EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 4, 1984

MEMORANDUM FOR: Dave Stockman
Joe Wright
M. B. Oglesby
Chris DeMuth

FROM: Mike Horowitz MH

SUBJECT: S. 2568: The "Civil Rights Act of 1984"

Bob Dole has emphasized that "[i]t is not the intent of the sponsors [of S. 2568] to break new ground". While this may not be the intent of Senator Dole (and of Howard Baker, among other cosponsors), the bill's impact if enacted is more accurately suggested by the sweep of its title: the "Civil Rights Act of 1984". Although the statutory changes S. 2568 would effect appear on their face to be limited and technical, they would in fact substantially expand the reach of Title VI, Title IX, Section 504, and the Age Discrimination Act (the "referenced acts") beyond that previously asserted by Federal agencies. Buttressed by the legislative history created to date, the bill if passed would largely eliminate the remaining distinctions between Federal and state, and Federal and private, concerns.

Under the current terms of S. 2568, for example, every licensed attorney would be empowered to file suit to enforce the "effects test" regulations of agencies, challenging practices in every aspect of every institution that receives any Federal assistance "directly ... or through a person"; including State bar examinations and teacher competency tests, and perhaps even the employment practices of grocers handling food stamps. Moreover, each agency would be required to police all activities of its grant recipients (including recipient activities outside of the scope of its expertise), and agency officials could even be subject to personal liability suits for failing to apply the "effects standard" to that unlimited range of activities. As S. 2568 has received no detailed attention to date, these and other major implications of the legislation have not been considered, or even suggested. They are detailed in the discussion below:

1. Coverage. The anti-discrimination statutes affected by S. 2568 currently cover "any program or activity receiving Federal financial assistance". S. 2568 would amend these statutes to instead cover "any recipient of Federal financial assistance" (in Title IX, the term "education recipient" is substituted for the term "recipient"). The following are only some examples how this

change in coverage would operate for these statutes that have as their purpose the ordering of changes in the practices of Federal fund recipients, who are put at risk of losing those Federal funds:

a. State and local governments. Currently, if a Federal agency extends Federal assistance, e.g. to a State university system, its broadest claim would be that the entire university system is covered by these statutes. Under S. 2568, however, all State departments and agencies would be covered by any requirements which Federal agencies might impose under the referenced acts (dealing with age, sex, race, color, national origin, and handicap). S. 2568 thus raises serious problems of Federalism by extending Federal mandates to State and local activities and agencies which receive no Federal funds whatever. The Act would also (for reasons explored more fully below) substantially increase the financial and paperwork burdens of compliance.

b. "Education activities" of non-educational institutions. Title IX currently covers any "education program or activity receiving Federal assistance". S. 2568 would dramatically extend the reach of Title IX to educational benefits not supported by Federal assistance offered by non-educational institutions, if those institutions receive Federal assistance for any purpose. According to Senator Kennedy's floor statement, if a state prison, e.g., were to receive "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, [would be] covered by Title IX". In addition to "juvenile and adult prisons", Kennedy also specifically mentioned "museums" and "hospitals not affiliated with a university". Thus, for example, internship programs of non-university affiliated hospitals would be covered if they receive any Federal assistance.

c. Non-education activities of universities. Finally, S. 2568 would extend the jurisdictional reach of enforcers of the referenced anti-discrimination acts, for the first time, to all activities and components of universities regardless of whether they receive Federal assistance. Universities that own real estate would, for example, be required to assure that all of their holdings comply with Federal architectural requirements on pain of expensive litigation and, indeed, for loss of any Federal funds construed as "supporting the noncompliance". The employment practices of university presses and other businesses (e.g., Howard University's for-profit radio station) would be covered under Section 504 and, in some instances, Title IX and Title VI. DOEd's Office of Civil Rights might, for the first time, be able to assert coverage of semi-autonomous institutions such as the Hoover Institute at Stanford.

2. Erosion of existing limitations on fund terminations. By explicitly amending and broadening current language "pinpointing" the effect of fund terminations -- one of the key (although not the only) enforcement modes of the referenced acts -- S. 2568 also significantly enlarges the range of assistance which agencies may terminate. The bill would remove the current requirement that any termination of Federal financial assistance must be "limited in its effect to the particular program, or part thereof" in which noncompliance has been found, replacing it with a fund cut-off reaching any "assistance which supports the noncompliance so found". Although sponsors of the bill deny that this change enlarges the potential scope of fund termination, these denials are contradicted by the imprecision and potential breadth of the term "supports" -- and by their own statements. Senator Kennedy, for example, emphasizes that "nexus" between the assistance and any discrimination found could be "direct or indirect" (Congressional Record, April 2, 1984, p. 4587); and Senator Cranston has emphasized that the amendment would assure that the assistance at risk in any dispute between a recipient and an agency civil rights office would not be "pinpointed":

> "This modification of the so-called 'pinpointing' language [is designed] to insure that the threat of fund termination remains a credible administrative tool and is not susceptible to so narrow an interpretation as to lose its force" (Ibid., p. 4595).

3. Consequences of removing current constraints. Withall, the most important aspect of the bill may relate to the effect of its changes on existing powers and processes under the referenced anti-discrimination acts. Currently, limitation of coverage to programs and activities receiving Federal assistance serves as a "regulatory breakpoint", restricting burdens and liability to those programs and activities in which the Federal government has some financial interest; and by limiting review and investigatory authority over Federally assisted programs and activities to agencies with expertise in them. And the current "pinpoint provision", by providing definite limits to the scope of any penalties which agencies might impose, has had a similar moderating effect. S. 2568 would remove these "breakpoints", while at the same time retaining all current judicial interpretations and agency practices under the referenced acts. As a result, standards such as the "effects test" would become applicable to all of a recipient's programs and activities, not just those receiving Federal funds. In the case of State recipients, for example, new bases would be provided for challenging the "adverse impacts" of standards established for teachers, attorneys, and other professionals. Changes of this magnitude have not been debated, much less understood, in the discussions that have thus far taken place with regard to S. 2568 and should not be permitted to take effect by default:

a. Extended coverage of agency regulations prohibiting neutral procedures that have "disproportionate impacts". In Guardians Association, Inc. v. Civil Service Commission of New York, the Supreme Court held (in 1983) that although Title VI itself prohibits only intentional discrimination, agency regulations implementing Title VI may nevertheless prohibit practices having a "disproportionate impact", regardless of their intent. DOEd's regulations in this regard are typical, stating that recipients may not:

> "...directly or through contractural or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect[s] individuals of a particular race, color, or national origin".

Elsewhere, DOEd's regulations provide that:

> "even though past discriminatory practices attributable to a recipient ... have been abandoned, the consequences of such practices [may] continue to impede the full availability of a benefit. If the efforts ... to provide information as to the availability of the program or activity, and the rights of beneficiaries ... have failed to overcome these consequences, it will become necessary [for such] recipient to take additional steps to make the benefits fully available to racial and nationality groups previously subjected to discrimination. This action might take the form, for example, of special arrangements for ... making selections which will insure that groups previously subjected to discrimination are adequately served".

Currently, the scope of such mandates is limited to a recipient's federally funded programs and activities. The effect of extending them to all of a recipient's activities would be significant. Any assistance to a State or city government would, for example, apply such requirements to all of their licensing and professional certification procedures. As noted, bar exams, medical boards, teacher competency exams, and a host of similar standards alleged by advocacy groups to have "discriminatory effects" would now be covered by the existing regulations for the first time and would be subject to agency enforcement activities and private lawsuits. Practices other than tests would be affected. For example, New York City's Taxicab "Medallion System" (Walter Williams, among others, has argued) has a demonstrable "adverse impact" on minorities.

b. Existing compliance burdens would be compounded. Agency regulations and paperwork requirements imposed under the statutes referenced by S. 2568 are currently onerous in many respects -- as witness the frequent references by university administrators and State and local officials to "mandate millstones", paperwork burdens, and duplicative enforement activities by Federal agencies. S. 2568, which would give all funding agencies authority -- indeed, the statutory responsibility -- to regulate all of the programs, activities, and subunits of entities to which they provide any assistance, will remove all existing boundaries of agency jurisdiction to conduct compliance reviews and complaint investigations. The result, particularly for universities and State and local governments which typically receive funding from many agencies and hence would be required to contend with multiple compliance reviews and reporting requirements, could be dramatic. Complainants could file with several agencies -- or single out the civil rights offices most likely to be sympathetic to their claims. Moreover, the "program and activity" language of current law would no longer contain the force and effect of agency excesses. For example:

- DOEd has attempted to require New York City to reassign its teachers, in violation of applicable union contracts, to achieve "racial balance" in the teaching staff of each school. Under S. 2568, DOEd would have the authority to apply similar requirements (and the rationale upon which they were based) to, e.g., New York City's police department, fire department, and municipal hospitals as well.

- State and local civil service commissions now largely subject only to OPM's oversight, if at all, under the above-referenced acts would become subject to the full range of "effects test" requirements currently set forth in the regulations of every Federal agency which provides any funds to the State or local government.

Agency expertise in the operation of programs and activities they fund would no longer promote the avoidance of obviously inappropriate requirements; as noted, all agencies giving funds, e.g., to a State, would be responsible for all activities of its federally funded and unfunded components. Agency compliance officers would almost certainly be embroiled in "turf battles" concerning, e.g., who would conduct particular investigations and enforcement proceedings, and this could dramatically increase paperwork requirements and FTE levels.

c. Coverage of institutions which receive no direct Federal funds. The extension of coverage to all programs and activities of institutions receiving any "Federal financial assistance", it cannot be overemphasized, would be based on the Supreme Court's Grove City definition of Pell grants to students as "Federal financial assistance" to the institutions they attend. Other Federal benefit programs, such as food stamps, work in a similar manner -- making, e.g., supermarkets that redeem food stamps potential "recipients of Federal financial assistance" (S. 2568's definition of "recipient" specifically includes entities "to whic Federal financial assistance is extended (directly or through ... a person)"). Federal architectural requirements alone would constitute a costly burden on large chains and small grocers alik -- not to mention application of agency "effects test" regulation to their employment and other activities. (See Department of Agriculture regulations at 7 CFR 15b.4(a)(4).) Moreover, since S. 2568 would define as a "recipient" any "transferee of any [entity] to which Federal financial assistance is extended (directly or through another entity or a person)", the definition of "recipient" might be limited only by the imagination of agency enforcers, given those vague terms in the bill.

d. The exposure of recipients to private suits. This is a further consequence that requires empahsis and full public discussion. Federal law provides for the award (at the discretio of Federal courts) of "reasonable attorneys' fees" to prevailing plaintiffs in any private suit to enforce Title VI, Title IX, Section 504, and the Age Discrimination Act. This substantial incentive to file such suits is currently limited by the restriction of these statutes to programs and activities receivin Federal assistance. S. 2568 would thus open all of a recipients' activities to private suits over practices deemed to have "discriminatory effects", regardless of their intent. The substantial impact of this increased exposure regarding "services and benefits" -- enforceable by all private members of the bar, effectively designated as "private Attorneys General" under current law -- is readily apparent.

e. Liability of agency officials. Finally, the changes that S. 2568 would effect must be fully examined in light of the Supreme Court's recent action letting stand the Circuit Court opinion in National Black Police Association v. Velde, which significantly extended the potential personal liability of officials for payment of money damages. As the Washington Post commented editorially on May 2: "Under the court of appeals approach, officials throughout the government who act with entirely proper purposes in distributing funds and enforcing the civil rights obligations of recipients can be faced with lengthy, burdensome proceedings and the threat of ruinous personal liability" (a copy of this editorial is attached). Effecting

S. 2568's substantial extension of coverage and dilution of existing "pinpoint" restrictions on fund termination in conjunction with this significant increase in the vulnerability agency enforcement officials to in terrorem demands by advocacy groups would have important implications for both the Federal Government and all Federal grantees which needs to fully defined and debated before being allowed to take effect.

4. The absence a national prohibition against employment discrimination on the basis of handicap may be a coverage deficiency which should be corrected. Our broadest prohibition, Title VII, does not cover discrimination based on disability -- and not necessarily for the best of reasons. But undoubtedly th most significant reason Congress has not simply extended Title V to cover discrimination based on disability is that such a simplistic approach would benefit neither persons with disabilities nor employers (while race must never disqualify a person for any job, no one would argue that this is the case wit regard to all disabilities and all jobs). The task is by no mea undoable, however, and carefully considered legislation prohibiting employment discrimination based on disability would clearly appropriate. S. 2568, however, would have the effect of turning this Congressional responsibility over to Federal agenci and the courts. In Consolidated Rail Corp v. Darrone (decided t same day as Grove City), the Supreme Court held that Section 504 prohibits employment discrimination based on disability in all Federally assisted programs and activities, and a private right action exists to enforce those rights. By eliminating the "program and activity" limitation, however, S. 2568 prohibits employment discrimination based on disability (in all operations of all recipients of Federal assistance) -- but with no legislative history to guide agencies and the courts in interpreting the prohibition. And the agencies involved would b agencies inexpert in employment discrimination -- not the EEOC, the agency specifically established by Congress to administer th national prohibitions against employment discrimination. And whereas Title VII, for example, is enforced in a manner that largely complements state and local prohibitions against covered discrimination (Title VII complaints are even referred to State and local agencies with equivalent jurisdiction for investigation), the same would not be true of the prohibition S. 2568 would -- by default -- create. State and local government employment would predictably bear the brunt of the uncertainty over what is, and is not, employment discrimination based on handicap (e.g., the extent to which failure to expend resources additional personnel -- such as "readers" for the blind employe -- or special equipment required to accommodate disabilities constitutes employment discrimination on the basis of handicap) Existing state laws would be effectively superseded as these matters are decided by Federal agencies and the courts.

5. If passed in its current form, S. 2568 would clearly effect major changes in the relationships between the Federal government, State and local governments, and private institutions. The extensive coverage it would give to these statutes, without modification of the broad sweep they have been given by agencies and the courts, would as noted largely eliminate the remaining distinction between public and private (and Federal and local) activities.

6. The simplest way to avoid this result would be to tailor the legislative remedy to the perceived problem created by the Grove City decision, which is the application of nondiscrimination requirements to educational institutions. This can be accomplished by amending Title IX to prohibit discrimination based on race, color, national origin, age, or handicap; and to specify that any assistance to an educational institution will result in coverage of all of its education programs -- and would, of course, be a true "repeal" of the Grove City decision. This is an outcome the Administration might support, and could surely live with -- particularly if the jurisdictional reach of the Act went to educational activities of educational institutions not, as S. 2568 does, to all of their non-educational investment and income producing functions as well. Such an outcome would of course be consistent with the announced "no new ground" character of S. 2568.

7. If, however, the legislation cannot be limited "merely to education", I believe it essential for Congress and the Administration, for the reasons cited above, to actively consider amendments that would secure the following basic principles:

- Coverage to be based on direct Federal assistance to an institutions (the legislation could make clear that it is not intended to eliminate Pell grants as a basis for coverage).

- For coverage purposes, State and local "recipients" to be defined as the specific public agencies receiving the assistance -- not the entire state or local government.

- Wildly overlapping agency jurisdiction to be precluded by centralizing enforcement activities in a single agency -- most logically the Department of Justice.

- The existing "pinpoint provisions" for fund termination in the statutes to be retained. If there is no intent to change the present scope of fund termination, there is no need to change the existing language.

- Carefully calibrating prohibitions against employment discrimination based on disability. What the political syst has been unwilling to accomplish through direction and attentiveness should not be imposed on a large group of employers through legislative indirection and unguided agenc regulations and court actions.

- Clearly establishing and defining the personal immunity of officials implementing the referenced anti-discrimination acts.

- Assuring that infants with disabilities are not subject to discrimination in the provision of medical care and related benefits has been a major enforcement objective of the President -- and consideration should be given to the idea that any broad extension of coverage such as that proposed b S. 2568 should include language expressly prohibiting such discrimination.

8. As Nathan Glazer observed in his book, Affirmative Discrimination, the most far reaching changes in the enforcement of our civil rights laws were generated during and by the Nixon Administration -- and were accompanied by loud accusations that Nixon as "rolling back" civil rights enforcement. Glazer makes clear that readers of the press during that era would have had great difficult understanding that intent standards were being replaced by quotas and "effects tests". A similar process is underway in regard to S. 2568 which would accomplish a virtual sea-change in the Federal role, but which is still understood as simply making "technical" changes restoring the status quo ante. Moreover, it must be clearly understood that the proposed restrictions of local and private options work both ways. Under S. 2568, the District of Columbia's quota requirements for participation in redevelopment projects and cable television wou clearly be subject to challenge by the Department of Justice (an private litigants) under Title VI -- as would a host of other activities of States and localities which may be arguably define as "reverse discrimination". Likewise, Walter Williams and othe libertarians would have a statutory basis for challenging local licensing requirements (such as the New York taxicab medallion system) in court -- and court ordered payment of legal fees by t municipalities could become as important a source of income to t growing number of conservative public interest law firms as it currently is to their liberal counterparts. Operation P.U.S.H., the Urban League, and other recipients would similarly become vulnerable to suits by private litigants who detected "reverse discrimination" in any of their activities.

9. The announced refusal of the bill's cosponsors (reflecting an agreement among advocacy groups) to consider any amendments whatsoever should suffice to indicate that more than "technical changes" are at stake. We should not permit such far-reaching changes to occur by default. Rather, we need to insist that they be subjected to thorough examination and open debate. This is our minimal responsibility in dealing with a bill which in its current form is clearly in need of debate and amendment. The broad establishment of jurisdictional vulnerability to suit, coupled with an equally broad jurisdictional grant of power to parties enabled and required to sue -- with no legislative standards defining the outcomes -- merely cedes to courts and Federal bureaucracies what Congress and State and local governments have the responsibility to accomplish.

10. Joint hearings on S. 2568, chaired by Congressmen Perkins and Edwards, are scheduled to begin as early as next week. Administration witnesses from Justice and Education have been asked to testify on May 22. We thus have a short time frame to define an Administration position before the House. (Senator Hatch is reportedly in the early stages of determining the nature and timing of Senate hearings on the bill.)

11. The process of establishing an Administration position will require at a minimum a Cabinet Council meeting, and I strongly urge that the Cabinet Council on Legal Policy secretariat be immediately tasked with setting one up.

Attachment

cc: John Roberts
Mike Uhlmann

The Washington Post, May 2, 1984

Bureaucrat, Beware

IF YOU'RE an official of the federal government whose work involves making grants to state and local governments or private organizations, you will be interested in an action taken by the Supreme Court this week. The story begins in 1975 when a group of plaintiffs—six blacks, six women and an organization called the National Black Police Association—sued four officials of the Justice Department, claiming that their civil rights had been infringed because the Law Enforcement Assistance Administration provided grants to some police departments that discriminated. This is not a suit against the government but a personal civil action against four individuals—former attorney general Edward Levi and three LEAA officials—seeking $20 million in damages from the defendants' own pockets. This week, the Supreme Court refused to hear argument on whether this suit should be thrown out of court, so the case goes back to District Court for further proceedings and, eventually, for trial.

There are many reasons for a court to find that the suit has no merit. LEAA officials had a number of options for dealing with discrimination by grant recipients, and they took many of them. Suits were filed against some departments, multiple reviews were conducted and concessions were made by recipients. Plaintiffs acknowledge all this but have chosen to sue because a specific remedy—fund cutoff—was not pursued. On the facts, Mr. Levi and his codefendants have a good case.

But a serious policy question is also presented here: should a government official be held personally liable for acts that were not illegal or even negligent but, on the contrary, were clearly within an area of discretion required by his job? Plaintiffs in this case do not even allege that the officials acted with any discriminatory intent. In their brief requesting the Supreme Court to dismiss the suit, the defendants describe the issue clearly. "Numerous important federal programs involve the distribution of funds to agencies of state and local governments," they point out. "These programs would be substantially affected if, as the court of appeals appears to have held, the Constitution is violated whenever any funds reach any recipient agency that is known to have discriminated—even if the discrimination consists of a minor incident, the funding program serves important social objectives, and the responsible officials are taking other steps to remedy the discrimination. Indeed, under the court of appeals approach, officials throughout the government would act with entirely proper purposes in distributing funds and enforcing the civil rights obligations of recipients can be faced with lengthy, burdensome proceedings and the threat of ruinous personal liability."

The kind of personal harassment illustrated by this suit is unfair and costly to the defendants, even if they win. It also has the potential for crippling federal grant-making programs. There are better ways to enforce civil rights laws—ways that do not endanger government workers who are trying conscientiously to do a good job.

THE WHITE HOUSE

WASHINGTON

April 13, 1984

MEMORANDUM FOR JOHN A. SVAHN

FROM: STEPHEN H. GALEBACH

SUBJECT: Packwood/Schneider Bill to Expand Civil Rights Coverage

This memorandum analyzes the bill introduced yesterday by Senator Packwood and Representative Schneider to expand coverage of the civil rights laws over federally assisted institutions.

1. Basic provision of Packwood/Schneider bill. The bill amends federal civil rights laws to provide that, if any part of an institution receives federal financial assistance, the entire institution is covered by the federal civil rights laws and regulations. The bill would amend the following sections: Title VI of the Civil Rights Act of 1964 (covering racial discrimination), Title IX (sex discrimination), Section 504 of the Rehabilitation Act of 1973 (discrimination on basis of handicap), and the Age Discrimination Act. These statutes currently provide coverage over each program or activity that receives federal assistance (program-specific coverage, rather than institution-wide coverage.)

2. Relation to earlier Administration position. We argued to the Supreme Court in the Grove City case that only the particular program or activity within a University that receives federal financial assistance should be covered by Title IX. The Supreme Court adopted our view, holding that only the financial aid office of Grove City received financial assistance from the government and that other programs and activities of this school would not be covered, due to the program-specific language of Title IX.

   The Supreme Court's decision, and our argument in Grove City, leaves it open to Congress to change the statutory language from program-specific to institution-wide coverge.

3. Implications of creating institution-wide coverage. If Congress were to amend the civil rights laws in the manner of the Packwood/Schneider bill, the following problems would arise:

- Virtually all universities would be required to provide for abortion in their health insurance programs. Current regulations of the Department of Education require that federally assisted health insurance programs at educational institutions must provide for abortion. Currently, under the program-specific rule of the Grove City decision, a college can avoid supporting abortion by refusing to accept federal assistance for its health insurance program. Under the Packwood/Schneider bill, however, any school that received federal assistance in any way (including, as in Grove City, federal benefits going only to individual students), would be forced to provide for abortions.

- Testing and grading policies of schools and individual professors could come under federal regulation. Under the program specificity rule, courts have exempted grading and testing decisions of professors and administrators from federal regulations, by saying that the academic program of a school does not receive federal assistance (Rice v Harvard case, 1st Circuit U.S. Court of Appeals, 1981). With passage of a Packwood/Schneider bill, however, testing and grading decisions could come under federal regulations, for example, to judge whether particular tests had a disproportionate racial impact, or to judge whether a professor gave out grades in ways that did not have a discriminatory impact on minorities or women.

- An institution that refused to accept any federal funds could be brought entirely under the jurisdiction of federal civil rights legislation. Example: Grove City College. The President has long argued that institutions such as Grove City should be able to avoid federal regulation by refusing to accept federal money.

4. Position of Civil Rights Commission. The Civil Rights Commission has encouraged Congress to consider institution-wide coverage, but has urged simulataneous consideration of other clarifications of the civil rights laws:

   - o Add provision stating that quotas are neither required nor permitted by civil rights laws.
   - o Consider whether civil rights laws could be used to interfere with academic testing and grading, because of allegations of disproportionate racial impact.
   - o Whether an intent standard rather than an effect standard should be used to enforcing anti-discrimination laws.

5. Legislative Status. Schneider bill referred to House Judiciary Committee, hearing to commence soon after Easter recess. Senate bill referred to Labor and Human Resources Committee, hearings to be held in Stafford's subcommittee around May 24.

   Senator Hatch intends to hold hearings of his own. He is considering introducing a bill very quickly to provide for institution-wide coverage but to include a specific disclaimer concerning mandatory abortion funding, a provision concerning nondiscrimination via quotas or other racial preference, and a provision that schools whose only link to federal assistance is individual students who receive education assistance shall not be deemed federally assisted institutions.

6. Options for Administration Action.

   - o Option 1 -- Support Packwood/Schneider bill. This option would draw heavy criticism from the President's conservative constituency, would be perceived as backing down on the President's outspoken support for the independence of Grove City College, and would be perceived by our opponents and a grudging submission rather than a praiseworthy initiative.

- Option 2 -- Oppose Packwood/Schneider bill. This option would create the appearance that we favor or are willing to tolerate sex discrimination and race discrimination. Packwood already has fifty-six cosponsors in the Senate and Schneider's bill is sure to win in the House. Outright opposition therefore appears futile.

- Option 3 -- Remain silent. Media would probably interpret silence as opposition, and would play passage of Packwood/Schneider bill as defeat for Administration position expressed in Grove City case.

- Option 4 -- Express support or at least nonopposition to concept of institution-wide coverage, but support Senator Hatch to consider carefully tailored amendments to avoid particular problems, as described above.

7. Recommendation. We should not endorse the concept of institution-wide coverage without expressing our concern about particular problems that need to be addressed. We should coordinate with Senator Hatch, and should give him a chance to come up with an alternative bill to introduce immediately after the upcoming Congressional recess.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO	John Svahn James Cicconi	Take necessary action ☐
	Fred Fielding Lee Verstandig	Approval or signature ☐
	Mike Uhlmann Mike Horowitz	Comment ☐
	Allen Meyer Barry White	Prepare reply ☐
	Naomi Sweeney Karen Wilson	Discuss with me ☐
		For your information ☐
		See remarks below ☐
FROM	Branden Blum (3802) Ext.	DATE 5/21/84

REMARKS

Subject: Department of Justice Testimony on H.R. 5490, the "Civil Rights Act of 1984"

The attached testimony is for a joint hearing tomorrow before subcommittes of the House Education and Labor Committee and House Judiciary Committee. Copies have been forwarded to Education and Health and Human Services.

H.R. 5490 was introduced in response to the Supreme Court's recent Grove City decision concerning Title IX, prohibiting sex discrimination in Federally assisted programs. Justice concludes that there are other alternatives which would reverse the Court's decision while making less drastic changes in existing civil rights statutes.

Please review and provide me with any comments -- ASAP.

cc: Joseph Wright
Jim Murr

OMB FORM 4
Rev Aug 70

SPECIAL

DRAFT

STATEMENT

OF

WM. BRADFORD REYNOLDS
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE

THE

COMMITTEE ON THE JUDICIARY
AND
COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 5490 - "CIVIL RIGHTS ACT OF 1984"

ON

MAY 22, 1984

DRAFT

Mr. Chairman and Members of this Joint Committee, I welcome this opportunity to appear before you today to present the views of the Department of Justice on H.R. 5490, the "Civil Rights Act of 1984."

Introductory Remarks

Let me preface my remarks on the proposed legislation, by stating first my personal intolerance -- and the abiding intolerance of the President, the Vice-President, the Attorney General and every other member of this Administration -- for discriminatory conduct, in whatever form and however manifested, against any person on account of race, color, sex, national origin, handicap, religion or age. Indeed, the nondiscrimination principle -- as embodied in the ideal of a color blind, sex-neutral, barrier-free society ~~bent on promoting uninhibited religious expression, not regulating it~~ -- ~~has had no greater champion than this Administration.~~ is at the center of America's historic struggle for civil rights. Ours has been a profound and unwavering commitment to ensuring every citizen an equal opportunity to compete fairly for the benefits our Nation has to offer (no matter how he or she might be grouped by reason of personal characteristics having no bearing on individual talent or worth). And, whenever discrimination interferes with that moral command -- whether it be viewed by others as benign

or pernicious -- the Administration has not hesitated to bring the full force of the law down on the accused discriminator.

There is another principle that this Administration has been every bit as vigilant in protecting, the principle of Federalism that is so critically important in a pluralistic society dedicated to the ideals of self-government and individual freedom. We have, therefore, resisted at every turn unnecessary and overly intrusive expansion of federal power, particularly when the federal intrusion impedes unduely state and local governments' efforts to deal effectively with regional and local problems that most directly impact on the citizenry at the state and local levels.

H.R. 5490, as currently drafted, poses a tension -- in my view, an unnecessary tension -- between these two important principles of equal opportunity and limited federal involvement in state and local affairs. That, in itself, is not remarkable, since it has always been the case that Federal laws directed at protecting the civil rights of all Americans necessarily intrude on the domain of State and local law enforcement. The Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, the Education Amendment Act of 1972, the Rehabilitation Act of 1973, to mention but a few, along with the various amendments to each of these statutes,

bring into focus the tension I have mentioned. Heretofore, however, Congress has undertaken -- through thorough and extensive deliberations, comprehensive hearings, open and rigorous floor debate, and the amendment process -- to insure that the Federal role in the civil rights arena is as comprehensive as necessary to satisfy the demand (based on congressional findings) for a strong Federal involvement (i.e., the Voting Rights Act of 1965), but not so overly intrusive as to usurp unnecessarily legitimate State and local law enforcement prerogatives (i.e., the Federal funding statutes that cover only those "programs or activities" receiving Federal financial assistance).

We would hope, and expect, that Congress would put "The Civil Rights Act of 1964" (H.R. 5490) through the same close scrutiny, and subject it to the same rigors of an open and freewheeling debate (in Committees and on the floor of the House and Senate) that has been the strength of past enactments of civil rights legislation. Let me explain why, in the Department of Justice's view, it is critically important that this process not be short-circuited.

The Grove City Decision

H.R. 5490 has been offered as a modest amendment of existing statutes intended to break no new ground but only to

overturn the Supreme Court's recent decision in Grove City College v. Bell, 104 S.Ct. 1211 (1984), to the limited extent that the Court held Title IX of the Education Amendment Act of 1972 to be program-specific in its coverage.

Title IX, as you know, bars discrimination on account of sex, in any education "program or activity" receiving Federal financial assistance. The Supreme Court in Grove City ruled that a college which enrolled students receiving Basic Educational Opportunity Grants ("Pell Grants") was subject to Title IX coverage, but that the prohibition against sex discrimination applied, not to the college as a whole, but only to the federally funded program at the college -- in this instance, the student aid program.

Much has been said since Grove City about the Court's "new interpretation" of Title IX, and considerable impetus for the current congressional interest in amending Title IX, comes from an assumption that the Court's pronouncement of Title IX as a program-specific statute altered the state of the law.

Simply to set the record straight, I would point out that the Court's "programmatic" reading of Title IX represents no change in the law. Before Grove City, every court of appeals except the Third Circuit in the Grove City case itself

had construed Title IX in a program-specific manner. 1/ Indeed, as to the parallel Federal funding statutes dealing with race discrimination (Title VI of the Civil Rights Act of 1964) 2/ and with handicap discrimination (Section 504 of the Rehabilitation Act of 1973), 3/ they, too, had consistently been interpreted by the lower Federal courts as program-specific. Thus, the considerable testimony provided to this Joint Committee regarding the dramatic strides made by women in college athletics since Title IX was enacted in 1972 should properly be evaluated with the clear understanding that those strides were made under a program-specific statute, understood as such and consistently so interpreted by the Federal courts.

The Supreme Court in Grove City simply directed the Third Circuit court of appeals -- which alone among the appellate courts had construed Title IX to have institutionwide coverage -- to get in line with existing judicial authority in this area, including earlier Supreme Court precedent. 4/

1/ Citations

2/ Citations

3/ Citations

4/ North Haven Community College v. Bell, ___ U.S. ____ (1980).

Indeed, the novelty of the Grove City decision is found in another aspect of the case, where the Court made it clear for the first time that education programs were covered under Title IX not only as a result of direct Federal funding, but also as a result of receiving Federal financial assistance indirectly (i.e., through ~~student loans~~ Pell Grants).

Nonetheless, if Congress believes there is reason, after Grove City, to consider an amendment to Title IX that will change its programmatic coverage to institutionwide coverage, that is certainly well within Congress' authority to do. In fact, I was accurately reported as stating as much immediately following the Court's announcement of the Grove City decision, and even went on to say that I personally would have no philosophical difficulty with such a change in the existing legislation. There is, moreover, a bill currently pending in the House, H.R. 5011, introduced earlier by Congresswoman Schneider, that comes very close to accomplishing the stated objective ~~of Congress generally, and of this Joint Committee in particular -- that is~~, overturning the program-specific feature of the Grove City decision by making Title IX coverage apply to the educational institution as a whole in the event that any of its education programs or activities receive

(directly or indirectly) Federal financial assistance. That is, in my view, the responsible way to accomplish the stated purpose for undertaking to amend Title IX and it is an approach that this Administration can fully support.

The Approach of H.R. 5490

H.R. 5490, on the other hand, takes a far more expansive approach than the original Schneider bill, H.R. 5011. Thus, H.R. 5490 would amend not only Title IX but also three other cross-cutting civil rights statutes: Title VI of the Civil Rights Act of 1964 (race discrimination); Section 504 of the Rehabilitation Act of 1973 (handicap discrimination); and the Age Discrimination Act of 1975 (age discrimination). As a consequence, the education nexus that defined Title IX coverage is not an essential feature of the proposed amendment; nor, obviously, is H.R. 5490 concerned (as was Title IX) only with discrimination on account of sex. In sum, the proposed amendment goes well beyond the articulated need for a change in the law that was voiced so often after Grove City, i.e, to insure nondiscrimination against ~~females~~ women in high school and college athletic programs.

If that is, indeed, the congressional desire, if it is Congress' intent to enact new legislation that significantly expands the current laws addressing Federal civil rights enforcement, that effort can be most constructively accomplished,

we think, by openly acknowledging the more expansive purpose underlying H.R. 5490 and forthrightly describing its full reach -- which, by design, does, in fact, go well beyond simply undoing the effects of Grove City. In this manner, complexities, ambiguities and inconsistencies in the proposed language can be better considered and dealt with more responsibly. Let me refer to some of the most troublesome concerns:

1. Definition of "Recipient." H.R. 5490 deletes the phrase "program or activity" from the existing statutes and substitutes in its place the word "recipient." Thus, the four statutes would prohibit discrimination "by any recipient of" Federal financial assistance, not just discrimination within a recipient's federally funded programs or activities.

The bill includes a definition of "recipient" that the sponsors claim is "drawn from" existing federal regulatory definitions of that term under Title VI, Title IX and Section 504. That claim is partially correct, although a "recipient," as used in the existing regulatory scheme, is subject to coverage only as to its funded "programs or activities;" by contrast, under H.R. 5490, a "recipient" is to be covered in

its entirety. Beyond that, it should be pointed out that the bill's definition of "recipient" goes farther than any of the present regulatory definitions, adding at the end the new clause: "or which receives support from the extension of federal financial assistance to any of its subunits." Thus, the bill's definition, in its entirety reads:

> the term 'recipient' means --
>
> > (1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thererof, 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.

There is, admittedly, ample room for debate as to the exact breadth of this language. No definition of "receives supports" is included in the bill and, thus far, statements by the sponsors and by witnesses at these hearings have provided little guidance as to the true legislative intent.

At a minimum, it seems clear that the term "recipient" is at least broad enough to insure coverage of an educational institution where federal funds are provided to one or more

of its programs or activities, and thus the Supreme Court's programmatic interpretation of Title IX in Grove City would be overturned. Presumably, the definition of recipient would also reach all campuses of a multi-campus university (i.e., University of California) if any federal funds went to just one campus, or to students (through a Pell Grant) enrolled at only one college campus. Also, federal funds going to an undergraduate program would, under H.R. 5490, seemingly include all graduate programs within Title IX coverage, even though there was no federal financial assistance at the graduate level.

Less clear is the intended scope of coverage under H.R. 5490 with respect to a college or university's commercial property. Rental property occupied by Pell Grant students would seem to be covered. But, also within reach of the broad recipient definition could well be university housing space rented to persons who are neither faculty nor students, or, for that matter, other commercial activities not associated with education, so long as it can be maintained that the non-educational enterprise "receives support" from the college or university that is in some aspect extended Federal financial assistance. Such an interpretation not only brings into play Title IX, but also Title VI, the Age Discrimination Act, and

Section 504. Thus, the requirement to make facilities accessible to handicapped individuals would, under H.R. 5490, apparently have application to the non-educational ventures of a university as well as to those associated with its educational activities.

Nor does that necessarily define the outer limits of coverage. If a federal agency extends federal assistance to a state university system, all other state departments or 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 arrangement with the university, would arguably be brought within the nondiscrimination coverage of the four statutes.~~ would be brought w/in the cov of the 4 statutes because the . . .

If such an understanding of the term "recipient" takes H.R. 5490 too far, Congress needs to clarify the vague and ambiguous language that currently appears in the bill. As things now stand, when Federal financial assistance is extended to a "subunit" (not defined) of a larger "entity" (not defined), the larger entity itself -- whether it be public or private -- can be viewed as the "recipient" if it is deemed to have "receive[d] support from" (not defined) the federal funds going to the subunit. The clear contemplation appears to be

that ~~this "trickle up" theory of coverage will permit -- indeed perhaps require~~ --> Federal agencies will be able to investigate claims of discrimination against a nonfunded component of State government if some other component is funded.

For example, if a county water ~~district~~ dept receives s grant from the Environmental Protection Agency (EPA) to study the county's sewer needs, H.R. 5490 would appear to provide that all of the county's operations are subject to all four civil rights statutes since the federal financial assistance can be said to give "support" to the county. Should EPA receive a complaint alleging discrimination in part of the county's operations that received no separate federal funds -- e.g., the county's road maintenance -- under the bill, EPA would presumably have the responsibility to deal with the allegation of discrimination, even though that agency has no knowledge or expertise in this area (it would fall within the province of the Department of Transportation).

~~There is, as well, a "trickle down" theory of coverage under the proposed "recipient" definition.~~ In addition, under the prop'd def of "recipient," if the large entity receives Federal financial assistance, all subunits are swept within the coverage provisions -- whether funded or not and whether or not they "receive support" from the funding.

Thus, a federal block grant to the State for educational purposes brings all political subdivisions of the State under the civil rights oversight responsibilities of the Federal government. Since there is no state that can claim it operates entirely free from Federal financial assistance, the extent of Federal intrusiveness into State and local affairs under H.R. 5490 seems to be virtually complete.

Nor does the private sector fair any better. ~~Both~~ the bill's coverage ~~"trickle up" and "trickle down" theories~~ applies with equal force to commercial ventures and enterprises. Moreover, all successors and assignees or transferees of a "recipient" become, under H.R. 5490, recipients in their own right. Thus, 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 (albeit unwittingly) signed an open invitation to federal enforcers to enter and investigate. While there have been disavowals by some member of Congress on the Senate side

that the amendments are intended to have such scope, the bill's language has not been carefully tailored to preclude so broad a reading.

2. Enforcement Provisions. In addition to expanding the substantive coverage of the nondiscrimination funding statutes, H.R. 5490 also substantially alters -- albeit again without any degree of clarity or precision -- the standards and methods of enforcing these statutes.

The bill would retain the existing enforcement options for the four statutes: Federal agencies would enforce either by fund termination by the particular federal funding agency or by referral to the Department of Justice for litigation ("any other means authorized by law"); private parties would continue to have a private right of action. The scope of these enforcement mechanisms are measurably expanded, however,

As to the fund termination provisions, H.R. 5490 replaces the current "pinpoint" language -- which limits fund termination to the particular program that has been discriminatorily conducted -- with new language providing for termination of "the particular assistance which supports" the discrimination (emphasis added). The calculated ambiguity introduced by the "supports" phrase opens the way for a possible interpretation of the four statutes

that would permit fund termination of a worthwhile and needy program which has never been operated in a discriminatory manner because the federal funds going to it provides "support" for another nonfunded program involved in unlawful discrimination. One could also conceive of an argument under the new termination provision that any federal assistance which goes to the entity as whole necessarily "supports" the discrimination of the component parts. It has been stated that such a broad construction of the bill's new language was never anticipated. If, however, Congress truely intends, as some profess, to retain the "pinpoint" approach, the current language of the four statutes unambiguously requires the more modest fund termination remedy and there would appear to be no good reason to alter that formulation.

The alternate enforcement capability through litigation, which is available both to the Government and to private litigants, is also expanded by H.R. 5490. The Supreme Court in North Haven Community College v. Bell, supra, held that the Federal government's authority to proceed in court (and a private litigant's jurisdiction in court) is no more extensive than its authority to proceed in fund termination proceedings. H.R. 5490 disregards this admonition, providing broader judicial enforcement capabilities than are available administratively.

If a federal agency seeks to enforce through fund termination, it can, at most, under H.R. 5490, reach only those ~~discriminatory~~ practices that are supported by federal funds. Yet, on referral of the same matter to the Department of Justice for litigation (or if a private litigant is in court by way of private right of action), the bill contemplates that all the ~~discriminatory~~ activities of a recipient, its subunits, subdivisions, instrumentalities and transferees, are reachable by the court -- even when there is no conceivable link between the ~~discrimination~~ violation and the federally funded activity. Thus, the Department of Justice (and private litigants) can seek to enjoin activity that would not be subject to fund cutoff by the funding agency.

There is, it seems, good reason for Congress to consider carefully whether it wishes to establish such an enforcement dichotomy in this area. Fund termination is a draconian remedy that has been used most sparingly. Yet, its potential as a viable and forceful response to discrimination has served a useful purpose in obtaining meaningful relief administratively through the conciliation process. ~~As altered under H.R. 5490, however, the threat of fund termination appears to be substantialy reduced, and every prospect points toward a noticeable (indeed, almost frightening) increase in~~

~~the number of lawsuits.~~ At least some consideration should be given to whether civil rights enforcement under this new approach of the Federal funding statutes will in fact be better served through the encouragement of more litigation, with which our already overburdened courts will somehow have to contend, and a lessening of a pressure to conciliate administratively.

3. Administrative Concerns. Nor can one overlook the serious administrative complexities that H.R. 5490 presents to the Federal agencies. The testimony last week of Mr. George Roche, President of Hillsdale College, captures the dimension of the problem with this apt description of the bill's effect (Roche Test, at p.4):

> Schools and colleges, hospitals and clinics, agencies of state and local government, large corporations and the corner grocery store, all would be subjected to vague anti-discrimination fishing expeditions by federal enforcement officials operating in a climate of perpetual suspicion and often without clear jurisdictional boundary even between one federal enforcement office and the next.

Agency regulations and paperwork requirements imposed under the four existing civil rights statutes are currently onerous in many respects. H.R. 5490, which would give all funding agencies authority -- indeed, the statutory responsibility -- to regulate all the programs, activities, and subunits of a

recipient, 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.

~~There is no procedure contemplated by the bill for interagency referrals that might serve to alleviate the concern over inexpert or duplicative agency complaint investigations.~~ Nor is it clear, even under some agency referral sytems, 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 by the draftsmen of H.R. 5490.

Closing Remarks

The foregoing observations are intended only to highlight some of the existing difficulties with the bill as drafted. If the aim of Congress is to reshape Federal civil rights enforcement so as to assign to the Federal government pervasive oversight responsibility in the public and private sectors with respect to discrimination on account of race, sex, age and handicap, such a legislative undertaking should be carefully considered, fully debated and cautiously constructed. There is, at present, nowhere near the Federal involvement in State and local affairs that will be required under H.R. 5490. Nor can it honestly be maintained that legislation designed to overturn Grove City by making Title IX coverage institutionwide warrants such intrusive Federal activity.

That does not, of course, foreclose Congress from embarking on such a legislative venture. But, it should do so fully cognizant (1) that the additional costs of Federal enforcement under a bill as comprehensive as H.R. 5490 can be staggering; (2) that the current regulatory regime is inadequate to the task and will necessarily need to be revised and likely

expanded; (3) that the paperwork requirements can only increase (and probably dramatically); and (4) that with new legislation that differs so dramatically from the existing statutes invariably comes considerable litigation, leaving the law unsettled for some years.

It is therefore important to remove ambiguities, to tailor H.R. 5490 to its stated purpose -- whether that be to overturn Grove City or to overturn the existing civil rights enforcement mechanism -- and to carefully craft the proposed bill with full attention to the complexities of the undertaking.

The Department of Justice's review of the foreseeable effects of H.R. 5490 leads us to conclude that the sweeping scope of the language proposed in the bill suggests a much broader application than simply reversal of the Grove City decision. We are concerned that the unsettling ambiguities in the bill that I have discussed have not been fully considered by the Joint Committee or responsibly addressed in 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.

To avoid either eventuality, the Department of Justice stands ready to assist the Joint Committee in ~~removing what we view as the troublesome features of H.R. 5490 and~~ formulating a bill more closely aligned with Congress' stated objective. If the purpose is simply to overturn the Grove City "programmatic" interpretation of Title IX, we would suggest that a bill more closely tailored to achieving that result is H.R. 5011, introduced by Congresswoman Schneider and cosponsored by some 141 Members of the House. If a broader purpose is involved, we are prepared to work with Congress on amending language to ~~either~~ H.R. 5011 ~~or H.R. 5490~~ to accomplish the desired end in precise, clear terms that leave no room for speculation as to the real thrust of the legislative effort.

Thank you. I will be happy to answer any questions.