions

(1) When any interested person brings an action in any United States district court for the district in which the defendant is found or transacts business to enjoin a violation of this [Act by any program or activity receiving Federal financial assistance] title, such interested person shall give notice by registered mail not less than 30 days prior to the commencement of that action to the Secretary of Health and Human Services, the Attorney General of the United States, and the person against whom the action is directed.

* * * * *

AGE DISCRIMINATION ACT OF 1975, § 302; 42 U.S.C. § 6101

§ 6101

It is the purpose of this chapter to prohibit discrimination on the basis of age [in programs or activities receiving] by recipients of Federal financial assistance, including [programs or activities receiving funds under the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. 1221 et seq.)] recipients of funds under chapter 67 of title 31, United States Code.

§ 6102

Pursuant to regulations prescribed under section 6103 of this title, and except as provided by section 6103(b) and section 6103(c) of this title, no person in the United States shall, on the basis of age, be excluded from participation [in], be denied [the] benefits [of], or be subjected to discrimination [under, any program or activity receiving] by any recipient of Federal financial assistance.

§ 6103

* * * * *

(b) Nonviolative actions

(1) It shall not be a violation of any provision of this chapter, or of any regulation issued under this chapter, for any person to take any action otherwise prohibited by the provisions of section 6102 of this title if [, in the program or activity involved]--

(A) such action reasonably takes into account age as a factor necessary to the normal operations of the recipient or the achievement of any statutory objective [of such program or activity] in furtherance of which the Federal financial assistance is used; or

* * * * *

(c) Employment practices

(1) Except with respect to [any program or activity receiving] Federal financial assistance for public service employment under the Comprehensive Employment and Training Act of 1974 (29 U.S.C. 801 et seq.) as amended, nothing in this chapter shall be construed to authorize action under this chapter by any Federal department or agency with respect to any employment practice of any employer, employment agency, or labor organization, or with respect to any labor-management joint apprenticeship training program.

* * * * *

REHABILITATION ACT OF 1973, § 504, 29 U.S.C. § 794

§ 794

(a) No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of [his] such individual's handicap, be excluded from the participation [in], be denied [the] benefits [of], or be subjected to discrimination [under any program or activity receiving] by any recipient of Federal financial assistance.

(b) [NEW] For the purpose of this section, the term 'recipient' means--

(1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

(2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit, to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.

§ 1682

Each Federal department and agency which is empowered to extend Federal financial assistance [to any] for education [program or activity], by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to [such program or activity] recipients by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance [under such program or activity] to any recipient as to [whom] which there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to [whom] which such a finding has been made, and shall be limited in its effect to the particular [program, or part thereof, in which] assistance which supports such noncompliance [has been] so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

APPENDIX

STATUTES AS AMENDED BY S. 2568 AND H.R. 5490 *

TITLE IX

EDUCATION AMENDMENTS OF 1972, § 901; 20 U.S.C. § 1681

§ 1681

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation [in], be denied [the] benefits [of], or be subjected to discrimination [under any education program or activity receiving] by any education recipient of Federal financial assistance, except that:

* * * * *

(c) "Educational institution" defined

* * * * *

(2) [NEW] For the purpose of this title, the term 'recipient' means--

(A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.

* New language is designated by underscoring or by "NEW;" portions that the bill would delete are in brackets.

ALTERNATIVES TO S. 2568 AND H.R. 5490

To the extent that the legislative objective is limited to removing the restraints found by the Court to have been written into present law in the Grove City decision, proponents might wish to consider alternative amendments which would reverse that decision without tampering with an otherwise effective and successful statutory scheme. Each possible alternative may raise its own set of issues to be considered carefully by the Congress, and because of the importance of any modification in these civil rights statutes, any proposed change deserves to be subjected to the full rigors of the committee hearing process, to provide an opportunity to develop fully its strengths and weaknesses, and to create a useful legislative history. One possibility for attaining the stated objective of reversing the Grove City decision through less drastic changes in the existing civil rights statutes would be the Schneider bill, H.R. 5011, currently before Congress, which would extend Title IX coverage to educational institutions as well as to "programs and activities." Alternatively, an amendment to S. 2568 and H.R. 5490 could go far toward avoiding at least some of the difficulties outlined in this report. The Department of Justice stands ready to work with the Committee to devise language that will fully meet Congress's stated purpose while avoiding the sort of coverage, administrative and enforcement problems discussed above.

VI

CONCLUSION

Our review of the foreseeable effects of S. 2568 leads us to conclude that the sweeping scope of the language proposed in the bill might well have much broader application than simply the reversal of the Grove City decision. We believe the consequences of the serious ambiguities in the bill and their constitutional implications, discussed above, have not been adequately considered by Congress or accurately reflected in the introductory statements of the bill's sponsors. The perhaps unintended ramifications of the bill are certain, at best, to create confusion in recipients, agencies, and courts. At worst, they may include impermissible interference with important state prerogatives or lead to adverse judicial decisions as to their enforceability.

Sincerely,

Robert A. McConnell
Assistant Attorney General
Office of Legislative and
Intergovernmental Affairs

Oregon v. Mitchell, 400 U.S. 112 (1970). In that case, the Court upheld Congress's § 5 authority to ban literacy tests in state voting based upon evidence of racially discriminatory effects, but it struck down Congress's attempt under § 5 to require states to permit the 18-year-old vote in state elections. Some members of the Court evidently believed that legislation outside the area of racial discrimination cannot be accomplished under § 5, id. at 130 (Opinion of Black, J.); id. at 212 (Opinion of Harlan, J.); id. at 293 (Opinion of Stewart, J., with Burger, C.J. and Blackmun, J.), while others apparently believed that all principles of equality may be enforced under § 5. Id. at 143 (Opinion of Douglas, J.); id. at 240 (Opinion of Brennan, White, and Marshall, JJ.). More recently, the Court declined an opportunity to decide whether the Age Discrimination in Employment Act (ADEA) could be upheld as a valid exercise of § 5 powers. EEOC v. Wyoming, 103 S. Ct. at 1064. Four justices, in dissent, expressed the view that § 5 could not provide the basis for Congress's extension of the ADEA to the states. Id. at 1068 (Burger, C.J., with Powell, Rehnquist, and O'Connor, JJ., dissenting). 21/

Title VI has the strongest claim to validity under § 5 because it focuses on racial discrimination. Title IX, the ADA and § 504 stand on more tenuous footing in this respect, since they arguably reach beyond the mandates of the Constitution in protecting classes of persons heretofore not judicially recognized as entitled, as a class, to the protections afforded by the Fourteenth Amendment to victims of racial discrimination. Consequently, it is much more likely that at least these three statutes would be analyzed under the Spending Clause rather than as exercises of congressional power under § 5. If so, the courts might well attempt to construe these statutes as applicable only in those instances where they may be perceived as providing sufficiently clear notice to constitute a valid imposition of conditions upon the acceptance of federal funds under the Spending Clause. However, this task should properly be undertaken in the first instance by the legislators.

21/ The Chief Justice appears to have taken the position that the Court must declare a class to be constitutionally protected before Congress can exercise whatever § 5 power it may have vis-a-vis the states. 103 S. Ct. at 1074 n.7.

unlikely to impute § 5 authority to such statutes unless Congress expressly invoked it. "Because such legislation [under § 5] imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." Pennhurst I, 451 U.S. at 16.

As to the second consideration, it is unclear whether § 5 would support the sweeping requirements of the four nondiscrimination statutes even if it were explicitly invoked. The limits of what may be the subject of "appropriate legislation" under § 5 have not been defined by the Court. See Pennhurst I, 451 U.S. at 16 n.12. The Court has extended to § 5 cases the test of McCulloch v. Maryland, 17 U.S. 315, 420 (1819), under which a statute passed under § 5 must be "plainly adapted" to the end of enforcing the Fourteenth Amendment and consistent with "the letter and spirit of the Constitution." Katzenbach v. Morgan, 384 U.S. 647, 651 (1966). The Court has construed broadly Congress's exercise of § 5 powers to impose requirements beyond those mandated by the Fourteenth Amendment itself, but to date such expansive readings of the § 5 powers have been accorded primarily in the area of race discrimination. See Fullilove v. Klutznick, 448 U.S. 448 (1980); City of Rome, 446 U.S. at 177.

However, the breadth of Congress's power under § 5 is an area which the Supreme Court has not fully explored. In particular, it is unsettled how much latitude Congress has to determine the substantive content of Fourteenth Amendment rights in the course of deciding what "rights" are appropriate to enforce pursuant to § 5. Thus it is not clear to what extent or in what circumstances Congress can modify or expand Fourteenth Amendment rights by statute, either on the basis of legislative findings of fact or as a matter of "resolution of competing values and a delineation of substantive constitutional rights by Congress rather than the Court." 20/

The Court has not yet applied the deferential standard accorded legislation involving race discrimination outside the area of race, the principal target of the Civil War Amendments. This question sharply divided the Court in

20/ G. Gunther, Constitutional Law 1086 (10th ed. 1980).