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UPDATE ON SUPREME COURT NOMINEES

On October 23, 1987, the Senate by a 58-42 vote rejected President Reagan's nomination of Judge Robert Bork to the Supreme Court of the United States. The vote on the Senate floor followed 23 hours of debate. Senator Edward Kennedy (D-MA) said:

This debate has been a timely lesson, in this bicentennial year of the Constitution, of our commitment to the rule of law, to the principle of equal justice for all Americans, and to the fundamental role of the Supreme Court in protecting the basic rights of every citizen.

In choosing Robert Bork, President Reagan selected a nominee who is unique in his fulminating opposition to fundamental constitutional principles as they are broadly understood in our society. He has expressed that opposition time and again in a long line of attacks on landmark Supreme Court decisions protecting civil rights, the rights of women, the right of privacy, and other individual rights and liberties. Judge Bork may be President Reagan's ideal ideological choice for the Supreme Court, but that ideology is not acceptable to Congress and the country, and it is not acceptable in a Justice of the Nation's highest court.

On November 9, the President nominated Judge Douglas Ginsburg, U.S. Court of Appeals for the District of Columbia (the same court on which Judge Bork sits), to fill the vacant seat on the Supreme Court. Judge Ginsburg's nomination was almost immediately plagued by problems. Questions were raised

about a possible conflict of interest because he had played a policy role in a Department of Justice court case involving expansion of cable-television rights while he held \$140,000 in convertible bonds in a cable-television firm. During his tenure as chief of regulatory policy at the Office of Management and Budget, he had delayed implementation of regulations to control asbestos because the regulations were considered too costly for the number of lives saved. He had been accused by Representative John Dingell (D-MI) of shredding drafts of a letter on government antitrust policy while at the Justice Department. It was also suggested that he had overstated his trial experience on the Judiciary Committee questionnaire he completed when he was nominated to the Court of Appeals in 1986. Questions were raised about why he had not recused himself for two months from a pension case that involved issues he had handled as a government official. Finally, concern was expressed about incidents in his personal background. These problems led Judge Ginsburg to ask the President on November 7 not to send his nomination forward.

Next, the President nominated Judge Anthony Kennedy, now a member of the U.S. Court of Appeals for the Ninth Circuit. Civil rights organizations are carefully examining the nominee's judicial record. He has written close to 500 opinions since his appointment to the Court of Appeals by President Gerald Ford in 1975.

Because of the nominee's extensive record and the need for careful examination of that record, the Leadership Conference on Civil Rights expressed surprise and disappointment that the Senate Judiciary Committee decided to hold hearings on the nomination the week of December 14. The period between Judge Kennedy's nomination and the start of the hearings is shorter than it was for any other Reagan Supreme Court nomination. Benjamin Hooks, Chair, and Ralph G. Neas, Executive Director of the Leadership Conference, stated:

...[W]e believe very strongly that the [Judge] Kennedy hearings should be as comprehensive, as informative, and as fair as the Bork hearings were. It is doubtful that such hearings could take place in the chaotic atmosphere that characterizes the last few days before a congressional adjournment.

Judge Kennedy's Record

Based upon a preliminary review of Judge Kennedy's record, several organizations have expressed concern about several of his opinions. The opinions are briefly discussed below. The summary of the first three cases borrows heavily from a Mexican American Legal Defense and Educational Fund Memorandum, prepared by E. Richard Larson. MALDEF has not taken a position on the nomination.

1). In TOPIC v. Circle Realty, 532 F.2d 1273 (9th Cir. 1976), Judge Kennedy wrote the court's opinion which held that the plaintiffs (individual homeowners and a fair housing organization) did not have standing (a sufficient interest in the case) to sue and dismissed the case. The plaintiffs had sued under sec. 812 of the Fair Housing Act to end racial steering by real estate brokers. The district court denied the brokers' motion to dismiss on grounds of standing and the brokers appealed. Judge Kennedy reversed and directed that the case be dismissed.

To reach this result, Judge Kennedy had to distinguish the Supreme Court's

decision in Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972), in which the Court recognized the standing of apartment complex tenants to challenge a landlord's similar steering under sec. 810 of the Fair Housing Act. The court in Trafficante recognized that such tenants were injured by a denial of their right to associate even though they were not direct victims of discrimination. He sought to distinguish Trafficante in two ways.

Judge Kennedy found that the injury allegedly suffered by the homeowners in TOPIC was probably much less direct than that suffered by the tenants in Trafficante since the former lived in the same community but not the same housing project. But Judge Kennedy then declined to base his decision on this premise.

Judge Kennedy instead limited Trafficante to its holding under the less-used sec. 810 of the Fair Housing Act, and held that sec. 812 relied on in TOPIC did not authorize lawsuits by residents who had not themselves been directly discriminated against.

Judge Kennedy's reasoning was rejected by the Supreme Court in a similar case three years later, Gladstone Realtors v. Bellwood, 441 U.S. 91 (1979). In a 7-2 opinion, written by Justice Lewis Powell, the Court noted: "[m]ost federal courts that have considered the issue agree that sec. 810 and 812 provide parallel remedies to precisely the same prospective plaintiffs.... The notable exception is the Ninth Circuit TOPIC v. Circle Realty."

2). In Aranda v. Van Sickle, 600 F.2d 1276 (9th Cir. 1979), Hispanic plaintiffs challenged the City of San Fernando's at-large elections asserting that the system diluted the Hispanic vote. Judge Kennedy in a concurring opinion that is longer than the majority opinion, provided a judicial roadmap which would have made future challenges to at-large elections difficult in states within the Ninth Circuit.

The plaintiffs alleged that there was a history of discrimination against Hispanics, and that the political process was not open equally to Hispanics. In support of their claim, the plaintiffs showed that as of the early 1970's, the population of San Fernando had grown to become 50 percent Hispanic; the population of registered voters was 29 percent Hispanic; and yet only three Hispanics had ever been elected to the five-member City Council. In addition few Hispanics had ever been appointed to the City's eighteen commissions; few Hispanics had been permitted to serve as election officials; volunteer Hispanic poll watchers were routinely harassed; more than half of the polling places were ordinarily located in the homes of Anglos while polling places had seldom been located in Hispanic homes; racial appeals were made by Anglos in election campaigns; and all ballots and election materials were available only in English.

Despite these allegations, the District Court denied plaintiffs a trial, and granted the City's motion for summary judgment on the ground that even if plaintiffs could prove all their allegations, this would not add up to the intentional discrimination necessary to establish liability. The Ninth Circuit affirmed the summary judgment dismissal in a majority opinion which set forth few of the facts, contained little legal analysis, and primarily adopted the District Court's opinion.

Judge Kennedy's concurring opinion filled in the facts and provided the analysis missing from the majority opinion. He reviewed the plaintiffs' many factual allegations, and then concluded that even if they proved all of them they could not win:

Assuming that plaintiffs' factual allegations are true, when taken together, they would not permit a reasonable person to infer that the at large system for electing the mayor and city council members is maintained because of an invidious intent.

In 1980 the Supreme Court said in the Bolden case that intent must be shown in voting cases of this kind. In 1982, however, Congress amended sec. 2 of the Voting Rights Act to clarify its intent that electoral practices which have a discriminatory effect are illegal. This 1982 amendment was further clarified by a narrowly divided Supreme Court in Thornburg v. Gingles, U.S. (1986).

3). In Spangler v. Pasadena Board of Education, 611 F.2d 1239 (9th Cir. 1979) the issue before the court was whether the District Court's supervision of the city's school desegregation efforts should be continued or terminated. The District Court ruled that the supervision should be continued and the Court of Appeals reversed, holding that the court's jurisdiction over the case should be terminated. Judge Kennedy filed a lengthy concurring opinion (more than three times longer than the majority opinion) setting forth the facts and providing a legal analysis for terminating the court's jurisdiction. In doing so, he went far beyond the majority opinion both procedurally and legally.

Although appellate courts usually do not disturb factual findings of a district court unless they are clearly erroneous, Judge Kennedy substituted his version of the facts for those found by the District Court. For example, although the District Court found substantial noncompliance particularly after 1976, Judge Kennedy argued that "there has been no showing of noncompliance in any degree since that date." Additionally, on the resegregation issue, Judge Kennedy acted as the trier of fact in finding that "the evidence does not support the conclusion that the school board harbors an intent to establish, or return to, a dual system." Irrelevant to Judge Kennedy were the campaign statements of new Board members [expressing their intent to revoke the desegregation plan], the actual deliberations of the Board, and the credibility of the Board members as witnesses. Relevant instead to Judge Kennedy was his conclusion that a "policy of favoring [a return to] neighborhood schools is not synonymous with an intent to violate the constitution." Moreover, the Board's "resolution [promising not to engage in intentional discrimination in the future] is further evidence that the Board is not likely to engage in new acts of intentional discrimination."

The issues dealt with by Judge Kennedy in the Spangler case are very much alive today. Recently several courts have faced the question of when jurisdiction should end over school districts that have been ordered to remedy unconstitutional segregation. Further, when jurisdiction ends, courts are faced with the question of whether districts are free to return to "neighborhood" assignment systems even though these will resegregate schools. Last year the Supreme Court refused to accept two such cases, Norfolk and Oklahoma City, which reached conflicting results. The issue will undoubtedly come up again.

4). The National Committee on Pay Equity has analyzed Judge Kennedy's decision in a major sex discrimination case, AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985). The National Committee has not taken a position on the nomination; it has, however, expressed concern about the Judge's opinion in this case:

[The opinion] lacks the degree of rigorous legal analysis that should be expected of a Supreme Court Justice, it exceeds the proper limits placed on appellate review by Supreme Court precedent, and it displays an unseemly eagerness to champion a political and economic position rather than decide a case.

A brief discussion of the case follows, with excerpts from a National Committee memorandum.

The district court found that the state of Washington had used a wage system that had an adverse impact on women without any sufficient business justification, and had intentionally treated women differently from men in setting salaries. This finding was based on job evaluation studies, performed by the state, that found significant wage disparities between men's jobs and women's jobs of equal skill, effort, responsibility and working conditions. Other evidence of discrimination included sex-segregated job classifications, job advertisements placed under "help wanted - male" and "help wanted -female" columns in newspapers up through 1973, equal pay violations, subjective classification decisions based on sex, and statements by state officials and decisionmakers admitting wage discrimination.

Instead of reviewing the trial court's findings, Judge Kennedy based his whole approach to the case on his presumption that the state's compensation system and its resulting underpayment of women's jobs reflected "prevailing market rates," even though the trial court made no finding in this regard and the trial court opinion does not even contain the word "market." Having framed the issue in an entirely new way, based on his own factual finding, Judge Kennedy then proceeded to write an endorsement of the free market system and an attack on "comparable worth" rather than to review the trial court's decision.

The National Organization for Women on November 19 announced its opposition to the nomination of Judge Kennedy. Molly Yard, President of NOW, stated: "Judge Anthony Kennedy's judicial decisions on employment discrimination and his ambiguity on an individual's right to privacy make him an unacceptable candidate for a Supreme Court seat." Ms. Yard also questioned the Judge's 25 year membership in the all-male Olympic Club, from which he resigned in late October 1987. The club has no black members and had an official policy that excluded blacks from membership until 1968.

THE CONTINUING IMPACT OF GROVE CITY

The continuing adverse impact of the Supreme Court's Grove City decision on the protection of civil rights was once again made evident in an October 6, 1987 decision by the U.S. Court of Appeals for the Eleventh Circuit, U.S. v. State of Alabama, No. 86-7090. The Appeals Court, citing the Grove City decision, reversed and remanded the lower court decision, which had found that the state of Alabama had maintained a segregated system of higher education,

and ordered the submission of a remedial plan. The Appeals Court noted that the Alabama higher education system received substantial amounts of federal monies, but ruled that the "complaint and proof must be redrawn to make the requisite showings of which particular programs or activities received federal funding and how these programs were discriminatory" [underline added]. In Grove City College v. Bell, 465 U.S. 555 (1984), the Supreme Court ruled that Title IX's prohibition against federal funding of sex discrimination extended only to the specific program or activity receiving the funds, and not to the entire recipient institution or entity. Since all the civil rights statutes relating to federal funds use the same language to describe coverage, the decision had the effect of also narrowing the scope of civil rights statutes prohibiting discrimination based on race, disability and age.

Background

Prior to 1953, the state of Alabama established and maintained a racially dual system of public higher education sanctioned by state law. That system was perpetuated after 1953 by the policies and practices of state officials. In response to the Adams case which required the Department of Health, Education and Welfare (now the Department of Education) to compel desegregation of public schools on all levels in the southern and border states, the Department of Education entered into negotiations with Alabama state officials attempting to develop an acceptable higher education desegregation plan. (For a discussion of the Adams case, see the CIVIL RIGHTS MONITOR, vol 2, no. 4.) After negotiations failed to produce an acceptable plan, the U.S. Department of Justice filed suit in federal district court on July 11, 1983 under the Fourteenth Amendment to the Constitution and Title VI of the Civil Rights Act of 1964.

The Justice Department charged that "since 1958, the defendants have continued to pursue policies and practices that have resulted in a public higher education system in which the institutions' student bodies, faculties, and governing boards are still substantially segregated by race." The United States sought the development of a plan to eliminate the vestiges of the racially dual system of higher education.

Following a month-long trial in July 1985 District Court Judge U.W. Clemon found "that the state had never fully eliminated the vestiges of its prior, racially dual system of higher education." The district court opinion listed a series of state actions that continued the racially dual system and stymied the growth and development of Alabama A&M and Alabama State University, historically black institutions. The actions included:

- o The expansion of the University of Alabama at Huntsville into a full degree-granting institution and the course duplication of Athens State-Calhoun Community College (historically white institutions) interfered with A&M's ability to recruit white students and faculties.

- o The development of the Montgomery campuses of Auburn and Troy State Universities served to duplicate ASU's programs and thus had a negative impact on white enrollment at ASU.

- o The state's allocation of funds and programs further reinforced ASU and A&M's historical status as second class black institutions.

The court found that the student bodies at four historically white institutions and the two historically black institutions were racially identifiable. In addition, the faculties and governing bodies of all the institutions were racially identifiable. State officials were ordered to submit a remedial plan to eliminate all vestiges of the dual system. The state appealed the decision, and the court of appeals reversed and remanded the case for a new trial consistent with the appellate court decision.

Among the issues before the court on appeal was whether the Department of Justice "failed to comply with the program specificity requirement of title VI when it treated the various institutions of public higher education in Alabama as part of a single system." The appeals court found:

It appears to this court that the United States overstates the novelty of its attempt to satisfy title VI's requirement by defining the program as the collective "system" comprised of the various public colleges and universities, committees and officials... The United States Supreme Court decision in Grove City College v. Bell serves as the leading case on the program-specific nature of title VI...

The United States presented no evidence, and the trial court made no findings, detailing which programs and activities within these defendant institutions received federal funding. Because of this failure to identify the particular federally assisted programs being affected, the United States could not show how the actions of defendants rendered these programs discriminatory. Such detailed showings are necessary to satisfy the program specificity requirement of title VI... [The] complaint and proof must be redrawn to make the requisite showings of which particular programs or activities received federal funding and how these programs were discriminatory.

Limited application of the financial assistance civil rights statutes will continue until the Civil Rights Restoration Act of 1987 (S557/HR1214) is passed by Congress. The bill would amend each of the affected statutes by adding a section defining the phrase "program or activity" to make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives federal financial assistance.

The Restoration Act has been reported out of the Senate Committee on Labor and Human Resources and is expected to be voted on by the full Senate early in the 2nd session of the 100th Congress. House action should follow shortly thereafter.

ANTI-DISCRIMINATION PROVISIONS OF THE IMMIGRATION REFORM AND CONTROL ACT
by Janet Kohn, Attorney, AFL-CIO, LCCR

The Immigration Act adopted in late 1986 (the Immigration Reform and Control Act of 1986 or "IRCA") has four principal components:

- (1). it will now be illegal for employers to hire persons known not to be authorized to work in the U.S. ("employer sanctions");

(2). because of fears that employer sanctions might lead some employers to discriminate against citizen and legal alien job applicants who look or sound "foreign", the Act establishes new protections against discrimination on the basis of national origin or citizenship status;

(3). the law establishes a general one-year legalization program by which aliens here unlawfully since before 1982 may acquire legal status; and

(4). there are programs concerning agriculture aimed at ensuring growers a sufficient supply of workers while protecting the legal rights and working conditions of those workers.

This report concerns the anti-discrimination provisions of the new law.

What the anti-discrimination provisions ban

The anti-discrimination provisions of IRCA were intended to prohibit employment discrimination not already banned by Title VII of the 1964 Civil Rights Act as amended. IRCA therefore covers employers of 4 or more, and in the case of discrimination based on national origin is limited to employers of no more than 15 because Title VII takes over at that point. The prohibition runs to employers and to those who recruit or refer for a fee, a category that does not include union hiring halls. The prohibited acts are refusing to hire (or recruit or refer), or firing, an individual because of that person's national origin or citizenship status. Those eligible for protection under the law are all individuals "other than an unauthorized alien." In order to qualify for citizenship status protection, an individual must be a U.S. citizen or national or an alien who (a) is a legal permanent resident, (b) has acquired temporary legal status under IRCA's legalization program, (c) is a refugee under U.S. immigration law, or (d) was granted asylum under our immigration law, and who in each case has completed an INS form declaring her/his intent to become a U.S. citizen; and in addition, the alien must have applied for citizenship within 6 months of becoming eligible to do so (or within 6 months of the law's taking effect on November 6, 1986, if that date was later). (There are other technical requirements, and there are exceptions to the prohibition, which space precluded discussing here; at the end of this item the reader will find sources of additional information.)

Who may file a charge

Discrimination charges may be filed by a person who believes s/he was discriminated against in violation of IRCA, or by an authorized representative of such a person, or by an officer on the U.S. Immigration and Naturalization Service (INS) who believes that such discrimination has occurred or is occurring. The charge is to be filed in writing, and sworn, with the Office of the Special Counsel (OSC) in the Justice Department, an office created by IRCA to enforce these provisions. A practice may be challenged under IRCA or Title VII, but not both.

It is the Special Counsel in the first instance who will handle these cases by investigating charges, issuing complaints where warranted, prosecuting such complaints before administrative law judges, and seeking court enforcement of an ALJ order finding a violation. (In addition to complaints based on charges, the Special Counsel may issue complaints on the basis of information

obtained through investigations undertaken on the Special Counsel's own initiative.) However, IRCA also contains an innovative provision that authorizes a charging party to file and prosecute a complaint directly before an ALJ if the Special Counsel does not do so within 120 days of receiving the charge and the charge alleges "knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity."

Status of the Office of Special Counsel

The anti-discrimination provisions of IRCA took effect on November 6, 1986, but the enforcement apparatus in the Department of Justice is still not completely in place and to date not one case has been initiated by the filing of a complaint.

On October 6, 1987, the Department of Justice promulgated final substantive rules and made available a form for filing charges of violations. (The Leadership Conference on Civil Rights has established an Ad Hoc Task Force on the Anti-Discrimination Provisions of IRCA, which filed comments on the draft OSC substantive rules when they were published last Spring. Some, but far from all, of the Task Force criticisms were taken into account in the final rules. The Department rejected the Task Force's major criticism -- that there was no warrant in the statute or its history for limiting prohibited discrimination to that which is knowing and intentional, i.e. excluding actions that have a discriminatory impact. (This limited reading originated in a statement of the President at the time he signed the Act into law)).

In early November, the Senate confirmed Lawrence J. Siskind of San Francisco as Special Counsel, and he has now assumed office. Specially-trained ALJs are available to hear cases. But there are still no procedural rules for the conduct of cases before the ALJs.

The statute is complex, and the OSC's suggested form for filing a charge is long and intricate. While an injured person is not required to use that form, s/he is expected to provide the agency with a great deal of information so that the agency can decide whether it will issue a complaint. Yet the OSC has no field offices nor any plan to establish a real presence around the country.

Status of enforcement

Under the circumstances outlined above, it is not surprising that as of September only 67 charges of violation had been filed with the two federal agencies, 15 with the OSC and 52 with the EEOC. (Of the 15 at OSC, as of September 9, two had been dismissed for lack of jurisdiction and one withdrawn when the charging party was rehired with backpay, according to the General Accounting Office (GAO)). The GAO, to which the law assigned the task of evaluating annually for three years starting with November 1987, whether employer sanctions have caused a pattern of discrimination against eligible workers, reports that it has learned also of 34 similar charges filed under state or local laws in Chicago and Illinois, Ft. Worth, Texas and New York City (the areas in which GAO did field work). As noted earlier, the OSC has not yet issued a single complaint. The MONITOR has not been able to ascertain whether the necessary time has passed to enable any charging party to proceed to complaint on its own.

Where to obtain more information

Persons who believe that they have been discriminated against in violation of the anti-discrimination provisions of IRCA or who need more information for their organizations to help educate workers and employers about the statute may seek further information from the following:

Office of the Special Counsel
for Immigration-Related Unfair Employment Practices
Suite 800
1100 Connecticut Ave., NW
Washington, D.C. 20036
(202) 653-8121

The OSC has a toll free phone number at which persons, outside of Washington, in need of advice may speak to english- and spanish-speaking attorneys. It is: 1-800-255-7688.

Mexican-American Legal Defense Fund (MALDEF)
Attn: Linda Wong
634 South Spring Street, 11th floor
Los Angeles, Calif., 90014

American Civil Liberties Union (ACLU)
Attn: Wade Henderson
122 Maryland Avenue, NE
Washington, D.C. 20002

Leadership Conference on Civil Rights
Attn: Janet Kohn
2027 Massachusetts Avenue, NW
Washington, D.C. 20036

HOUSE COMMITTEE STAFF INVESTIGATION FINDS THAT "ENFORCEMENT
AT OFCCP HAS COME TO A VIRTUAL STANDSTILL SINCE 1980"
BUT RECOGNIZES THAT IMPROVEMENTS ARE UNDERWAY

The House Education and Labor's Subcommittee on Employment Opportunities on October 29, 1987 approved a staff report on the enforcement activities of the Department of Labor's Office of Federal Contract Compliance Programs. The Committee staff's review of OFCCP "revealed that [the] agency is in substantial disarray; that it is rife with political and ideological turmoil at the National Office and, as a result, the field offices are in a state of total confusion as to the official policies and practices of the agency. Effective enforcement has come to a virtual standstill." The report also states that during Joseph Cooper's tenure as Director of OFCCP (1985-87), the office "was not permitted to issue regulations and policy directives..., could not implement training programs for the OFCCP field offices..., and Cooper may have been excluded from National Office discussions regarding OFCCP policy and the Justice Department's proposed amendments to Executive Order 11246."

In the report, Committee staff acknowledged that since the completion of their investigation (October 1986) the Department of Labor has issued directives on substantive policy issues that are responsive to some of the concerns expressed in the report, but concluded:

These directives, therefore, constitute a positive step toward restoring the OFCCP as a vigorous civil rights enforcement agency. The Department has also indicated its intention to enforce more aggressively the law by appointing Fred W. Alvarez, former Commissioner of the Equal Employment Opportunity Commission (EEOC), as Assistant Secretary for ESA [Employment Standards Administration] and by initiating more administrative enforcement actions against recalcitrant federal contractors. Much more is required, however, in order to allay the confusion which exists within the field offices and the contractor community concerning the agency's policies and practices.

Background

The Office of Contract Compliance Programs in the Department of Labor is responsible for enforcing Section 503 of the Rehabilitation Act of 1973, the Vietnam Era Veterans Readjustment Assistance Act of 1974 and Executive Order 11246 which requires affirmative action in the employment practices of contractors and subcontractors of the Federal Government. The Executive Order implementing regulations, issued in 1968 and revised in 1970 and 1971, require federal contractors to undertake an availability analysis to determine if there are fewer women or minorities in their employ than would be expected according to their availability for work. If this analysis reveals an underutilization of minorities and women, the contractor is required to develop measurable goals and timetables and make a good faith attempt to meet these targets.

The contract compliance program affects some 215,000 federal contractors who employ more than 30 million employees and do more than \$167 billion worth of business with the Federal Government.

Readers of the MONITOR will recall the Department of Justice's efforts since August 1985 to revise the Executive Order so as to prohibit the Federal Government from seeking to have contractors adopt affirmative action plans that include numerical goals and timetables. These DOJ efforts also have sought to restrict coverage to "demonstrated discriminatory treatment." Then-Secretary of Labor William Brock, as well as 70 Senators and more than 200 Representatives, a majority of the business community, and civil rights organizations voiced strong opposition to the proposed revision. The Supreme Court's rulings on a trilogy of affirmative action cases in 1986 and two cases in 1987 sanctioned the type of affirmative action required by the Executive Order. At this writing the Executive Order continues unaltered.

Hearings

At hearings before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, on June 3, 1987, witnesses outlined the efforts of this Administration since 1981 to dismantle the contract compliance program (See Testimony of Women Employed Institute, Submitted by Nancy Kreiter, Research Director, June 3, 1987.) In addition to the efforts to revise the Executive Order on affirmative action, these efforts include:

1. Days after taking office in 1981, the Administration "suspended the effective date of comprehensive regulations developed as part of a four-year effort to strengthen and streamline" the affirmative action requirements of the contract compliance program.
2. Proposed new regulations were published in August 1981 and April 1982 which would have exempted at least two-thirds of all federal contractors from the affirmative action requirements, limited back pay remedies to identified victims of discrimination, eliminated accepted statistical methodologies for determining classwide remedies for systemic discrimination, eliminated pre-award reviews, weakened standards for defining sex discrimination in the areas of sexual harassment and pregnancy discrimination, allowed five-year exemptions from compliance reviews and required identification of all complainants, even in third-party charges.
3. Because of the public outcry about these regulations, they were never made final. However, testimony to the Subcommittee and the staff investigation document that the provisions of the proposed regulations "were quietly implemented by internal policy directives in the national office by what has been called 'podium policy'."
4. The Office initiated a National Self-Monitoring Reporting System which through secret agreements with corporations permitted the filing of "multi-year affirmative action plans, abbreviated compliance reviews, and the use of a limited and much less effective form of availability analysis." Congressional oversight and public outcry prevented an expansion of the program, but agreements still exist with AT&T, General Motors, IBM, and Hewlett Packard.

Witnesses also testified to recent improvements in the Office. OFCCP has recently reinstituted policy abandoned six years ago. "Specifically, classwide

formula relief, the identification of groups of victims of discrimination rather than individuals, the use of statistical evidence in systemic cases, and investigation of affected classes of employees who suffer from the effects of past discrimination --all policies which had guided the agency prior to the Reagan administration --are officially back on the books" (Kreiter testimony).

Susan R. Meisinger, then-Deputy Under Secretary for Employment Standards, testified for the administration that the Department of Labor has "continued to fully implement and enforce its regulations--both as they apply to nondiscrimination and to affirmative action--under the Executive Order, the Rehabilitation Act and the Vietnam Era Veterans Readjustment Act." She also stated that since December 1986, 15 policy directives have been issued, several of which address class-based discrimination issues.

Ms. Meisinger also provided statistics for the first two quarters of FY 1987 which reflect an upward trend in the area of back pay: back pay settlements for FY 1987 were already 136% (\$2,592,785) of the amount awarded in FY 1986 (\$1,911,145). However, if the same amount were to be awarded in the second two quarters of FY 1987, the total amount would still be far less than the amount awarded in FY 1980 (\$9,253,861) without even considering the effect of inflation.

Nancy Kreiter testified that the policy shift at OFCCP was a positive and necessary step, but added "we must remember that the agency has been in severe decline for six years and must now catch up. We must ensure that OFCCP uses these policy and enforcement mechanisms to pursue contract compliance aggressively and with a renewed commitment to the goal --equal employment opportunity."

Staff findings

During its investigation of OFCCP, the Committee staff conducted a number of on-site reviews of selected regional and area offices between August and November of 1986, and reviewed agency policy directives and statistics. The investigation found that enforcement at the agency had come to a virtual standstill. OFCCP statistics show that the number of persons receiving back pay as a remedy for past discrimination had declined from 4,336 in 1980 to 499 in 1986, and the amount of back pay received declined from over \$9 million to less than \$2 million. Other indicators of lax enforcement include:

1. The number of cases referred to the Solicitor of Labor for administrative enforcement action, including suspension or termination of contracts, declined from 269 cases in 1980 to 22 in 1986. As a consequence, the number of administrative complaints against noncomplying contractors brought by the Solicitor's Office before an Administrative Law Judge declined from 43 in 1980 to 12 in 1986.

2. Actual debarments of companies found in violation of the executive order have also declined since 1980. In 1980, 5 debarments were initiated or completed, 1 occurred in 1981, none 1982-1984, one in 1985 and none in 1986. (Women Employed testified that of the two debarments during the Reagan Administration, one was initiated, investigated, and developed entirely by the previous administration.)

3. OFCCP has instituted a numbers game by which its enforcement staff is evaluated. Thus, enforcement staff are rated by the number of compliance reviews and complaint investigations completed and not by the quality of such activities. Further, testimony at the hearing asserted that "[m]anagement currently insists that investigators limit the hours spent on each case and meet deadlines that are incompatible with conducting thorough investigations." The Administration cites the increase in the numbers of complaints and compliance reviews as an indicator of increased enforcement.

The staff report also states that the conflict within the Administration over revising the Executive Order on affirmative action has resulted in many contractors, particularly in the construction field, resisting OFCCP's review of the company's affirmative action policies. Further, "OFCCP has prohibited its enforcement staff from requiring federal contractors to establish ultimate goals and multiyear timetables, goals above availability, make-up goals and numerical goals."

Staff recommendations

The recommendations of the staff report include:

1. The OFCCP should be established as a separate office in the Department of Labor, with an Assistant Secretary reporting directly to the Secretary.

2. The House Committee on Education and Labor should review and monitor the appropriateness of legislation to codify Executive Order 11246.

3. Consistent with its recent actions to memorialize the directives on formula relief and continuing discrimination, the OFCCP should either rescind or immediately commit all of its outstanding oral or 'podium' and 'marginal' policies to writing and disseminate them to the field office.

4. The House Committee should request an audit by the General Accounting Office to investigate the concerns raised in this report.

5. The agency should ensure that modifications of and amendments to its regulations and policies are promulgated pursuant to and consistent with the notice and comment procedures of the Administrative Procedure Act.

Copies of the report should be available shortly from the House Subcommittee on Employment Opportunities, 518 Annex 1, Washington, D.C. 20515. After reviewing the Report, readers should feel free to share their comments with Representatives Matthew G. Martinez, (D-CA), Chair of the Subcommittee and Augustus Hawkins (D-CA), Chair of the House Committee on Education and Labor, 2181 Rayburn, Washington, D.C. 20515.

AFFIRMATIVE ACTION HEARINGS HELD

A joint oversight hearing on affirmative action in the workforce was held October 8, 1987 by the House Subcommittees on Employment Opportunities and on Civil and Constitutional Rights. The focus of the hearing was a report on affirmative action prepared by The Study Group on Affirmative Action, a committee of 21 persons from the legal, academic, business, labor, civic, and public sector, with varied views on affirmative action, that operated under the auspices of the Wharton School, University of Pennsylvania. The group was organized in 1986 "to assemble information related to the development, implementation, and impact of affirmative action, and after discussing the evidence, to make recommendations on measures to achieve equal employment opportunity now, and in the years ahead." The study group sought to assist in moving the debate on affirmative action beyond the controversy that surrounds it to a "consensus on its value as a device for assuring equal job opportunity..." The report has been published by the House Education and Labor Committee as a Committee Print, A Report of the Study Group on Affirmative Action to the Committee on Education and Labor. Dr. Bernard Anderson, Coordinator of the Study Group, summarized the findings and recommendations of the report at the hearing.

Background

The work of the Study Group was directed by a steering committee of six persons which met five times during the year-long project to discuss equal employment policies and practices with practitioners and scholars. Members of the larger group participated in the meetings at various times, and the group as a whole met for a one-day dialogue on the current status and possible future directions for affirmative action. Four papers, commissioned by the group, are included in the report.

Dr. Bernard Anderson, coordinator of the study group, said in testimony before the subcommittees:

During the past decade, affirmative action has been the subject of an increasingly quarrelsome debate. Critics question the legitimacy of affirmative action as a device for assuring nondiscriminatory behavior. Advocates argue that the special measures reflected in affirmative action are essential for reducing employment and income inequality based on race, gender and national origin. The absence of support for affirmative action in many sectors of our society limits the potential for broadening and sustaining a vigorous assault on the remaining vestiges of discrimination that deny full economic opportunity to many minorities and women.

In order to get beyond the controversy surrounding affirmative action, and to seek consensus on its value as a device for assuring equal job opportunity, we organized a study group to conduct a careful and dispassionate review of experience under affirmative action policy during the past two decades.

After reviewing the evidence the study group agreed on a series of findings and recommendations that are explained fully in the report.

Findings and Recommendations

Some of the findings and recommendations of the study group are summarized below. For a fuller discussion, readers should request a copy of the report from the House Committee on Education and Labor, U.S. House of Representatives, Washington, D.C. 20510.

A. Finding

There is a perception that senior executives of major corporations have downgraded the importance of affirmative action, and that minorities and women have borne the brunt of company workforce adjustments necessitated by efforts to reduce production costs.

Recommendation

The Committee on Education and Labor should hold hearings on recent trends in equal opportunity in order to document changes in the employment of minorities and women since 1980. In preparation for such hearings, the Office of Federal Contract Compliance Programs should prepare a review of employment trends among government contractors, and the Equal Employment Opportunity Commission should do the same for employers who submit reports to that agency.

B. Finding

Affirmative action enabled many minorities and women to enter occupations and industries from which they had long been excluded. But the success in reducing hiring discrimination has not been duplicated in occupational upgrading, especially among minorities in higher levels of private sector management.

Recommendation

In its employment monitoring practices, including preaward reviews, the Office of Federal Contract Compliance Programs should give more attention to the wage and salary level of minority and female employees as compared with the attention given the number of persons employed in the different occupational groups. By focusing greater attention on the wage and salary level of minority and female workers OFCCP can help sensitize employers to the importance of upgrading as well as hiring as an important goal of affirmative action.

C. Finding

When affirmative action was introduced in 1961 as a device to help assure equal job opportunity, the objective was to make employers more aware of the total pool of job applicants available for work. Affirmative action was never intended to be a panacea for solving the unemployment problems of minorities and women.

Experience has shown an uneven impact of affirmative action. The better educated, experienced, and highly motivated minority group members and women have taken advantage of wider opportunities made possible through

affirmative action programs. This has contributed to a widening gap within minority communities between those whose income and social status have improved, and others within the community whose status has worsened.

Recommendation

Employers should broaden the scope of their affirmative action policies to include efforts to help improve the quality of education in the schools to assure a steady flow of productive employees. This is especially important for employers in communities where minority group youth comprise a large part of the school population... Broadening affirmative action plans to encompass efforts to improve the quality of the labor pool will help narrow the gap in economic opportunity, and increase the potential for later success in minority employment. Improved private sector linkages with the schools can be made by firms of all sizes and in most industries. Such public/private partnerships should be promoted as a central feature of affirmative action plans.

D. Finding

Enforcement of affirmative action continues to be necessary to assure equal economic opportunity for minorities and women. But the form and substance of affirmative action might well be modified to take account of contemporary changes in the labor market, and in the structure and operation of many business firms.

For example, the de-emphasis of the federal government since 1981 on the development and implementation of goals and timetables has led some firms to a more diverse view of affirmative action. The decline in paperwork associated with the requirements of compliance reviews has, in some cases, freed up management to design more creative ways to integrate minorities and women into the workforce. But this is true only in companies where there is a strong commitment to achieving higher levels of employment for minorities and women. In other cases, lesser enforcement has been taken as a signal that measures to assure equal job opportunity are no longer required.

Recommendation

The Committee on Education and Labor should urge the Office of Federal Contract Compliance Programs and the U.S. Equal Employment Opportunity Commission to continue vigorous enforcement of affirmative action policy, including the use of goals and timetables as a device for measuring good faith efforts toward compliance. Moreover, both agencies should emphasize the importance of affirmative action by giving public recognition to employers, unions and individuals who have made outstanding contributions to the advancement of equal job opportunity through the implementation of affirmative action programs.

Further, Congress should seek ways, through its budget and appropriation processes, to encourage and promote linkages between support for education and training, and the pursuit of affirmative action in both the public and private sectors. Indeed, the broad field of federal/state relations should be infused with the expression of the Federal government's commitment to affirmative action and a determination to see it become a regular part of

the way the nation conducts its business.

FAMILY AND MEDICAL LEAVE ACT REPORTED OUT OF COMMITTEE

A bipartisan compromise Family and Medical Leave Act was reported out of the House Committee on Education and Labor on November 17, 1987. The compromise attempts to address the concerns of small business owners while guaranteeing job security for working family members who must take leave for medical or family reasons. The bill would allow employees to take up to ten weeks of unpaid leave over a two year period to care for a newborn or adopted child, or a seriously ill child or parent. In addition, a worker could take up to 15 weeks as needed because of the worker's own serious illness and be guaranteed the same or an equivalent job when (s)he returned to work.

Background

The Family and Medical Leave Act was introduced in the 99th Congress for the first time by Representatives William Clay (D-MO), and Patricia Schroeder (D-COL), and Senator Christopher Dodd (D-CONN). It was reintroduced in the 100th Congress by the same sponsors. The bill as introduced would have provided 26 weeks of unpaid, job-guaranteed leave for all employees who are temporarily unable to work as the result of a serious health condition including disability due to pregnancy, and 18 weeks of unpaid, job-guaranteed leave for employees to stay home to care for a newborn, newly-adopted or seriously ill child. The bill would have also set up a commission to study means for implementing wage-replacement during such leaves.

In the 99th Congress, hearings were held in both Houses and the bill was reported out by the two House Committees with jurisdiction in 1986, but time did not permit floor action. The U.S. Chamber of Commerce pledged to fight any federal requirement of family leave. According to the Chamber, federally-mandated benefits would discourage the creation of new jobs and would particularly burden small employers.

Provisions of the Compromise

The bill as introduced this year in the House would have covered all businesses that employ 15 or more employees. The compromise covers employers with 50 or more employees for three years after enactment of the bill and thereafter employers of 35 or more employees. The leave requirements apply only to employees who have been on the job for at least a year and work twenty or more hours a week. If the employer can demonstrate business necessity, an employee in the top 10 percent of the salary scale can be exempted. The reported bill, like the original, permits unpaid leave but requires that pre-existing health insurance be continued during the leave period.

The Administration has expressed opposition to the bill, asserting that provision of fringe benefits should be left to voluntary negotiations between employers and employees. The Chamber of Commerce, which opposes the legislation, initially estimated that the bill as introduced would have cost \$16.2 billion a year, later lowering the estimate to \$2.6 billion. On November 10, 1987 the General Accounting Office released a report which estimates the cost of the compromise bill at \$188 million for employers of 50 or more workers, and at \$212 million when companies that employ between 35 and

49 people are included. The GAO report states that 39 percent of the workforce would be covered during the first three years after enactment (50 employee requirement) and 43 percent thereafter (35 employee level).

Floor action in the House is expected in the second session which begins in January 1988. A series of hearings have been held by the Senate including hearings across the country, but no committee action has been taken.

COMMISSION ON CIVIL RIGHTS FUNDS CUT

The formerly independent, now discredited, U.S. Commission on Civil Rights, has been reputed once again by a bipartisan Congress. The Senate has reduced the U.S. Commission on Civil Rights' fiscal year 1988 budget from \$7.5 million to \$5.9, and the House has voted to cut off all funds to the agency. A conference committee will meet before the end of this session to work out a compromise. The Senate proposal continues the earmarks and restrictions placed on the Commission last year. Funds are earmarked for regional offices (\$2.2 million) and for monitoring of civil rights enforcement activities of Federal departments and agencies. Commissioners are limited to 75 billable days, with the exception of the Chair who is permitted 125 days. Assistants to Commissioners are limited to 150 billable days. Senator Frank Lautenberg (D-NJ) stated that Senators were "acting out of frustration with the commission. We're definitely not happy with the way the commission is functioning" (New York Times, Sept. 24, 1987).

Clarence Pendleton, Commission Chair, stated: We're getting punished and we did everything Congress asked of us. We don't have any friends on Capitol Hill, Republican or Democratic. This is a bipartisan hanging" (New York Times, Sept. 24, 1987).

The General Accounting Office recently released a report which clearly documents the decline in Commission productivity since 1983:

The number of publications issued each year by the new Commission has declined significantly compared to the number issued by the old Commission. The old Commission issued an average of about 51 publications each year; the new Commission issued about 13. Of the 353 publications we identified as issued from 1978 to 1986, 316 were issued by the old Commission. Of the 37 publications issued by the new Commission, 12 were the result of projects started by the old Commission, and 13 were the result of projects started by the new Commission.

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